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UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

P. L. LAMPHERE, Admr., etc., of C. Roy
Lamphere, Deceased, Plff. in Err.,

v.
OREGON RAILROAD & NAVIGATION
COMPANY et al.

(116 C. C. A. 156, 196 Fed. 336.)

Master and servant — employers' liability act — interstate commerce — servant going to work.

A railroad fireman who, in accordance with his contract, is obeying an order to report at a station for transportation to relieve the crew of an interstate train, is employed in interstate commerce, and therefore the railroad company is liable under the Federal employers' liability act for his negligent killing by fellow servants also engaged in interstate commerce, while crossing the track at the station where he was ordered to report.

(May 6, 1912.)

ERROR to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington to review a judgment in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by GILBERT, Circuit Judge:

The writ of error in this case brings under review the judgment of the court below sustaining a demurrer to the complaint of the plaintiff in error. The action was brought by the administrator of the estate of one Lamphere, deceased, and the complaint alleged, in substance, that the said Lamphere was a locomotive fireman in the employment of the Oregon Railroad & Navigation Company; that his duties required

him to respond at any time upon an order to do so; that on December 1, 1910, at 7:15 P. M., he was ordered by the said railroad company to proceed from his home in the town of Tekoa, Washington, to the depot in that town, to secure transportation there, and go on board a certain interstate train which was due at 7:45 P. M., and to proceed to a certain other town in the state, and there to relieve an engine crew which had been continuously employed for more than sixteen hours on an engine hauling an interstate train; that, after receiving said order, he hastened to the depot of the company in Tekoa, and had reached a crossing in the yards of the railroad company where the cars were cut, when, without warning, the cars were suddenly closed by reason of other cars being carelessly and negligently kicked against them, and that thereby he sustained injuries which resulted in his death. The complaint alleged that at the time of the happening of the injury and death of Lamphere, "and immediately prior thereto, he was engaged in the performance of his duty in the employment of the said Oregon Railroad & Navigation Company in doing and performing exclusively the acts and things necessary and properly to be done in the performance of his said duties in obedience to the order of said company, and as a part of the necessities and requirements of said company in aid of and as a part of the operation of its cars, engines, and trains in carrying on its business of interstate commerce by railroad." The complaint further alleged that Lamphere had been for a long time a locomotive fireman in the employment of said company, and that his duties as such fireman required him to respond at any time of the day or night when he should be called upon by said company to perform any of his said duties assigned to him from time to time. The complaint alleged, also, that the crossing used by said Lamphere was one which had been used by him and other employees

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.

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of the company in the performance of their duties, and by the general public of Tekoa and the vicinity.

Argued before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

Messrs. W. H. Plummer and Henry Jackson Darby, for plaintiff in error:

Plaintiff's intestate was employed in interstate commerce within the meaning of the employers' liability act, and an action will lie under such act for his death.

Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Colasurdo v. Central R. Co. 180 Fed. 832; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Doherty, Liability of Railroads to Interstate Employees; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, affirmed in 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; St. Louis & S. F. R. Co. v. Smith, — Tex. Civ. App. —, 90 S. W. 926; Overton v. Chicago, R. I. & P. R. Co. 111 Mo. App. 613, 86 S. W. 503; Rice v. Wabash R. Co. 92 Mo. App. 35; Stubbs v. Omaha, K. C. & E. R. Co. 85 Mo. App. 192; Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, affirming 33 Kan. 298, 6 Pac. 291; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 332, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625, affirming 93 Minn. 63, 100 N. W. 681; Pittsburgh, C. C. & St. L. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845; Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; Haden v. Sioux City & P. R. Co. 92 Iowa, 226, 60 N. W. 537; Atchison, T. & S. F. R. Co. v. Vincent, 56 Kan. 344, 43 Pac. 251; Rayburn v. Central Iowa R. Co. 74 Iowa, 637, 35 N. W. 606, 38 N. W. 520; Leier v. Minnesota Belt Line R. & Transfer Co. 63 Minn. 203, 65 N. W. 269; Bain v. Northern P. R. Co. 120 Wis. 412, 98 N. W. 241, 15 Am. Neg. Rep. 750; Georgia R. & Bkg. Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Georgia R. & Bkg. Co. v. Brown, 86 Ga. 320, 12 S. E. 812; Georgia R. Co. v. Ivey, 73 Ga. 499; Mabry v. North Carolina R. Co. 139 N. C. 388, 52 S. E. 124; Sigman v. Southern R. Co. 135 N. C. 181, 47 S. E. 420; Mott v. Southern R. Co. 131 N. C. 234, 42 S. E. 601; United States v. The Anjer Head, 46 Fed. 664; King v. United States, 32 Ct. Cl. 234; United States v. Catherine, 2 Paine, 721, Fed. Cas. No. 14,755; United States v. Morris, 14 Pet. 464, 475, 10 L. ed. 543, 548.
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Messrs. W. W. Cotton, A. C. Spencer, and Ralph E. Moody, for defendants in error:

Lamphere was not employed in interstate commerce at the time he sustained the injury which resulted in his death.

Tamura v. Great Northern R. Co. 58 Wash. 316, 108 Pac. 774; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 498, 52 L. ed. 309, 28 Sup. Ct. Rep. 141; Pedersen v. Delaware, L. & W. R. Co. 184 Fed. 737; St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 949.

Gilbert, Circuit Judge, delivered the opinion of the court:

It is conceded that the negligence which caused the death of the plaintiff in error's intestate was negligence of the latter's fellow servants, but it is contended that the complaint states a cause of action in that the allegations thereof bring the case within the provisions of employers' liability act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322.

There are decisions which hold that an employee of a railroad company while going to and from his work is not engaged in the service of his employer, and is not the fellow servant of other employees of the same master, but there are cases holding to the contrary, and, whatever may be the conflict of authority as to the ordinary case of an employee going to and from his work, there can be no question that he is in the service of his master, and is a fellow servant of his coemployees, whenever he is doing that which, under his contract of employment he is bound to do. Dishon v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 128 Fed. 194; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570; Boldt v. New York C. R. Co. 18 N. Y. 432; Ewald v. Chicago & N. W. R. Co. 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591. The deceased, when he was killed, was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the

track and take his place on another train engaged in interstate commerce, and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court.

In *Zikos v. Oregon R. & Nav. Co.* (C. C.) 179 Fed. 893, it was held that one who was engaged in repairing the defendant's main track and driving spikes in the ties for the purpose of tightening the joints of the rails was engaged in interstate commerce, and that he could recover for injuries sustained through the negligence of a fellow servant who was also engaged in such commerce. In *Colasurdo v. Central R. Co.* (C. C.) 180 Fed. 832, where a track walker was injured while assisting his fellow employees in repairing a switch in a railroad yard, the switch being connected with a track used for both interstate commerce and intrastate commerce, it was held that he was engaged in interstate commerce within the employers' liability act. Said the court: "Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think he would be any the less so engaged than the engineer on the locomotive or the train despatcher who kept the trains at proper intervals for safety."

In *Behrens v. Illinois C. R. Co.* (D. C.) 192 Fed. 581, the plaintiff's intestate came to his death through an accident while he was employed as fireman on an engine of a switching crew, the duties of which were to switch cars that had to move both in interstate and intrastate commerce indiscriminately. Foster, District Judge, said: "I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions, and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

In *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901, the circuit court of appeals for the second circuit affirmed the decision above cited in 180 Fed. 832, and the court said: "The car which struck the plaintiff was employed in interstate commerce. It connected with defendant's ferry-

boats at Jersey City, and passengers from New York to Somerville, New Jersey, and *vice versa* were transported in it. The track and switch in question were used by engines and cars so engaged. We think the statute was intended to apply to every carrier while engaging in interstate commerce, and to an employee of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial. The plaintiff was repairing an interstate road over which interstate passengers and freight and cars and engines engaged in interstate commerce were constantly passing."

Counsel for the defendant in error contend that the act applies only to employees of railroad companies who are at the time actually engaged in the movement of interstate commerce, and they deny that others, such as those who are employed in the shops of a railroad company, where its engines are repaired, or are repairing its tracks or roadbed, are employed in interstate commerce, and they cite the case of *Pedersen v. Delaware, L. & W. R. Co.* (C. C. E. D. Pa.) 184 Fed. 737, in which it was held that, although the railroad company was engaged in both interstate and intrastate business at the time of the plaintiff's injury, he, being an employee engaged at that time in bridge construction on the track of the company, which was to be used for such commerce, was not engaged in interstate commerce. The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in *Second Employers' Liability Cases* (*Mondu v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The judgment in that case disposes of three cases involving the application of the employers' liability act. In one of the cases, the judgment in which was affirmed, the action was brought and damages were recovered by a personal representative of a deceased employee of a railroad company. The complaint alleged that the injury occurred while the defendant as a common carrier was engaged in commerce between some of the states, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce. The statement of the facts is meager, but it would appear therefrom that the employee who was injured was not one of a train crew, but was a machinist or repairer whose duty it was to replace drawbars, and that the work was done either in a yard or on

a switch, for the injury resulted from the negligence of fellow servants in pushing other cars against the one on which the deceased was working. In the opinion in that case the court made certain observations concerning the act which we think pertinent to the case at bar. Affirming the power of Congress over commerce among the states, as extended incidentally to every instrument and agent by which such commerce is carried on, the court said: "But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. . . . Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whether such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

Said the court again: "The second objection proceeds upon the theory that even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory in that it treats the source of the injury rather than its effect upon interstate commerce as the criterion of congressional power. . . . It is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce, for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."

As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer. Under the imperative command of his employer, the deceased was on his way to relieve, in the capacity of a fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder

and delay the movement of that train. In our opinion the complaint states a cause of action under the employers' liability act.

The judgment is reversed, and the cause remanded for further proceedings.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.,

v.

GEORGE H. DARR.

(— C. C. A. —, 204 Fed. 751.)

Master and servant — Federal employers' liability act — repairing engine at terminal.

An employee engaged in replacing a bolt in the brake beam of the tender of an engine engaged in interstate commerce, while it is on a switch track at a terminal station being prepared for the return trip, is within the protection of the Federal employers' liability act.

(February 5, 1913.)

ERROR to the District Court of the United States for the District of Maryland to review a judgment in plaintiff's favor in an action brought to recover compensation under the Federal employers' liability act for injuries received by plaintiff while in the employment of defendant. Affirmed.

Statement by Pritchard, Circuit Judge:

This was an action at law instituted in the district court of the United States for the district of Maryland, by George H. Darr, as plaintiff, against the Baltimore & Ohio Railroad Company, a corporation incorporated under the laws of the state of Maryland. For convenience, the plaintiff in error will be referred to as the defendant, and the defendant in error, as the plaintiff. The declaration was filed on the 22d day of March, 1912. The defendant pleaded on April 8, 1912, and on May 15, 1912, it demurred to the declaration, which demurrer the court overruled. On May 15, 1912, the case was tried before a judge and jury, and the jury rendered a verdict in favor of the plaintiff in the sum of \$1,000, together with the costs of the action. The defendant made the usual motions, which were overruled, and the case was brought here on writ of error.

There was evidence tending to show that George H. Darr was, at the time of his

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injury, engaged as an employee and servant of the defendant company in the city of Cumberland, Maryland, as a running repairman and emergency man, whose duty it was to repair the engines and tenders of said company; that on the date of his injury, to wit, the 12th day of December, 1911, engine No. 4,119 of the defendant company, and its tender, brought in a loaded freight train from Brunswick, Maryland, to Cumberland, Maryland, crossed into the state of West Virginia, and again into the state of Maryland, before arriving at Cumberland; that said engine and cars arrived in Cumberland about 9 o'clock on the morning of December 12, 1911, and it was found, upon examination, that its tender was in need of immediate repair to the left front brake. A hanger bolt had fallen out of the brake beam on the tender. As a result the brake beam hung down in dangerous proximity to the rail, and was likely to cause an accident. The plaintiff and one Stephen M. Thomas were directed to repair the same. The engine was removed to a track called the "fire track," on which temporary repairs were made, and the plaintiff went to work to repair the brake shoe and hanger bolt. It further appears that, while engaged in repairing it, and without any negligence whatever on his part, his fellow servant in charge of the engine turned on the air, and plaintiff was seriously injured.

The plaintiff testified that engine No. 4,119 was a second division engine, belonging to the Baltimore & Ohio Railroad Company, running out of Maryland, into West Virginia, to Brunswick, Maryland; that it hauled freight over the second division, and that he first saw the engine about 9 o'clock on the morning he was injured; that it was then standing on the fire track; that he was running repairman and emergency man, employed by the defendant company at its roundhouse, in South Cumberland, Maryland.

A witness by the name of A. W. Dean, foreman in the employ of the defendant company at the time the plaintiff was injured, testified that he knew engine No. 4,119, and that it was a through engine engaged in hauling freight; that it came from Brunswick, Maryland, on the morning the plaintiff was injured; that it brought a freight train in that morning; and that when it went out again it went either to Brunswick or Martinsburg, West Virginia. Dean further testified that the defendant company was at all times on the day of the injury to the plaintiff, and ever since, engaged in the business of interstate and intrastate carrier of passengers and freight for hire; its freight and passenger trains traveling several times a day to and from Cumberland 47 L.R.A. (N.S.)

to Brunswick, Maryland, through the state of West Virginia.

A witness by the name of Stephen M. Thomas testified that he assisted the plaintiff in repairing said engine at the time of his injury; that the engine came into the yard at 9:15 on the morning the plaintiff was injured, and went out on its run at 2 o'clock on the same afternoon.

William Moreland, boss caller for the defendant company at Cumberland, was also examined as a witness. He testified that he was in the employ of the Baltimore & Ohio Railroad Company in its shops in South Cumberland, and was thus engaged on the morning the plaintiff was injured, and further testified that he knew engine No. 4,119, and that it was engaged at that time in handling freight between Cumberland and Brunswick, Maryland, Martinsburg and Keyser, West Virginia; that it comes into Cumberland and goes out regularly with freight.

Argued before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges.

Mr. George A. Pearre, for plaintiff in error:

When employees are engaged in intrastate commerce, the act does not apply.

Pedersen v. Delaware, L. & W. R. Co. 184 Fed. 737; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

Plaintiff was not entitled to the benefit of the statute.

Pedersen v. Delaware L. & W. R. Co. 117 C. C. A. 33, 197 Fed. 537; Bennett v. Lehigh Valley R. Co. 197 Fed. 578; Heimbach v. Lehigh Valley R. Co. 197 Fed. 579; Feaster v. Philadelphia & R. R. Co. 197 Fed. 580; Lamphere v. Oregon R. & Nav. Co. 193 Fed. 248; Tamura v. Great Northern R. Co. 58 Wash. 316, 108 Pac. 774; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mr. Finley C. Hendrickson, with Mr. Walter C. Capper, for defendant in error.

Pritchard, Circuit Judge, delivered the opinion of the court:

This action was instituted in pursuance of act April 22, 1908, chap. 149, § 1, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, which, among other things, provides: "Every common carrier by railroad, while engaging in commerce between any of the several states, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or em-

ployees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

It is clear that it was the purpose of this act that every common carrier by railroad engaged in commerce between any of the several states should be liable in damages to any person suffering injury while employed in interstate commerce by such carrier, for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such company, as well as employees injured by reason of any defect or insufficiency in its engines, cars, bolts, etc.

Therefore the only questions that it becomes necessary for us to determine are as to whether, first, the defendant company as a carrier was engaged in interstate commerce, and if the plaintiff below was at the time of the injury employed in such commerce; second, as to whether the injury the plaintiff sustained was due to the negligence of any of the officers, agents, or employees of such carrier; but there seems to be no controversy as to the second proposition. Therefore this leaves for our consideration the sole question as to whether, at the time of the injury, the engine in question was employed or engaged in interstate commerce.

The evidence offered in the court below was to the effect that this particular engine was used by a common carrier while engaged in interstate commerce. Manifestly it was the intention of Congress that this act should apply to a particular class of employees and to a particular class of carriers, to wit, those carriers that were engaged in interstate commerce and those employed by such carriers for the purpose of aiding them in carrying on the business. The plaintiff belonged to this class of employees.

If this engine had been stopped *en route* while attached to a loaded train, either in the state of Maryland or in the state of West Virginia, for making needed repairs, it could hardly have been insisted that during the time consumed in making such repairs the defendant company was not engaged as an interstate carrier. The engine was making its daily trips through Maryland and West Virginia, and while temporarily in the yards at Cumberland, Maryland, it became necessary to make certain repairs that were essential to the successful operation of the defendant company's trains. Therefore it necessarily follows that any work that was performed by the plaintiff was as much an incident of the business as if the accident had occurred while the train was on its regular trip either in

Maryland or West Virginia. The learned judge who heard this case in the court below, among other things, made the following statement of facts: "The engine was, at the time of the accident, habitually used in interstate commerce, and apparently, from the testimony, in no other kind of commerce. It was not withdrawn from service. . . . The engine came in from its interstate commerce run as usual, and apparently went out as usual. The repairs which the plaintiff was making to it were of the ordinary trivial kind, which must be, and habitually are, made from day to day, without in any wise interfering with the ordinary and profitable use of the equipment. At the time of the accident, I am persuaded, the locomotive and tender were 'instruments of interstate commerce,' as those words are used by the Supreme Court."

The case of *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 17 Am. Neg. Rep. 412, 25 Sup. Ct. Rep. 158, is very much in point. It appears that a dining car regularly used to furnish meals to passengers between San Francisco and Ogden was detached from the east-bound train at Promontory and left at that point to be picked up by the next west-bound train. Johnson sustained injuries while coupling it to an engine. In that case, as in this, it was insisted that for the time being the car was not engaged in interstate commerce. The court in that case said: "Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the east-bound train was so late that it was found that the car could not reach Ogden in time to return on the next west-bound train, according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening. The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not 'an empty,' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker v. Chicago, M. & St. P. R. Co.* (C. C.) 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the

company, because the cars were loaded, but would not be binding upon the return trip, because the cars were empty.'

"Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In *Coe v. Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Main, were subject to taxation in the former state before transportation had begun. The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

In the case of *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233, the circuit court of appeals for the sixth circuit held, as a matter of law, that the car in question was engaged in commerce, notwithstanding the fact that it was kept out of service at least a day before the repairs were even begun. From the facts of that case, it appears that there was no necessity for making immediate repair; but in the case at bar the engine was to be used immediately, and the work of repairing the brake beam began shortly after the engine and tender had been placed on the fire track. While it appears that the plaintiff on account of his injury was prevented from making the repair, another employee was called upon to finish the work, thus enabling the engine to leave at 2 o'clock in the afternoon of that day on its regular run. Why was it necessary that this engine be repaired promptly? Can any inference be drawn from the facts, other than that it was essential to the prosecution of the work in which the company was engaged? Of course, the cars drawn by this engine had to be carried on schedule time, and, the repairs being of such a character as could be made during the interval between the incoming and the outgoing of the train, the repairs were promptly made notwithstanding the accident, and the company was thus enabled to carry on its busi-

ness as an interstate carrier without interruption.

The case of *Lamphere v. Oregon R. & Nav. Co.* (C. C.) 193 Fed. 248, was cited by counsel for the defendant to sustain this phase of the case. On the 1st day of December, 1910, C. Roy Lamphere, a resident of Tekoa, Washington, was employed on the Oregon Railroad Company as a locomotive fireman. On the evening of that day he received orders from his superior officers to board the west-bound train at Tekoa as a part of the deadhead crew, to proceed thence westerly to a certain town, there to relieve an engine crew which had been constantly employed for more than sixteen hours on an engine engaged in interstate commerce, and on the way from his home to the depot at Tekoa, for the purpose of taking the train as directed, he was crushed between two cars and received injuries from which he thereafter died. A demurrer was filed in that case, which was sustained upon the ground that the plaintiff was not, at the time he was injured, employed in interstate commerce, within the meaning of the employers' liability act. Later this case was carried to the circuit court of appeals for the ninth circuit, where the lower court was reversed. That case is reported in ante, 1, 116 C. C. A. 156, 196 Fed. 336. The court, in referring to this case, among other things, said: "The deceased, when he was killed, was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states, in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train, and proceed across the track, and take his place on another train engaged in interstate commerce, and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court."

"Counsel for the defendant in error contend that the act applies only to employees of railroad companies who are at the time actually engaged in the movement of interstate commerce, and they deny that others,

such as those who are employed in the shops of a railroad company, where its engines are repaired, or are repairing its tracks or roadbed, are employed in interstate commerce, and they cite the case of *Pedersen v. Delaware, L. & W. R. Co.* (C. C.) 184 Fed. 737, in which it was held that, although the railroad company was engaged in both interstate and intrastate business at the time of the plaintiff's injury, he, being an employee engaged at that time in bridge construction on the track of the company, which was to be used for such commerce, was not engaged in interstate commerce. The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in *Second Employers' Liability Cases* (*Mon dou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The judgment in that case disposes of three cases involving the application of the employers' liability act. In one of the cases, the judgment in which was affirmed, the action was brought and damages were recovered by a personal representative of a deceased employee of a railroad company. The complaint alleged that the injury occurred while the defendant as a common carrier was engaged in commerce between some of the states, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce. The statement of the facts is meager, but it would appear therefrom that the employee who was injured was not one of a train crew, but was a machinist or repairer, whose duty it was to replace drawbars, and that the work was done either in a yard or on a switch, for the injury resulted from the negligence of fellow servants in pushing other cars against the one on which the deceased was working. In the opinion in that case the court made certain observations concerning the act, which we think pertinent to the case at bar.

"As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is: What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him intended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer. Under 47 L.R.A.(N.S.)

the imperative command of his employer, the deceased was on his way to relieve, in the capacity of a fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder and delay the movement of that train. In our opinion, the complaint states a cause of action under the employers' liability act."

The learned judge who heard this case in the court below submitted issues to the jury, one of which raised the question as to whether the defendant was engaged as a common carrier in interstate commerce, and also as to whether the plaintiff was injured while employed in interstate commerce, and the issues thus raised were found in favor of the plaintiff. In view of the evidence to which we have referred, we are of the opinion that the circumstances surrounding this case are such as to bring it within the purview of the statute, and therefore that the plaintiff is entitled to recover for the injuries sustained. We have examined the cases relied upon by counsel for the defendant, but are of the opinion that they do not apply to the case at bar. A careful consideration of the rulings of the lower court, as respects the questions raised by the assignments of error, impels us to the conclusion that the same are without merit. For the reasons stated, the judgment of the lower court is affirmed.

WASHINGTON SUPREME COURT. (Department No. 2.)

M. P. HORTON, Admr., etc., of Wilbur F. Horton, Deceased, Appt.,
v.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, Respt.

(72 Wash. 503, 130 Pac. 897.)

Master and servant — Federal employers' liability act — who protected by — operator of pumping station.

An operator of a railroad pumping plant which furnishes water for interstate and cross-state engines is employed in interstate commerce while riding from his home to his work on a hand car furnished by the company for that purpose, so as to be within the operation of the Federal employers' liability act if injured by those, during that time, in charge of an interstate train.

(March 21, 1913.)

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.

County in defendant's favor in an action brought to recover damages under the Federal employers' liability act for the death of a railroad employee. Reversed.

Messrs. W. H. Plummer and Henry Jackson Darby, for appellant:

The complaint states a cause of action under the Federal employers' liability act.

Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Colasurdo v. Central R. Co. 180 Fed. 832, 113 C. C. A. 379, 192 Fed. 901; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Lamphere v. Oregon R. & Nav. Co. ante, 1, 116 C. C. A. 156, 196 Fed. 336; Behrens v. Illinois C. R. Co. 192 Fed. 581; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Jones v. Chesapeake & O. R. Co. 149 Ky. 566, 149 S. W. 951.

Decedent, at the time of injury, was employed by defendant in interstate commerce.

United States v. The Anjer Head, 46 Fed. 664; United States v. Catharine, 2 Paine, 721, Fed. Cas. No. 14,755; United States v. Morris, 14 Pet. 464, 475, 10 L. ed. 543, 548; Willmarth v. Cardoza, 27 L.R.A. (N.S.) 376, 99 C. C. A. 475, 176 Fed. 1, 2 N. C. C. A. 534; Boldt v. New York C. R. Co. 18 N. Y. 432; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570; Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, 220 U. S. 608, 56 L. ed. 607, 31 Sup. Ct. Rep. 725; Ewald v. Chicago & N. W. R. Co. 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; Savannah, F. & W. R. Co. v. Chaney, 102 Ga. 814, 30 S. E. 437; O'Brien v. Boston & A. R. Co. 138 Mass. 387, 52 Am. Rep. 279; Ryan v. Chicago & N. W. R. Co. 60 Ill. 171, 14 Am. Rep. 32; Taylor v. George W. Bush & Sons Co. 5 Penn. (Del.) 378, 61 Atl. 236, 6 Penn. (Del.) 306, 12 L.R.A. (N.S.) 853, 66 Atl. 884; O'Neil v. Pittsburgh, C. C. & St. L. R. Co. 130 Fed. 204; Pendergast v. Union R. Co. 10 App. Div. 207, 41 N. Y. Supp. 927.

Messrs. Arthur C. Spencer and Hamblen & Gilbert, for respondent.

Ellis, J., delivered the opinion of the court:

Action by the administrator of the estate of Wilbur F. Horton, deceased, for the benefit of the surviving widow and children of decedent, to recover damages for wrongful death, under the Federal employers' liability act.

47 L.R.A. (N.S.)

The amended complaint alleged, in substance, that the defendant was a corporation engaged in interstate commerce by railroad; that the decedent was employed by the defendant as a pumper at Onyx, Idaho, and operated at that place a pumping plant for the purpose of supplying the locomotives of the defendant with water; that decedent lived 2 or 3 miles from the pumping plant, and that it was necessary for him to go to the plant daily; that for this purpose defendant furnished him with a small handcar, called a "speeder;" that on October 8, 1910, while going from his home to the pumping plant, and while operating the speeder on the track of the defendant, decedent was overtaken by an interstate passenger train; that decedent, upon becoming aware of the approach of the train, stopped the speeder, and, for the purpose of avoiding a collision, consequent destruction of defendant's property, and probable loss of life, attempted to remove the speeder from the track; that while so doing he was struck by the train and instantly killed; that defendant failed to exercise reasonable care to avoid the collision after becoming aware of his presence; that "the duties which said Horton performed and was required to perform, both in going to and coming from his home to said water pumping plant, were acts and things incident to, and made necessary in, the operation of said company's trains, cars, and locomotives in the carrying on of its business of interstate commerce by railroad, and as an integral part thereof; and said Wilbur F. Horton was at the time of his death in the performance of said duties and in the employ of said company, and employed by it for the purpose of aiding and assisting it in the operation of its trains, cars, and locomotives, and in the carrying on of its business of interstate commerce by railroad." It was admitted that the decedent was a fellow servant of the persons operating the train. While not so alleged, it seems to be conceded that the defendant was engaged in both interstate and intrastate commerce. The trial court sustained a demurrer to the complaint, upon the ground that the facts stated were not sufficient to invoke the benefit of the employers' liability act, and dismissed the action. The plaintiff appealed.

The first section of the employers' liability act of 1908, 35 Stat. at L. p. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, provides "that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories,

or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The sole question presented for our consideration is this: Was the decedent employed by the defendant in interstate commerce at the time of his death, so as to enable his representative to invoke the benefit of this act? The earlier act of 1906 (act June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316 was in the Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, held unconstitutional as exceeding the power of Congress under the commerce clause of the Constitution, in that it imposed a liability, as against all common carriers engaged in interstate commerce, in favor of any of their employees without restriction, and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908, above quoted, was passed to conform to that decision, and should therefore be construed as including within the term, "any person suffering injury while he is employed by such carrier in such commerce," every person who could be so included within the purview of the constitutional power. "The act meant to include everybody whom Congress could include." *Colasurdo v. Central R. Co.* (C. C.) 180 Fed. 832. That such was the purpose and intent of the second act seems to be assumed by the Supreme Court of the United States in an opinion holding the act constitutional. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The inquiry is thus narrowed to the concrete question: Had Congress the constitutional power to enact a law regulating the relation between a common carrier engaged in interstate commerce and its serv-

ant who is employed in pumping water used by its engines both for interstate and intrastate commerce? If Congress had this power, then we must assume that it intended to exercise it in passing the present act.

In determining the extent of the power of Congress and the consequent extent of the exercise of that power by this act, we are bound, whatever our personal views, by the decisions of the Federal courts. We are not called upon to decide whether, if an injury be inflicted by a person or instrumentality employed by the defendant in intrastate, but not in interstate, commerce, the act could in any event be invoked, since the case is here on demurrer, and the complaint alleged that the train, and by necessary inference its crew, were employed in interstate commerce. It may be remarked in passing, however, as showing the sweepingly broad construction placed upon the act and the true criterion of the congressional power, that in the *Second Employers' Liability Cases*, supra, the Supreme Court expressly decided that the fact that the negligence which caused the injury was that of an employee engaged in intrastate commerce was immaterial; the true criterion being the effect of the injury upon interstate commerce, not the source of the injury. As to the character of service in which the injured servant must be engaged in order to be subject to the congressional power, so as to enable the servant to claim the benefit of the act, the Supreme Court, in the cases mentioned, does not particularize, but contents itself with the broad holding that "the particulars in which those relations [of carrier, masters, and employees] are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged." In those cases (*Second Employers' Liability Cases*, supra) two of the injured employees were locomotive firemen apparently employed on interstate trains; while the third was a car repairer engaged in replacing a drawbar in one of the defendant's cars then in use in interstate commerce, and was killed by fellow servants pushing other cars against the one on which he was working. In each of these cases it was held that there was such a real or substantial relation to interstate commerce in the employment of the injured person as to come within the regulating power of Congress and within the protection of the act.

In *Darr v. Baltimore & O. R. Co.* (D. C.) 197 Fed. 665, the plaintiff's regular work was the making of what is called "running repairs." An engine and tender used in hauling interstate trains had reached the

end of their run, and were placed upon a fire track to await the time for starting upon the return trip. The plaintiff, while replacing a bolt lost from a brake shoe of the tender, was injured through the negligence of a fellow servant. It was held that he was employed by the carrier in interstate commerce and entitled to the benefit of the act.

In the foregoing instances, so far as the opinions show, the employment of the injured servant related solely to instrumentalities used in interstate commerce. There are, however, numerous cases in which it is held that, where the service of the injured servant contributed indiscriminately to both the interstate and the intrastate business of the carrier master, the injured servant is entitled to the benefit of the act.

In *Zikos v. Oregon R. & Nav. Co.* (C. C.) 179 Fed. 893, the plaintiff, a section hand, was injured while employed in repairing the main line of the defendant's railroad used both in interstate and intrastate commerce. The argument seems to have been advanced that, because the part of the track he was repairing lay wholly within the state, the plaintiff was not employed in interstate commerce. The late Judge Whitson, holding the employers' liability act applicable, used the following language: "But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states,—to deny the power of Congress over interstate commerce, but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. . . . But where the employment necessarily and directly contributes to the more extended use, and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although 47 L.R.A. (N.S.)

it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to Federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter, whenever a carrier is using the track for the double purpose."

In *Colasurdo v. Central R. Co.* (C. C.) 180 Fed. 832, plaintiff, a railroad trackman, was assisting in the repair of a switch in a railroad yard at night, the switch being used indifferently for both kinds of commerce, when he was struck and injured by certain cars. The court, holding that he was within the protection of the act, said: "The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time." This decision was, on writ of error, affirmed by the circuit court of appeals in 113 C. C. A. 379, 192 Fed. 901; that court saying: "We think the statute was intended to apply to every carrier while engaged in interstate commerce, and to an employee of such carrier while so engaged; and if these conditions concur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial."

In *Behrens v. Illinois C. R. Co.* (D. C.) 192 Fed. 581, the plaintiff's testate was fireman of a switching crew whose duty it was to switch cars that had to move both in interstate and intrastate commerce indiscriminately. At the time of the accident the train being moved originated within the state, and the freight carried constituted intrastate commerce. It was contended that neither the defendant nor the deceased employee was at the time engaged in interstate commerce, so as to permit a recovery under the employers' liability act. The court said: "In my opinion, the construction sought to be secured by the defendant is entirely too narrow and restricted. Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow servant and the modification of the doctrines of contributory

negligence and assumed risk make for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible. In this view of the case I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad; and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

In *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1, the plaintiff's intestate, a car repairer employed in the defendant's repair shops connected with an interstate track, was injured while engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce. The circuit court of appeals, in affirming the decision of the district court that the act applied, after pointing out that the car was one of the instruments of interstate commerce, said: "It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic." See also *Johnson v. Great Northern R. Co.* 102 C. C. A. 89, 178 Fed. 643; *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Jones v. Chesapeake & O. R. Co.* 149 Ky. 566, 149 S. W. 951.

But it is urged that, even assuming that the employment of the deceased when actually pumping water was so related to interstate commerce as to meet the requirements of the act, still he was not so employed while going to his work. It is argued that the decedent, at the time of his death, was not "actually and actively engaged in interstate commerce." The word, however, used in the act itself, as applied to the servant, is "employed." It is somewhat difficult to see how he could have been passively employed, or employed at all without being actually employed. The act itself places no such tautological em-

phasis upon the word "employed." The deceased was going to the pumping station by the means supplied by the master. He was performing a necessary part of his employment in the manner contemplated by the master. The decision of the circuit court of appeals in *Lamphere v. Oregon R. & Nav. Co.* 116 C. C. A. 156, 196 Fed. 336, ante, 1, reversing a contrary decision of the district court (193 Fed. 248), sustains the appellant here in every essential particular. There the decedent, a locomotive fireman, was on his way to the depot to secure a pass, board a passenger train, and go to another town and bring forward, as one of an engine crew, an interstate train. While on his way to the depot and in the yards of the defendant, he was killed by an interstate train. The court said: "He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states, in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce, and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court." Nor can we see any real distinction between the case quoted and the one before us.

The decisions mainly relied upon by the respondent as generally combating the doctrine sustained in all of the foregoing citations are *Pedersen v. Delaware, L. & W. R. Co.* (C. C.) 184 Fed. 737, and *Tamura v. Great Northern R. Co.* 58 Wash. 316, 108 Pac. 774. The *Pedersen* Case is clearly out of harmony with the principles announced in all of the foregoing decisions. In the *Lamphere* Case, supra, after citing the *Zikos* Case, the *Colasurdo* Case, the *Behrens* Case, and others, the court, referring to the *Pedersen* Case, said: "The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875."

In our own decision in *Tamura v. Great Northern R. Co.*, we did not have the ad-

vantage of the foregoing authorities, which, it will be noted, are all recent. Moreover, as we there said: "It is not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded." In so far, however, as that case may be construed as running counter to the foregoing decisions, we are constrained by the overwhelming weight of those authorities to overrule it.

Tested by the criterion laid down in the Second Employers' Liability Cases, *supra*, and exemplified in the foregoing decisions, namely, by the effect of the injury upon interstate commerce, it seems to us too plain for cavil that the deceased, when killed, was employed by the carrier in such commerce, within the meaning of the act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master as well as the local trains, must have ceased altogether. This demonstrates the "real or substantial" connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too finespun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice. The demurrer to the amended complaint should have been overruled.

The judgment is reversed, and the cause is remanded for further proceeding in accordance with this opinion.

Crow, Ch. J., and Main, Morris, and Fullerton, JJ., concur.
47 L.R.A.(N.S.)

OREGON SUPREME COURT.

SAMUEL M. MONTGOMERY, Appt.,
v.
SOUTHERN PACIFIC COMPANY, Resp't.
(64 Or. 597, 131 Pac. 507.)

Master and servant — Federal employers' liability act — member of switching crew.

1. A member of a switching crew injured while attempting to move on a switch a tank car loaded with oil for engines running between states, as well as for his own, which is engaged in moving cars between switches and the main track where they are left and taken up by interstate trains for transportation into other states as well as to points within the state where he is located, is, although his duties are all performed in one state, employed in interstate commerce within the operation of the Federal employers' liability act.

Evidence — duties of employee — character of service.

2. Upon the question whether or not a railroad employee was engaged in interstate commerce at the time of his injury, evidence is admissible as to the general duties with which he was charged during the time of his employment with the furtherance of which he was engaged at the time of his injury.

(April 15, 1913.)

APPEAL by plaintiff from a judgment of nonsuit of the Circuit Court for Multnomah County in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Bean, J.:

This is an action for damages. From a judgment of nonsuit in favor of defendant, plaintiff appeals.

The action is brought under the act of Congress of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, generally known as the employers' liability act. The principal question involved in this case is whether or not plaintiff was engaged in interstate commerce at the time he was injured, so as to bring him within the terms of that act. At the time of the accident complained of, plaintiff was employed by the defendant as a brakeman in one of its switching crews, engaged in making up trains between Weed, California, and Pioneer, in the same state. The defendant company was engaged in interstate com-

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.

merce, operating a main line of railroad between Portland, Oregon, and San Francisco, California, and also a branch line extending from the main line at the station of Weed, and running up into Oregon to Klamath Falls. Its principal business was in carrying freight and passengers from state to state. The duties of the switching crew were to assist in making up trains, setting cars in and out, and keeping the road clear and ready for traffic. Their section of road extended from Weed south to Pioneer, a distance of about 14 miles. This part of the road was situated in a lumber region. There were many large mills and factories at the different places, from which large shipments of lumber, box material, etc., were made to all parts of the United States, and also to local California points. Empty cars would be left at these switches by regular trains, and it was the duty of the switching crew to set them in for loading, and, when loaded, to pick them up and set them out upon a side track next to the main line in such a position that they could be conveniently taken up by the regular trains. It was also the duty of the switching crew to collect these cars at different stations and carry them over the mountains to Sisson, from which place they could be more easily transported by the regular trains; the grade going south being too steep for heavily loaded trains to attach the cars at Weed and other points north. The evidence tended to show that the shipments from Weed were largely interstate shipments, and that all this interstate traffic was necessarily moved every day by the switching crew; that the interstate freight, and also the intrastate freight, was carried at times in foreign cars which came from roads in the East and Middle West, and sometimes in cars belonging to the defendant company.

On the morning of the 16th of May, 1909, plaintiff started out with the switching crew for the purpose of moving any interstate commerce, and also of handling any local business, that there might be along the road. During the day they switched and moved cars destined to points outside of the state, around the yard that they might be taken up by the regular trains in the usual course of business. On this day they went down as far as Sisson. Defendant claims that all cars handled by this train on this day were from and destined to points within the state of California.

Plaintiff testified on this point as follows:

Q. What are the facts as to whether during that time you were or were not handling cars for points out of the state of California? (N.S.)

fornia, both loaded and unloaded, and to what extent?

A. We were handling cars going out of the state of California, quite a number of them, day after day,—every day.

On the way back from Sisson, before putting up their engine for the night, they undertook to move an oil car at the station of Weed. This car had come from the oil fields of California, and was being moved, primarily, for the purpose of providing fuel for the engine which was to run up into Oregon on the interstate road on its regular trip, and also for the purpose of providing their own switch engine with oil in order that they might continue on the morrow in the handling of articles of interstate, as well as state, commerce. From this car they pumped oil into the tank of the engine. While engaged in moving the oil car in the regular course of business, by some miscalculation it was left standing on the point of the frog at the intersection of the wye of the main line running into Oregon. In order to clear the track for the incoming passenger from Oregon on this branch line, and to get the car to the point where it was to be left for the purpose of supplying oil, it was necessary to move the car from the frog. It was thought necessary to move the car by chaining it to the engine and by moving the latter forward on one branch of the wye, thereby throwing the car farther along the other track, which was nearly parallel at this point, until it passed the frog so that the engine could get by. While at this wye, plaintiff was standing near the car attending the chain, when the engineer suddenly and violently started up his engine in such a way that it drew the chain suddenly around and caught plaintiff's hand. Then the engineer continued to start and stop violently several times, causing the plaintiff's hand to be entirely torn off.

Upon the trial of the cause it appeared that plaintiff had been at work in the employ of the defendant from May 9 to May 16, 1909. Counsel for plaintiff inquired of the witnesses in regard to the setting of cars loaded by one of the lumber companies at that place, during the above-mentioned time, that were to be shipped beyond the California line. Objection was made by counsel for defendant for the reason that the evidence was confined to the day and time of the accident. The court sustained the objection, whereupon plaintiff offered to prove the following facts: "That the business in which the plaintiff was engaged was generally that of handling both interstate and state traffic; that they would start out in the morning to find what work was to be done, with the intention and

instructions to switch whatever cars were ready to be switched, whether interstate or state, and to ascertain whether there were any interstate cars to be switched, and to switch them if there were; that the oil car which they were engaged in moving at the particular time contained oil which was being removed to another point in the yard of the company, for the purpose of getting it off the track and out of the way of traffic on the main line up to Klamath Falls, and also for the purpose of placing it where the oil in the car could be distributed and used; that the oil in the car was some of it to be distributed to engines of the defendant running out of the state of California and into the state of Oregon, and other portions of it were to be used by the plaintiff and the train crew of which he was a member, and was placed up there that night, partly that they might get oil for their engine on the morrow for the purpose of going out on their regular trip to switch and distribute interstate and state commerce alike, and to be used by them on other succeeding days in the same way; and there was no other crew doing that kind of switching or any switching at Weed and other stations within that district during the time that plaintiff was so employed; and that their crew did all the switching, both state and interstate." The trial court sustained the defendant's objection to this offer of proof, and ruled that before the plaintiff would be engaged in interstate commerce, within the meaning of the act of Congress, he must have been engaged at the time in handling a car which either came from out of the state, or was bound outside of the state, or was passing through the state. There was testimony tending to show the negligence of the engineer and the resulting injury.

Messrs. Bennett & Sinnott and C. B. Watson, for appellant:

The authority of Congress to regulate commerce clearly includes all the instruments of commerce, and men engaged in that commerce, as well as cars, engines, and railroad tracks, are within the constitutional provisions.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Gibbons v. Ogden, 9 Wheat. 229, 6 L. ed. 78; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Gloucester Ferry Co. Pennsylvania, 114 U. S. 203, 29 L. ed. 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; United States v. Trans-Missouri Freight Asso. 166 U. S. 312, 41 L. ed. 1017, 47 L.R.A.(N.S.)

17 Sup. Ct. Rep. 540; Doherty, Liability of Railroads to Interstate Employees, § 41; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Felt v. Denver & R. G. R. Co. 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379; Southern R. Co. v. United States, 222 U. S. 26, 27, 56 L. ed. 74, 75, 32 Sup. Ct. Rep. 2.

It is not necessary that the employees shall be engaged solely in moving interstate traffic. It is enough that it is partly his employment at the time, even although a great portion of his work is in the movement of state traffic.

Doherty, Liability of Railroads to Interstate Employees, pp. 84, 87, 229; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 616, 621, 55 L. ed. 881, 883, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

Plaintiff being generally engaged in interstate commerce, and his work at the particular moment when he was injured being incidental to such commerce, and partly or solely for the purpose of promoting the same, he was within the purpose and intention of the act, and an instrument of interstate commerce within the power of congressional regulation, under the provision of the Constitution.

Doherty, Liability of Railroads to Interstate Employees, 94, 98; Colasurdo v. Central R. Co. 180 Fed. 832, 113 C. C. A. 379, 192 Fed. 901; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Snead v. Central R. Co. 151 Fed. 608; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Lamphere v. Oregon R. & Nav. Co. ante, 1, 116 C. C. A. 156, 196 Fed. 336; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Behrens v. Illinois C. R. Co. 192 Fed. 581; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Jones v. Chesapeake & O. R. Co. 149 Ky. 566, 149 S. W. 951; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 336; Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002.

Messrs. Ben C. Dey, W. D. Fenton, and R. L. Fenton, with Mr. Ralph E. Moody, for respondent.

Bean, J., delivered the opinion of the court:

It is contended by counsel for plaintiff that the work plaintiff, Montgomery, was doing at the time of the injury complained

of, was incidental to the movement of interstate commerce, and that he was acting partly as an agent of interstate commerce at the time, and was therefore "engaged in interstate commerce" within the meaning of the act. Counsel for defendant contend: (1) That neither the engine, caboose, nor tank car was an instrument of interstate commerce; (2) that, while moving this tank car, defendant was not engaged in interstate commerce, nor was plaintiff employed therein. The employers' liability act provides "that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the state and territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322.

The first and main question is, Did the work in which the plaintiff and his associates were engaged at the time of the injury have a real or substantial connection with interstate commerce, so as to bring plaintiff within the protection of the act? The question is not an entirely new one.

The Federal courts have blazed the way to be followed in determining most, if not all, of the questions involved in this action.

As will be noticed, the evidence tended to show that the plaintiff was engaged in moving the oil for the purpose of providing fuel for the engines used in transmitting freight and passengers from California into Oregon. The oil was to be used principally for the engine and crew with which plaintiff was engaged in his general work of switching interstate cars, and spotting, setting out, and moving them from station to station. It appears that about two thirds of the work of plaintiff, of switch crew, and engine, was the moving of cars used in the transportation of interstate commodities, although all of plaintiff's work was done in the state of California.

Mr. Thornton, in his work on the Federal Employers' Liability and Safety Appliance Acts, 2d ed. § 38, says: "It is beyond debate that the statute embraces all engineers, firemen, brakemen and conductors employed at the time of their injuries upon an interstate train. In one case it is said that the statute covers a telegraph operator despatching trains, and in that same case it is said that Congress meant to include

everybody whom it could include. . . . It includes a car repairer in a switching yard repairing interstate cars. . . . No doubt, it is believed, but what a freight handler of interstate freight, in loading and unloading cars in which it is to be or has been carried, is covered by the terms of the statute. So are mechanics or repairmen while engaged upon interstate cars, engines, or other interstate instrumentalities, and even while passing over the railroad for the purpose of repairing such cars, engines, or instrumentalities. Likewise the members of an emergency crew while at work upon any interstate train or any railroad track that is a highway of interstate commerce. Linemen fall within its terms. Not only are track repairers within its terms, but also those who construct or repair the signal wires used by an interstate railroad, even though they be used without discrimination between the local or interstate character of its traffic. . . . In the case of yardmen engaged in making up an interstate train, under the liberal construction given these Federal statutes by the courts, there is no doubt but what they will be held within the terms of this employers' liability act.

In the case of Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), and the other cases decided therewith, 223 U. S. 1, at page 48 of the opinion, 56 L. ed. 327, 343, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, Mr. Justice Van Devanter said: "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted." The part of the opinion on page 52 of 223 U. S. is peculiarly applicable to the case at bar. It is there said: "It is true that the liability which the act creates . . . is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains." Digressing from the main question, this language, to our minds, indicates that the ruling of the circuit court sought and obtained by the learned counsel for defendant, to the effect that, before plaintiff would be en-

gaged in interstate commerce within the meaning of the act of Congress, he must be engaged at the time in handling a car which either came from out of the state, or was bound outside of the state, or was passing through the state, restricts the matter within too narrow limits.

In *Doherty, Liability of Railroads to Interstate Employees*, § 17, pp. 88, 89, it is said: "But what rule may be laid down for the determination of the question, 'When is an employee engaged in interstate commerce?' The crew of an interstate train is, of course, included. A switchman engaged in duty, as such, for an interstate train, a freight handler while employed in handling interstate or foreign freight, and mechanics or car repairmen while engaged in work upon interstate cars or other interstate instrumentalities, and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train, are also included, and emergency or wrecking crews while at work upon any train on the interstate highway may reasonably be included. In other words, all who are at the time of injury engaged in duty which has direct relation to the interstate business of the carrier are entitled to the protection of the act." And on page 229, *Id.*, it is said: "All who participate in the maintenance of the instrumentalities for the general use of the road, even in the maintenance of such instrumentalities as are used on purely local branches, necessarily participate in the work of interstate commerce, because interstate commerce is carried on over every part, branch, section, and division of the entire system of such interstate road."

In *Southern R. Co. v. United States*, 222 U. S. 20, at page 27, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, we find the following: "Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains."

In *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, at page 48 of the opinion, 54 L. ed. 921, 928, post, 84, 30 Sup. Ct. Rep. 676, the court said: "A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps

no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operation of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tippie is therefore essential to the operating of a railroad."

In the case of *Zikos v. Oregon R. & Nav. Co.* (C. C.) 179 Fed. 893, the plaintiff was engaged in repairing a track used incidentally in both classes of traffic. It was held that his employment came within the law; the court saying at page 898: "But where the employment necessarily and directly contributes to the more extended use, and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other." See also *Colasurdo v. Central R. Co.* (C. C.) 180 Fed. 832, which is a strong case and very much in point.

As stated in the brief of the late Solicitor General, and quoted in the *Mondou Case*, 223 U. S. at page 48, 56 L. ed. 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 174, 1 N. C. C. A. 875: "Interstate commerce (if not always, at any rate when the commerce is transportation) is an act." Let us then determine whether or not the act in which plaintiff was engaged at the time of the injury was one relating in a substantial way to interstate commerce.

A large part of the general duties of plaintiff, with his associates, was in switching and spotting cars to be loaded and cars loaded with interstate commerce commodities. In order to aid and accelerate such interstate business, the plaintiff, with the other members of the crew, by means of the engine, hauled cars up the mountains to a station from which they could conveniently be taken by a regular, through, or interstate train passing over an interstate railroad. Loading freight and making preparation for the same to be shipped by switching the cars and attaching them to the regular train, and especially in transporting the cars a portion of the distance, would seem to be as much a part of the interstate traffic of a railroad as the actual transportation across the state line; so, also, would be the furnishing and pumping of oil for the engines to be used in such interstate business. Was not the act which plaintiff was performing at the time of the accident just as essential to interstate commerce as the repairing or the pulling of the throttle of an engine used in such traffic? It was a necessary act in the transmission of interstate freight, and all who co-operated in the work were engaged in interstate commerce, within the meaning of the act of Congress. It was closely con-

nected with his general duties. Oil is the food that gives life and strength to the engine, furnishing the motive power for the transportation of interstate freight, and by the aid of which a stream of commerce flows from state to state and from state to foreign nations. To illustrate: Draw a line to represent the boundary between two states; draw another line crossing the first, to represent the stream of interstate commerce. Whatever act in a substantial manner aids, accelerates, or increases the amount of, or furnishes a part of the supply for, such stream, and is connected therewith, to the same extent may be said to aid, support, and maintain the act of interstate commerce. Such labor makes interstate commerce more secure, more reliable, and more effective. Suppose that all the agents engaged in providing oil to be used as fuel in interstate commerce upon a railroad, as this oil was destined to be used, should cease to act, for instance, on account of a boycott, or by reason of an injunction order issued by a state court for some purpose conceived to be good (a violent assumption), and there were a failure of the supply of fuel, and both the switch and interstate engines were compelled to stop, the stream of interstate commerce would also stop or be lessened to the same extent. What court or lawyer would say that under these circumstances there was not a substantial interference with interstate commerce?

In the business of an interstate railroad, the interstate and intrastate traffic is intermingled and usually handled indiscriminately. It would be practically impossible to name any servant of an interstate road who is employed exclusively in the furtherance of purely interstate traffic. All employees who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the act. The fact that a portion of plaintiff's work pertained to local traffic would not change the character of his labor in the performance of acts reasonably proximate and essential to the moving of interstate freight, and in assistance thereof. *Doherty*, § 58; *Thornton*, § 37.

The evidence introduced and offered upon the trial in the case at bar tended to show that the defendant railroad company, and the plaintiff, its employee, were, at the time of the injury complained of, engaged in interstate commerce by railroad, within the meaning of the act of Congress. It follows, if this be true, that plaintiff was entitled to the protection of the act, and the case 47 L.R.A. (N.S.)

should have been submitted to the jury. This conclusion is, we think, in harmony with the act of Congress, the above authorities, and *Darr v. Baltimore & O. R. Co.* (D. C.) 197 Fed. 665; *Lamphere v. Oregon R. & Nav. Co.* ante, 1, 116 C. C. A. 156, 196 Fed. 336; *Horton v. Oregon-Washington R. & Nav. Co.* 72 Wash. 503, ante, 8, 130 Pac. 897; *Jones v. Chesapeake & O. R. Co.* 149 Ky. 566, 149 S. W. 951; *Breske v. Minneapolis & St. L. R. Co.* 115 Minn. 386, 132 N. W. 337.

The evidence tendered by plaintiff relating to the general duties of the plaintiff and of the other members of the switching crew, during the time plaintiff had been employed by the railroad company, was, in our opinion, material for the purpose of showing plaintiff's general duties and the kind of business in which the car of oil was to be used. The trial court erred in rejecting the evidence. The position of counsel for defendant is that it is immaterial what plaintiff's general duties were, or what he may have been engaged in at any other time than that of the accident, and they cite therefor, among other authorities, *Doherty*, § 17, pp. 87, 88, and *Thornton* 2d ed. § 37. But we do not so read these authorities. They are to the effect that it is not enough to show that an employee was engaged generally by an interstate railroad company, in order to come within the provisions of the act, but that he must go further and show that he received his injury while engaged in interstate commerce for the company. This does not necessarily indicate that testimony as to his general duties would be immaterial.

The judgment of the lower court will therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO GREAT WESTERN RAILROAD
COMPANY, Plff. in Err.,

v.

MARGARET McCORMICK, Admr., etc.,
of John McCormick, Deceased.

(118 C. C. A. 527, 200 Fed. 375.)

**Pleading — amendment — source of
authority of administrator.**

1. It is within the discretion of the trial court to permit the amendment of the com-

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.

plaint in an action to recover damages for wrongful death so as to change the averment as to the source of plaintiff's letters of administration, by stating that they were issued in a county different from that first stated.

Master and servant — hand car as notice of danger.

2. A locomotive engineer is not bound, as matter of law, to slacken his speed upon seeing a hand car on the track, with men at work near it, until he knows or has reasonable ground to believe that it will not be removed in time to let his train pass, failure to do which will be such negligence as to preclude recovery in case the track is so defective that his engine is derailed to his injury.

Trial — instructed verdict — Federal statute — contributory negligence.

3. The jury cannot be directed to find for defendant because of contributory negligence in a personal-injury action brought under the Federal statute, which provides that such negligence shall not bar a recovery, but merely diminish the damages.

Appeal — instruction — objection raised for first time.

4. An instruction cannot be held erroneous on appeal for a cause not brought to the attention of the trial court.

Same — exclusion of evidence — danger in striking hand car.

5. It is not reversible error to exclude evidence that it is dangerous for a running train to strike a hand car, in an action to hold a railroad company liable for injury to an engineer through the derailment of his train by a broken rail, the only notice of which was the fact that a hand car stood on the track at that place.

(October 28, 1912.)

ERROR to the District Court of the United States for the Northern District of Iowa to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn, Hook, and Adams, Circuit Judges.

Mr. George H. Carr, with Mr. Fred P. Carr, for plaintiff in error.

Messrs. Healy & Healy, M. F. Healy, and Robert Healy, for defendant in error:

The amendment in this case does not change the parties plaintiff; but if it did have that effect it would be proper.

Glick v. Hartman, 10 Iowa, 410; Ream v. Jack, 44 Iowa, 325; Wells v. Stomback, 59 Iowa, 376, 13 N. W. 339.

If a party sues as administrator, without taking out letters of administration, the taking them out afterwards cures the defect, and relates back so as to make the

petition or declaration good from the beginning.

Hodges v. Kimball, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845; Doolittle v. Lewis, 7 Johns. Ch. 49, 11 Am. Dec. 389; 11 Am. & Eng. Enc. Law, 2d ed. 908; McAleer v. Clay County, 38 Fed. 709.

An engineer in charge of a train passing through the country has a right to assume that section men working along the track will clear the track and remove their tools and hand car before the train reaches them, provided they are warned of the approach of the train; and the engineer is not required to reduce the speed of his train until it is apparent to him that the section men cannot clear the track.

33 Cyc. 800; Nelling v. Chicago, St. P. & K. C. R. Co. 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404; Fisk v. Chicago, M. & St. P. R. Co. 111 Iowa, 392, 82 N. W. 931; Evans v. Wabash R. Co. 178 Mo. 508, 77 S. W. 515; Copp v. Maine C. R. Co. 100 Me. 568, 62 Atl. 735.

The hand car did not contribute to the cause of the injury complained of, and its presence on the track is not sufficient to charge the engineer with notice of the fact that the rail beyond it was removed from the track.

Mumford v. Chicago, R. I. & P. R. Co. 128 Iowa, 685, 104 N. W. 1135.

Hook, Circuit Judge, delivered the opinion of the court:

John McCormick, an engineer in the service of the Chicago Great Western Railroad Company, was killed by the derailment of his engine at a point in Iowa where section men engaged in repairing the track had removed a rail. His wife, as administratrix, claiming that no warning of the broken track was given him, sued the company and obtained judgment.

Complaint is made by the company that after the jury had been impaneled the trial court allowed the plaintiff to amend her petition by averring that her appointment as administratrix was by a local court of a different county from that first stated, thereby in effect, as claimed, permitting the substitution of a new plaintiff. There was no error in this. The giving of leave to amend was well within the discretion of the trial court. There are a multitude of cases upholding the action of trial courts, where the changes in the character and positions of the parties as stated in their pleadings were as radical as that questioned here.

There was evidence that McCormick's train was flagged by one of the section crew sent back for the purpose; also evidence to the contrary. But as the verdict was for

the plaintiff, we must assume no warning was given either by flag or by torpedoes on the rails, and that the company was negligent in that respect. We therefore turn to the defense of contributory negligence. It was admitted in plaintiff's petition that when three fourths of a mile away, McCormick saw a hand car upon the track and the crowd of section men near by. He then had ample time to stop the train, but he continued at high speed until too late to stop and avoid derailment. The effect, as a warning, of the presence of the hand car and the section men upon and about the track, was submitted to the jury, with instructions respecting the duty of the engineer. The trial court charged the jury that the engineer had a right to assume the track was in a reasonably safe condition for the passage of his train, that it was customary for men to work on and along a track kept open for traffic, and that an engineer on an approaching train is not required to slacken speed or stop until he knows or has reasonable grounds for believing they are not going to remove their hand cars, tools, and implements, and get off the track; that "after such knowledge, or after reasonable grounds to so believe, then if he fails to exercise care to stop it, he may be chargeable with negligence." We think this is a correct statement of the law applicable to the case. If the man sent back by the section foreman failed to use the flag or torpedoes, the engineer might very properly have assumed the track was safe, though he saw the hand car and the men in the distance. Common experience in railroading would not have led him to suspect a broken track from their presence. Warnings of unsafety are given in other ways. It is not the custom to take the mere presence of men and implements as notice of danger. The efficient operation of railroads forbids it. The hand car and the men on and about the track only became a warning upon which the engineer was obliged to act when it became reasonably apparent the track would not be cleared for the passage of the train. Various phases of the principle upon which this proceeds are recognized in *Illinois C. R. Co. v. Ackerman*, 76 C. C. A. 13, 144 Fed. 959, 20 Am. Neg. Rep. 248; *St. Louis & S. F. R. Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Evans v. Wabash R. Co.* 178 Mo. 508, 77 S. W. 515; *Copp v. Maine C. R. Co.* 100 Me. 568, 62 Atl. 735; *Nelling v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404; *Fisk v. Chicago, M. & St. P. R. Co.* 111 Iowa, 392, 82 N. W. 931. It may be said in this connection that the head brakeman, who was riding in the cab on the fireman's box, tes-

tified that it appeared to him that the men were making an effort to remove the hand car. The other witnesses denied that was the case; but, if it also appeared that way to the engineer, it would account for his not sooner checking the speed of the train.

It is claimed that the court erred in refusing to give four instructions asked by the company. The subject of them was covered by the charge of the court above noted. Besides this, they either ambiguously or incorrectly stated the time when the men and car on the track became a warning to affirmative action by the engineer. For example, one was that the engineer was guilty of contributory negligence if he "knew . . . that there was a hand car or hand cars standing upon the track and men working upon the track at the place where the derailment occurred, as his train approached from the west, in sufficient time to have enabled him to have got his train under control . . . and to have stopped the same" before reaching the place where the rail had been removed. Under the conceded facts this was equivalent to a request for a declaration of contributory negligence as matter of law. It would have declared the duty to stop the train, though the engineer reasonably believed at the time the track would be cleared. By another of these instructions a finding of contributory negligence was to be followed by a verdict for the company, though the train was engaged in interstate commerce, and the action was brought under the act of Congress (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322) which provides that contributory negligence shall not bar a recovery, but that the jury shall diminish the damages proportionately.

Complaint is also made of parts of the charge to the jury. The only one of which special mention need be made is that where the court, in referring to the men and hand cars at the place of derailment, said: "That fact of itself—the fact that he [the engineer] could see them, or the fact that he did see them—is not of itself evidence of his contributory negligence."

The court evidently meant that the fact referred to did not by itself establish contributory negligence, and not that it was not evidential. Moreover, this view of the instruction was expressed in the exception taken by counsel at the time. The exception did not direct the attention of the court to the particular point of objection, and on appeal it is too late to enlarge or change it.

The court sustained an objection to a question asked a witness for the company whether there is danger of a train being

derailed by striking a hand car on the track. The train in question was derailed by the break in the track, not by the hand car. It is a matter of common knowledge, and needs no evidence to prove, that it is dangerous for a train in motion to strike a hand car upon the track, and that was all there was of importance in that matter bearing upon the negligence of the engineer.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

ETTA TEEL, Admr., etc., of Lake Teel, Deceased, Plff. in Err.,
v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

(— C. C. A. —, 204 Fed. 918.)

Removal of cause — denial of right — due process of law.

1. A defendant in a suit under the Federal employers' liability act is not denied due process of law or the equal protection of the laws by being forbidden to remove the cause from a state to a Federal court, although there is diversity of citizenship, which is a cause for removal in other classes of cases.

Same — diversity of citizenship — employers' liability act.

2. The provision in the Federal employers' liability act forbidding the removal of causes from the state to the Federal courts prevents removal in such cases on the ground of diversity of citizenship.

Same — existing rights of action — effect.

3. A statute denying the right to remove causes from state to Federal courts may be made to apply to rights of action which have already arisen.

(May 6, 1913.)

ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment in favor of defendant in an action brought to recover damages under the Federal employers' liability act for the death of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Argued before Warrington, Knappen, and Denison, Circuit Judges.

Messrs. Myers & Howard for plaintiff in error.

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.
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Messrs. John Galvin and Maurice L. Galvin, for defendant in error:

The judgment should be affirmed.

Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Siegel v. New York C. & H. R. R. Co. 178 Fed. 873; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Lyddy v. Louisville & N. R. Co. 117 C. C. A. 20, 197 Fed. 524; Cryder v. Chicago, R. I. & P. R. Co. 81 C. C. A. 559, 152 Fed. 417.

Warrington, Circuit Judge, delivered the opinion of the court:

Facts necessary to the consideration now required of this cause are contained in the statement accompanying our opinion in the same case, rendered April 8, 1913. 204 Fed. 914. Under the rules to show cause then entered in the case, return was made in the form of a stipulation, which, by consent, is made part of the transcript heretofore filed in this court. It now appears that, upon the hearing below of the motion to remand the cause to the state court, the Chesapeake & Ohio Railway Company of Virginia introduced evidence showing that, prior to the accident in dispute, the Chesapeake & Ohio Railway Company of Kentucky had transferred and assigned its interest in the line of railway in question to the first-named railway company; that at the trial of the case "no evidence was offered by the plaintiff or at all" respecting the Chesapeake & Ohio Railway Company of Kentucky; and that the other railway company was throughout regarded and treated by the court and the parties as the only defendant below.

One of the questions of jurisdiction of the court below, alluded to in our former opinion, concerns the court's denial of plaintiff's motion to remand the cause to the state court. This question is not presented by any assignment of error, but it is scarcely necessary to say, for it has been so often decided, that it is the duty of the appellate court to inquire into the jurisdiction of the court below. Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 177, 55 L. ed. 163, 164, 31 Sup. Ct. Rep. 185; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 419, 55 L. ed. 523, 31 Sup. Ct. Rep. 460; Re Martin, 119 C. C. A. 363, 201 Fed. 33 (C. C. A. 6th C.). Should the motion to remand have been allowed? Plaintiff's intestate received his injury and died on September 8, 1909. The suit was commenced in the Kenton county circuit court on September 6, 1910. The removal proceeding was begun in that court on the 21st of the same month, and the

transcript was filed in the court below October 17th following. The motion to remand was filed March 21 and overruled April 7, 1911. Meanwhile § 6 of the employers' liability act of April 22, 1908 (35 Stat. at L. 66, chap. 149), which simply limited the time within which actions might be brought, was, to wit, April 5, 1910, amended by adding the following (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324).

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This provision is purely remedial and is couched in plain language. Congress was clearly acting within its constitutional power when it passed the amendment. While § 2 of article 3 of the Constitution declares that the judicial power shall extend to all cases arising under that instrument and the laws of the United States, as also, among others, to cases "between citizens of different states," yet it was long ago settled that, as to courts inferior to the Supreme Court, their jurisdiction in every case must depend upon some act of Congress. *Sewing-Mach. Cos.' Case* (Grover & B. Sewing-Mach. Co. v. Florence Sewing-Mach. Co.) 18 Wall. 553, 577, 21 L. ed. 914, 919; *Cary v. Curtis*, 3 How. 236, 245, 11 L. ed. 576, 581; *Turner v. Bank of North America*, 4 Dall. 9, 1 L. ed. 718 (note A); *Loveland*, App. Jur. § 2. As Justice Harlan said in *Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 252, 260, 38 L. ed. 429, 433, 14 Sup. Ct. Rep. 608, 611: "But, except in the cases specially enumerated in the Constitution, and of which this court may take cognizance, without an enabling act of Congress, the distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government."

It follows that the privilege of removal is not in any sense a vested right, no matter whether it be based, as here, on diversity of citizenship, or upon a right of action created by Federal law, like that given by the employers' liability act. The power in Congress to grant or withhold the right of removal is at last the power to prescribe

the jurisdiction of courts, as already stated. Such power is continuing in its nature, and of necessity includes authority to take away, as well as to bestow, the right to remove causes. *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115. Judge Severens forcibly said in *Manley v. Olney* (C. C.) 32 Fed. 709 (and what he there said is in no wise affected by his opinion in *Tiffany v. Wilce* [C. C.] 34 Fed. 230): "Congress may, therefore, grant or withhold altogether jurisdiction over removal cases. The jurisdiction which it has power to grant it has power to withdraw. If the right of removal was a vested right of property, quite different considerations would apply. But it is not so. It is simply a privilege of having the case tried in some other than the state tribunals. There is no property in it."

The plenary character of this power manifestly includes discretion in Congress to classify remedies, as well as the rights thereby intended to be enforced. The power of Congress to create the rights of action given by the employers' liability act is settled; and since such rights of action are limited to a particular class, there is no perceivable reason why the remedies making them available may not be likewise limited. The insistence, then, that to construe the amendment so as to include and prohibit removal on the ground of diversity of citizenship in this class of cases, while permitting removal on such ground in other cases, would be to deny due process of law and the equal protection of the laws, cannot be sanctioned. *Gaines v. Fuentes*, 92 U. S. 18, 19, 23 L. ed. 527, 528; *McChesney v. Illinois C. R. Co.* (D. C.) 197 Fed. 87, 88; *Kelly v. Chesapeake & O. R. Co.* (D. C.) 201 Fed. 605, 606.

It is not the right of action, the liability, created by the employers' liability act, but it is the remedy given to enforce such right, with which we are here concerned. Neither Mrs. Teel's right of action nor the railroad company's defense was disturbed; the change made simply affected the remedy. This distinguishes the present case from *Winfree v. Northern P. R. Co.* 227 U. S. 296, 301, 57 L. ed. 518, 520, 33 Sup. Ct. Rep. 273, and *Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428, decided by the Supreme Court April 7, 1913. It needs only to be stated that a remedial act should be liberally construed. The jurisdiction conferred upon the courts of the United States is concurrent with that of the courts of the several states, and removal of any case arising under the employers' liability act and brought in any state court of competent jurisdiction is explicitly forbidden.

It is not claimed that the state court was not one of "competent jurisdiction;" but it is urged that, since the liability created by the act of April 22, 1908 (employers' liability act), did not exist before, the intent was simply to deny removal under the act itself, and not to disturb such right when traceable to some other provision of law (reliance being placed on *Van Brimmer v. Texas & P. R. Co.* [C. C.] 190 Fed. 394, 399); and so it is insisted that, where diversity of citizenship or local prejudices exists, the right of removal still prevails. No question of local prejudice is raised; and, while the logic of the situation might seem to embrace such a matter, it will be time enough to pass upon it when presented. Upon the amended record, the only grounds of removal presented are diversity of citizenship and the fact that the case arose under the employers' liability act. It is now rightly conceded by learned counsel that the fact that the action arose under the employers' liability act afforded no ground for removal.

We think the remaining ground is equally untenable. The ban placed upon removal is as broad as the employers' liability act itself. The act makes no exception. The manifest purpose was to yield to suitors under it the choice of tribunals as between the courts of the United States and of the several states. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56, 58 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. We agree with Judge Cochran, who said in *De Atley v. Chesapeake & O. R. Co.* (D. C.) 201 Fed. 591, where the removal had been obtained on the ground of diversity of citizenship: "Congress said that 'no case arising under this act' should be removed and it should be taken to have meant what it said."

The learned judge cited a number of cases in support of his conclusion, among which were *Symonds v. St. Louis & S. E. R. Co.* (C. C.) 192 Fed. 353, by Judge Youmans; *Ullrich v. New York, N. H. & H. R. Co.* (D. C.) 193 Fed. 768, by Judge Hand, and concurred in by Judges Holt and Hough; *McChesney v. Illinois C. R. Co.* supra, 197 Fed. 85, 87, by Judge Evans. See also *Kelly v. Chesapeake & O. R. Co.* supra, 201 Fed. 605, 606; *Saiek v. Pennsylvania R. Co.* (C. C.) 193 Fed. 303.

In view of the decisions in the *De Atley* and *Kelly* Cases, supra, we take it that the attention of the trial judge in the present case was not called to the amendment of April 5, 1910, and presumably counsel were not aware of its passage, at the time the motion to remand was denied.

The judgment below is reversed, with 47 L.R.A.(N.S.)

costs, and the cause is remanded with instruction to grant the plaintiff's motion to remand the cause to the state court.

IOWA SUPREME COURT.

F. W. McCULLOUGH, Admr., etc., of Roy P. McCullough, Deceased,
v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt.

(— Iowa, —, 142 N. W. 67.)

Damages — Federal employers' liability act — action by parent.

1. The recovery by parents for death of an adult child under the Federal employers' liability act is limited to compensation for such prospective gifts of money, property, or services as they should reasonably expect to receive in the course of their lives from deceased, without any allowance for suffering or bereavement.

Evidence — damages — Federal employers' liability act — action by parent.

2. Upon the question of the amount to be allowed parents for the death of a child, under the Federal employers' liability act, evidence may be considered of the means and earning capacity of the son and of the parents, and the extent of contributions which he made to them.

Same — sufficiency.

3. Evidence of contributions by a son to his parents, without anything to show their amount, is not sufficient under the Federal employers' liability act to sustain a verdict in their favor for his death for \$5,000.

Same — sufficiency — break of side bar on engine — negligence.

4. Negligence on the part of a railroad company may be found from evidence that a side bar on an engine broke when the engine was in motion, and injured an employee in the cab, and that the engine was old and out of repair, that its wheels, bushings, and bearings were worn, and that it pounded while at work.

Trial — instruction — absence of evidence — necessary implication.

5. There is no error in instructing the jury as to lack of inspection as an element of negligence, in an action to hold a railroad company liable for injury by the breaking of the side bar of an engine, although there was no evidence of lack of inspection, and affirmative evidence of inspection on the day before the accident, if there was no repair of conditions which should have been discovered by the inspection.

(June 7, 1913.)

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38.

APP^{EAL} by defendant from a judgment of the District Court for Hardin County in plaintiff's favor in an action brought to recover damages for the death of an employee, under the Federal employers' liability act. Reversed.

Statement by Evans, J.:

This is an action for damages brought under the provisions of the employers' liability act enacted by Congress. The action was brought by the administrator in behalf of the parents of the deceased. There was a verdict for the plaintiff, and the defendant has appealed.

Messrs. J. L. Parrish, Robert J. Banister, Carskaddan & Pepper, and Lundy, Wood, & Baskerville, for appellant:

The court erred in submitting to the jury for their finding, the question whether there was want of reasonable care in inspecting and caring for the engine.

Hydinger v. Chicago, B. & Q. R. Co. 126 Iowa, 222, 101 N. W. 746; Albertson v. Lewis, 132 Iowa, 243, 109 N. W. 705; Fothergill v. Fothergill, 129 Iowa, 93, 105 N. W. 377; Everingham v. Lee, 78 Iowa, 630, 43 N. W. 459; Negley v. Cowell, 91 Iowa, 256, 51 Am. St. Rep. 345, 59 N. W. 48; Bank of Monroe v. Anderson Bros. Min. & R. Co. 65 Iowa, 692, 22 N. W. 929; State v. Myer, 69 Iowa, 148, 28 N. W. 484; White v. Spangler, 68 Iowa, 222, 26 N. W. 85; Johnson v. Miller, 69 Iowa, 562, 58 Am. St. Rep. 231, 29 N. W. 743.

Only actual pecuniary loss to the next of kin is recoverable in this action.

St. Louis, M. & S. E. R. Co. v. Garner, 76 Ark. 555, 89 S. W. 550; Burke v. Cork, etc. R. Co. 10 Cent. L. J. 48; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877; Van Brunt v. Cincinnati, J. & M. R. Co. 78 Mich. 530, 44 N. W. 321.

If no such person or class of persons exists as that specified in the statute as the beneficiary of the recovery, no action can be maintained, and in order to maintain the action, the existence of the beneficiary and his pecuniary loss must be alleged and proved.

Western U. Teleg. Co. v. McGill, 21 L.R.A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699; Kenney v. New York C. & H. R. Co. 49 Hun, 535, 2 N. Y. Supp. 512; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; Dickins v. New York C. R. Co. 23 N. Y. 158, 5 Am. Neg. Cas. 61; Trafford v. Adams Exp. Co. 8 Lea, 96; Blake v. Midland R. Co. 10 Eng. L. & Eq. 437; Safford v. Drew, 3 Duer, 627; Chicago & R. I. R. Co. v. Morris, 26 Ill. 400; Burke

v. Cork, etc. R. Co. 10 Cent. L. J. 48; Duckworth v. Johnson, 4 Hurlst. & N. 653, 29 L. J. Exch. N. S. 25, 5 Jur. N. S. 630, 7 Week. Rep. 655.

Where the action is brought in behalf of the next of kin, and the petition fails to allege that deceased contributed to the support of the beneficiaries, or other facts showing financial loss by his death, the petition is bad on demurrer.

Safford v. Drew, 3 Duer, 627; Regan v. Chicago, M. & St. P. R. Co. 51 Wis. 599, 8 N. W. 292; Westcott v. Central Vermont R. Co. 61 Vt. 438, 17 Atl. 745; Orgall v. Chicago, B. & Q. R. Co. 46 Neb. 4, 64 N. W. 450; Chicago, B. & Q. R. Co. v. Bond, 58 Neb. 385, 78 N. W. 710.

Where the suit is for benefit of the parents of a child of full age, no presumption of injury arises from his death, and the facts of relationship, loss of support, and consequent injury and damage must be alleged and proved.

Winnt v. International & G. N. R. Co. 74 Tex. 32, 5 L.R.A. 172, 11 S. W. 907; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 52 Am. St. Rep. 543, 6 Pac. 877; Atchison, T. & S. F. R. Co. v. Brown, 26 Kan. 443; Cherokee & P. Coal & Min. Co. v. Limb, 47 Kan. 469, 28 Pac. 181, 15 Am. Neg. Cas. 11; Atchison, T. & S. F. R. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603.

The actual probability of advantage to the next of kin from the continuance of the life must be shown by the evidence.

Burk v. Arcata & M. River R. Co. 125 Cal. 364, 73 Am. St. Rep. 47, 52, 57 Pac. 1065; Cleveland, C. C. & St. L. R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286; 2 Sedgw. Damages, 9th ed. § 579.

When the action is by the parent of an adult son, substantial damages are recoverable only by showing that the deceased had been of actual pecuniary benefit to his parent, or that such benefit might be reasonably expected by the continuance of his life, the reasonable character of such expectation to appear from the facts in evidence.

8 Am. & Eng. Enc. Law, 2d ed. 922; Chicago & A. R. Co. v. Shannon, 43 Ill. 339; Pennsylvania R. Co. v. Adams, 55 Pa. 499; Fordyce v. McCants, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 694; Smith v. Chicago, M. & St. P. R. Co. 6 S. D. 583, 28 L.R.A. 573, 62 N. W. 967; Mollie Gibson Consol. Min. & Mill Co. v. Sharp, 5 Colo. App. 321, 38 Pac. 850; Greenwood v. King, 82 Neb. 17, 116 N. W. 1128; Smith v. Hatcher, 102 Ga. 158, 29 S. E. 162; Standard Light & P. Co. v. Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931; Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715; Hurst v. Detroit City

R. Co. 84 Mich. 539, 48 N. W. 44; *Hodnett v. Boston & A. R. Co.* 156 Mass. 86, 30 N. E. 224; *Diebold v. Sharpe*, 19 Ind. App. 474, 49 N. E. 837; *Wabash R. Co. v. Oregan*, 23 Ind. App. 1, 54 N. E. 767; *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 84, 27 N. W. 307; *Youngquist v. Minneapolis Street R. Co.* 102 Minn. 501, 114 N. W. 259; *Gonzales v. Galveston, H. & S. A. R. Co.* — Tex. Civ. —, 107 S. W. 897; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 792; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080; *Louisville, N. A. & C. R. Co. v. Goody-Koontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 374, 49 N. W. 621.

Messrs. Wade, Dutcher, & Davis and Bryson & Bryson, for appellee:

This statute must be construed in view of the rights existing before its passage, and in view of the public sentiment which forced the legislation.

St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 949; *Cain v. Southern R. Co.* 199 Fed. 211.

Evans, J., delivered the opinion of the court:

The decedent was an unmarried adult twenty-five years of age. He left surviving him a father and mother fifty-three and fifty-four years of age, respectively. He was an employee of the defendant company, and as such was engaged at the time of the accident resulting in his death in interstate commerce. He was the forward brakeman on his train, and was at his proper place upon the engine while the train was running between stations, when a side bar of the drive wheel was suddenly broken. The revolving piece tore the cab of the engine where the decedent was sitting, and inflicted injury upon him from which he shortly died. There was a verdict for the plaintiff for \$5,000. It is urged by the appellant that there was no basis, either in the pleading or in the evidence, for the allowance of substantial damages under said liability act. The question presented is a very important one in its effect upon future cases under this statute, and we therefore give it our first attention.

The liability act referred to creates a right of action against the employer for the death of any employee resulting from the employer's negligence, in favor of the administrator, but for the benefit of certain classes of relatives, as follows: "(1) For the benefit of the surviving widow or husband and children of such employee; (2) and if none, then of such employee's 47 L.R.A.(N.S.)

parents; (3) and if none, then of the next kin dependent upon such employee." The beneficiaries of this suit are those of the second class above stated. It is urged by the appellant that the petition made no averment that the beneficiaries named suffered any pecuniary loss by reason of their son's death. And it is urged, further, that there was no evidence of any such pecuniary loss, or of any facts from which such pecuniary loss could be found. Inasmuch as this act impliedly provides that suit may be brought thereunder to state courts as well as Federal courts, it is important that there be uniformity of judicial opinion in construing its provisions. Manifestly, the final word will rest with the Supreme Court of the United States as to matters of substantive right thereunder. As to pleading and procedure, necessarily the courts of each state must pursue their own statutory methods.

The parties before us differ in their analysis of the act in question. The plaintiff contends that in its general application it is not materially different from the Iowa statute on the same subject. This contention is not tenable. This act is modeled in its principal features upon an English statute known as Lord Campbell's act, enacted in 1846, and which, with some amendment, has been in force in England ever since. This act does not provide for a survival of the cause of action arising to the decedent in his lifetime because of the injury which resulted in his death. It creates a new cause of action, not in favor of the estate of the deceased, but in favor of certain specified classes of beneficiaries. The cause of action is based, not upon the injury to the deceased, but upon the fact of his death by wrongful act of the defendant. The extent of damage in each case is to be measured by the pecuniary loss sustained by the particular beneficiaries, rather than by the loss to the estate of the decedent as such. Similar statutes have been enacted in thirty-five or forty states of the Union, and have been in force in some of them for many years. Iowa, however, is not one of such states. Our statute is a survival statute. That is to say, the cause of action which arose to the deceased in his lifetime because of the injury is made to survive after his death to his administrator. The extent of damage is measured by the loss to his estate as such, although exemption of the proceeds for the benefit of the family is provided. The measure of damage is not controlled or varied by the identity or circumstance of the particular person or persons to whom the benefit inures. It will be noted that the Federal act under consideration provides

for three classes of beneficiaries in the alternative, preference being given in the order named. The existence of the second class excludes the third. If there be no representative of any of the three classes, then there is no cause of action.

Manifestly, also, the measure of damage in favor of the first class will be essentially different from that in favor of the second and third classes, and that in favor of the second class may be different from that in favor of the third.

In those states where similar statutes have been in force, it has been quite uniformly held that substantial damages will be presumed in favor of the widow and children without special averment or proof other than a showing of the pecuniary value of the life of the decedent to his family; and doubtless to his own estate, on the theory that a prospective inheritance of such estate by the family would ordinarily be a reasonable expectation. It has also been quite usually held that as to other classes of beneficiaries it is necessary to aver and prove their pecuniary loss by appropriate allegation and evidence. If the action be brought on behalf of the parents, it is not enough to show their mere survival. Pecuniary loss must be shown. From the nature of the case the evidence must often be circumstantial only, and perhaps indefinite, but the aim of the statute to that end is definite and persistent.

Where recovery is claimed for the benefit of parents for the death of a child, it is material to show whether the decedent was a minor or adult. If a minor, the question whether his services during the remaining years of his minority would have been pecuniarily valuable to his parents may be inquired into as affecting the measure of damage. If the decedent was adult, then this question is eliminated. There remains, however, the somewhat narrow ground of "prospective gifts" either of money, property, or services which the parents could have reasonably expected to receive in the course of their lives from the decedent. Under this act, pecuniary loss only can be considered. Compensation cannot be had for suffering or bereavement. It has been held that a presumption of nominal damages will obtain in favor of the parents. *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877, and cases cited therein. But there is no presumption in favor of substantial pecuniary loss to parents or dependent relatives, except such inference or presumption as may naturally arise out of evidence tending to show such loss.

Apparent exceptions to this rule are found in New York and Illinois. But the 47 L.R.A. (N.S.)

decisions in those states are based upon the particular form of their statutes. Each statute provides that the jury may give "such damages as they shall deem a fair and just compensation." Under each statute, also, the beneficiaries are confined to surviving husband or wife and next of kin, and the damages recovered are distributed in accordance with the statutes of descent.

Generally speaking, in all other jurisdictions the measure of such loss is held to be the present worth of such gifts as the parents could reasonably have expected to receive from their adult child in the course of their lives. The trial court instructed in substance to this effect. The difficulty with this record is not in the instructions nor in the rulings of the court on the admission of evidence, but in the final state of the evidence, and perhaps in the state of the plaintiff's pleadings. In our foregoing analysis of the liability act in question, reference is had to the original act of April 22, 1908, alone. The amendment of April 5, 1910, is excluded from consideration, because the alleged cause of action involved herein accrued prior to its adoption.

This question of loss of prospective gifts to the parents will ordinarily involve an inquiry into the means and earning capacity of the decedent on the one hand, and the means and earning capacity of the parents on the other. The extent of previous contributions for support would clearly be a proper consideration. It is not legally necessary to show that the parents were dependent upon the deceased child, as in cases of "dependent next of kin." But such fact would undoubtedly be admissible in behalf of the parents, if it were shown that such dependence was recognized by the deceased in the form of contributions. In the nature of the case, evidence cannot be very definite as to the actual amount of the pecuniary loss sustained in such a case, but it does devolve upon the plaintiff to show those general facts which are necessarily within the general knowledge of the beneficiaries, and which bear upon the financial resources and prospects of themselves, as well as those of the decedent.

Turning to the petition in the case before us, there was an averment that the decedent left surviving him his father and mother. There was no direct averment that such survivors had sustained any pecuniary loss by his death, nor any direct averment that the action was brought in their behalf. Taking the petition as a whole, however, the fair inference perhaps ought to be indulged that such was the apparent intention of the pleader. We would be slow to reverse on this ground, especially in view

of the fact that the petition was not asailed.

Turning to the evidence, the question of the amount of the pecuniary loss sustained by these parents seems to have been either overlooked or left to mere presumption. The surviving father testified as a witness, but did not touch upon this subject at all. The mother, testifying, touched the subject as follows: "Roy was not the oldest in the family. I have a married daughter. I have one other boy. My husband is a common laborer. My son contributed to the family expenses when he was working."

Cross-examination:

We have been living in Iowa Falls about four years. My husband used to work for the Rock Island Road. He ceased to work for the Rock Island about five years ago. About three years before Roy's death. He was formerly a conductor. I lived in Minnesota while he was conductor.

Q. You had been living at Iowa Falls about two years at the time of Roy's death?

A. Yes, sir.

Q. He had been working for the Rock Island all those two years?

A. The boy, I understand you?

Q. Yes, the boy Roy?

A. Yes, sir. He was working on that division between Estherville and Cedar Rapids, and made his home with me and my husband. He boarded and roomed there when he was there, and paid me for his board and room.

Q. And in that way contributed to the family?

A. Yes, sir; and in other ways, too.

This is the entire testimony in the record on that question. It fails to furnish any sufficient data upon which the jury could properly award a verdict of \$5,000.

Some fair guide ought to be furnished to the jury for the exercise of their judgment. They should not be permitted to render a finding solely upon the earning capacity of the decedent, nor upon the amount of damage accruing to him or to his estate; nor should they be required or permitted to make a mere guess without the aid of pertinent facts tending to show the extent of pecuniary loss. The supreme court of Minnesota states the rule as follows: "The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry; his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the 47 L.R.A.(N.S.)

court will set it aside or cut it down." *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294. In the foregoing case the contributions of the son were \$50 a year to his mother, whose expectancy of life was seven and one-half years. A verdict of \$3,500 was reduced to \$2,000. In *Little Rock & Ft. S. R. Co. v. Voss*, — Ark. —, 18 S. W. 172, the decedent earned from \$100 to \$150 a month, and contributed to the support of his mother and invalid sister from \$30 to \$50 a month, and from \$5 to \$20 additional when necessary to his sister. A verdict of \$6,500 was sustained. In *For dyce v. McCanta*, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 694, the decedent had been contributing all his wages except \$125 a year to his parents, who were poor and dependent. A verdict of \$2,391 was sustained. In *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269, the decedent was twenty-three years old, and had been the sole support of his mother and her minor children, and had contributed to such support \$40 to \$50 per month. A verdict of \$3,000 was sustained. Verdicts of \$2,000, \$1,500, \$3,750, \$4,200, \$3,550, and \$2,500 were sustained in the following cases, respectively: *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Salem v. Harvey*, 129 Ill. 344, 21 N. E. 1076; *McVeigh v. Minneapolis & R. River R. Co.* 113 Minn. 450, 129 N. W. 852; *Smith v. Coon*, 89 Neb. 776, 132 N. W. 535; *Texas & P. R. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955; *Missouri P. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. 828; *Leque v. Madison Gas & Electric Co.* 133 Wis. 547, 113 N. W. 946. The following verdicts were held excessive: In *Chicago & E. I. R. Co. v. Vester*, 47 Ind. App. 141, 93 N. E. 1039, \$4,000; in *McKay v. New England Dredging Co.* 92 Me. 454, 43 Atl. 29, \$2,000, reduced to \$750; in *Paulimer v. Erie R. Co.* 34 N. J. L. 151, 16 Am. Neg. Cas. 643, \$3,000; in *Hackett v. Wisconsin C. R. Co.* 141 Wis. 464, 124 N. W. 1018, verdict of \$4,500, reduced to \$2,000; *Hirschkovitz v. Pennsylvania R. Co.* (C. C.) 138 Fed. 438, verdict of \$3,500, reduced to \$2,500. The cases on this subject are fully collated by Tiffany in his volume "Death by Wrongful Act," 2d ed., under §§ 153 to 180. The following quotation from §§ 167 and 168 of this work is a fair résumé of the state of the authorities on the question here considered. We insert in parentheses in the quotations the marginal citations upon which the text is based: "The cases in which upon the facts damages are recoverable for the loss of prospective gifts are commonly actions by parents for the death of adult children, although cases also arise in which such dam-

ages may be recovered for the benefit of adult children on account of the death of a parent, or for the benefit of brothers and sisters and other collateral relatives. As has been said, such damages are not confined to cases of these descriptions, but may be recovered, where the facts furnish a proper basis, in addition to damages for loss of services, support, etc., in actions for the benefit of husbands, wives, minor children (*Pym v. Great Northern R. Co.* 2 Best & S. 759, 4 Best & S. 396, 32 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922), and in some jurisdictions at least, of parents of minor children."

In order to lay a foundation for the recovery of damages for the loss of prospective gifts, it is usually held necessary, except in New York, for the plaintiff to show that the deceased during his life gave assistance to the beneficiaries by way of money, services, or other material benefits, which in reasonable probability would have continued but for the death. Cases cited in notes to §§ 168-170. In Illinois, however, the rule is established that, where the next of kin sustain a lineal relation to the deceased, the law presumes some substantial damages from the relationship alone, and it is not essential to show that they received pecuniary assistance from the deceased (*Dukeman v. Cleveland, C. C. & St. L. R. Co.* 237 Ill. 104, 86 N. E. 712; *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701; *Cleveland, C. C. & St. L. R. Co. v. Dukeman*, 130 Ill. App. 105), although it is, of course, competent to show that such assistance was given (*Prendergast v. Chicago City R. Co.* 114 Ill. App. 156; *Nordhaus v. Vandalia R. Co.* 147 Ill. App. 274). § 168. Thus, in *Dalton v. South-Eastern R. Co.* 4 C. B. N. S. 296, 4 Jur. N. S. 711, 27 L. J. C. P. N. S. 227, 6 Week. Rep. 574, where it appeared that the plaintiff's son, who was twenty-seven years old and unmarried, and lived away from his parents, had in the last seven or eight years been in the habit of making them occasional presents of provisions and money, amounting to about £20 a year, it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from his son's life as to entitle him to recover damages. And in *Franklin v. South-Eastern R. Co.* 3 Hurlst. & N. 211, 4 Jur. N. S. 565, 6 Week. Rep. 573, 8 Eng. Rul. Cas. 419, it appeared that the father was old and infirm, and that the son, who was young and earning good wages, assisted him in some work for which he was paid 3s. 6d. a week; and, the jury having found that the father had a reasonable expecta-

tion of benefit from the continuance of the son's life, it was held that that action was maintainable, although the verdict of £75 was excessive. In *Sykes v. North-Eastern R. Co.* 44 L. J. C. P. N. S. 191, 32 L. T. N. S. 199, 23 Week. Rep. 473, on the contrary, where the deceased was a bricklayer and received from his father the wages of a skilled workman, and was of great assistance to his father, who was also a bricklayer, and who, owing to the loss of assistance from the deceased, could not take the contracts which he had done during his son's life, it was held that, inasmuch as the benefit which the father derived accrued not from the relationship, but from a contract, and there was no evidence that he paid his son less than the usual wages, he had suffered no pecuniary loss from the death. *Demarest v. Little*, 47 N. J. L. 28. The distinction taken in English cases has generally been observed in the United States (*St. Louis, M. & S. E. R. Co. v. Garner*, 76 Ark. 555, 89 S. W. 550; *Hillebrand v. Standard Biscuit Co.* 139 Cal. 233, 73 Pac. 163, 14 Am. Neg. Rep. 520; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Louisville, N. A. & C. R. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Diebold v. Sharp*, 19 Ind. App. 474, 49 N. E. 837; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Fisher*, 79 Kan. 578, 100 Pac. 507; *McKay v. New England Dredging Co.* 92 Me. 454, 43 Atl. 29; *Greenwood v. King*, 82 Neb. 17, 116 N. W. 1128; *Holmes v. Pennsylvania R. Co.* 220 Pa. 189, 123 Am. St. Rep. 685, 69 Atl. 597; *Texas Portland Cement & Lime Co. v. Lee*, 36 Tex. Civ. App. 482, 82 S. W. 306; *Brush Electric Light & P. Co. v. Lefevre*, — Tex. Civ. App. —, 55 S. W. 396; *Gulf, C. & S. F. R. Co. v. Brown*, 33 Tex. Civ. App. 269, 76 S. W. 794; *St. Louis Southwestern R. Co. v. Huey*, — Tex. Civ. App. —, 130 S. W. 1017; *Fritz v. Western U. Tele. Co.* 25 Utah, 263, 71 Pac. 209; *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536); that is, the plaintiff must show that the decedent gave assistance to the parent, or that the parent had reasonable expectation of pecuniary benefit from the continued life of the child. The proper measure of damage is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life, in proportion to the amount he was contributing at the time of his death, not exceeding his expectancy of life (*Richmond v. Chicago & W. M. R. Co.* 87 Mich. 374, 49 N. W. 621), though it would seem that the rule is not to be applied with mathematical strictness, and that the jury may properly take into

consideration the increasing wants of the parent and the increasing ability of the child to supply them. *International & G. N. R. Co. v. Kindred*, 57 Tex. 491; *Texas & P. R. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. In some cases, indeed, the evidence has been held sufficient to sustain a finding that there was a reasonable expectation of pecuniary benefit, although the evidence fell short of showing that assistance was actually furnished. *Hooper v. Denver & R. G. R. Co.* 84 C. C. A. 21, 155 Fed. 273; *Sieber v. Great Northern R. Co.* 76 Minn. 269, 79 N. W. 95.

The question here involved has received recent consideration by the Federal circuit court of appeal for this circuit in the case of *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715. The following quotation from such opinion will serve to indicate the view of that court on such question: "As to the necessity for amendment, it is to be observed, as set out in the statement, that plaintiff simply sues for the benefit of decedent's parents in the first and second counts, and as administrator in the third count. He does not allege anywhere in the declaration that the parents of the deceased suffered any pecuniary loss or injury through his death. The theory seems to have been that it was necessary to state only facts sufficient (1) to give the court jurisdiction; (2) to show the employment of the deceased and the negligence resulting in his death; (3) the names of the particular beneficiaries for whose benefit the suit is brought, and also the amount of damages sued for. It may be conceded for present purposes that if a widow and children had survived, and the action were maintained for their benefit, the law would presume substantial damages, and so dispense with the necessity of specific averment in that behalf. *Dukeman v. Cleveland, C. C. & St. L. R. Co.* 237 Ill. 109, 86 N. E. 712. In some jurisdictions even the relationship or connection of the beneficiaries is not deemed important in this respect. *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, 17 Am. Neg. Rep. 490; *Knife & Shear Co. v. Hathaway*, 27 Ohio C. C. 750, 751, and cases there cited. But the decedent in this case was twenty-four years of age and unmarried at the time of his death, and we are convinced that the better practice is, at least as to such beneficiaries as are involved here, to require the nature of the damages claimed to have been suffered in consequence of the death to be averred. This results from the conclusion that the action which accrued to the deceased prior to his death did not survive. We have already pointed out that the third class, the 'next of kin,' provided

for in the act, is specifically limited to such as were 'dependent upon such employee.' This provision at once furnishes the token for identifying the beneficiaries, and prescribes the condition of recovery. Is it to be said that such identification and condition need not be averred? Since it is not uncommon experience that a son past legal majority, as well as a minor son, may be an expense to his parents, it is more consonant with the reason disclosed by the act in respect of next of kin, to hold that averment of pecuniary loss or injury is likewise necessary in regard to parents, although dependence, in the sense in which the term is used in the statute with reference to next of kin, is not essential to a recovery for the benefit of parents." Other cases in substantial accord with the foregoing are as follows: *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306; *Cain v. Southern R. Co. (C. C.)* 199 Fed. 211; *Youngquist v. Minneapolis Street R. Co.* 102 Minn. 501, 114 N. W. 259; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Gonzales v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 107 S. W. 897; *Van Brunt v. Cincinnati, J. & M. R. Co.* 78 Mich. 530, 44 N. W. 321; *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467; *Chicago v. Scholten*, 75 Ill. 468; *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. 514; *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385, 78 N. W. 710; *Topping v. St. Lawrence*, 86 Wis. 526, 57 N. W. 365; *Winnt v. International & G. N. R. Co.* 74 Tex. 32, 5 L.R.A. 172, 11 S. W. 907; *Atchison, T. & S. F. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603; *Cherokee & P. Coal & Min. Co. v. Limb*, 47 Kan. 469, 28 Pac. 181, 15 Am. Neg. Cas. 11. See also *Hale, Damages*, 2d ed. §§ 140-142.

In the case before us the most that can be said for the evidence is that it showed the mere fact that contributions had been made to the parents by the decedent to some amount in his lifetime. There is not the slightest disclosure as to the extent of such contributions. Without any disclosure on that question, how could a jury form any judgment as to the amount which might have been reasonably expected in the future? If this evidence could be deemed sufficient to sustain a verdict for \$5,000, then it were better for the plaintiff to omit pertinent testimony than to produce it. It is true that no hard or fast rule can be laid down for the measurement of damages. When all is shown that can be shown on behalf of the beneficiaries, much will necessarily be left to fair inference and estimate.

There is no escape from the conclusion, however, that the verdict in this case was purely arbitrary as to amount. Resting solely upon the evidence which we have quoted herein, it was clearly excessive and the motion for a new trial ought to have been sustained on that ground.

As an addendum to the foregoing division of the opinion, we desire to say that since it was written, publication has occurred of the opinions of the United States Supreme Court in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426. These cases support our construction of the act in question.

2. The defendant challenges the jurisdiction of the district court and of this court, because the cause of action sued on is founded upon a Federal statute. We had occasion to consider the question here presented in *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A.(N.S.) 684, 128 N. W. 1. The defendant challenges the correctness of our holding in that case, and asks that the case be overruled. In that case we held that the implications of the congressional act in question permitted a concurrent jurisdiction to the state courts for its enforcement within their respective states. Since that time (April 5, 1910) Congress has enacted an amendment to the original act, whereby it has in express terms recognized such concurrent jurisdiction in the state courts. If anything more were needed to remove the question beyond the realm of debate, it has been furnished by the holding of the Supreme Court of the United States in *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

3. It is strenuously urged by appellant that there was no evidence to sustain the charge of negligence. The evidence did show that the engine in question was old and out of repair; that its wheels were badly worn; the bushings and bearings were worn; and that the engine rattled and pounded while it worked. The immediate cause of the breaking of the side bar was not ascertained. There was evidence tending to show that some other part must have broken first. The general theory of negligence charged in the petition was that the worn and dilapidated condition of the engine was such as to produce an unusual strain upon the side bar, and this was the theory upon which the case was submitted 47 L.R.A.(N.S.)

to the jury. We think the evidence was such that the question of negligence was fairly one for the jury.

Some complaint is directed toward the instructions. It is said that the instructions assumed that there was evidence to the effect that the engine wheels were "flattened," and that under the instruction the jury was permitted to find such fact. It is urged that there was no evidence to support such assumption. The petition did charge that the wheels were flat. The trial court followed somewhat the allegation of the petition in stating the details of negligence contended for, and this particular alleged condition was referred to in the instruction. The evidence did show that the wheel and rims were "badly worn," and that they had not been trimmed for more than a year and a half. There is no explanation in the record as to what is meant by a "flat" wheel. It appears to be conceded that it is a form of wear upon the rim or tire of the wheel. The term is doubtless capable of a more exact definition, and this form of wear may have its own peculiar characteristics, but it does not so appear from the record before us.

Lack of inspection was included in the enumeration of the trial court of certain specifications of negligence. It is urged that there was no evidence of lack of inspection, and that on the contrary the affirmative evidence of inspection was undisputed. There was no direct evidence of a lack of inspection. There was direct evidence of an inspection of the engine on the day of the accident. Whether the inspection was adequate was a question which inhered deeply in the actual condition of the engine as described by the various witnesses. Theoretically there is a distinction between a failure to inspect and a failure to repair after inspection and discovery. But such distinction is frequently not capable of practical application. If this engine was in the dilapidated condition described by the witnesses for the plaintiff, then the duty of adequate inspection, discovery, and repair would be practically identical. We think, therefore, that there was no prejudicial error in the instructions at this point.

Other minor errors are specified, but they are of a nature not likely to arise again, and we pass them without further consideration. For the reason indicated in the first division hereof, the judgment below must be reversed, and the case remanded for a new trial.

Weaver, J., taking no part.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.

JOHN DOHERTY, Admr., etc., of Joe Doherty, Deceased.

(153 Ky. 363, 155 S. W. 1119.)

Pleading — complaint under Federal employers' liability act — sufficiency.

1. A complaint is insufficient to state a cause of action under the Federal employers' liability act, for the death of an employee, if it fails to show that decedent left surviving him anyone of the beneficiaries named in that act, in whose behalf a recovery can be had.

Conflict of laws — state and Federal employers' liability act.

2. No recovery can be had under state statutes, for the death of a railroad employee under circumstances rendering applicable the Federal employers' liability act.

Pleading — amendment — conformity to proof.

3. Under the rule that pleadings may be amended to conform to the proof, amendment of a complaint should not be permitted merely to state a cause of action, where there is no evidence to sustain the amendment.

Death — recovery under employers' liability act — dependent.

4. To render one a dependent beneficiary under the Federal employers' liability act, he must have sustained some pecuniary loss on account of the death of decedent.

(Nunn, J., dissents.)

(April 23, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for McCracken County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Messrs. Blewett Lee, C. L. Sibley, and Trabue, Doolan, & Cox, with Messrs. Wheeler & Hughes, for appellant:

This action, if it can be maintained at all, must be prosecuted under the Federal employers' liability act of 1908, and cannot be maintained under any state law.

Fulgham v. Midland Valley R. Co. 167 Fed. 660; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Sherlock v. Alling, 93 U. S. 104, 23 L. ed. 820; Gulf, C. & S. F.

Note. — As to the constitutionality, application, and effect of the Federal employers' liability act, see note, post, 38. 47 L.R.A.(N.S.)

R. Co. v. Hefley, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Proof of the existence of a surviving beneficiary or beneficiaries is necessary, and consequently the fact of the existence of someone entitled to the recovery, which is a material and issuable fact, is a necessary averment in the complaint, and without such an averment the pleading is insufficient and bad.

Webster v. Norwegian Min. Co. 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; Safford v. Drew, 3 Duer, 627; Serensen v. Northern P. R. Co. 45 Fed. 407; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726; Com. v. Boston & A. R. Co. 121 Mass. 36; Com. v. Eastern R. Co. 5 Gray, 473; Hervey v. Moseley, 7 Gray, 479, 66 Am. Dec. 515; Chicago & E. R. Co. v. LaPorte, 33 Ind. App. 691, 71 N. E. 166; Western U. Tele. Co. v. McGill, 21 L.R.A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699; Southern R. Co. v. Maxwell, 113 Tenn. 464, 82 S. W. 1137; Duzan v. Myers, 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046; Pennsylvania R. Co. v. Lilly, 73 Ind. 252; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Louisville, N. A. & C. R. Co. v. Wright, 134 Ind. 509, 34 N. E. 314; State ex rel. Meriwether v. Walford, 11 Ind. App. 392, 39 N. E. 162; Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. 837; Wabash R. Co. v. Cregan, 23 Ind. App. 1, 54 N. E. 767.

If the beneficiaries are "dependent kin," proof of mere relationship is not sufficient, — the actual fact of expectancy must be shown.

Standard Light & P. Co. v. Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931.

It must be shown that beneficiaries have sustained a pecuniary loss by reason of the cessation of the earning capacity of the decedent; something upon which the jury could legally base a verdict.

Missouri P. R. Co. v. Henry, 75 Tex. 220, 12 S. W. 828; St. Louis, A. & T. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104; Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. 837; Commercial Club v. Hilliker, 20 Ind. App. 239, 50 N. E. 578; Armour v. Czischki, 59 Ill. App. 17; Fithian v. St. Louis & S. F. R. Co. 188 Fed. 842; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Goodsell v. Hartford & N. H. R. Co. 33 Conn. 51;

Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Northern P. R. Co. v. Adams, 54 C. C. A. 196, 116 Fed. 324; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; St. Louis Southwestern R. Co. v. Bowles, 32 Tex. Civ. App. 118, 72 S. W. 451.

Messrs. F. N. Burns and Hendrick & Orice for appellee:

Settle, J., delivered the opinion of the court:

This action was instituted in the court below against the appellant, Illinois Central Railroad Company, by the appellee, John Doherty, as administrator of the estate of his brother, Joe Doherty, deceased, to recover of it damages for the death of the latter, which occurred at Central City, this state, while he was in its employ as a car repairer, and, as alleged in the petition, resulted from the negligence of appellant's yard foreman in failing to provide him a reasonably safe place to work; it being also alleged that the decedent, by order of the yard foreman, and because of his promise to guard and protect him from injury, went under one of appellant's cars standing on a yard side track, for the purpose of repairing a defective brake thereof, and that while the decedent was performing the work required of him, the foreman, instead of protecting him from injury as he promised to do, negligently permitted another car, operated by a locomotive in charge of one of appellant's engineers, to be moved against the one the decedent was repairing, which caused it to run over his body and kill him. It was further alleged in the petition that the appellant was at the time of the decedent's death, and is now, a common carrier engaged in interstate commerce; that the decedent, when killed, was in the appellant's employ and "assisting it in carrying on interstate commerce," and that the car he was repairing when killed was being put in order for use by appellant in transporting freight from one state to another, and "had been used, and was being used, and was to be used, by defendant in carrying on interstate commerce." The answer of appellant denied that the decedent's death was caused by the negligence of its yard foreman complained of, or that of any of its servants, and pleaded contributory negligence on the part of the decedent, which plea was controverted by the appellee's reply. The trial resulted in a verdict awarding appellee \$16,000 damages, and from the judgment entered on that verdict this appeal is prosecuted.

Only such of the numerous errors assigned for the new trial moved for by appellant

as we regard material will be considered on the appeal.

Appellant's first complaint is that the trial court erred in overruling its demurrer to the petition, it being claimed that the petition failed to state a cause of action. That is, it is argued by its counsel, that although the petition rests the right of recovery upon the provisions of the act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," it does not state a cause of action, as it is not therein alleged that the decedent left surviving him anyone of the beneficiaries named by that act in whose behalf a recovery can alone be had. The act in full is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [common] carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence,

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 5. That any contract rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees, under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of

action under the act of Congress entitled 'An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations, to Their Employees' [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316], approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908," 35 Stat. at L. 65, 66, chap. 149, U. S. Comp. Stat. Supp. 1911, pp. 1322-1325.

It will be observed that the act places certain restrictions upon the right of the common carrier engaged in interstate commerce to plead or prove assumption of risk on the part of the servant injured or killed, while in its service in interstate commerce, deprives it of the right to plead or prove that his injury or death was caused by the negligence of a fellow servant, or that he was guilty of contributory negligence, except that such contributory negligence may be pleaded and shown for the purpose of diminishing the damages in proportion to the amount of negligence attributable to such employee.

It will also be observed that the right of action given by the act to the personal representative of the decedent, against the railroad carrier in whose service he was killed in interstate commerce by the negligence of its officers, agents, or employees, is for the benefit, first, of the surviving widow or husband and children of the decedent; and, if none, second, his parents; and, if none, third, the next of kin dependent upon the decedent.

It is clear that the act does not, like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It therefore expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz., the beneficiaries named in the order named. This being so, it necessarily follows that in an action under the act of Congress, if there is no one for whom a recovery can be had, there can be no recovery. Proof must therefore be made of the existence of such surviving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So, if the petition in such an action fails to allege that the decedent is survived by a person or

persons coming within the indicated limitation, it is bad on demurrer. *Western U. Teleg. Co. v. McGill*, 21 L.R.A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Louisville, N. A. & C. R. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Fithian v. St. Louis & S. F. R. Co.* (C. C.) 188 Fed. 842; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801. In this jurisdiction, in numerous cases involving consideration of § 3, chap. 57, General Statutes, known as the "Wilful Neglect Statute," since repealed, it was held by us that an action thereunder could not be maintained, unless the decedent left a widow, child, or children, as the statute so provided. *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, 11 S. W. 1013; *Henderson v. Kentucky C. R. Co.* 86 Ky. 389, 5 S. W. 875; *Newport News & M. Valley Co. v. Dentzel*, 91 Ky. 46, 14 S. W. 958, 15 Am. Neg. Cas. 175; *Hackett v. Louisville, St. L. & T. P. R. Co.* 95 Ky. 236, 24 S. W. 871; *Cincinnati, N. O. & T. P. R. Co. v. Privitt*, 92 Ky. 224, 17 S. W. 484; *Givens v. Kentucky C. R. Co.* 89 Ky. 231, 12 S. W. 257; *Clarke v. Louisville & N. R. Co.* 101 Ky. 40, 36 L.R.A. 123, 39 S. W. 840, 2 Am. Neg. Rep. 360.

Thus far our consideration of the objection to the petition raised by the demurrer has rested upon the assumption that the action is controlled by the provisions of the act of Congress. It must now be determined whether this is so. It is insisted by counsel for appellee that, although the petition be regarded insufficient to authorize a recovery under the Federal statute, *supra*, it nevertheless states a cause of action under § 6, chap. 1, Kentucky Statutes, which entitled him, upon the evidence introduced in support of its averments, to the verdict and judgment in his favor returned and entered in the court below. This view of the case seems to have been adopted by the trial court, and the instructions under which it was submitted to the jury, except an incorrect one as to the measure of damages, allowed a recovery under the Kentucky statute, but we are unable to accept this as the law, for, as we shall presently see, the authorities all hold to the contrary.

That the appellant is and was at the time the decedent met his death a common carrier by railroad engaged in interstate commerce, and that decedent at the time

of his death was "assisting it in carrying on interstate commerce," by then repairing a freight car which "had been used, was being used, and was to be used by defendant in carrying on interstate commerce," cannot be doubted; for, as previously stated, it is so alleged in the petition. In addition, these facts appear from the bill of evidence, and also by the following agreement between the parties to the action entered of record: "It is hereby agreed between counsel for plaintiff and defendant that the decedent, Joe Doherty, at the time of his death, was employed by the defendant, and was engaged in interstate commerce in the performance of his duties at the time of his injury; that the car causing his death was an interstate commerce car, and was being so used; and that the engine which kicked or ran the car against him was at the time making up an interstate commerce train to be immediately carried into other states." It being then an admitted fact that the decedent, when killed, was in appellant's employ while it was engaged in interstate commerce, and when he was serving it in such commerce, and it appearing from the evidence that his death was caused by the negligence of other servants of appellant who were also employed by it in such commerce, it inevitably follows that the action by the administrator to recover damages for his death, if permissible at all, could be maintained only under and by virtue of the provisions of the act of Congress of April 22, 1908, which is superior to and supersedes chapter 1, § 6, Kentucky Statutes.

In *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, the constitutionality of the act of Congress in question was sustained, and, in addition, practically every material question involved in the instant case considered and decided. With respect to the question we are now considering, it is in the opinion said: "The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316 (p. 405), 4 L. ed. 579: 'If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state

may be willing to control its operations, no state is willing to allow others to control them. The nation on those subjects on which it can act must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, "This Constitution and the laws of the United States, which shall be made in pursuance thereof, . . . shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." (p. 426.) This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.' And particularly apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.' True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. . . . The inaction of Congress, however, in no wise affected its power over the subject. . . . And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." The opinion likewise holds that the distribution of the damages recoverable under the act of April 22, 1908, for the death of an employee while engaged in interstate

commerce, is governed by the provisions of that act, which necessarily supersede any state legislation that would otherwise apply; and, furthermore, that the enforcement of rights under the act, *supra*, are not even impliedly restricted to the Federal courts, but may be enforced in the state courts as well; concurrent jurisdiction to that end being conferred by the judiciary act of August 13, 1888 (chapter 866, § 1, 25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508), and recognized by the amendment of April 5, 1910 (chapter 143, § 1, 36 Stat. at L. 291, U. S. Comp. Stat. Supp. 1911, p. 1324), to the original employers' liability act. In response to the suggestion that, if the act of Congress is not in harmony with the policy of a state, the courts of the state would be free to decline jurisdiction, the opinion declares such a proposition "inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. . . . As was said by this court in *Claffin in Houseman*, 93 U. S. 130, 136, 137, 23 L. ed. 833, 838: 'The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject, also, to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169, and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the

state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.' We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases. We conclude that rights arising under the act in question may be enforced as of right in the courts of the state, when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

Since *Mondou v. New York, N. H. & H. R. Co.* supra, was decided, two others, *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, and *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, have been decided by the Supreme Court of the United States, in each of which was reaffirmed the doctrine announced in the *Mondou* Case, that, with respect to the liability of interstate carriers by railroad to their employees injured in such commerce, a recovery by the injured employee, or for his death by his personal representative, could be had only under the employers' liability act of April 22, 1908, and that such act supersedes all state laws upon the subject. In *Missouri, K. & T. R. Co. v. Wulf*, supra, it was also held that a reference to a state statute in the petition in an action which could legally rest only upon the employers' liability act of April 22, 1908, which supersedes state laws upon the subject, did not invalidate the pleading any more than would mention of a repealed statute. As, upon the admitted facts of the instant case, appellant's liability, if any, for the death of the decedent, must be made to rest upon the employers' liability act of April 22, 1908, and the petition failed to allege that the decedent left surviving him any one of the beneficiaries

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named by that act in whose behalf a recovery against appellant could be had, it did not state a cause of action, hence the demurrer filed to it by appellant should have been sustained.

We do not overlook the fact that after the evidence was all in appellee offered to file an amended petition in which it was alleged "that the decedent, Joe Doherty, did not leave any wife or children, father or mother, surviving him; that the said Joe Doherty left surviving him the plaintiff, John Doherty, a brother, and Margaret Doherty, a sister, and Mary Doherty O'Donnell, another sister, George, Pat, Mac, James, and Thomas Doherty, brothers of deceased, his next of kin who were dependent upon him; and that since the death of said Joe Doherty one of the said sisters, to wit, Mary Doherty O'Donnell, died, his next of kin, who was dependent upon him at the time of his death; that the said deceased sister left surviving her children." If there had been any evidence conducing to prove that the decedent's brothers or sisters or any of them mentioned in the amended petition were dependent upon him, the filing of the amended petition would have been permissible in order to make the pleadings conform to the proof, but there was no such evidence, therefore the rejection of the amended petition was not an abuse of discretion.

The only evidence introduced on that point was that of appellee, who testified that the decedent had, besides the brothers before mentioned, two sisters, one of whom was married and living with her husband in Ireland; the other, a sister of charity, residing in a convent in Virginia and devoting her time and services to the Catholic Church and its benevolences. Appellee admitted the sister of charity was supported by her church, and that she did not ask for nor receive assistance from the decedent. He said the decedent had sometimes sent money to the married sister in Ireland, which he had on more than one occasion borrowed of him for that purpose, but did not say that the money borrowed of him was in fact sent the sister, or that she was dependent upon the decedent. Whether the money the latter sent her was in payment of a debt or for her support he did not know, or, at any rate, did not say; nor did he undertake to state that the husband of the sister in Ireland was unable to support his wife and children. The death of the sister in Ireland occurred since that of the decedent, and the names of her surviving children do not even appear in the record. There was no attempt on the part of appellee to show that he or the other

brothers of the decedent were in any way dependent upon him.

In order to make one a dependent beneficiary under the employers' liability act, he or she must have sustained some pecuniary loss on account of the death of the decedent, and the damages recoverable "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received, if the deceased had not died from his injuries." As said in *Michigan C. R. Co. v. Vreeland*, supra: "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. . . . Pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased, relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.'" *Patterson, Railway Acci. Law*, § 401; *Tiffany, Death by Wrongful Act*, § 153; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *Tilley v. Hudson River R. Co.* 24 N. Y. 471; *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329; *Louisville & N. R. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010.

The evidence being wholly insufficient to show that the decedent was survived by any person naturally or actually dependent upon him, in the meaning of the employers' liability act of April 22, 1908, the refusal by the trial court of the peremptory instruction directing a verdict for appellant was error. No right of recovery in behalf of appellee was shown, and, having failed to manifest such right under the employers' liability act, he could not rest his right to recover on the statute of the state. Whether he could have done so, if the evidence had shown that the decedent was not at the time of his death employed by appellant in interstate commerce, is not before us for decision. As also said in *Michigan C. R. Co. v. Vreeland*, supra: "We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is 47 L.R.A. (N.S.)

one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states."

The act of Congress, though paramount and exclusive, may be enforced in the state, as well as the Federal, courts; therefore no obstacle stands in the way of a ready application of its provisions. The conclusion we have reached makes it unnecessary for us to consider appellant's objections to the instructions given on the trial. None of them should have been given, but the jury instead should have been peremptorily instructed to find for the appellant.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

Nunn, J., dissenting:

I cannot agree to the opinion in deciding that the act of Congress covers the whole field of interstate employees. Such an employee who has no one dependent upon him within the meaning of the statute is not touched by the act; he is left to the different jurisdictions of the law governing his case.

The *Mondou* and the other two cases since decided, which are referred to in the opinion, were cases where the employees engaged in interstate commerce left persons dependent upon them within the meaning of the act. Consequently, all that was said in those cases was applicable to such cases, —they were discussing the cases before them. There has never been a case in the Supreme Court of the United States deciding the exact question herein considered, but they have discussed questions of similar character. It would seem that our statute (§ 6) is not in conflict with the Federal act. It does not deny or change any right given under the employers' liability act, but covers a field not touched upon by Congress, and one which Congress did not intend to disturb. See *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Missouri K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. 488; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064.

17 Sup. Ct. Rep. 627; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Fitch v. Livingston*, 4 Sandf. 492; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

It will also be noticed that the act itself says that it is for the benefit of interstate employees in "certain cases," and those em-

ployees having no one dependent upon them are excluded. I also cannot agree with the court's conclusion upon the subject of dependency.

For these reasons, I dissent from the opinion by the court.

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I. Introduction and scope of note.

The first Federal employers' liability act was passed in 1906, while the second was passed in 1908, shortly after the first had been declared unconstitutional in its application to commerce between the states. As is generally the case after the passage of any act which makes radical changes in the existing laws, especially where the statute is construed in a large number of jurisdictions, the earlier decisions upon its constitutionality, application, and effect are confused and conflicting. But in a number of cases, the United States Supreme Court, which is the court of last resort in all cases arising under the act, has recently passed upon different phases of the act, and it may be said that, for the most part at least, the various vexatious questions arising under the act have been determined.

It is the purpose of the present note to bring together in one place all the various decisions in which the act has been passed upon and construed, regardless of the particular point actually decided by the court.

The name which has been generally applied to the act is unfortunate in one particular. The term "employers' liability act" has been, by practically unanimous consent, applied to the English act of 1880 and the various statutes modeled thereafter. The Federal act bears no resemblance whatever to the English act of 1880, except so far as it provides that the master

is liable for defects in various appliances, etc., which is a mere codification of the common law. The statute does, however, resemble the statutes of various states the principal purpose of which is to abrogate in whole or in part the fellow servant rule in the case of railroads and in some cases certain other designated employers. The better title for the act, or rather one which might lead to less confusion, would be the "Federal fellow servant act."

The original act of 1908 is set out in full at page 32, ante. The statute was materially amended in 1910, by elaborating § 6 and by adding § 9. These sections now read as follows:

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. . . ."

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury." 36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, pp. 1324, 1325.

As to duty and liability under the Federal and state railway and safety appliance act, see note to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, supplementary note to Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

The constitutionality and application of the state statutes abrogating the fellow servant rule are discussed in notes to Louisville & N. R. Co. v. Melton, post, 84, and Missouri P. R. Co. v. Smith, post, 113, and the earlier notes therein referred to.

II. Validity and construction generally.

1. Constitutionality.

It is now fully settled that "Congress, in the exertion of its power over interstate 47 L.R.A.(N.S.)

commerce, may regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged." ¹ The same view was taken in a case arising under the act of 1908 by a lower Federal

¹Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. There the court, in discussing the act of 1908, formulated the two following propositions as being, with several others, no longer open to dispute: "5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

In Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming 148 Fed. 997, where the act of 1906 was under discussion, White, J., in stating the opinion of the court, which was unanimous on this point, said: "We think the unsoundness of the contention that, because the act regulates the relation of master and servant, it is unconstitutional, because, under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred."

In Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, the court in discussing generally the powers of Congress, said: "In that case [the Employers' Liability Cases] the court sustained the authority of Congress under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in

court, prior to the decision of the United States Supreme Court.³

The first attempt of Congress to regulate the liability of interstate carriers to their employees was held to be invalid as "being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity [it] includes subjects wholly outside of the power of Congress to regulate commerce." The justices who took this position rejected the contention "that, because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other of such carriers, and that the words 'any employee,' as found in the

statute, should be held to mean any employee when such employee is engaged only in interstate commerce."³

It was observed that the acceptance of the contention would necessitate "writing into the statute words of limitation and restriction not found in it," and that, if the statute were modified in this manner, the result would be to restrict its operation with respect to the District of Columbia and the territories. It was also held that the subjects in regard to which Congress was competent to legislate were so blended in the act with subjects to which its constitutional powers did not extend, that they could not be separated. Consequently the whole act must be pronounced invalid.

Four of the justices dissented from this decision.⁴ Mr. Labatt, in his work on Master and Servant, calls attention to the principle of construction upon which the majority proceeded and calls it "far-reaching."⁵

cases of personal injuries . . . while actually engaged in such commerce."

³ *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893.

³ *Employers' Liability Cases*, supra.

⁴ The disagreement of Justices Moody, Harlan, and McKenna was based upon the ground that the act should not be construed as including intrastate commerce. Discussing the theory upon which the majority proceeded, viz., that, as there was no qualification of or exception to the generality of the language descriptive of the employees or instrumentalities, it must be deemed to include those engaged and used solely in intrastate commerce, and even in manufacture, as well as those engaged and used in other commerce, Moody, J., said: "I venture to think that this argument rests upon too narrow ground. It contemplates merely the words of the statute; it shuts out the light which the Constitution sheds upon them; it overlooks the significance of the enumeration of the kinds of commerce clearly within the national control, and the omission of the commerce beyond that control,—an enumeration and omission which characterize, color, and restrain every word of the statute,—and it neglects the presumptions in favor of the validity of the law and of the obedience of Congress to the commands of the Constitution, which cannot with propriety be disregarded by this court. Taking into account these missing aids to construction, it becomes quite easy, quite reasonable, and, in my opinion, quite necessary, to construe the act as conferring its benefits only upon employees engaged in some fashion in the commerce which is enumerated in it, and is undoubtedly under the control of Congress. Even without these guides for discovering the intent of Congress, which the uniform practice of the court compels us to use, it is natural to suppose that,

when territorial interstate, and foreign carriers only are mentioned, and every such carrier is declared to be liable 'to any of its employees,' only its employees in such commerce are intended. With those guides, the conclusion appears to me irresistible, for they show that if the words 'any of its employees,' in the context where they are used, are capable of meaning all of the employees upon any kind of work, yet their generality should be restrained so as to include only those who are subject to the power of the lawmaking body."

Justice Holmes delivered a separate dissenting opinion, in which he took the position that the phrase "every common carrier engaged in trade and commerce" might be construed as meaning "while engaged in commerce."

⁵ 8 Labatt, Mast. & S. 2d ed. § 2798. The learned writer says: "In view of the enactment of the amended statute, noticed in the following section, the actual conclusion arrived at in this case is no longer of any practical interest, so far as regards the actual subject-matter involved. But the principle of construction upon which the court proceeded is one of living force and great importance. It may, perhaps, be enumerated thus: Where the persons designated as being within the purview of a statute are described by generic terms which on their face are applicable both to persons who belong to a class with reference to which the legislature is competent to make regulations, and also to persons who do not belong to such a class, a court cannot, for the purpose of upholding the statute, treat it as being applicable only to the former class, even though there may be a probability approaching to a reasonable certainty that the legislature intended that it should be of this limited scope. The full effect of such a far-reaching principle remains to be seen."

By this decision of the United States Supreme Court a number of decisions of the lower Federal courts were overruled.⁶ In one of the inferior Federal courts, the act of 1906 was held to be unconstitutional not only as an attempt to regulate intrastate commerce, but also because the subject-matter of the act, viz., the creation and enforcement of liabilities growing out of the negligence of common carriers to their employees, was not a regulation of commerce between the states, within the meaning of that phrase in the Constitution.⁷ As is shown in note 1, supra, although the Supreme Court was not required to pass directly upon this question, nevertheless in the opinion of the court Congress did have the power to regulate such liabilities.

In a later case in the Supreme Court, it was explained that the general language used in the opinion delivered by the court was not to be understood as affirming the unconstitutionality of that part of the statute which defines the liability of carriers engaged in commerce in the territories and the District of Columbia.⁸ The statute has also been upheld as applied to the District of Columbia and the territories in a number of the state courts.⁹ The position taken by the courts, in thus upholding the statute, was that the portion of the statute referring to commerce between the states was severable from that referring to the District of Columbia and to the territories.¹⁰ But the general language used by the Supreme Court in the earlier case mis-

⁶ By the ruling of the Federal Supreme Court the authority of some decisions of inferior Federal courts which affirmed or assumed the validity of the act is destroyed, in so far as they turned upon that factor. *Spain v. St. Louis & S. F. R. Co.* 151 Fed. 522; *Snead v. Central of Georgia R. Co.* 151 Fed. 608; *Malloy v. Northern P. R. Co.* 151 Fed. 1019; *Kelley v. Great Northern R. Co.* 152 Fed. 211; *Plummer v. Northern P. R. Co.* 152 Fed. 206; *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 564.

In *Hall v. Chicago, R. I. & P. R. Co.* supra, it was held that, under the act of 1906, it was the interstate character of the carrier, rather than the particular employment in which the employee was engaged, that was controlling.

⁷ *Brooks v. Southern P. R. Co.* 148 Fed. 986.

⁸ In sustaining the act of 1906 in its application to the District of Columbia and the territories, the Federal Supreme Court in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, said: "When we consider the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that, had Congress not undertaken to deal with this relation in the states where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the territories, over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject."

⁹ The constitutionality of the act of 1906 as applied to the territory of New Mexico was upheld in *Friday v. Santa Fe C. R. Co.* 16 N. M. 434, 120 Pac. 316; *Gutierrez v. El Paso & N. E. R. Co.* 102 Tex. 378, 117 S. W. 426; *Atchison, T. & S. F. R. Co. v. Pickens*, — Tex. Civ. App. —, 118 S. W. 1133.

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The act of 1906 is constitutional as applied to actions based on injuries occurring in the Indian territory. *Missouri, K. & T. R. Co. v. Poole* — Tex. Civ. App. —, 123 S. W. 1176.

The constitutionality of the act of 1906 as applied to the District of Columbia was upheld in *McNamara v. Washington Terminal Co.* 35 App. D. C. 230; *Hyde v. Southern R. Co.* 31 App. D. C. 466; *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A.(N.S.) —.

¹⁰ In *Hyde v. Southern R. Co.* 31 App. D. C. 466, it was held that the act of 1906 was constitutional as restricted in its application to the District of Columbia and the territories of the United States; by merely striking out the second clause, which referred to commerce between the states, the section would be perfect and complete, without the addition of a new word or the slightest change in the meaning of one that had been used. It was also held that there was no reason to doubt that Congress would have enacted the bill with its unconstitutional provisions eliminated.

In speaking of the severability of the invalid and the valid parts of the act of 1906, the Federal Supreme Court in *El Paso & N. E. R. Co. v. Gutierrez*, supra, said: "Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from, and in nowise dependent upon, the provisions of the act regulating commerce within the District of Columbia and the territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the territories, and left to the various states the regulation of the subject-matter within their borders, as had been the practice for many years."

led at least one of the state courts.¹¹ The act of 1906 has also been upheld in a case involving foreign commerce.¹² In one case upholding the act of 1906, the rule was asserted that Congress has the power to establish the rule of comparative negligence in respect to employers and employees engaged in interstate commerce; to this extent, at least, the case has the support of the Supreme Court.¹³

The passage of the act of 1906 did not invalidate state legislation relative to the liability of interstate carriers to their employees, since the act was invalid, and consequently it was inoperative for any purpose.¹⁴

There seems to be some difficulty in reconciling on any broad ground the position taken by the United States Supreme Court in upholding the Federal enactment requiring the use of safety appliances on railroads, with that taken by the same court in denying the constitutionality of the first employers' liability act. But the practical importance of this point has been greatly diminished by the fact that the second em-

ployers' liability act does away with the objection which was considered fatal to the validity of the first act.¹⁵

The act of 1908, which was passed to cure the vices of the act of 1906, has been declared constitutional by the United States Supreme Court.¹⁶ The court in the *Mondou* Case first asserted that Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers to their employees while both are engaged in such commerce.¹⁷

The court also sustained the act against the contention that Congress had exceeded its power by prescribing the particular regulations embodied in the act. The principal points advanced in support of this contention were:

First. That the abrogation of the fellow servant rule, the extension of the carrier's liability to cases of death and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employee is engaged in interstate commerce, in which they are engaged.¹⁸

¹¹ In *Atchison, T. & S. F. R. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480, it was held that the act of 1906 was unconstitutional not only as applied to the states, but also to the territories; the view which the court took was that the constitutional and unconstitutional parts of the statute were so intermingled and interdependent that they could not be separated. The court quotes at length from the opinions of both Mr. Justice White and Mr. Justice Moody, but it is clear from the subsequent decisions of the Federal Supreme Court that the justices, when speaking of the constitutional and unconstitutional parts, had reference solely to commerce between the states, and not to such portions of the statute as were applicable to the territories and to the District of Columbia. It cannot be said that the court was wholly unjustified in taking the view that it did of the language of the Supreme Court justices. The court said: "Courts have no means of knowing that Congress would have passed the law in question and made it applicable to the District of Columbia and the territories alone, and to strike out portions of a section of the act to make it conform to that hypothesis would be making by judicial construction a law which Congress did not make."

¹² *Lancer v. Anchor Line*, 155 Fed. 433 (recovery by employee engaged in unloading vessel sustained).

¹³ *Plummer v. Northern P. R. Co.* 152 Fed. 206.

¹⁴ The intention of Congress to take control of the subject, so as to invalidate existing state statutory regulations in respect to the fellow servant doctrine as to interstate railway employees, cannot be inferred from the enactment of the act of 1906, since 47 L.R.A. (N.S.)

that statute, having been held to be an invalid exercise of the power of Congress, was not a law for any purpose. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581.

¹⁵ In the dissenting opinion of Mr. Justice Moody in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, he says: "If the statute now before us is beyond the constitutional power of Congress, surely the safety appliance act is also void, for there can be no distinction in principle between them." This statement, which is of course purely *dictum*, is combated in *United States v. Southern R. Co.* 164 Fed. 347, the judgment in which was confirmed by the Federal Supreme Court in 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2. A very elaborate attempt at distinguishing between the employers' liability act and the safety appliance act was made in *United States v. Wheeling & L. E. R. Co.* 167 Fed. 198. But, as has been noted above, this question is now of no practical importance.

¹⁶ *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The constitutionality of the act was again affirmed in *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

¹⁷ So, also, in *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949, it was held that Congress has power to regulate the relationship of master and servant of interstate railroads.

¹⁸ In reply to this objection the court said: "Of the objection to these changes it is enough to observe: First. 'A person

Second. That the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged.¹⁹

has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Martin v. Pittsburgh & L. E. R. Co.* 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 577, 22 L. ed. 654, 662; *Western U. Tele. Co. v. Commercial Mill. Co.* 218 U. S. 406, 417, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815. Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

¹⁹ The court's reply to this objection was as follows: "The second objection proceeds upon the theory that, even though Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. v. United States*, 222 U. S. 20, 27, 56 L. ed. 72, 75, 32 Sup. Ct. Rep. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, deals only with the liability of a carrier engaged in interstate commerce, for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid 47 L.R.A.(N.S.)

Third. That the act offends against the 5th Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract,²⁰ and (b) by arbitrarily placing all employees in a disfavored class and all their

objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."

Prior to the decision of the Supreme Court upon the act of 1908, it had been held constitutional by a Federal court over this same objection.

In *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942, affirmed in 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533, the court said: "If the contention of defendant is sustained, the effect would be that although the employee of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the negligence of a switchman or other employee of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional, as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit or deliver a message from the train despatcher directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence there is a collision. . . . It is well known that, while there may be some few railroads engaged wholly in intrastate traffic, there are practically none engaged in interstate transportation which are not also engaged in intrastate carriage of freight or passengers. To limit the liability of the railroad to its employees on a train employed in interstate traffic, for injuries caused by fellow servants engaged in like employment, would in many instances make the act valueless and of no benefit to the employee."

²⁰ The court disposed of this objection by saying that if Congress had power to impose the liability, "which we here hold that it does, it also possesses the power to insure its efficiency by prohibiting any contract, rule, regulation, or device in evasion of it."

In *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, it was held

employees engaged in such commerce in a favored class.²¹

The statute was upheld in general terms by the cases cited in the note, both of which were decided prior to the decision of the United States Supreme Court in the *Monodou Case*.²²

A number of other arguments against the validity of the act have been brought forward from time to time, but in every instance its validity has been sustained.

The act does not attempt to delegate the judicial power of the United States to state courts in violation of article 3 of the Constitution, but creates substantive rights in virtue of the power of Congress over in-

terstate commerce, and these may be availed of in any court of competent jurisdiction.²³

The argument that the act is discriminative in that a person not entitled to claim an amount which would give the Federal court jurisdiction might be precluded from bringing any action at all has been held to be untenable, since it is not every controversy arising under Federal statutes that may be heard in the Federal court.²⁴

The provision of the statute forbidding the removal of causes arising under the act is not unconstitutional, since the right of removal is purely statutory, and consequently can be taken away by statute.²⁵

That the practical effect of the act will

that Congress had the power to enforce a regulation validly prescribed by the act, § 5, by preventing the acceptance of benefits under a contract of membership in a railway relief department from operating as a bar to the recovery of damages for the injury or death of an employee, and by avoiding agreements to that effect.

The validity of § 5 was also asserted in *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97; 187 Fed. 949.

Section 3 of the act of 1906, corresponding to § 5 of the act of 1908, was held not to be an unconstitutional encroachment upon the freedom of contract guaranteed by the Federal Constitution, in *McNamara v. Washington Terminal Co.* 35 App. D. C. 230.

Even if § 5, which provides that any contract, rule, regulation, or device whatever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by the act, shall be to that extent void, is unconstitutional, the provisions of the act in this regard are clearly separable, and there may be statutory liability in the absence of contract, and the parties be left free to contract in avoidance of it without overturning the provisions which would control in the absence of contract. *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893.

²¹ Upon this point the court said: "Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the 'due process of law' clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the

power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsey v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, post, 84, 30 Sup. Ct. Rep. 676; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243."

The same view was taken by some of the lower Federal courts.

The Federal statute abolishing the fellow servant rule, in limiting its application to carriers by rail, does not make an arbitrary or unreasonable classification. *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942, affirmed in 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533.

The act is not invalid because it is confined to interstate carriers by rail. *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893.

²² *Cain v. Southern R. Co.* 199 Fed. 211; *Owens v. Chicago G. W. R. Co.* 113 Minn. 49, 128 N. W. 1011.

²³ *Zikos v. Oregon R. & Nav. Co.* supra.

²⁴ *Ibid.*

²⁵ *McChesney v. Illinois C. R. Co.* 197 Fed. 85; *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

As the right of removal to the Federal court is purely statutory, another statute taking away such right cannot, on that ground, be unconstitutional. *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 578.

In *McChesney v. Illinois C. R. Co.* supra,

be that it will encourage carelessness in the place of inducing the exercise of greater care, and that a servant, knowing that an employer would be liable for his negligence if it should result in injury to his fellow servant, would not exercise the same degree of diligence as where he knew that there would be no such liability, has been held to be a question for the legislature to consider, and not for the court.²⁶

2. Retroactive operation.

It has been held that the Federal acts do not apply to accidents occurring before their passage.²⁷ And the amendment of 1910, in reference to the jurisdiction of the circuit court of the United States, does not confer jurisdiction upon pending suits.²⁸ The amendment of 1910, providing for the survival of the right of action of the injured person, is not retroactive.²⁹ So it has been held that the rule of comparative negligence established by the act of 1906 created a new right and a new obligation; this being so, to construe the statute to apply to injuries which occurred before its passage would render the statute unconstitutional.

the court said: "In its legislative discretion Congress may exert this power to the extent of making one class of cases removable while denying that right to another class. It has uniformly and without question exercised this right and discretion ever since the original judiciary act of 1789. In respect to the amount in controversy, it has always drawn the line where it pleased. In our day, indeed, from time to time, that line has stood, first, at \$500, then at \$2,000, and now at \$3,000. We know of no place where a more general discrimination has been made between classes of cases than in respect to the amount involved, though otherwise the cases are precisely alike. No one, we think, has ever seriously questioned the right to make this character of classification, and the classification now called in question rests upon no different principle. And so, after Congress had created certain new rights by the enactment of the employers' liability statute, it provided that no suit brought in a state court to enforce the rights thus created should be removed to a Federal court."

A defendant in a suit under the Federal employers' liability act is not denied due process of law or the equal protection of the laws by being forbidden to remove the cause from a state to a Federal court, although there is diversity of citizenship, which is a cause for removal in other classes of cases. *TEEL v. CHESAPEAKE & O. R. Co.* ante, 21.

²⁶ *Zikos v. Oregon R. & Nav. Co.* supra.

²⁷ The act of 1906 was not retroactive. *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 564.

Nor is the act of 1908 in any of its features

tutional.³⁰ The provision in the employers' liability act of 1908 extending the time within which actions may be brought to two years is not retroactive.^{30a}

But it has been held that the provision of the act that any contract, etc., the purpose or intent of which shall be to enable the carrier to exempt itself from liability created by the act, shall be void, applies to existing contracts as well as future contracts.³¹

And it has been held that the statute denying the right to remove causes from state to Federal courts may be made to apply to rights of action which have already arisen.³² But a different view was apparently taken in a state court, where, in a syllabus by the court, it was said that the amendment of 1910, in respect to the jurisdiction of the courts of the United States and to the removal of causes, had no application to actions brought prior to the amendment.³³

3. Liberal or strict construction.

In some cases the courts have said, without reserve, that the act is remedial and should

be construed retroactive. *Winfree v. Northern P. R. Co.* 44 L.R.A.(N.S.) 841, 97 C. C. A. 392, 173 Fed. 65, affirmed in 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273.

²⁸ *Newell v. Baltimore & O. R. Co.* 181 Fed. 698.

²⁹ *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; *Cain v. Southern R. Co.* 199 Fed. 211.

³⁰ *Plummer v. Northern P. R. Co.* 152 Fed. 206.

^{30a} *Morrison v. Baltimore & O. R. Co.* 40 App. D. C. 391.

³¹ In *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, it was held that construing the condemnation in the employers' liability act of 1908, § 2, as embracing an existing agreement under which the acceptance of benefits on account of the injury or death of an employee, under a contract of membership in a railway relief department, was to release the company from liability, does not render the section invalid, since such agreement must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its power to regulate commerce as to render the agreement unenforceable or impair its value.

³² *TEEL v. CHESAPEAKE & O. R. Co.* ante, 21.

³³ *Ft. Smith & W. R. Co. v. Blevins*, — Okla. —, 130 Pac. 525. Judging, however, from the language used by the court in the opinion, this is merely *obiter*, as it was apparently decided that the complaint did not state a cause of action under the statute.

be liberally construed,³⁴ while other courts, recognizing that the statute is both remedial and in derogation of the common law, say that it is to be strictly construed, but that the court in so doing must keep in mind the purpose of the act, and the evils against which it was aimed.³⁵

III. Operation and effect generally.

1. General purpose and effect.

Briefly stated, the effect of the act in cases to which it is applicable, is to abolish the defense embodied in the so-called fellow servant doctrine; to abolish the defense of contributory negligence in all cases where the injury was contributed to by the violation by the common carrier of any statute enacted for the safety of employees; and in all other cases to establish the doctrine of comparative negligence, so that the contributory negligence of the employee will not bar a recovery, but merely diminish the damages recoverable; to abrogate the defense of assumption of risk in all cases

where the injury was contributed to by the violation by the common carrier of any statute enacted for the safety of employees; to prevent the common carrier from exempting itself from liability under the act by contract, rule, regulation, or other device.

In its application are embraced employees of interstate carriers by railroad while they themselves are employed in interstate commerce, and all employees of common carriers of railroads in the territories, the District of Columbia, the Panama canal zone, and other possessions of the United States. The act has been held to apply to employees of a railroad while engaged in operating a ferryboat.³⁶ And it has been expressly decided that the act extends to Porto Rico, which is a "possession" within the meaning of the act.³⁷

The general purpose of the act is well expressed by a lower Federal court.³⁸

As the statute under consideration is a Federal statute, the decisions of the Federal courts, and especially those of the Su-

³⁴ *TEEL v. CHESAPEAKE & O. R. Co.* ante, 21; *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

³⁵ In *Behrens v. Illinois C. R. Co.* 192 Fed. 581, the court said: "Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow servant, and the modification of the doctrines of contributory negligence and assumed risk, make for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible."

The statute is in derogation of the common law, and it must be conceded that such statutes are to be construed strictly, but they are also to be construed sensibly and with a view to the object aimed at by the legislature. *St. Louis, I. M. & S. R. Co. v. Conley*, supra.

The act is in derogation of the common law and must be strictly construed, but not so strictly as to defeat the obvious intention of Congress. *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, reversed in — *L.R.A.(N.S.)* —, 104 C. C. A. 151, 181 Fed. 91, upon the ground that no negligence on the part of the railroad company was shown.

³⁶ *The Passaic*, 190 Fed. 644, affirmed in — *C. C. A.* —, 204 Fed. 266.

³⁷ *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Reu. 603; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224.

³⁸ In *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, the court, in speaking of the general purpose of the act, said: "It proceeds on the theory that the railroad corporations are quasi public corporations, 47 *L.R.A.(N.S.)*

and that the railroad company in the first place, and the public in its final analysis, should be insurers of the lives and persons of its employees while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employees, they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. The theory of this legislation is that the public should share the misfortunes of the families of those who are injured or killed in the quasi public business in which railroads are engaged. So it is provided, in substance, where the employee is injured in the service of a railroad while engaging in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have by his own negligence contributed to the injury; but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Here the common-law doctrine of contributory negligence is abrogated in the interest of the employee, and the doctrine of comparative negligence substituted, which, *pro tanto*, encourages care and diligence upon the part of the employee. The act further provides that the servant's contributory negligence shall not deprive him of compensatory damages to any extent, if the master's failure to observe any statute enacted for the protection of the employee has contributed to the servant's injury; nor shall the servant be held to have assumed the risk under such condition; and no device, rule, regulation, or contract the master may make with his servant, or for his guidance, shall relieve him from any liability imposed by the act.

preme Court, are binding upon the state courts.³⁹

It has been said that it was the intent and purpose of the act to cover every negligence for which a common carrier engaged in interstate commerce might be liable to its employee in such commerce.⁴⁰ So, also, it has been said that "the act meant to include everybody whom Congress could include."⁴¹

It has been said that the Federal act creates no right that did not exist at common law, the changes in the doctrines of assumption of risk, fellow servant, and contributory negligence conferring no new right, but is operative only to withdraw from the railroad defenses theretofore existing.⁴² On the other hand, it has been said that the modification of the rule as to

contributory negligence created "a new right and a new obligation."⁴³

In a suit in admiralty, it was held that the act did not repeal U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2843, relative to the limitation of the liability of owners of vessels.⁴⁴

2. Superseding state laws.

It being determined by the decisions of the United States Supreme Court that Congress has authority, under its power to regulate interstate commerce, to prescribe the rule of liability as between interstate carriers and their employees, and Congress having acted in that field, its acts must be held to supersede the common law and all state legislation upon the subject.⁴⁵ The

These changes are all distinctive advantages to the employee, and all in derogation of the common law, and some of them far in advance of the statutes of this state in like cases." This case was reversed in — L.R.A.(N.S.) —, 104 C. C. A. 91, 181 Fed. 91, upon the ground that no negligence on the part of the railroad company was shown.

³⁹ The interpretation, construction, and effect of the act by the Supreme Court of the United States is conclusive upon all other tribunals when the same matters are called in question. *Rich v. St. Louis & S. F. R. Co.* 166 Mo. App. 379, 148 S. W. 1011.

The state courts are bound by the decisions of the United States Supreme Court. *Dooley v. Seaboard Air Line R. Co.* — N. C. —, 79 S. E. 970.

In construing the act the state court is bound by the decisions of the Federal court. *Horton v. Oregon-Washington R. & Nav. Co.* ante, 8.

⁴⁰ *DeAtley v. Chesapeake & O. R. Co.* 201 Fed. 591.

In *Dewberry v. Southern R. Co.* 175 Fed. 307, the court said: "My best judgment is that this law was intended by Congress to cover the entire subject-matter of the liability of carriers by railroad while engaged in interstate commerce, to employees, if the employee injured or killed is, at the time, engaged in such interstate commerce, and that it is plenary and supercedes all other laws relating to such liability."

⁴¹ *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901. To the same effect, *Horton v. Oregon-Washington R. & Nav. Co.* ante, 8.

⁴² *Burnett v. Atlantic Coast Line R. Co.* — N. C. —, 79 S. E. 414.

⁴³ *Plummer v. Northern P. R. Co.* 152 Fed. 206.

⁴⁴ *The Passaic*, 190 Fed. 644, affirmed in — C. C. A. —, 204 Fed. 266.

⁴⁵ *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. 47 L.R.A.(N.S.)

Ct. Rep. 703; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Dewberry v. Southern R. Co.* 175 Fed. 307; *Whittaker v. Illinois C. R. Co.* 176 Fed. 130; *Taylor v. Southern R. Co.* 178 Fed. 380; *DeAtley v. Chesapeake & O. R. Co.* 21 Fed. 591; *Thomas v. Chicago & N. W. R. Co.* 202 Fed. 766; *Illinois C. R. Co. v. Nelson*, 203 Fed. 956; *South Covington & C. Street R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *Southern R. Co. v. Howertson*, — Ind. App. —, 101 N. E. 121; *Rich v. St. Louis & S. F. R. Co.* 166 Mo. App. 379, 148 S. W. 1011; *Burnett v. Atlantic Coast Line R. Co.* — N. C. —, 79 S. E. 414; *Rivera v. Atchison, T. & S. F. R. Co.* — Tex. Civ. App. —, 149 S. W. 223; *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841; *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178; *Eastern R. C. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Rowlands v. Chicago & N. W. R. Co.* 149 Wis. 51, 135 N. W. 156.

If both the injured employee and the carrier were engaged in interstate commerce at the time of the injury, the employers' liability act, superseding all other law, must be controlling on the question of the jurisdiction of the Federal court and the right of removal. *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 318.

In *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, in discussing the Federal statute, the court said: "It covered not only injuries sustained by employees engaged in that commerce, resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making in certain cases, at least, the master and insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive. All state legislation on that subject must give way before that act." This case was reversed in — L.R.A.(N.S.) —, 104 C. C. A. 151, 181 Fed. 91, upon the ground that no negli-

Federal acts, of course, supersede all territorial acts on the same subject. This is true not only of the act of 1908,⁴⁶ but also of the act of 1906.⁴⁷ The Federal act is said to be the supreme law of the land upon the subject of the liability of interstate carriers for injuries to their servants,⁴⁸ and to supersede all state legislation of the same subject, although it does not abrogate in terms such legislation.⁴⁹ Consequently, if the accident occurs under such

circumstances as to make the Federal statute applicable, the plaintiff, as well as the defendant, is bound by its terms.⁵⁰ In such a case there can be no recovery under any state statute,⁵¹ even if the state statutes are more favorable to the plaintiff than the Federal act.⁵²

If the Federal act applies, it is exclusive of other remedies, although the complaint may also set out a cause of action at common law,⁵³ or under some state statute.⁵⁴

gence on the part of the railroad company was shown.

Where it is admitted that the decedent when killed was in the defendant's employ while it was engaged in interstate commerce, and while he was serving it in such commerce, and it appears from the evidence that his death was caused by the negligence of other servants of the defendant who were also employed by it in such commerce, it inevitably follows that the action by the administrator to recover damages for his death can be maintained only under and by virtue of the provisions of the Federal act. *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31.

In case of the death of an employee, if the Federal statute is applicable, the right of recovery, if any, is in the personal representative of the deceased, and no one else can maintain the action. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, reversing — *Tex. Civ. App.* —, 148 S. W. 1099.

⁴⁶ The Federal act supersedes the Compiled Laws of the Territory of New Mexico. *Rivera v. Atchison, T. & S. F. R. Co.* — *Tex. Civ. App.* —, 149 S. W. 223.

⁴⁷ The act of 1906 necessarily supersedes any otherwise applicable provision of any territorial act. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 *Tex.* 378, 117 S. W. 426.

The act of 1906 superseded the laws of the territory of New Mexico. *Atchison, T. & S. F. R. Co. v. Tack*, — *Tex. Civ. App.* —, 130 S. W. 596.

The act supersedes the statute of New Mexico. *Southern P. Co. v. McGinnis*, 98 C. C. A. 403, 174 Fed. 649.

⁴⁸ In so far as it is applicable, the Federal act is the supreme law of the land. *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 701.

Where a state statute conflicts with an act of Congress the latter will prevail as the supreme law of the land. *Kansas City M. & O. R. Co. v. Pope*, — *Tex. Civ. App.* —, 152 S. W. 185.

If the Federal statute is applicable the state statute is excluded by reason of the supremacy of the former under the National Constitution. *St. Louis, S. F. & T. R. Co. v. Seale*, supra.

The Federal act is paramount and exclusive. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495.

The Federal act is paramount and exclu-

sive where the defendant railroad was engaged in interstate commerce and an employee was injured while so engaged. *Eastern R. Co. v. Ellis*, — *Tex. Civ. App.* —, 153 S. W. 701.

"It follows that all other laws in respect to the matters embraced therein were swept away when the act became the supreme law of the land." *McChesney v. Illinois C. R. Co.* 197 Fed. 85.

⁴⁹ *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1002.

⁵⁰ *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551.

⁵¹ Where the complaint shows that the case comes within the act, there is no liability under the state statutes. *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

If the employee comes within the protection of the Federal act, he cannot recover under the state statute. *Rich v. St. Louis & S. F. R. Co.* 166 Mo. App. 379, 148 S. W. 1011.

The act supersedes the state statutes covering the same ground, and it is error for the trial court to charge the provisions of the state statute. *Louisville & N. R. Co. v. Kemp*, — *Ga.* —, 79 S. E. 558.

In *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31, it was held that no recovery can be had under state statutes for the death of a railroad employee under circumstances which render the Federal act applicable.

⁵² In *Charleston & W. C. R. Co. v. Anchors*, supra, the court said that no person could secure the benefit of the Federal act "without surrendering whatever particular benefits may be given him by the state law so far as they are not also given by the Federal law."

⁵³ *Ullrich v. New York, N. H. & H. R. Co.* 193 Fed. 768.

⁵⁴ That a complaint for injury to an employee of an interstate railroad alleged facts which might warrant a recovery either at common law, under a statute of Massachusetts, or under the Federal employers' liability act, is not sufficient to justify a removal, since the cause of action will be deemed to be based on the Federal act and consequently is not removable. *Rice v. Boston & M. R. Co.* 203 Fed. 580.

Upon a motion to remand, it has been held that the plaintiff avoids the jurisdiction of the Federal court when he alleges that he was engaged in interstate commerce, although the complaint also makes out a cause of action under the New York labor law and also at common law.

So, the setting forth in terms of the state wrongful death statute in the petition does not militate against the view that the case is one arising under the Federal act.⁵⁵ And a reference to a state statute in the petition in an action which can legally rest only upon the Federal act, which supersedes state laws upon the subject, will not invalidate the pleading any more than would the mention of any other repealed statute.⁵⁶ And the mere fact that the defendants' answer is drawn in accordance with the state law does not prevent him from relying on the Federal act.⁵⁷

As to effect of failure of defendant to raise the question of the applicability of the Federal statute, see subdivision XIII. *infra*.

Prior to the amendment of 1910, it was very ingeniously argued in one case that since the evident purpose of Congress was to extend protection to the working class,

and the act did not provide for the survival of the action in case of the death of the injured employee, it could not be held that the statute superseded state legislation, which did provide for such survival.⁵⁸ But the United States Supreme Court, in reversing that decision, held that the ruling of the state court was error, since the act of Congress superseded all state laws in the matter with which it dealt, and that act provided in case of death that the only right of action was one for the benefit of the next of kin.⁵⁹ It would seem that, in view of the decision of the Supreme Court just cited, there could be no further question as to the inapplicability of any state statute, or of any provision thereof, to a case where the Federal act applies; but there are a number of earlier state decisions which question this view.⁶⁰

It has been held that a judgment for the

Ulrich v. New York, N. H. & H. R. Co. *supra*.

⁵⁵ Stafford v. Norfolk & W. R. Co. 202 Fed. 605.

⁵⁶ Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135.

⁵⁷ A carrier sued for the death of an employee is not estopped to urge that its liability was measured by the Federal employers' liability act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the state law, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and as he relied upon the state law, the defendant had no choice if it was to defend upon the facts. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

⁵⁸ In *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874, where the complaint was not based on the act, one count thereof was for the pain and suffering of the deceased for the benefit of the estate, and upon demurrer to this count, it was insisted that the Federal statute superseded the state statute, and consequently this count was bad; but the court said: "From the terms of the Federal statute no intention is disclosed to limit or take from employees any right theretofore existing by which they were entitled to a more extended remedy than that conferred upon them by the act, and it was evidently the purpose of Congress in passing it to extend further protection and enlarge the remedy by law to employees engaged in interstate commerce in case of death or injury to them while engaged in such service. It may be that this statute does not give a right of action for the injury to the person that survives his death, as some courts have held, but it is not in conflict with the state law giving or preserving such right, which we hold is not superseded by it, and that the remedy it provides is not exclusive of that under the state law permitting a recovery upon said surviving

right of action. We are not unaware of the decision in *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, nor of other decisions of some of the state courts taking a contrary view of the law, nor of its amendment by Congress since the occurrence of this injury."

⁵⁹ *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

⁶⁰ The act did not supersede the Missouri act giving a wife the right to maintain an action for the wrongful death of her husband, if such action is brought within six months, and if not, then authorizing the children of the deceased to bring such action. *Thompson v. Wabash R. Co.* 184 Fed. 554.

In *Re Taylor*, 144 App. Div. 634, 129 N. Y. Supp. 378 (leave to appeal to court of appeals granted, 145 App. Div. 940, 130 N. Y. Supp. 1132), where the deceased left no children and only a widow and a father, it was held that the widow, who as administratrix had, under the act, recovered a judgment, could not retain the net proceeds of such judgment for her own use against the claims of the father, as regulated by § 1903 of the Code of Civil Procedure, where it appeared that the complaint set forth acts which constituted a cause of action under the state law. The court, in speaking of the effect of the act, said: "Assuming its validity, it is certainly questionable that Congress intended to supplant the laws of such states as afforded already a remedy as adequate as that which it granted itself. Take the case at bar, if the act of Congress here applies, and displaces the remedial laws of this state as applied to this cause of action, the only substantial effect thereof is to change the method of distribution of the proceeds of recovery under an existing right of action. If Congress has such power in the premises, it must not be deemed to have attempted to exercise it, unless the intent be unmistakable. To carry its assumed power to such extent would be an advance into gov-

defendant under the state law which recognizes the fellow servant doctrine is not a bar to an action under the Federal act, founded upon the negligence of a fellow servant.⁶¹ See note 219a, *infra*.

IV. *Contracts exempting carriers from liability — benefit associations.*

Section 5 of the act of 1903, providing that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," shall be void, has been held to embrace stipulations making the acceptance of benefits on account of the injury or death of an employee, under a contract of membership in a railway relief department, equivalent to a release of the company's liability, so that an employee, by accepting benefits under such a contract of a membership in a relief department, is not barred from recovering damages for the

injury under the act.⁶² The same view has been taken in a state court.⁶³ And it has been held that a release for injuries executed by the injured employee, so as to secure the benefit of a relief association, is not a bar to an action under the act, since such release was merely the method of obtaining the benefits, and was in no sense a release based on a settlement.⁶⁴

V. *Negligence, existence of, as basis of liability.*

Under the act, the mere happening of the accident will not warrant a recovery; there must be negligence on the part of the railroad company or on the part of same employee.⁶⁵ There can be no recovery for injuries to a section hand engaged in loading ties upon a hand car, where the accident was caused by reason of a tie turning in the hands of the men, due to the fact that it was wet and slippery from rain.⁶⁶ Un-

der the act, no harm could be done by determining that the state statute applied, rather than the Federal statute.

ernmental territory heretofore free from invasion, and one fraught with dangerous consequences, considering the dual nature of our political systems and the absolute necessity that the functions of each should be kept sharply distinct. We are of opinion that the act of Congress in question should be construed as one granting a new remedy, under certain circumstances, where none, or a less adequate one, existed under the state laws, and as not intended to supplant or abrogate a right of action of practically equal extent existing under the laws of this state."

In *Horton v. Seaboard Air Line R. Co.* 157 N. C. 146, 72 S. E. 958, although the question was not squarely before the court, the language used seemed to indicate that it was the court's impression that the plaintiff could elect to sue either under the Federal act or under the state act.

In *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31, in a dissenting opinion by Nunn, J., the view was expressed that the act of Congress did not cover the whole field of interstate employees, that when such an employee had no one dependent upon him within the meaning of the statute, the case was not affected by the act, but was left to the different jurisdictions of the law governing his case. Attention is called to the fact that the act itself says that it is for the benefit of interstate employees in "certain cases," and the conclusion is drawn that those employees having no one dependent upon them are excluded from the act.

In *Fleming v. Norfolk Southern R. Co.* 160 N. C. 196, 76 S. E. 212, it was held that where the state statute, in so far as it undertakes to regulate and provide for fixing responsibility on the issue of the defendant's negligence, is not dissimilar to the Federal statute on the same subject, and the facts of the occurrence itself are

all before the court, no harm could be done by determining that the state statute applied, rather than the Federal statute.

⁶¹ *Troxell v. Delaware, L. & W. R. Co.* 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274.

⁶² *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

Upon the general subject of contract requiring servant to elect between acceptance of benefits out of a relief fund, and the prosecution of his claim in an action for damages, see note to *Frank v. Newport Min. Co.* 11 L.R.A. (N.S.) 182.

⁶³ *Burnett v. Atlantic Coast Line R. Co.* — N. C. —, 79 S. E. 414.

⁶⁴ *Baltimore & O. R. Co. v. Gawinske*, 116 C. C. A. 579, 197 Fed. 31.

⁶⁵ *Louisville & N. R. Co. v. Kemp*, — Ga. —, 79 S. E. 558. See also *The Passaic*, 190 Fed. 644, affirmed in — C. C. A. —, 204 Fed. 266.

Under the Federal statute, the plaintiff must show negligence under the rules ordinarily applicable. *South Covington & C. Street R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

Under the act of 1906, the right of action must be based upon the negligence of the defendant, and without that negligence no right of action can exist in favor of the plaintiff. *Missouri, K. & T. R. Co. v. Poole*, 104 Tex. 36, 133 S. W. 239.

There can be no recovery under the act unless there was negligence on the part of the master or someone representing him, or upon the part of a fellow servant. *Neil v. Idaho & W. N. R. Co.* 22 Idaho, 74, 125 Pac. 331.

The burden of proving negligence is upon the plaintiff. *Charleston & W. C. R. Co. v. Brown*, — Ga. App. —, 79 S. E. 932.

⁶⁶ *Long v. Southern R. Co.* — Ky. —, 159 S. W. 779. The court said: "While

der the Federal statute, the negligence of an engineer of an interstate train is that of the railroad company.⁶⁷

In one case brought under the act, the courts said that the maxim, *Res ipsa loquitur*, did not apply, but in so holding the court was simply enunciating the rule applied in many Federal courts, namely, that the maxim never applies in master and servant cases.⁶⁸

In the note below are cited several cases in which the question of negligence *vel non* was determined.⁶⁹

VI. "Ways," what constitute.

The act of 1906 made the common carrier

it is true that the employers' liability act has abrogated the fellow servant doctrine, and that the contributory negligence of the injured employee does not bar a recovery, but simply diminishes the damages in proportion to the amount of negligence attributable to such employee, yet it is still necessary to show that the injury resulted in whole or in part from the negligence of the officers, agents, or employees of the carrier, or by reason of some defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. It is not insisted that the injury resulted from any defect or insufficiency in defendant's cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

⁶⁷ Southern R. Co. v. Gadd, — C. C. A. —, 207 Fed. 279.

Under the act of 1906, a locomotive fireman can recover for injuries though caused solely by the negligence of the engineer in running his train over a new road which was rough and irregular, at too rapid a rate of speed. Missouri, K. & T. R. Co. v. Poole, — Tex. Civ. App. —, 123 S. W. 1176.

In Owens v. Chicago G. W. R. Co. 113 Minn. 49, 128 N. W. 1011, it was held that a conductor could recover for injuries caused by the negligence of the engineer in the premature application of the full force of the air brake.

⁶⁸ Midland Valley R. Co. v. Fulgham, — L.R.A.(N.S.) —, 104 C. C. A. 151, 181 Fed.

⁶⁹ As to applicability of maxim, *Res ipsa loquitur*, as between master and servant, see notes to Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) 337, and Byers v. Carnegie Steel Co. 16 L.R.A.(N.S.) 214.

⁶⁹ In Missouri, K. & T. R. Co. v. Rogers, — Tex. Civ. App. —, 128 S. W. 711, it was held that under the act of 1906 the defendant was liable for the negligence of a section foreman and section hand whose duty it was to construct and maintain in proper repair a platform where the plaintiff was injured,—the accident happening in the Indian territory.

Notwithstanding the duty to promulgate rules is a non-delegable duty of the master. L.R.A.(N.S.)

liable for defects in its "ways" as well as in its cars, engines, etc. This word was omitted from the act of 1908, but it is not probable that Congress intended by that omission to limit the liability of the railroad in any respect, since the phrase "other equipment" was added, and it is difficult to conceive of any instrumentality which would be covered by the term "ways" which would be covered by the terms employed,— "appliances," "track," "roadbed," "works," and "other equipment."

But one case has been found in which the court passes upon the question what constitutes a way within the meaning of the act.⁷⁰

ter, it is a duty which, as is the case with all the non-delegable duties of a corporation, can be performed only through its officers, agents, and employees; consequently, any negligence in respect to the promulgation of the rule falls within the statute. De Atley v. Chesapeake & O. R. Co. 201 Fed. 591.

In Colasurdo v. Central R. Co. 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901, it was held that it could not be said that, as a matter of law, there was no negligence in operating in a freight yard four cars under their own impetus, after dark without warning and without light.

To maintain a switchstand in such a position that, when set for one track, a prong is not over 11½ inches from the side of cars passing on an adjoining track, on the sides of which employees are required to work, is negligence which will permit a recovery under the act. McDonald v. Railway Transfer Co. 121 Minn. 273, 141 N. W. 177.

To maintain a large number of boxes 4 feet tall and 13 and 18 inches thick, unsecured on a railroad trestle platform 12 or 14 inches from a passing train, is actionable negligence rendering the railroad company liable for injuries caused by their being jarred over against a train and tearing away the steps of a car. Ferebee v. Norfolk Southern R. Co. — N. C. —, 79 S. E. 685.

In McCULLOUGH v. CHICAGO, R. I. & P. R. Co. ante, 23, it was held that negligence on the part of a railroad company may be found from evidence that a side bar of an engine broke when the engine was in motion, and injured an employee in the cab, and that the engine was old and out of repair, that its wheels, bushings, and bearings were worn, and that it pounded while at work.

A "way" over the track of the defendant company which had, to its knowledge, for a long time been used by the employees in going to and from their work, must be said to be insufficient where it is not protected in any way against accidents. Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, — L.R.A.(N.S.) —.

⁷⁰ A passageway over tracks of the defendant company which has for a long time,

The term "ways" is used in practically all the statutes modeled after the English employers' liability act, and the meaning of the term as used in those statutes has been discussed in previous notes in this series.⁷¹

VII. When employees deemed to be engaged in interstate commerce.

1. General principles applicable.

Where the injured employee was actually engaged at the time in the operation of an interstate train, he is clearly within the protection of the statute.⁷² So, where it is clear that the employee was engaged solely in intrastate work, the Federal act does not apply, although, as a matter of fact, the defendant railroad was also engaged in

interstate commerce.⁷³ According to the holding of one case, a railroad whose tracks and provinces lie wholly within one state is not an interstate railroad merely because it is leased to another railroad which is engaged in both interstate and intrastate commerce.⁷⁴ In one case, it was held that where the fact that the plaintiff was engaged in interstate commerce was neither alleged in the complaint, nor asserted in the answer, it will be presumed that he was engaged in intrastate commerce, and that the state laws applied.⁷⁵ So, evidence that the railroad and the injured employee were engaged in interstate commerce has been held to be properly excluded where the complaint alleged that the plaintiff, at the time of the injury, was engaged in operating an intrastate train,

to the knowledge of the company, been used by employees in going to and from their work, constitutes a "way" within the meaning of the statute. *Philidelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A. (N.S.) —.

⁷¹ See notes to *Coley v. North Carolina R. Co.* 57 L.R.A. 820, and *Hubbard v. Central of Georgia R. Co.* 19 L.R.A. (N.S.) 738.

⁷² "Where the defendant is shown to be engaged in interstate commerce, and the injured servant is employed in work incident thereto, he is likewise engaged in such commerce, and may invoke the statute in his behalf." *Southern R. Co. v. Hower-ton*, — Ind. App. —, 101 N. E. 121.

An engineer engaged in hauling cars which were being used in interstate commerce is himself engaged in interstate commerce. *Horton v. Seaboard Air Line R. Co.* 157 N. C. 146, 72 S. E. 958.

An averment that the plaintiff was employed as a fireman on an engine running between two cities in different states, and hauling passengers and mail, shows that the plaintiff was engaged in facilitating interstate commerce. *Rowlands v. Chicago & N. W. R. Co.* 149 Wis. 51, 135 N. W. 156.

In *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494, affirmed in 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, it was held that an employee who was injured while engaged in replacing a drawbar on one of the defendant's cars while in use in interstate commerce was within the protection of the act.

An employee is engaged in interstate commerce while adjusting the coupling of the cars and the air hose upon them, some of which were engaged in interstate commerce. *Johnson v. Great Northern R. Co.* 102 C. C. A. 89, 178 Fed. 643.

If both the injured employee and the carrier were engaged in interstate commerce at the time of the injury, the employers' liability act, superseding all other law, must be controlling on the question of the 47 L.R.A. (N.S.)

jurisdiction of the Federal court and the right of removal. *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 318.

⁷³ Allegations in a complaint that the defendant railroad company owned and operated various lines of railroad all within the state, and that the plaintiff when injured was at work upon a run between two terminals both within the state, show that the action is one based on the state statute, and not on the Federal statute. *Missouri, K. & T. R. Co. v. Hawley*, — Tex. Civ. App. —, 123 S. W. 726.

Where a member of a train crew is injured while doing purely local work on a short branch which terminates at a smelting works, he properly bases his action on the local statute, and not on the Federal law, although a part of his time is spent on interstate runs. *Southern R. Co. v. Murphy*, 9 Ga. App. 190, 70 S. E. 972.

Testimony that the caboose upon which the plaintiff was working at the time he was injured came from "Liberal" to the place where the repairs were being made is not sufficient to show that the plaintiff was engaged in interstate commerce, where there is nothing to show where the "Liberal" mentioned was situated. *Chicago, R. I. & G. R. Co. v. Rogers*, — Tex. Civ. App. —, 150 S. W. 281.

⁷⁴ *Zachary v. North Carolina R. Co.* 156 N. C. 496, 72 S. E. 858.

⁷⁵ *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A. (N.S.) 684, 128 N. W. 1. The court said: "Nor do we think there was error in striking the evidence tending to show that plaintiff was, at the time he received the injury, engaged in interstate commerce. The fact that he was so engaged had not been alleged in the petition, nor asserted in the answer; so that whether he was so engaged was not in issue. As argued, it is not necessary to plead the statutes of the United States, but, to invoke their benefit, facts rendering these applicable should be pleaded. All essential under the state law was proof that the injury was received because of the negligence of the company in the use or opera-

and these allegations were not denied or in any way challenged in the answer.⁷⁶

The act does not necessarily apply to the same person in all details of his employment, as one man may have duties including both interstate and intrastate commerce, and he would be subject to the act while engaged in the one, and not in the other.⁷⁷ In determining the question whether the injured employee was engaged in interstate commerce, the general duties of the employee are to be considered.⁷⁸ If the employee is engaged in interstate commerce, so is the railroad, for the road is the

master and the servant's act is its act.⁷⁹ The burden of proof is upon the plaintiff to show that he was engaged in interstate commerce.⁸⁰

While it is essential that the carrier be engaged in interstate commerce, and that the employee when injured be also engaged in such commerce, it is immaterial whether the negligent servant or defective appliance be so engaged or not.⁸¹

It has been held by the circuit court of appeals that it is not necessary that the employee be actually engaged at the time of the injury in the movement of interstate

tion of its railway within the state, for, until the contrary was made to appear, it will be presumed to have been engaged in intrastate commerce."

⁷⁶ *Fleming v. Norfolk Southern R. Co.* 160 N. C. 196, 76 S. E. 212.

⁷⁷ *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

In *Barker v. Kansas City, M. & O. R. Co.* 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151, it was also pointed out that the same kind of act may at one time be a part of interstate transportation, and at another time have nothing to do with it.

⁷⁸ In *MONTGOMERY v. SOUTHERN P. Co.*, ante, 13, it was held that upon the question whether or not a railroad employee was engaged in interstate commerce at the time of his injury, evidence is admissible as to the general duties with which he was charged during the time of his employment with the furtherance of which he was engaged at the time of his injury.

⁷⁹ *Colasurdo v. Central R. Co.* supra.

In *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551, the court said: "The present law emphasizes three things which must concur before its provisions are applicable: (1) The railroad company in question must engage in interstate commerce; (2) it must, at the time of the injury in question, be engaging in that character of commerce, as contradistinguished from such purely local matters as it may also engage in; (3) the injured servant must also, at the time of receiving his injury, be engaging in interstate commerce."

It would seem that the court somewhat complicates the question by the introduction of the second item which it states must concur before the provisions of the act are applicable; and in view of the decisions of the Federal court and of the United States Supreme Court, it would seem that the first and the third items are sufficient; if, by the second item, the court means anything more than what is included in the third item, namely, that the injured servant must at the time of receiving his injury be engaged in interstate commerce, the decision is clearly erroneous under the rule of the Federal courts.

⁸⁰ *Tamura v. Great Northern R. Co.* 58 Wash. 316, 108 Pac. 774.

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⁸¹ In *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, the Supreme Court expressly decided that the fact that the negligence which caused the injury was that of an employee engaged in intrastate commerce was immaterial, "for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee was also engaged therein."

If the injury is suffered while the carrier is engaged in interstate commerce, and while the injured employee is employed by the carrier in such commerce, it is not essential that the causal negligence is that of a coemployee also employed in such commerce. *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, reversing 184 Fed. 737, and 117 C. C. A. 33, 197 Fed. 537.

In *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942, affirmed in 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533, the court said: "If the contention of defendant is sustained, the effect would be that, although the employee of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the negligence of a switchman or other employee of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit or deliver a message from the train despatcher directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence there is a collision."

The negligent employee need not be engaged in interstate commerce. *Darr v. Baltimore & O. R. Co.* 197 Fed. 665, af-

commerce; an employee on his way to or from his work is also within the protection of the statute.⁸² A similar decision was rendered in the District of Columbia,⁸³ and in Washington.⁸⁴ The decision of the circuit court of appeals must be considered as overruling two earlier decisions of the circuit court, both of which were decided upon the authority of the case, which was reversed by the court of appeals, referred to above.⁸⁵ Where, however, the employee is injured while going to or from his work, which he left for purposes solely of his

own, or on business not connected with the company, there can be no recovery.⁸⁶

2. What constitutes.

As to what constitutes interstate commerce under the Federal safety-appliance act, see notes to *Chicago, M. & St. P. R. Co. v. United States*, 20 L.R.A.(N.S.) 473, and *Lake Shore & M. S. R. Co. v. Benson*, 41 L.R.A.(N.S.) 49.

A conductor who, after his train is made up, has gone to the engine to give the engineer his clearance card, is engaged in

firmed by circuit court of appeals, see ante, 4.

Where the injured employee is engaged in interstate commerce, it is immaterial whether or not a train which struck him was engaged in that commerce or not. *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

It is not necessary to allege that the defective car which caused the injury was engaged in interstate commerce. *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

In *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893, it was held that, in view of the facts disclosed by the complaint, it was not necessary to go further than to hold that interstate and intrastate service are separable by upholding liability when injury results from the negligence of fellow servants engaged in interstate commerce, and denying it when resulting through the negligence of an intrastate employee to one engaged in interstate commerce, and this if the act could be held subject to the objection urged against it.

In *Granger v. Pennsylvania R. Co.* — N. J. —, 86 Atl. 264, although the case was apparently decided upon the ground that the injured employee, who was repairing a switch, was not himself engaged in interstate commerce, the court calls attention of the fact that the car which struck him was not an interstate car. This point, however, is immaterial, as is shown by the case cited above.

⁸² A locomotive fireman is, while on his way from his home to the depot for the purpose of riding upon a train to a distant point as a part of a deadhead crew, there to fire an engine hauling an interstate train, employed in interstate commerce, so that the railroad company will be liable under the act for injuries to him caused by the negligence of a crew of a train which struck him as he was on a crossing near the depot. *LAMPHERE v. OREGON R. & NAV. CO.*

As to liability of master for injury to servant while not at work, see notes cited in Index to L.R.A. Notes, under title Master and Servant, § 61.

⁸³ A special locomotive fireman who, while on his way to work after being called, crosses a track of the defendant company at a point where employees have been in

the habit of crossing for a long time, is within the protection of the statute. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A.(N.S.) —.

⁸⁴ In *Hobson v. Oregon-Washington R. & Nav. Co.* ante, 8, it held that an operator of a railroad pumping plant which furnishes water for interstate and cross-state engines is employed in interstate commerce while riding from his home to his work on a hand car furnished by the company for that purpose, so as to be within the operation of the Federal employers' liability act if injured by those, during that time, in charge of an interstate train.

⁸⁵ In *Feaster v. Philadelphia & R. R. Co.* 197 Fed. 580, it was held that an extra conductor who was on his way to take charge of a work train, and, while riding on a light engine, was injured by collision with a local passenger train, was not engaged in interstate commerce, where it does not appear that he had been engaged in such commerce at the time of the injury, or that he was about to be so engaged.

An employee of a railroad company is not, while riding home from his work in the caboose of a train, by the permission of the railroad company, engaged in interstate commerce. *Bennett v. Lehigh Valley R. Co.* 197 Fed. 578.

⁸⁶ In *Zachary v. North Carolina R. Co.* 156 N. C. 496, 72 S. E. 858, in holding that a fireman, while going from his engine to his boarding house for a purpose entirely personal to himself, was not engaged in interstate commerce, the court said: "If the contention of the defendant can be maintained, then it follows that all employees of railways that do an interstate business are necessarily employed in interstate commerce. The ticket seller who sells a ticket to a traveler going beyond the state, the car cleaner who cleans the car he is to travel in, the man who loads the engine tender with coal which is to pull him, and the gatekeeper who examines his ticket and passes him on to his car, are all employed in interstate commerce."

In *Meyers v. Norfolk & W. R. Co.* — N. C. —, — L.R.A.(N.S.) —, 78 S. E. 280 (rehearing pending), it was held that an employee on a work train who was injured while attempting to catch a freight to go for the mail for the working force is not engaged in interstate commerce.

interstate commerce while walking back around his train, inspecting it.⁸⁷ A yard clerk killed while proceeding through railroad yards to meet an incoming interstate freight train for the purpose of taking down the numbers and initials on the cars, etc., is employed in interstate commerce within the meaning of the Federal employers' liability act of 1908, although the yard may be terminal for that particular train, and none of the cars were going to points beyond.⁸⁸

An employee engaged in loading interstate freight onto a car for interstate trans-

portation is engaged in interstate commerce.⁸⁹ But there can be no recovery for injuries to an employee engaged in loading rails upon a flat car, where it is not shown whether the rails are old or new, where they came from, where they were to be taken, or where the car was to go when loaded.⁹⁰

In the earlier decisions under the act, the view was taken in some cases that an employee engaged in repairing the track was not engaged in interstate commerce, although interstate trains passed over the tracks.⁹¹ In some of these cases, the court

⁸⁷ Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331.

⁸⁸ St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, reversing — Tex. Civ. App. —, 148 S. W. 1099.

⁸⁹ Illinois C. R. Co. v. Porter, — C. C. A. —, 207 Fed. 311.

⁹⁰ Tsumura v. Great Northern R. Co. 58 Wash. 316, 108 Pac. 774. The court said: "The respondent's theory seems to be that, because the appellant was authorized to, and did at times, engage in interstate commerce, and because the respondent was employed in loading a flat car with rails which had been used, or were to be used, in the repair of its roadbed in the state of Montana, he was necessarily engaged in interstate commerce within the meaning of the act. We cannot assume that every employee of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employees whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions, it is, in our opinion, open to the same objections which rendered the earlier act unconstitutional. If respondent is to avail himself of its benefits, the burden devolves upon him to show that the duties which he was performing while an employee of the appellant were of a character that directly pertained to, and were a part of, interstate commerce. No such showing was made, and appellant's motion for a directed verdict should have been sustained."

⁹¹ In Pierson v. New York, S. & W. R. Co. 83 N. J. L. 661, 85 Atl. 233, it was held that the work of transporting rails from their place of destination, where they had been delivered after being transported into the state, to where they were to be used in replacement of old rails, is not interstate commerce. The court, relying upon Pedersen v. Delaware, L. & W. R. Co. 117 C. C. A. 33, 197 Fed. 537, said: "The repairing of an instrument of commerce which is used sometimes in interstate and sometimes in intrastate transportation, whether it be the roadbed of a railroad, or a car, or an engine which is run over it, is not an engaging in commerce, but a preparation for engaging therein in the 47 L.R.A.(N.S.)

future." It should be noted that the Pedersen Case was overruled by the United States Supreme Court. See note 92, *infra*.

The Pierson Case was followed in Granger v. Pennsylvania R. Co. — N. J. —, 86 Atl. 264, where it was held that the work of oiling a switch which is sometimes used in interstate and sometimes in intrastate transportation is not engaging in interstate commerce. Both of these cases must be considered as overruled since the authority relied upon was reversed by the court of last resort upon the question.

In Charleston & W. C. R. Co. v. Anchors, 10 Ga. App. 322, 73 S. E. 551, where a section foreman at work on a track over which interstate commerce passed was injured by reason of being struck by a particle of iron put in flight by the negligent blow of a hammer in the hands of one of the men under him, the court said: "To our minds, neither the servant who struck the blow nor the servant whose eye was injured through the blow's being struck was engaged in interstate commerce, since the whole object of striking the blow was merely to drive a spike to hold in place a rail that this defendant might have a railroad track upon which it could thereafter, if it so desired, engage in commerce, either interstate or intrastate. If the distinction between preparing to engage in commerce and the act of actually engaging in it is to be observed, this transaction falls squarely within the domain of preparation."

A man engaged in repairing bridges and doing bridge work generally, even though he may work in different states for the railroad company, is not engaged in interstate commerce within the meaning of the act. Taylor v. Southern R. Co. 178 Fed. 380.

See also Pedersen v. Delaware, L. & W. R. Co. *supra*, which was reversed by the United States Supreme Court (see note 92).

In Ft. Smith & W. R. Co. v. Blevins, — Okla. —, 130 Pac. 526, it was held that no cause of action under the Federal act was stated in a complaint which alleged that the defendant was a corporation existing under the laws of the state of Arkansas for the purpose of building, equipping, and operating a line of railway extending from Arkansas into Oklahoma, and that the plaintiff was one of the employees on a work train, engaged in ditching the sides

attempts to draw a distinction between "preparing to engage" and "engaging" in interstate commerce. Any such supposed distinction is apparently swept away by the Supreme Court of the United States in a recent decision, in which it was held that an employee engaged in carrying a sack of bolts or rivets to be used in repairing a bridge regularly in use in interstate as well as intrastate commerce was engaged

in interstate commerce.⁹² The same view has been taken by state and lower Federal courts in decisions most of which were handed down before the question was settled by the Supreme Court.⁹³ So, an employee of an interstate railroad engaged in repairing a switch which was constructed and used by the defendant railroad so as not to delay an interstate passenger and freight train is entitled to the benefit of the

of the track and removing the dirt to fills, and when injured was at work upon a portion of the road between two points in the state of Oklahoma. It is impossible to tell, however, from the opinion, the precise ground upon which it is based. The cause arose upon the appeal of the defendant from the denial by the trial court of its application for removal, and it is not clear whether the court based its decision upon the fact that the defendant was not an interstate carrier, or whether the work upon which the plaintiff was engaged was not interstate commerce, or whether the decision was based solely upon a matter of pleading.

⁹² *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 651, reversing 184 Fed. 737, and 117 C. C. A. 33, 197 Fed. 537. The court said: "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its re- 47 L.R.A. (N.S.)

lation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? . . . Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities, and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former, nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce. The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

⁹³ A section hand engaged in repairing the track over which interstate traffic is carried is likewise engaged in interstate commerce. *Southern R. Co. v. Howerton*, — Ind. App. —, 101 N. E. 121.

An employee of an interstate railroad engaged in the repair of a bridge on such railroad is employed in interstate commerce. *Thomson v. Columbia & P. S. R. Co.* 205 Fed. 203.

A railroad trackman injured while repairing a switch in the yards of the railway company over which both interstate and intrastate commerce is transported comes within the statute. *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

In *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893, the court, in holding that an employee engaged in working on a track over which both interstate and intrastate commerce is carried was himself engaged in interstate commerce, said: "The track of a railroad company engaged both in inter-

act as being engaged in interstate commerce.⁹⁴

A section foreman engaged in removing a hand car from the track in front of an interstate train is engaged in interstate commerce.⁹⁵

The work of repairing cars or engines while they form a part of an interstate train is unquestionably connected with interstate commerce;⁹⁶ and it has also been held that employees engaged in repairing engines or cars are engaged in interstate commerce where an interstate run has been completed and cars and engine are being made ready for another run.⁹⁷ But in a

state and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states,—to deny the power of Congress over interstate commerce,—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. . . . The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to Federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way; or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose.”

⁹⁴ *Jones v. Chesapeake & O. R. Co.* 149 Ky. 566, 149 S. W. 951.

⁹⁵ *Louisville & N. R. Co. v. Kemp.* — Ga. —, 79 S. E. 558.

⁹⁶ An employee engaged in repairing a car loaded with interstate freight, which had been taken a distance of 14 miles off the route to a place still within the state 47 L.R.A.(N.S.)

state court an employee engaged in repairing a boiler, part of the wrecking appliance of the railroad company, was held not to be engaged in interstate commerce when, at the time, the boiler was lying near the wrecking car in a roundhouse.⁹⁸

It is submitted that the decision in this case is inconsistent with those cited in the preceding note and with the spirit of the rule enunciated in the Pedersen Case. The fact that the work is a preparing to engage rather than an actual engaging is immaterial according to the clear import of the language quoted from the opinion of the Supreme Court in the Pedersen Case. That

where it originated, where the repairs could be made, is engaged in interstate commerce. *St. Louis & S. F. R. Co. v. Conarty.* — Ark. —, 155 S. W. 93.

⁹⁷ An employee in car shops connected with an interstate track, who was employed in repairing a car used by the defendant railroad indiscriminately in both interstate and intrastate commerce, is engaged in interstate commerce within the meaning of the act. *Northern P. R. Co. v. Maerkl.* 117 C. C. A. 237, 198 Fed. 1.

An employee who is engaged in repairing an engine used in hauling interstate trains after it has completed one haul and is about to return is engaged in interstate commerce. *Baltimore & O. R. Co. v. Darr.* ante, 4.

A locomotive engineer engaged in inspecting and oiling an engine which had just been taken from the shop where it had been repaired, and was located on a side track, being made ready for a trial trip, is engaged in interstate commerce. *Lloyd v. North Carolina R. Co.* — N. C. —, 78 S. E. 489.

In *ILLINOIS C. R. Co. v. Doherty*, ante, 31, it was conceded that an employee engaged in repairing a car which was used in interstate commerce was himself engaged in such commerce.

In *Heimbach v. Lehigh Valley R. Co.* 197 Fed. 579, it was held that employees engaged in repairing a car which had been transported from one state into another, but which had reached the end of its journey, and had been unloaded, and was put on a side track for the purpose of repair, are not engaged in interstate commerce. This case was decided upon the authority of the decision of the Federal court in the Pedersen Case, which was overruled by the Supreme Court.

⁹⁸ “We reach the conclusion that the employee is not employed by the carrier in interstate commerce where he is engaged in constructing or repairing an appliance, which appliance may thereafter be used to facilitate intrastate or interstate transportation, as occasion may require, and is intended for such use, but is not, at the time the repairs in question are being made, in use for the purpose of facilitating interstate transportation.” *Ruck v. Chicago, M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074.

the work of clearing away wreckage from interstate tracks is as much an engaging in interstate commerce as any other work of repairing the tracks seems beyond dispute. And if the repairing of the appliance was for the purpose of rendering it available for immediate use in removing an existing wreck, such work would seem to be as closely connected with interstate traffic as is the repairing of an engine or car which had completed an interstate run, and was being fitted for another run. It is true that in the present case the appliance was to be used in the future, and not in the present, but so also were the fuel and water referred to in the cases in note 105, *infra*. There is one possible distinction between the cases cited in that note and the present case; there it was a certainty that fuel and water would be needed, while it was possible that no wreck would ever occur to affect the interstate transportation on the railroad; but in the former cases there also existed the possibility that all of the particular fuel and water that was being handled would be consumed in interstate commerce, while the possibility of wrecks is not so remote as to be a negligible consideration.

So, employees engaged in switching cars loaded with interstate freight are engaged

in interstate commerce.⁹⁹ And he is still within the statute although the cars are upon a siding at the time of the injury; ¹⁰⁰ So, also, he is within the statute although he may handle both interstate and intrastate cars,¹⁰¹ and was, at the time of the injury, working on an intrastate car.¹⁰² In one case, it was held that a brakeman, who was injured while attempting by means of a flying switch to cut out an intrastate car from an interstate train, was himself engaged in intrastate commerce.¹⁰³ In this case the brakeman was thrown off the intrastate car by the sudden stopping of the engine before the car had been detached from the interstate cars. This decision is contrary in spirit, at least, to those cited above, and was disapproved by the trial term judge in a New York case, who held that a brakeman injured while engaged in setting the hand brake on an intrastate car, which had been cut out from an interstate train and run upon a siding, by the negligence of his fellow brakeman in setting the air brakes, which caused the hand-brake wheel to revolve rapidly in the opposite direction from that in which the plaintiff was turning, was within the protection of the act.¹⁰⁴

It seems clear, in view of the Supreme

⁹⁹ A switchman engaged in switching a car loaded with interstate freight is engaged in interstate commerce. *Rich v. St. Louis & S. F. R. Co.* 166 Mo. App. 379, 148 S. W. 1011.

In *Barlow v. Lehigh Valley R. C.* — App. Div. —, 143 N. Y. Supp. 1053, it was held that an engineer engaged in switching cars loaded with coal to be used by defendant's engines in both interstate and intrastate transportation was within the protection of the statute.

¹⁰⁰ An engineer on an interstate train is still engaged in interstate commerce where, after reaching his destination, he is engaged in switching interstate cars preparatory to placing them in the yards, according to orders previously received. *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

A brakeman while at work in "cutting out" two intrastate cars from an interstate train is engaged in interstate commerce, and under the protection of the Federal statute, although at the time of the injury the cars had been actually disconnected and were on a siding. *Carr v. New York C. & H. R. R. Co.* 77 Misc. 346, 136 N. Y. Supp. 501.

¹⁰¹ A member of a switching crew which is engaged in moving cars between switches and the main track, where they are left and taken up by interstate trains for interstate transportation, as well as for transportation within the state, who is injured while attempting to move on a switch a tank car loaded with oil to be used for interstate engines as well as for the switch

engines, is employed in interstate commerce within the operation of the Federal act, although his duties are all performed in one state. *MONTGOMERY v. SOUTHERN P. Co.* ante, 13.

¹⁰² The fireman of a switch crew whose duty it was to switch cars in both intrastate and interstate commerce is within the protection of the act, although at the time of the injury he was actually working on an intrastate train. *Behrens v. Illinois C. R. Co.* 192 Fed. 581. The court said: "In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

¹⁰³ *Van Brimmer v. Texas & P. R. Co.* 190 Fed. 394.

¹⁰⁴ *Carr v. New York C. & H. R. R. Co.* supra. The court, after calling attention to the conflict between the *Behrens* and *Van Brimmer* Cases, said: "It is conceded that the train and crew of the defendant in this case, while hauling the

Court decisions, that employees engaged in the work of furnishing fuel and water for interstate engines are themselves engaged in interstate commerce, and it has been so held

in some decisions.¹⁰⁵ But the contrary view was taken in the Texas court of civil appeals.¹⁰⁶ The argument of the court does not deem to be conclusive, and is in-

train from Rochester to Buffalo, were engaged in interstate commerce. Can it fairly be said that during the ten or twenty minutes they were engaged in cutting out the two cars in question, and placing them on the siding at Tonawanda, they ceased to be so engaged? May it not be fairly argued that the placing of these cars on the siding was simply an incident to the operation of the entire train engaged in interstate commerce? Can it be distinguished in principle from the attaching of those cars to the train at the local station by the crew? And can it be successfully argued that when men engaged in operating an interstate train, for the convenience of the railroad, take onto such a train intrastate cars, they cease to be, for that particular act, interstate commerce agents? Is not the sounder and wiser view to regard such a train crew as retaining all the time, even when performing isolated acts relating to intrastate commerce, the legal relationship of men engaged in moving interstate commerce, and entitled to the protection of the Federal statute? . . . If we assume that the immediate act of placing the two cars on the siding at Tonawanda was not an act of interstate commerce, nevertheless that fact or circumstance, the Supreme Court says, is not controlling in determining the liability of the defendant under the Federal statute. The fact that the negligent employee is engaged in intrastate commerce at the time does not control, but, as the court said, it is 'the effect of the injury upon interstate commerce' which is the criterion of congressional power to legislate on the subject. The defendant, the New York Central & Hudson River Railroad Company, was engaged generally in interstate commerce. This particular train was engaged in such commerce. The plaintiff and his fellow brakeman were engaged in interstate commerce when manning the train. Assuming they were doing intrastate commerce duties while placing the two cars in question, they still remained all the time in the employ of the defendant, and in charge of the operation of the interstate commerce train from which the two cars in question were taken. While cutting out the cars in question at Tonawanda, they still continued their relationship to the rest of the train as interstate commerce agents. Placing the cars upon the siding was but incidental to their main employment. Any accident or injury to one or more of the crew, to that extent, tended to unman the train about to proceed in interstate commerce, and to disable one or more of such a crew might impede and delay the progress of the train on its way, and affect its safety and despatch. The safety of the plaintiff, as one of the trainmen charged with the movement of the remaining cars of the train, had an

important bearing and direct relationship to the movement of interstate commerce, and his injuries, and consequent inability to discharge his duties as brakeman on the train about to proceed, directly affected such commerce."

¹⁰⁵ An interstate railroad when engaged in moving cars of water or coal over its own lines from one state into another, for use in its own engines, is engaged in interstate commerce. *Barker v. Kansas City, M. & O. R. Co.* 88 Kan. 767, 43 L.R.A. (N.S.) 1121, 129 Pac. 1151.

A member of a switching crew injured while attempting to move on a switch a tank car loaded with oil, for use both on switch engines and engines engaged in interstate commerce, is himself engaged in such commerce. *MONTGOMERY v. SOUTHERN P. Co.* ante, 13.

In *HORTON v. OREGON-WASHINGTON R. & NAV. Co.* ante, 8, it was held that an employee whose duty it was to pump water to be used by engines both for interstate and intrastate commerce was within the protection of the statute while he was proceeding from his home to his place of work upon a small hand car which had been furnished to him by the railroad company for that purpose. The court said: "Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. This demonstrates the 'real or substantial' connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too finespun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice."

¹⁰⁶ A brakeman on a train used to carry

consistent with that of the other courts cited above.¹⁰⁷ The work of putting ice on interstate trains has been held to be within the purview of the statute.¹⁰⁸

3. General effect of decisions.

The original act was declared invalid because the court said that Congress attempted to embrace within the application of the act employees of interstate railroads who were not themselves employed in furthering such commerce. In view, however, of the decisions as to what employees are within the protection of the act, it would seem that the act of 1908 has by judicial construction been extended as far as the court said that Congress went in the earlier act. If an employee in carrying a bag of rivets and bolts to be used in repairing a bridge over which interstate commerce would pass is engaged in interstate commerce, as the Supreme Court in the Pedersen Case said he was, it would seem to require a rather vivid imagination to conceive of an occupation in which an employee of an interstate railroad could be employed which

would not be connected in some way with the furtherance of interstate commerce. This was pointed out by Mr. Justice Lamar in his dissenting opinion in the Pedersen Case, which is concurred in by Mr. Justice Holmes and Mr. Justice Lurton.¹⁰⁹

The above comment is not made as a criticism of the theoretical correctness of either of these decisions, but rather as a suggestion of the practical effect of the act of 1908 as construed by the court.

VIII. Defenses abrogated or modified.

1. Fellow-servant doctrine.

Probably the most important change in the common law made by the Federal statute is the entire abrogation of the so-called fellow-servant doctrine, so that the common carrier is liable for an injury to an employee though it be caused by the negligence of a fellow servant. That this is the result of the operation of the statute has not been questioned in any decision, and has been held either expressly or by implication in practically every case which has touched upon the law in any point.

water to a tank for the use of the engines on the road is not engaged in interstate commerce merely because some of the engines taking water from the tank are engaged in interstate commerce. *Missouri, K. & T. R. Co. v. Fesmire*, — Tex. Civ. App. —, 150 S. W. 201.

¹⁰⁷ The court said: "It occurs to us that Fesmire was essentially not engaged in interstate commerce. The duties he was performing were inconsistent with the primary meaning of the term. What he did served no interstate traveler or shipper. His duties were those of a brakeman on a train that hauled water from a point in Dallas county to a point in Rockwall county. If it be conceded that the water he was helping haul might ultimately be used by some train passing that point, yet the proof shows that yet another employee must pump the water into the elevated tank before it could be used by any passing train. If this be interstate traffic, what, then, is intrastate traffic? When the train crew loaded the water on the cars at Honey Springs in Dallas county, and unloaded same in Rockwall county, their duty was fulfilled; yet, as unloaded, no train could use the water until it was by some process pumped into the elevated tank and from thence into a passing engine; and since the record fails to sustain the claim that the water was to be used for interstate commerce, and because in our opinion, even though the water so hauled might at some time be used by a train so engaged, it could not in law be deduced therefrom that Fesmire was employed on a train engaged in any sense in such commerce, we conclude the assignment of error is not sound, and the same is overruled."

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¹⁰⁸ A brakeman approaching an interstate train with ice intended to cool certain hot boxes and for use on the interstate train is engaged in interstate commerce. *Illinois C. R. Co. v. Nelson*, 203 Fed. 956.

In *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033, it was held that an employee engaged in putting ice into the ice box of a passenger coach which was carrying both intrastate and interstate passengers was engaged in interstate commerce. This view, however, was not approved by the supreme court, but the latter court did not pass upon the question, a writ of error being refused on other grounds (— Tex. —, 148 S. W. 290).

¹⁰⁹ Mr. Justice Lamar says: "It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers."

2. Contributory negligence.

Under the express provisions of the act, contributory negligence is no defense,¹¹⁰ but if the injured employee was negligent, that fact merely goes to a diminution of the damages.¹¹¹ In such a case it is for the jury to apportion the damages.¹¹²

In reducing the damages recoverable on account of the contributory negligence of the employee, only such negligence as

proximately contributes to the injury is to be considered, although the accident happened in a state under the rules of which any negligence of the person injured which even remotely contributes to the accident is taken into account.¹¹³

Under the statute, the question of the employee's contributory negligence is for the jury.¹¹⁴ A nonsuit on this ground is error,¹¹⁵ and the court cannot instruct the jury to find for the defendant in case it

¹¹⁰ *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937; *Carter v. Kansas City Southern R. Co.* — Tex. Civ. App. —, 155 S. W. 638.

The plaintiff is not required to show that he is free from fault. *Charleston & W. C. R. Co. v. Brown*, — Ga. App. —, 79 S. E. 932.

¹¹¹ *Cain v. Southern R. Co.* 199 Fed. 211; *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836; *Neil v. Idaho & W. N. R. Co.* 22 Idaho, 74, 125 Pac. 331; *McDonald v. Railway Transfer Co.* 121 Minn. 273, 141 N. W. 177; *Atchison, T. & S. F. R. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596.

In an action under the Federal act the charge that there may be a recovery even if both the railroad company and the employee were negligent, though the damages may be diminished in proportion to the negligence attributable to the employee, is not erroneous. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

An instruction that the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), requires that where the plaintiff has been guilty of contributory negligence, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, is not objectionable because the court further said that such negligence "goes by way of diminution of damages," since this statement must not be regarded as a qualifying one, but merely as intended to repeat the statutory requirement in somewhat different terms. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654.

In *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, the court, in discussing the question of contributory negligence, said: "If, under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was

the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

In *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887, it was held that the court did not err in instructing the jury that they might, if they found defendant guilty, assess the amount of damages which the evidence showed the widow and children had sustained, and then diminish that amount in proportion to the amount of negligence attributable to such decedent.

¹¹² The trial court did not err in permitting the jury to compare the negligence of the deceased employee with the negligence of the defendant carrier, and to render a verdict in favor of the plaintiff if they found the negligence of the decedent slight, and that of the defendant gross. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A. (N.S.) —.

In *Fleming v. Norfolk Southern R. Co.* 160 N. C. 196, 76 S. E. 212, it was held that where the plaintiff's contributory negligence was shown, the judge should direct the jury in general terms that such fact is no bar to recovery, but the same should be considered in diminution of damages.

The direction in the employers' liability act of April 22, 1908, that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employee, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. *Norfolk & W. R. Co. v. Earnest*, supra.

It is a question of fact for a jury to apportion the negligence of an employer and an employee. *Fogarty v. Northern P. R. Co.* — Wash. —, 133 Pac. 609.

¹¹³ *Illinois C. R. Co. v. Porter*, — C. C. A. —, 207 Fed. 311 (cause of action arose in Tennessee, where the doctrine of comparative negligence prevails).

¹¹⁴ *Sandidge v. Atchison, T. & S. F. R. Co.* 113 C. C. A. 653, 193 Fed. 867.

¹¹⁵ In *Horton v. Seaboard Air Line R. Co.* 157 N. C. 146, 72 S. E. 958, it was held that under the express terms of the Federal act the court is forbidden to direct a nonsuit

finds the plaintiff guilty of contributory negligence.¹¹⁶ In one case it was argued that if the jury should find from the evidence that the negligence of the plaintiff equaled or exceeded that of the defendant, then they should assess no damages against the defendant; but the court held that such a construction of the act was not the proper construction, it was only when the plaintiff's act was the sole cause of the injury that the defendant would be relieved from liability.¹¹⁷ In another case the court raised, but did not decide, the question whether or not the court could ever say that the negligence of the employee was, as a matter of law, so far in excess of the negligence of the employer that the jury would not be justified in returning a verdict for any amount.¹¹⁸

Although the contributory negligence of the plaintiff will not defeat a recovery, nevertheless, if such negligence is shown by the evidence, the defendant is ordinarily entitled to have a concrete definition of contributory negligence given to the jury.¹¹⁹ But if the alleged negligence of the carrier consists of a breach of some statutory duty, then, according to the express terms of the statute, it cannot rely upon contributory negligence for any purpose.¹²⁰

Contributory negligence, to be available

upon the ground that there was evidence of contributory negligence shown by the plaintiff's testimony.

¹¹⁶ CHICAGO G. W. R. Co. v. McCORMICK, ante, 18.

¹¹⁷ Louisville & N. R. Co. v. Wene, supra. See also Grand Trunk Western R. Co. v. Lindsay, supra.

Ellis v. Louisville, H. & St. L. R. Co. — Ky. —, 160 S. W. 512.

¹¹⁸ Fogarty v. Northern P. R. Co. supra.

¹¹⁹ Illinois C. R. Co. v. Nelson, 203 Fed. 956.

¹²⁰ Where the employee is injured because of the failure of a railroad to comply with the requirements of a safety-appliance act, the defense of contributory negligence is not applicable. Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643.

Where the trial court holds that the sole ground of recovery rests upon the alleged failure of the defendant to comply with the safety-appliance act, it follows that the defendant is not entitled for any purpose to rely upon the plaintiff's contributory negligence. Burho v. Minneapolis & St. L. R. Co. 121 Minn. 326, 141 N. W. 300.

See also Montgomery v. Carolina & N. W. R. Co. — N. C. —, 80 S. E. 83.

¹²¹ Fleming v. Norfolk Southern R. Co. supra.

¹²² In Central Vermont R. Co. v. Bethune, — C. C. A. —, 206 Fed. 868, in holding that a servant might assume the risk of the negligence of the railroad company in building its tracks so close together as

even as a partial defense, must be pleaded, according to the holding of the North Carolina court.¹²¹

3. Assumption of risk.

One of the points in respect to the act which does not as yet appear to be definitely determined is whether the defense of assumption of risk, where the railroad company has been negligent, is open to the master. If the negligence charged is the violation of a duty specifically imposed by statute, the defense is precluded by the express terms of the statute. But where the negligence alleged is not a violation of a statutory duty, there remains some confusion as to the actual effect of the statute.

In the majority of the cases, the rule prevails that the defense is still open to the master. The most reasonable ground of support to this view is that there would be no occasion for the express abrogation of the defense in case of the violation of a statute if the defense was in every case impliedly revoked by the statute as a whole.¹²³ The following statements in the United States Supreme Court decisions apparently support the view that the defense of assumption of risk is still open to the railroad except where the injury was due to

to be dangerous for employees on trains passing each other, the court, after calling attention to the fact that one provision of the act did exclude the defense where there was a violation of any statute, said: "In order that the provision might apply here, instead of using the words 'violation of any statute,' it should have been broadened out to cover all the obligations of a carrier, required either by the common law or by statute; and the construction now claimed by the plaintiff for this provision is too extreme and unnatural to be accepted."

Assumption of risk is a good defense to an action under the Federal act except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the employee; and when such defense is pleaded and supported by the evidence, it is the duty of the court to instruct thereon. Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151. The argument of the court was directed to the fact that as contributory negligence was expressly excluded as a defense, and as the defense of contributory negligence and of assumption of risk are distinct, it could not be assumed that Congress intended to exclude the latter, in the absence of express language to that effect, especially as the defense was expressly abrogated where the action was based upon the master's negligence in failing to obey the express requirements of a statute.

The doctrine of assumption of risk ap-

a violation of statute; but the question does not as yet appear to have been expressly decided by that court.¹²³

But the view that the defense is retained in other cases because it is expressly excluded where a statute has been violated is re-

pudiated in some cases.¹²⁴ That the defense is no longer open to the defendant is the view taken by other cases which base the decision upon various grounds.¹²⁵ In a Federal case it was held that a servant never assumed the risk of the master's

plies to an action under the statute. *Charleston & W. C. R. Co. v. Brown*, — Ga. App. —, 79 S. E. 932.

To the same effect, *Missouri, K. & T. R. Co. v. Scott*, — Tex. Civ. App. —, 160 S. W. 432.

The defense of assumption of risk remains as at common law except where the action is predicated upon the failure of a carrier to comply with any statute enacted for the safety of the employee. *Neil v. Idaho & W. N. R. Co.* 22 Idaho, 74, 125 Pac. 331.

A head brakeman does not, under the Federal act, assume any risk resulting from the failure of another member of the train crew to do his duty in respect to inspecting the cars, of which failure he was unaware. *Carter v. Kansas City Southern R. Co.* — Tex. Civ. App. —, 155 S. W. 638.

In *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033, it was held that the defense of assumption of risk was still open to the master in all cases except where the negligence complained of was the breach of a statutory duty. A writ of error was denied by the supreme court of the state (— Tex. —, 148 S. W. 290), but apparently the view taken by the supreme court was that the Federal act did not in any way affect the case.

In *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937, it was assumed without discussion that assumption of risk would bar a recovery.

¹²³ "It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition, a number of special requests asked by the railroad company in respect to several aspects of the facts were given. The contention is that, upon all of the evidence in the case, there was no sufficient evidence of any negligence for which the company was chargeable in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by." *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426.

"The rule that an employee was deemed to assume the risk of injury even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury." *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, 47 L.R.A.(N.S.)

¹²⁴ In *Wright v. Yazoo & M. Valley R. Co.* 197 Fed. 94, the court said: "It is conceded that the common-law rule that contributory negligence barred the right of recovery has been abolished by the act. Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier? In view of the first section of the act, which provides that such common carrier shall be liable in damages to its employee, resulting in whole or in part from the negligence of any of its officers, agents, or employees, it is not permissible, in my judgment, to hold that the employee assumes the risk of his employment, which arises from the negligence of the officers, agents, or employees of the carrier. It is insisted that since the act provides that he shall not be held to have assumed such risk in cases only where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury, the maxim, *Expressio unius est exclusio alterius*, applies. I do not think this insistence is sound, or that it should be sustained." This decision was affirmed (— C. C. A. —, 207 Fed. 281), the circuit court of appeals holding that there was no evidence tending to show that the employee knew the danger and appreciated the risk thereof.

In *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A.(N.S.) —, it was held that under the act of 1906 the defense of assumption of risk was not available to the defendant railroad. The court said: "We think this act was intended to quicken the responsibility of carriers, and by doing away with the doctrine of assumption of risk in cases based upon their negligence, compel them to take proper precautions for the safety of their servants." The court's attention was called to the fact that in the second act, passed in 1908, it was expressly provided that the doctrine of assumption of risk should not apply where the violation by the common carrier of any statute enacted for the safety of the employee was the basis of the action; but the court said that there was nothing in that statute which would lead them to think that it was not intended by Congress that the defense of assumption of risk should be abrogated by the act of 1906; and the court further said that they were not prepared to say that there was anything in the later act which compelled a different view from that which they had taken of the earlier one.

¹²⁵ In *Southern R. Co. v. Howerton*, —

negligence. Consequently, if the defendant was guilty of negligence in any manner, the question of assumption of risk did not arise. The court cites a long list of United States Supreme Court decisions in support of this rule, but, as a matter of fact, the decisions cited do not support it, but go no further than to hold that the servant does not assume the risk of the master's negligence of which he is ignorant. If the view taken in this case is correct, there certainly would be no occasion for the insertion in the statute of the provision of § 4, to the effect that the servant will not be held to have assumed the risk where the injury was due to a violation of a statute by the railroad, as such a violation would be negligence, and, under the rule asserted in the Sandidge Case, the servant would not assume the risk thereof.¹²⁶ And it has been held that the statute abolished the defense of assumption of risk by the section of the act which provided that no contract of employment entered into by or on behalf of any employee should constitute any bar or defense to an action brought to recover damages for personal injury to or death of such employee.¹²⁷ In a Federal case, however, it was held that § 5, referring to "any contract, rule, regulation, or device" looking to an exemption of the common carrier, relates only to some express undertaking or device of a specific character, wholly aside from mere implication of liabilities and rights growing out of the mere matter of employment.¹²⁸ The court very naturally took the view that the doctrine of assumption of risk was not an implied term of the contract of employment.

IX. For whose benefit the statute inures; survival of action.

As to applicability of the statute to injuries incurred while employees are not actively engaged in their duties, see subdivision VII., notes 82-84, *supra*.

Ind. App. —, 101 N. E. 121, the court seemed to assume that the defense of assumption of risk was not available in an action brought under the act, the same as the defenses of co-service and contributory negligence.

¹²⁶ Sandidge v. Atchison, T. & S. F. R. Co. 113 C. C. A. 653, 193 Fed. 867. As to servant's assumption of risk of master's negligence, see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

¹²⁷ Malloy v. Northern P. R. Co. 151 Fed. 1019.

¹²⁸ Central Vermont R. Co. v. Bethune, — C. C. A. —, 206 Fed. 868.

¹²⁹ Missouri K. & T. R. Co. v. West, — Okla. —, 134 Pac. 655.

The agent of an express company, employed and paid by it, and entitled to ride 47 L.R.A.(N.S.)

1. Employees of other companies.

Express messengers are not employees of the railroad so as to be within the protection of the Federal statute where they are employed by the express company, and their connection with the railroad, such as handling baggage, etc., is merely incidental to their employment by the express company.¹²⁹

Where, under the contract between the railroad company and the Pullman Car Company, the railroad company was simply to draw the cars of the Pullman company, it has been held that the porter upon the Pullman car was not an employee of the railroad, and consequently was not entitled to the benefit of the act.¹³⁰ But where the contract between the railroad company and the Pullman company provided that the two companies should own and operate the cars jointly, for their own benefit, then it has been held that the porter was an employee of the railroad company, and so within the purview of the Federal employers' liability act, although he may also have been in the employment of the Pullman company.¹³¹

2. Injured employee.

Primarily, the statute gives a cause of action to an employee injured while engaged in interstate commerce, and if the injury is not fatal, then no person other than the injured employee has any right of action.

3. In case of death of the employee.

(1) Nature of action.

The statute, however, provides for two distinct causes of action; one for the benefit of the injured employee himself, and one for certain prescribed beneficiaries in case of the death of the employee.¹³² The actions proceed upon different principles, and the damages recoverable by the relative

on the cars of a railroad company by reason of a contract between the two companies, will not be deemed a servant of the railroad company, so as to be within the application of the Federal act, in the absence of any proof that he was specially in the employ of the railroad company. Missouri, K. & T. R. Co. v. Blalack, — Tex. —, 147 S. W. 559.

¹³⁰ Robinson v. Baltimore & O. R. Co. 40 App. D. C. 169, — L.R.A.(N.S.) —.

¹³¹ Oliver v. Northern P. R. Co. 196 Fed. 432. The court said that persons employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords.

¹³² Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep.

dependent upon him do not include any damages which might have been recovered by the employee had he lived.¹³² And the liability to certain relatives dependent upon the decedent which is interposed by the act is not limited to cases where death was instantaneous, since the right of action thus created is independent of any cause of action which the decedent himself had while he lived.¹³⁴

(2) Beneficiaries; necessity of existence and dependence of.

In case of the death of the employee there

can be no recovery unless there is in existence some of the designated beneficiaries.¹³⁵ It is to be especially noted that the existence of one class of beneficiaries excludes the lower classes.¹³⁶ So, a dependent mother has no cause of action for the death of a son if he leaves a wife or child surviving.¹³⁷ And where the deceased employee leaves a widow and a sister, the action is properly brought by the personal representative for the widow alone.¹³⁸

There can be no recovery unless the designated beneficiary has suffered some pecuniary loss.¹³⁹ It is error to refuse to in-

192: Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715.

In McCULLOUGH v. CHICAGO, R. I. & P. R. Co. ante, 23, the court, in speaking of the beneficiaries, and of the character of the damages recoverable in case of the death of the employee, said: "This act does not provide for a survival of the cause of action arising to the decedent in his lifetime because of the injury which resulted in his death. It creates a new cause of action, not in favor of the estate of the deceased, but in favor of certain specified classes of beneficiaries. The cause of action is based not upon the injury to the deceased, but upon the fact of his death by wrongful act of the defendant. The extent of damage in each case is to be measured by the pecuniary loss sustained by the particular beneficiaries, rather than by the loss to the estate of the decedent as such."

¹³² In Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, in discussing the distinction between the cause of action given to the injured employee himself and to the defendants, the court said: "This cause of action is independent of any cause of action which the deceased had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."

In Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715, in holding that the cause of action given the injured employee was different from that given the surviving widow, etc., the court said: "As regards damages, the right of action in the employee (Lewis) involved only consequences of his injury; the new right of action involves only consequences of his death. These consequences are distinct and must not be confused. For example, the employee's pains resulting from the injuries were suffered by him, not by the beneficiaries; and the new right of action furnishes the beneficiaries no solatium for their distress of mind; their damages are measured by their pecuniary loss."

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The right of action given to the dependent relatives by the act is independent of that given to the decedent, and does not include any of the damages that he might have recovered from the carrier had he lived, but is given to them, for the pecuniary loss which they may have sustained because of his untimely death. Thomas v. Chicago & N. W. R. Co. 202 Fed. 766.

¹³⁴ Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495.

¹³⁵ Thomas v. Chicago & N. W. R. Co. 202 Fed. 766.

When the action is brought by the personal representative, it is necessary to allege in the complaint that there are in existence persons answering the description of the beneficiaries named in the statute, for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002.

¹³⁶ In McCULLOUGH v. CHICAGO, R. I. & P. R. Co. ante, 23, the court said: "It will be noted that the Federal act under consideration provides for three classes of beneficiaries in the alternative; preference being given in the order named. The existence of the second class excludes the third. If there be no representative of any of the three classes, then there is no cause of action."

As to failure of beneficiary first entitled under death statute to bring action, as giving such right to beneficiary next entitled, see note to Hammond v. Lewiston, A. & W. Street R. Co. 30 L.R.A.(N.S.) 78.

¹³⁷ St. Louis, S. F. & T. R. Co. v. Geer, — Tex. Civ. App. —, 149 S. W. 1178. In speaking of the beneficiaries under the act the court said: "Under the Federal statute, if there be persons of the first class mentioned therein, all the persons of the second and third class are excluded; and no cause of action is given for their benefit for any damages which may have resulted to them on account of the death of the employee."

¹³⁸ Second Employers' Liability Cases (Northern P. R. Co. v. Babcock) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 33 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

¹³⁹ Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192.

struct the jury that a daughter of the decedent, who is married, and resides with and is maintained by her husband, cannot recover in the absence of any allegation or evidence that she was in any way dependent upon the decedent, or that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life.¹⁴⁰

There is no presumption that the parents or other next of kin suffered any pecuniary loss.¹⁴¹ Consequently, if the action be brought on behalf of the parents, it is not enough to show their mere survival, but

To render one a dependent beneficiary under the act, he must have sustained some pecuniary loss on account of the death of the decedent. *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31.

¹⁴⁰ *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, reversing — Tex. Civ. App. —, 147 S. W. 1188. The court said: "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

¹⁴¹ There is no presumption in favor of substantial pecuniary loss to parents or dependent relatives. *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23.

In an action in favor of the parents and next of kin of a deceased employee, the complaint must allege that they suffered pecuniary loss because of his death. *ILLINOIS C. R. Co. v. Porter*, 207 Fed. 311.

Although ordinarily the presumption must be indulged that every decedent leaves heirs, there is no presumption that all or any of the next of kin of a decedent were dependent upon him. *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1002.

¹⁴² *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23.

Where the deceased employee left no wife or children, an averment of pecuniary loss or injury is necessary in regard to parents, although dependence in the sense in which the term is used in the statute with reference to next of kin is not essential to a recovery for the benefit of the parents. *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715.

Evidence that the father of the deceased employee was the owner of a large tract of land, and was the largest farmer in his neighborhood, that he was seventy-one years of age and growing feeble, that he relied on deceased as the manager of his farm, that deceased was strong in physique and health, well educated, and possessed of good business qualifications and an ap-
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pecuniary loss must be shown.¹⁴² In one case, the court seemed to take the view that pecuniary loss would not be presumed even in case of a wife and child.¹⁴³

(3) *Survival of the employee's action.*

(a) *Under the original act.*

See Index to L.R.A. Notes, under title Death, for notes upon various features of the so-called "death statutes."

The act of 1908, as originally passed, made no provision for the survival of the

titute for all kinds of machinery, including such as was used on the farm, that when he went away to engage in railroad work he stated that he would be back to gather the corn, that he was unmarried, and lived with his father and mother as one of the family, and that while he was not in receipt of fixed wages from his father, he was in the habit of receiving money from him when he desired it, presents prima facie a reasonable expectation of benefit from the continuance of the son's life, which, with proof of the value of such benefit, is susceptible of the estimate of pecuniary loss to the father and also to the mother, who was some eight years younger than the father. *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715.

The action may be maintained in behalf of widow, or husband, or children, or parents upon proof of a reasonable expectation of pecuniary benefit, but when it is for the benefit of others as next of kin, there must be proof of dependence. *Dooley v. Seaboard Air Line R. Co.* — N. C. —, 79 S. E. 970. The court in holding that the employee's father had a reasonable expectation of pecuniary benefits from the continuance of the life of his son, said: "The deceased was, according to the evidence, strong, healthy, intelligent, and industrious, and he was a young man of good habits and good character. He had helped his father and was so disposed to him that he would give him his last cent if the father needed it, and the father was growing old and while not actually dependent on the son for support at the time of death, he did not know how soon he might be."

¹⁴³ *Fogarty v. Northern P. R. Co.* — Wash. —, 133 Pac. 609. The court disapproved an instruction in the following words: "You are instructed that it was the legal duty of the deceased in his lifetime to care for and support his wife and child, even though he lived separate and apart from them, or they lived separate and apart from him; and this duty could not be avoided by him by any voluntary act on his part, and a wife and child have the right to recover damages for the death of the husband and father, caused by the negligence of another, independent of whether he has contributed anything to their support."

cause of action of the injured employee in the event of his death. 144

(b) *Under the amendment of 1910.*

By section 9 of the act which was added by the amendment approved April 5th, 1910, the cause of action given to the injured employee survived to his or her personal representative for the benefit of the surviving widow or husband and children of such injured employee, or to his parents, or to the next of kin dependent upon him. The beneficiaries of this cause of action are the same as those under the

the cause of action given for the death of the employee in the original act, and this action must be brought or carried on by the same person; namely, the personal representative. 145 So, also, no such cause of action survives unless there are such beneficiaries in existence. 146

X. Jurisdiction.

1. Of Federal courts.

The Federal courts have been held to have original jurisdiction over suits arising

¹⁴⁴ Second Employers' Liability Cases (New York, N. H. & H. R. Co. v. Walsh) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495; Fulgham v. Midland Valley R. Co. 167 Fed. 660, reversed in — L.R.A. (N.S.) —, 104 C. C. A. 151, 181 Fed. 91, upon the ground that no negligence on the part of the railroad company was shown; Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715; Cain v. Southern R. Co. 199 Fed. 211; Thomas v. Chicago & N. W. R. Co. 202 Fed. 766; ILLINOIS C. R. Co. v. DOHERTY, ante, 31; Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002.

Before the amendment of 1910, the cause of action which was created in behalf of the injured employee did not survive his death nor pass to his representatives. American R. Co. v. Didrickson, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224.

Prior to the amendment of 1910, the only right of action given by the act in case of death of the employee was one for the benefit of the next of kin; and no recovery could be had for the injury and pain suffered by the deceased. St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

In Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715, in holding that the cause of action does not survive, the court said: "It will be observed that the liability imposed is in damages (1) to the employee; (2) to the personal representative for the benefit of (a) the surviving widow . . . and children, and, if none, then (b) such employee's parents, and, if none, then (c) the next of kin dependent upon such employee. The damages mentioned are allowed in favor of different classes of persons, differently related to the deceased employee. The classes vary, and the purpose would seem to follow that the damages should also vary. The damages allowed to the injured employee are but declaratory of rights existing at common law; the damages allowed to the beneficiaries specified are dependent solely on the statute. It is easy to perceive why ordinarily the widow and children would suffer damages greater than would the par-

ents or next of kin. Indeed, the next of kin may be many in numbers, but none can recover without showing dependency. It is therefore hard to discern in this act a legislative intent to bestow the right of action so declared in favor of the injured employee upon these classes of beneficiaries alike, according as one or another should happen to survive the deceased."

In Fulgham v. Midland Valley R. Co. 167 Fed. 660 (reversed in — L.R.A. (N.S.) —, 104 C. C. A. 151, 181 Fed. 91, on ground that no negligence was shown), the court, in holding that the cause of action of an injured employee did not survive his death, said: "In the opinion of the court the right of action given to the injured employee by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. I might add that this conclusion is in harmony with the known purposes of the act, which was intended to make some provision for the unfortunate family of the deceased employee, and not to make provision for the creditors of his estate. Can it be supposed that Congress would make a railroad company the insurer of an employee, killed in its service, for the purpose of paying the debts the employee had incurred in his lifetime? And yet that would be the inevitable result if the contention of plaintiff's counsel is sound, for whatever is recovered on account of injuries sustained and for which the injured employee had a cause of action in his lifetime must go to his estate."

¹⁴⁵ In Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002, in speaking of the right of action which existed after the death of the injured employee, the court said: "It is to be observed that whether the action is for a recovery for the death of the employee or for injury sustained by him for which he might have maintained an action, the person who must bring or continue the action is the same, viz., the personal representative. The beneficiaries in each case are the same."

¹⁴⁶ Thomas v. Chicago & N. W. R. Co. 202 Fed. 766. The court said: "By that amendment, the right of recovery given to decedent survives his death; but not, however, for the benefit of his estate, but of

ing under the act.¹⁴⁷ Where the cause of action is based upon the statute, diversity of citizenship is not a requisite for the jurisdiction of the Federal court.¹⁴⁸

Prior to the amendment to § 6 of the act of 1910, however, a suit under the act could not have been brought in the Federal court except in the district of which the defendant was a resident, except with his consent,¹⁴⁹ and this is so, although there was also present the question of diversity of citizenship.¹⁵⁰

In a Federal case, the court, interpreting the amendment, said: "In any action brought in the proper district court of the United States under this act as thus amended, or removed thereto from any state court, it cannot rightly be said that the United States court 'has no jurisdiction thereof,' for under said act the proper state and United States courts are given concurrent jurisdiction of the same. It is obvious, however, that Congress by the amendment intended to give to the injured employee, or, in case of his death, his personal representative, the right to sue for such injuries or death, in either the proper

state or United States court; and if suit is brought therefor in the state court, the plaintiff may seasonably object to its removal by the defendant to a United States court, and, if removed over his objection, he may have it remanded by the United States court to the state court from which it is removed. Should he not, however, if the cause is removed to the United States court, seasonably move to remand the same, and should consent to its remaining in the United States court, the action may rightly proceed to final judgment therein the same as though it had been originally brought in that court."¹⁵¹

In one case it was held that a suit could, with the consent of the parties, be brought in any district.¹⁵²

In a number of cases involving the Federal employers' liability act, the United States Supreme Court has passed upon the question whether or not the case presented a Federal question so as to be reviewable by that court. These cases are set out in the note, although some of the points raised may not be peculiar to causes arising under the act.¹⁵³

specified relatives in the order stated, and for the pecuniary loss which they may have sustained because of his death. If no such relative survives the decedent, then no right of recovery is given by the act to his personal representative."

¹⁴⁷ Clark v. Southern P. Co. 175 Fed. 122.

¹⁴⁸ Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527.

A writ of error lies from the Federal Supreme Court to review a judgment of a circuit court of appeals, which affirmed a judgment of the circuit court, founded upon the employers' liability act, where the matter in controversy exceeds \$1,000, since the jurisdiction of the circuit court was not dependent entirely upon the diversity of citizenship. Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135.

¹⁴⁹ Newell v. Baltimore & O. R. Co. 181 Fed. 698. The court said that the very fact that such an amendment was deemed necessary by Congress was persuasive that, prior to such amendment, an action under the act could only be brought in the district of which the defendant was an inhabitant.

A suit under the act cannot be maintained in any district other than that in which the defendant is an inhabitant, except with his consent. Smith v. Detroit & T. Short Line R. Co. 175 Fed. 506; Whitaker v. Illinois C. R. Co. 176 Fed. 130.

¹⁵⁰ Cound v. Atchison, T. & S. F. R. Co. supra.

¹⁵¹ Thomas v. Chicago & N. W. R. Co. 202 Fed. 766, which denied a motion to remand upon the ground that the complaint based upon the death of the em-

ployee failed to allege the existence of any of the beneficiaries prescribed by the statute.

¹⁵² Clark v. Southern P. Co. 175 Fed. 122.

¹⁵³ The contention of the defendant railway company sued in a state court, under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged and while he was employed by it in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Federal employers' liability act of 1908; and that it was liable only to his personal representative, and not to the plaintiff, his wife and parents,—presents a Federal question, which, when decided by the state court, will support a writ of error from the Federal Supreme Court. St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, reversing — Tex. Civ. App. —, 148 S. W. 1099.

A judgment of the Texas supreme court which, reversing the judgment of the court of civil appeals of that state, affirmed the judgment of the trial court, entered on a verdict in favor of the plaintiff in an action against a railway company for the negligent killing of an employee in the territory of New Mexico, is reviewable in the Federal Supreme Court as necessarily deciding against a Federal right specially set up, where the trial court sustained a demurrer to a plea setting up a defense under a statute of the territory which, if applicable, was a complete bar to the action because of noncompliance with its requirements, although the decision of the state supreme court proceeded upon the theory that the case was controlled by the Federal employers' liability act, which

2. Removal of causes.

See Index to L.R.A. Notes under title Removal of Causes, for notes discussing various questions arising under the removal act.

Before the amendment of 1910, there was considerable conflict of opinion upon the right of the defendant to have the cause removed to the Federal courts. Under the original act, diversity of citizenship was a sufficient cause of removal.¹⁵⁴ In a number of cases, it has been held that the mere fact that the action was brought under the act did not show that a Federal question was involved, so as to justify a removal on that ground.¹⁵⁵ On the other hand, it has been held that where the action was based upon the Federal statute, a Federal question was necessarily involved.¹⁵⁶ A case is properly removed to the Federal court

where it is necessary to determine the meaning of the phrase, "person employed by such carrier in such commerce," used in the act of 1908.¹⁵⁷

In one case it was held that where a widow brings a suit in accordance with the terms of an act of the state, such action is not removable upon the ground that it involves the construction of a Federal law, notwithstanding the husband was killed while engaged in interstate commerce.¹⁵⁸ But this case cannot be considered as authority, since it proceeded upon the erroneous theory that the act did not supersede all state laws.

In the note will be found a number of cases passing upon the right of removal, in some of which it does not appear that the conclusion reached by the court was in any way affected by the fact that the plaintiff was suing under the Federal act.¹⁵⁹

it held to be valid. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426.

A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, U. S. Comp. Supp. 1911, p. 1321), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, i. e., defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

A Federal question must be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised, and decided it. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

¹⁵⁴ *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 701.

¹⁵⁵ In *Miller v. Illinois C. R. Co.* 168 Fed. 982, it was held that the mere fact that an employee of a railroad company brought an action for personal injury under the employers' liability act of 1908 did not make the case removable, where it did not appear from the declaration that the construction of the Federal act was involved.

The fact that a suit is brought under the Federal employers' liability act, and that its application may be necessary in the progress of the case, does not justify a 47 L.R.A.(N.S.)

removal to a Federal court, unless the construction of the act be involved, and unless the final determination of the case depends upon such construction. *Nelson v. Southern R. Co.* 172 Fed. 478; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994.

¹⁵⁶ A suit brought under the act presents a Federal question. *Smith v. Detroit & T. Shore Line R. Co.* 175 Fed. 506.

In *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527, it was held that since the act succeeded the common law upon the subject, and was the only law under which the suit could be brought, it necessarily involved the construction, application, and effect of an act of Congress, and, tested by all the authorities, was one arising under a law of the United States.

The Cound Case was followed by *Clark v. Southern P. Co.* 175 Fed. 122.

If both the injured employee and the carrier were engaged in interstate commerce at the time of the injury, the employers' liability act, superseding all other law, must be controlling on the question of the jurisdiction of the Federal court and the right of removal. *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 318.

¹⁵⁷ *Colasurdo v. Central R. Co.* 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

¹⁵⁸ *Thompson v. Wabash R. Co.* 184 Fed. 554.

¹⁵⁹ A cause of action based on the Federal employers' liability act, between citizens of Wisconsin, cannot be removed from the state court of Minnesota to the Federal circuit court in the district of Minnesota. *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994.

Where neither of the parties is a resident of the district, the consent of both the plaintiff and the defendant seems to be necessary for the removal of a case brought under the employers' liability act. *Bottoms v. St. Louis & S. F. R. Co.* supra.

There is no right of removal to the circuit court of Georgia where the plain-

Under the amendment of 1910, to § 6, providing that no case arising under the act in any state court of competent jurisdiction should be removed to any Federal court, one case held that a litigant is not deprived of his right to remove his case to a Federal court if he had such right independent of the act.¹⁶⁰ But the great weight of authority is that a cause of action based on the act is not removable because of diversity of citizenship,¹⁶¹ nor on any other ground.¹⁶² A case is not removable where a cause of action is made out under the Federal statute, even if a

cause of action is also made out at common law and also under a state statute.¹⁶³ And it has been held that, even if the plaintiff fraudulently joins a coemployee as defendant, so as to prevent a removal, such joinder will be ignored, and the case treated as though it was solely against the corporate defendant.¹⁶⁴ In one case, this point was raised, but not decided in one case, as the court held that the joinder was not fraudulent.¹⁶⁵

A cause of action based upon the statute is not removable, even if it appears that ultimately there can be no recovery under

tiff is a citizen of Alabama and the defendant a citizen of Missouri. *Ibid.* It was held that where a case had been removed to the Federal court in a district which would not have jurisdiction of the case originally, the case would be remanded on the motion of the plaintiff, although the case had been removed because it was brought under an act of Congress.

On a motion to remand a cause in which the complaint alleged facts which might justify a recovery on three grounds of liability, namely, the Federal statute, the common-law liability, and the Massachusetts statute, the Federal court cannot impose the condition, in remanding the case, that the plaintiff elect, as a condition of remanding, that he will at the trial stand on the Federal act. *Rice v. Boston & M. R. Co.* 203 Fed. 580.

Where the plaintiff was a citizen of a territory, the cause cannot be removed upon the ground of diversity of citizenship, since the citizen of a territory is not the citizen of a state. *Clark v. Southern P. R. Co.* supra.

¹⁶⁰ *Van Brimmer v. Texas & P. R. Co.* 190 Fed. 394.

¹⁶¹ *McChesney v. Illinois C. R. Co.* 197 Fed. 85; *De Atley v. Chesapeake & O. R. Co.* 201 Fed. 591; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 578; *St. Louis & S. F. R. Co. v. Conarty*. — Ark. —, 155 S. W. 93; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

The provision in the Federal employers' liability act forbidding the removal of causes from the state to the Federal court prevents removal in such cases on the ground of diversity of citizenship. *TEEL v. CHESAPEAKE & O. R. Co.* ante, 21.

¹⁶² *Hulac v. Chicago & N. W. R. Co.* 194 Fed. 747; *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602; *Patton v. Cincinnati, N. O. & T. P. R. Co.* 208 Fed. 29.

The amendment of April 5, 1910, takes the cases arising under the act out of the operation of the removal act. *Symonds v. St. Louis & S. F. R. Co.* 192 Fed. 353.

In *Saiek v. Pennsylvania R. Co.* 193 Fed. 303, it was held that no suit brought under the act was removable, even if it involved more than \$2,000 and there was a diversity of citizenship. To the same effect, *Ullrich* 47 L.R.A.(N.S.)

v. New York, N. H. & H. R. Co. 193 Fed. 768.

¹⁶³ *Rice v. Boston & M. R. Co.* supra; *Ullrich v. New York, N. H. & H. R. Co.* 193 Fed. 768.

¹⁶⁴ In *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602, where the plaintiff joined the alleged negligent coemployee with the railroad company as defendant, the court, in holding that such joinder, even if it would have been proper had the action been brought under another statute, did not make the cause removable, said: "What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the national statute, and one against the individual defendant under the state statute, and it may be accepted that they are improperly joined. Had the suit been against the corporate defendant alone, it would not have been removable. Does, then, the fact of the improper joinder of the cause of action against the corporate defendant with the cause of action against the individual defendant render it removable? The effect of such joinder is to make in the suit what is called a separable controversy, i. e., a controversy between the plaintiff and the corporate defendant, which is wholly between them, and can be fully determined between them. If it were not for the prohibition against removal in the employers' liability act, this circumstance would render the cause removable, notwithstanding the joinder of the individual defendant. The question here, then, comes to this: Does that prohibition apply to a controversy arising under the employers' liability act, which is a separable controversy in a suit, or is it limited to one that is the sole controversy therein? The answer to this question depends on whether, because of the joinder therewith of another controversy, the case can be said to arise under the act. It does not wholly arise thereunder; i. e., it does not arise thereunder so far as such other controversy is concerned. But it does arise thereunder so far as the controversy as to the liability on that act is concerned."

¹⁶⁵ In *Lloyd v. North Carolina R. Co.* — N. C. —, 78 S. E. 489, it was assumed, although possibly only for the sake of the argument, that where the plaintiff had

the act.¹⁶⁶ But a motion to remand based solely on the ground that the suit was brought upon the act will be denied where the plaintiff's complaint does not allege facts sufficient to show that the action was intended to be brought under the Federal liability act.¹⁶⁷

By § 28 of the Judicial Code of March 3, 1911, it is provided "that no case arising" under the Federal employers' liability act,

and brought in any state court of competent jurisdiction, shall be removed to any Federal court. This provision has removed any question which may have existed before as to the removability of causes arising under the act.¹⁶⁸

It has been pointed out in one case that the withdrawal of the right of removal to the Federal courts is in line with the general policy of the act.¹⁶⁹

fraudulently joined a resident defendant for the sake of preventing a removal, such a removal might be had notwithstanding the action was brought under the act. In this case, where the defendant alleged that the plaintiff had joined a resident defendant fraudulently for the purpose of preventing a removal, it was held that the charge of fraud could not be sustained where it appeared that, at the time of the injury, the plaintiff was in the employ of the defendant as a locomotive engineer; that he had been operating the engine over a portion of the state railroad which was used as a part of the trunk line of the interstate railroad; and that, at the time of the injury, he was engaged in inspecting and oiling an engine which had just come from the shop for repairs, with a view of taking the engine for further service for the company.

¹⁶⁶ A suit against the common carrier engaged in interstate commerce, by one of its employees therein, to recover damages for an injury caused by the negligence of one of its officers, agents, and employees, arises under the act, even if the facts alleged did not make out that there had been negligence as charged. *De Atley v. Chesapeake & O. R. Co.* 201 Fed. 591.

In *Stafford v. Norfolk & W. R. Co.* 202 Fed. 605, it was held that where plaintiff claimed that the action was within the act, and based his right to recover solely upon it, the case was one arising under the act, even though it be conceded that the plaintiff's intestate was not employed in interstate commerce, and that plaintiff ultimately would not be able to recover under the act.

¹⁶⁷ *Thomas v. Chicago & N. W. R. Co.* 202 Fed. 766.

¹⁶⁸ "The law is stronger against removability since then [the passage of the new Judicial Code] than before." *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

"The plain reading and effect is to prohibit the removal of a case arising under that act to the Federal court." *Rice v. Boston & M. R. Co.* 203 Fed. 580.

So, in *Strauser v. Chicago, B. & Q. R. Co.* 193 Fed. 293, it was held that by the amendment to the Judicial Code, Congress plainly shows its intention that no case should be removed from the state court upon any ground, provided it arose under the act of Congress relative to employees.

In *Lee v. Toledo, St. L. & W. R. Co.* 193 Fed. 685, it was held that whatever may have been the rule before, § 28 of the 47 L.R.A.(N.S.)

Judicial Code of March 3, 1911, in force January 1, 1912, provided definitely that no case arising under the act shall be removed. The court, citing *Van Brimmer v. Texas & P. R. Co.* 190 Fed. 394, cited supra, was of the opinion, however, that prior to the amendment to the Judicial Code, there was no intention to destroy or withhold the right of removal which the defendant might have by virtue of some provision of the law other than the employers' liability act.

¹⁶⁹ In *Hulac v. Chicago & N. W. R. Co.* 194 Fed. 747, the court said: "It is a well-recognized fact in judicial history that plaintiffs in actions brought by employees against railway companies for damages resulting from personal injuries have quite generally, and for many years, sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the Federal courts. The expense of trials and of appeals in the Federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and Federal courts has also been well understood. Congress has recognized by the employers' liability act, as well as by the safety appliance acts, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the employers' liability act was the granting of additional rights to the servant, and the removal of existing defenses by the master, in actions by injured employees against railway companies. One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated. The amendatory act of Congress gives concurrent jurisdiction to the courts of the United States with the courts of the states, and increases the number of districts in which the plaintiff may sue in the United States courts, and, while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground."

In *Lloyd v. North Carolina R. Co.* — N. C. —, 78 S. E. 489, it was said that it was no doubt the purpose and effect of the amendment of 1910 to withdraw the right of removal in cases arising under the statute when the action has been instituted in the state court, and to require that liti-

In a recent case in which the requisite diversity of citizenship and amount in dispute were present, it was held, on a motion to remand, that the prohibition against removal was for the benefit of plaintiff solely, and, being a personal privilege, might be waived by him.¹⁷⁰ And it has been held that other provisions of the removal law may be waived.¹⁷¹

On the other hand, it has been held in a still more recent case in a Federal court, that the prohibition against removal contained in the act and in the Judicial Code is not a personal privilege or exemption which may be waived by appearance or consent, but is a limitation of the jurisdiction of the Federal courts entirely withholding from them jurisdiction through removal proceedings of cases arising under the employers' liability act which have

previously been commenced in state courts of competent jurisdiction.^{171a}

3. Enforcement in state courts.

Apparently the only court which ever questioned the right of the state court to enforce the Federal act was the supreme court of Connecticut.¹⁷³ It has now, however, been definitely determined by the United States Supreme Court that the state court has jurisdiction over a suit brought under the act, and that the rights arising under the act "may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."¹⁷³ In a considerable number of decisions of the state courts and of the lower courts, the same view has been taken, some of the cases arising before the decision of the United States Supreme Court.¹⁷⁴ These

gants desiring to have the result of the trial reviewed by reason of the presence of the Federal question shall proceed by writ of error to the state court making final disposition of the cause in its jurisdiction.

¹⁷⁰ *Stephens v. Chicago, M. & P. S. R. Co.* 206 Fed. 854.

¹⁷¹ Where the case involves a Federal question under the Federal employers' liability act, the parties may agree to try it in a Federal district other than that in which the defendant is an inhabitant. *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994.

If an action arising under the statute has been removed from a state court to the Federal court, and the parties accept the jurisdiction of that court, such removal cannot be questioned on appeal, since the action might originally have been brought and maintained by the plaintiff in a Federal court. *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715.

^{171a} *Patton v. Cincinnati, N. O. & T. P. R. Co.* 208 Fed. 29. The court said: "It results that, as Congress has expressly withheld from the Federal courts, as a class, jurisdiction in cases arising under the employers' liability act previously brought in a state court, the plaintiff could not, under the rule laid down in the cases above cited, waive his objection to the want of jurisdiction in this court by filing his declaration in this court, or otherwise, and could not, even by express consent, confer jurisdiction upon this court under the removal proceedings in this cause; and, it appearing that jurisdiction in a case of this character has been expressly withheld from the Federal courts by the acts of Congress, it would clearly be the duty of the court, even in the absence of a motion to remand, upon its own motion, when such want of jurisdiction is brought to its attention, to remand the case to the state court, under the provisions of § 37 of the Judicial Code."

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¹⁷³ See *Mondou v. New York, N. H. & H. R. Co.* 82 Conn. 373, 73 Atl. 762; *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42.

¹⁷³ Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 324, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

¹⁷⁴ *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893, disapproving *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Cas. 42; *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 875; *Midland Valley R. Co. v. Lemoyne*, 104 Ark. 327, 148 S. W. 654; *Atlantic Coast Line R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937, disapproving the conclusion of the Connecticut court in the *Hoxie* Case; *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A.(N.S.) 684, 128 N. W. 1; *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23; *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 701; *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31; *Owens v. Chicago G. W. R. Co.* 113 Minn. 49, 128 N. W. 1011; *Golligher v. Pennsylvania R. Co.* 237 Pa. 152, 85 Atl. 129; *Missouri, K. & T. R. Co. v. Blalack*, — Tex. Civ. App. —, 128 S. W. 706, affirmed in — Tex. —, 147 S. W. 559; *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

The amendment of April 5, 1910, which expressly gave concurrent jurisdiction to the Federal and the state courts over causes of action under the act, was a legislative precaution intended to remove doubt rather than to supply a deficiency, since the courts had such concurrent jurisdiction under the original act. *Zikos v. Oregon R. & Nav. Co.* 179 Fed. 893.

cases are discussed at length in a note to *Bradbury v. Chicago, R. I. & P. R. Co.* 40 L.R.A.(N.S.) 684.

4. Enforcement in admiralty.

The act will be enforced in admiralty.¹⁷⁵

XI. Parties.

1. Plaintiff.

In case of the death of the injured employee, the cause of action is purely statutory, and the provisions of the statute giving a cause of action to the personal representative must be closely followed. The widow cannot maintain a cause of action in her own name,¹⁷⁶ even if it is for the benefit of herself and as next friend of her minor children;¹⁷⁷ or in her own behalf and on behalf of the minor children and parents of the deceased.¹⁷⁸ So, an

action brought by a widow and her son must be dismissed.¹⁷⁹ Nor has the next of kin any right to bring an action under the statute, even if there is no personal representative;¹⁸⁰ and the sole beneficiary, except he is also the personal representative, cannot maintain an action.¹⁸¹ The action must in all cases be brought by the personal representative.¹⁸²

The objection that the action was brought by the widow in her own name, instead of as the personal representative of the deceased, may be brought to the appellate court's attention by exception, and is not waived on account of failure of an objection *in limine*.¹⁸³ The defendant does not waive its right to insist upon the defense that the action was brought by the widow for herself, and not by the personal representative of the deceased, by first answering to the merits, and then setting up the defense as to parties by amendment.¹⁸⁴

¹⁷⁵ *The Passaic*, 190 Fed. 644, affirmed in — C. C. A. —, 204 Fed. 266.

¹⁷⁶ *Thompson v. Wabash R. Co.* 184 Fed. 554; *Rich v. St. Louis & S. F. R. Co.* 166 Mo. App. 379, 148 S. W. 1011.

A demurrer to a complaint brought by a widow in her own behalf will be sustained. *Dewberry v. Southern R. Co.* 175 Fed. 307.

¹⁷⁷ *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185; *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841.

¹⁷⁸ The suit must be brought by the personal representative, and cannot be brought by the widow in her own behalf and on behalf of the parents and minor children of the deceased. *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

¹⁷⁹ In *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603, it was held that the widow and son of a deceased railway employee cannot bring in their own name the action for damages given by the employers' liability act of 1908, § 2, "to his or her personal representative for the benefit of the surviving widow or husband and children of such employee," — especially in *Porto Rico*, where the distinction between heirs and personal representatives is recognized, and where there existed a local employers' liability act when the Federal statute was enacted, which gave a cause of action, if the condition of liability existed, to the widow of the deceased, or to his children or dependent parents.

¹⁸⁰ The "if none" in § 1 of the act refers to the beneficiaries, and not to the representative. *Fithian v. St. Louis & S. F. R. Co.* 188 Fed. 842.

¹⁸¹ Under the Federal statute a plaintiff cannot, although sole beneficiary, maintain an action except as personal representative. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135. 47 L.R.A.(N.S.)

¹⁸² See cases cited in last notes. See also subdivision IX. 3, as to cause of action in case of death of employee.

In *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1002, in speaking of the right of action which existed after the death of the injured employee, the court said: "It is to be observed that whether the action is for a recovery for the death of the employee, or for injuries sustained by him for which he might have maintained an action, the person who must bring or continue the action is the same, viz., the personal representative. The beneficiaries in each case are the same."

Where one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute, to recover from the company damages therefor, and such injury results in the death of the injured person, damages resulting from the personal suffering and from such death not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute. *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

¹⁸³ *Eastern R. Co. v. Ellis*, *supra*.

In *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185, the court said: "By that act, no one in express terms is authorized to bring the suit, but the cause of action is given to the personal representative. No one else therefore can show a right to recover under the statute. It is not a mere question of capacity of parties requiring a plea *in limine*, but is rather a question of liability at all."

¹⁸⁴ *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841. The court said: "Appellant's liability existed by reason of the Federal statute alone, there being no common-law liability. This being true, the right of action is wholly and en-

The term "personal representative" as used in the statute means an executor or administrator.¹⁸⁵

2. Defendant.

The negligent coemployee is not liable under the employers' liability act, for it is limited to common carriers engaged in interstate commerce.¹⁸⁶

XII. Pleading.

1. Complaint, sufficiency of.

As to effect of pleading state statute in action to which the Federal act is applicable, see subdivision III. 2, *supra*.

The complaint must allege that the defendant is a common carrier, or state facts from which it might reasonably be inferred.¹⁸⁷ And if based upon the death of an employee, it must allege the existence of some of the designated beneficia-

tirely dependent upon the statute itself. While the plaintiff and her minor children were named as beneficiaries therein, still the cause of action arising out of the liability of appellant under the statute was given to the personal representative of the deceased, and not to said beneficiaries. This being true, it seems to us that it follows that no one except said representative could maintain the suit. If this were not true, then the defendant might be harassed with several suits brought by different beneficiaries, as well as by the administrator or executor of the deceased. If the suit had been instituted and prosecuted to judgment by the beneficiaries, we do not believe that it would bar another suit brought by the personal representative of the deceased."

¹⁸⁵ *Rivera v. Atchison, T. & S. F. R. Co.* — Tex. Civ. App. —, 149 S. W. 223.

¹⁸⁶ The master mechanics of the defendant railroad company cannot be joined with the railroad company in an action under the act. *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

The negligent coemployee is not liable under the Federal act, since the act applies by terms only to "common carriers by railroad, while engaged in commerce between any of the several states." *Taylor v. Southern R. Co.* 178 Fed. 380.

¹⁸⁷ *Shade v. Northern P. R. Co.* 206 Fed. 353.

An allegation that "at the time of the injuries hereinafter complained of, your petitioner was engaged in the transportation of interstate commerce," is insufficient to make a case under the act, as it should be alleged at least that the defendant was a common carrier engaged in interstate commerce by railroad. *Walton v. Southern R. Co.* 179 Fed. 175.

¹⁸⁸ A complaint under the act is defective where it is nowhere alleged that the

ries for those benefit the cause of action is given.¹⁸⁸

On a demurrer the sufficiency of a complaint will be tested by the state law, unless the complaint itself shows that the plaintiff was relying upon the Federal act or that the Federal act was applicable.¹⁸⁹

Where the deceased employee left no wife nor children, an averment of pecuniary loss or injury is necessary in regard to parents, although dependence in the sense in which the term is used in the statute with reference to next of kin is not essential to a recovery for the benefit of the parents.¹⁹⁰ But the fact that a complaint in an action in favor of the parents and next of kin fails to allege that they have suffered a pecuniary loss is not fatal where the complaint was not demurred to and no motion in arrest of judgment was made, and the evidence showed, as a matter of fact, that the parents did suffer a pecuniary loss.¹⁹¹

deceased left surviving him a widow, child, parent, or next of kin for whose benefit the right of action given to the decedent survives, nor for whose benefit an original right of action was given for the pecuniary loss either may have sustained because of his untimely death, and for whose benefit alone the plaintiff is entitled to recover. *Thomas v. Chicago & N. W. R. Co.* 202 Fed. 766.

In *ILLINOIS C. R. Co. v. DOHERTY*, ante, 31, it was held that a complaint is insufficient to state a cause of action under the act, for the death of an employee, if it fails to show that decedent left surviving him any of the beneficiaries named in that act in whose behalf a recovery can be had.

The existence of a beneficiary must be alleged and proved. *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1002.

¹⁸⁹ In *Missouri, K. & T. R. Co. v. Neaves*, — Tex. Civ. App. —, 127 S. W. 1090, it was held that where the plaintiff's petition does not disclose that the suit is based upon the Federal statute, it must be held that he is not seeking to recover under such statute, and the sufficiency of his petition will be tested by the state law.

To the same effect, *Missouri, K. & T. R. Co. v. Hawley*, — Tex. Civ. App. —, 123 S. W. 726.

In the *Neaves* case, the court, after citing some Federal cases, said: "If they can be relied upon as authority for the position assumed by appellant, that where a suit of this character is brought in a state court the plaintiff's petition is subject to demurrer unless it discloses whether or not the plaintiff at the time he was injured was engaged in interstate commerce, we are not disposed to follow them."

¹⁹⁰ *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715.

¹⁹¹ *Illinois C. R. Co. v. Porter*, — C. C. A. —, 207 Fed. 311.

If the plaintiff relies both upon the Federal statute and upon state laws, the separate causes of action should be stated in separate counts.¹⁹²

In the note below a number of cases are cited which discuss the sufficiency of particular complaints under the act.¹⁹³

2. Necessity of pleading the statute; judicial notice.

In order to have the benefit of the Federal act, it is not necessary that the act be mentioned,¹⁹⁴ or that the plaintiff claim

that he is suing under the act;¹⁹⁵ it is sufficient if the facts alleged bring the cause of action within the terms of the statute.¹⁹⁶

If the Federal statute is available to uphold the judgment, such judgment will be upheld, notwithstanding the complaint does not mention the act, and the case was tried under and in pursuance of the laws of the state without reference to the Federal act.¹⁹⁷

The basis of this rule is that the courts are bound to take judicial notice of a Federal statute.¹⁹⁸ This is true of

¹⁹² Where the plaintiff in one count alleges two causes of action, one under the Federal statute and one under the state law, she will be required to amend her petition and state the facts constituting such causes of action in separate counts. *Bankson v. Illinois C. R. Co.* 196 Fed. 171.

¹⁹³ Negligence on the part of a fellow servant is sufficiently alleged in a complaint so as to bring the action within the Federal act, where it is averred that the engineer in charge of an interstate train, in accordance with the regular custom, directed the plaintiff, a flagman on the train, to get off the train as it was approaching a tower and to go forward to it and get orders, and that while he was on his way from the tower, pursuant to such direction, was endeavoring to remount the train while it was in motion, he fell, and that the engineer failed to stop the train for him,—it necessarily following from these allegations that the plaintiff got off and on while the train was in motion, pursuant to the engineer's direction, and that the latter knew that he did so,—and it was not essential to allege that the engineer owed a duty to the plaintiff to stop the train. *DeAtley v. Chesapeake & O. R. Co.* 201 Fed. 591. This decision was rendered on a motion to remand. A similar view was taken in the state court on an appeal from the order of removal. 147 Ky. 315, 144 S. W. 95.

Allegations that the defendant was a common carrier of commerce by railroad between the states of Missouri, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, and that the plaintiff was a brakeman on a local train running from Texas into Arkansas, is sufficient to show that the case is one under the Federal employers' liability act. *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

A complaint is sufficient to state a cause of action under the act, when it alleges that the defendant railroad company was a common carrier engaged in interstate commerce, that the injured employee was employed therein, and that his death was caused by the negligence of the officers, agents, and employees of the defendant, and by reason of defects and insufficiencies of the road, rails, and tracks, and of the engine, appliances, and machinery. *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602. 47 L.R.A. (N.S.)

¹⁹⁴ *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, reversing — *Tex. Civ. App.* —, 148 S. W. 1099; *Clark v. Southern P. Co.* 175 Fed. 122; *Lancer v. Anchor Line*, 155 Fed. 433; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Smith v. Detroit & T. Short Line R. Co.* 175 Fed. 506; *Whittaker v. Illinois C. R. Co.* 176 Fed. 130; *McChesney v. Illinois C. R. Co.* 197 Fed. 85; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579; *Southern R. Co. v. Howerton*, — *Ind. App.* —, 101 N. E. 121; *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A. (N.S.) 684, 128 N. W. 1; *Morrison v. Baltimore & O. R. Co.* 40 App. D. C. 391.

The setting forth in terms of the West Virginia wrongful death statute in the petition does not militate against the view that the case is one arising under the Federal act. *Stafford v. Norfolk & W. R. Co.* 202 Fed. 605.

¹⁹⁵ *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

¹⁹⁶ *Rowlands v. Chicago & N. W. R. Co.* 149 Wis. 51, 135 N. W. 156.

It is not necessary to plead a Federal statute, but allegations constituting a cause of action or defense thereunder must be made in order to have the benefit thereof. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 875.

It is not necessary that the pleading should refer to the law which makes a "right" out of the facts so alleged. *Ullrich v. New York, N. H. & H. R. Co.* 193 Fed. 768.

Averments that the deceased met his death while in the employ of an interstate company, and while it was engaged in interstate commerce, are sufficient. *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715.

¹⁹⁷ *Southern R. Co. v. Howerton*, — *Ind. App.* —, 101 N. E. 121.

¹⁹⁸ *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 564.

The Federal courts are presumed to be cognizant, without pleading, of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enact-

the state courts as well as of the Federal courts.¹⁹⁹

3. Answer, sufficiency of.

In order to take advantage of the two-year limitation of the statute, the defendant must plead the failure to bring the action within such time.²⁰⁰ Contributory negligence, to be available, even as a partial defense, must be pleaded according to the holding of the North Carolina court.²⁰¹

The defendant does not estop himself from relying upon the statute by pleading contributory negligence, where the plaintiff based his complaint upon the state statute.²⁰²

XIII. Practice generally.

1. In general.

In one case it has been held that the act is general in its terms, and makes no specif-

ment, it had the effect of superseding state laws upon the subject. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135.

¹⁹⁹ The state court will take judicial notice of the act. *Rowlands v. Chicago & N. W. R. Co.*, *supra*.

The state court is required to take notice of the Federal statute; consequently it need not be pleaded. *McDonald v. Railway Transfer Co.* 121 Minn. 273, 141 N. W. 177.

In *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 701, the court said: "It is necessary to set out the state statute relied on, but not the Federal statute, if facts are stated that bring the cause of action within the scope of the Federal statute, as the state courts will take judicial notice of acts of Congress, but not of the statute law of other states."

²⁰⁰ *Burnett v. Atlantic Coast Line R. Co.* — N. C. —, 79 S. E. 414.

²⁰¹ *Fleming v. Norfolk Southern R. Co.* 160 N. C. 196, 76 S. E. 212.

²⁰² *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

²⁰³ *Bennett v. Southern R. Co.* — S. C. —, 79 S. E. 710.

See also *Helm v. Cincinnati, N. O. & T. P. R. Co.* — Ky. —, 160 S. W. 945.

²⁰⁴ *Charleston & W. C. R. Co. v. Brown*, 11 Ga. App. 493, 75 N. E. 826.

²⁰⁵ The objection that a carrier sued for the death of an employee was estopped to rely upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), by having pleaded contributory negligence and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the Federal question was sufficiently

ic regulation as to the quantity, quality, and methods of proof of negligence, and in the absence of any such regulation, the procedure will conform as near as possible to the state law in the manner and mode of trial and the rules of pleading, evidence, and law applicable thereto.²⁰³

The trial court is not required to charge the jury, at least in the absence of a written request so to do, that the Federal act differs from the state act in that, under the former, there is no presumption against the railroad company.²⁰⁴

In the note below will be found a number of cases brought under the act in which various questions of miscellaneous practice are discussed, some of which are determined solely by the accidental features of the particular case.²⁰⁵

2. When rights under the act are waived.

One case has held that the question whether the Federal act is applicable may

raised, and decided it. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

In *Fleming v. Norfolk Southern R. Co.* 160 N. C. 196, 76 S. E. 212, it was held that, as the Federal statute was general in its terms and made no specific regulations as to the method by which the fact of contributory negligence should be established, the procedure, when the action is brought in the state court, should conform as nearly as may be to the state law applicable; and under the rule prevailing in North Carolina, contributory negligence should be treated as a partial defense which, to be available, must be pleaded.

The trial court, in the exercise of its authority under United States Revised Statutes, § 954, U. S. Comp. Stat. 1901, p. 696, may allow an amendment to the petition in an action brought by the sole surviving parent in her individual capacity, by which, for the first time, she sets up the right to sue as personal representative, in which capacity alone can her action under the employers' liability act be maintained. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135.

Instructing the jury to estimate from their own experience the financial value of a widow's loss of her husband's "care and advice" requires the reversal of a judgment against the carrier, since it opens the door to conjecture and speculation. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495.

Under the rule that pleadings may be amended to conform to the proof, an amendment of a complaint to the effect that the deceased employee left brothers and sisters who were dependent upon him should not be permitted merely to state the cause of action, where there was no evidence to sus-

be raised for the first time on appeal.²⁰⁶ But a contrary view has been taken in others.²⁰⁷ This question has not been definitely settled by the Supreme Court.²⁰⁸

tain such amendment. *ILLINOIS C. R. Co. v. Doherty*, ante, 31.

There is no abuse of discretion in sustaining a motion to strike an amendment of the answer filed after all the evidence is adduced, to make the pleading conform thereto, notwithstanding such evidence shows that the cause of action was one to which the Federal act would apply. *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A. (N.S.) 684, 128 N. W. 1.

In *Troxell v. Delaware, L. & W. R. Co.* 185 Fed. 540, it was held that the fact that a new and different cause of action arose under the Federal employers' liability act of 1908 from that stated in the same plaintiff's statement of claim in a prior suit in the state court will not prevent a judgment in the former suit acting as a bar, where the material questions of fact supporting the new cause of action are the same as those which were involved and passed upon in the former suit. A subsequent judgment in favor of the plaintiff, however, was affirmed by the United States Supreme Court, 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274, upon the ground that a judgment for the defendant in an action in which the fellow servant rule was a defense was not a bar to a subsequent action based upon the negligence of a fellow servant.

It is permissible for the widow of a deceased employee, who, as administratrix, is bringing an action under the Federal employers' liability act, to testify as to the contributions which the deceased had given her from time to time; such testimony does not fall within the constitutional provision that "in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testate, intestate, or ward, unless called to testify thereto by the opposite party." *St. Louis & S. F. R. Co. v. Conarty*, — Ark. —, 155 S. W. 93.

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495, it was held that a writ of error from the Federal Supreme Court will not be dismissed because the constitutional question involved had, since the allowance of the writ of error, been decided by that court in another case adversely to the plaintiff in error.

Holdings of a circuit court of appeals, when affirming a judgment of a circuit court in an action to recover damages for personal injuries, to the alleged effect that the Federal employers' liability law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and that a railroad employee injured in the course of his employment could avail himself of the benefits of the statute, although 47 L.R.A. (N.S.)

at the time of the injury he was not actually engaged in interstate commerce, furnish no ground for reversal, where the benefit of the defense of the assumption of risk was accorded to the railway company at the trial, and the right of the employee to recover was made dependent upon his establishing that, at the time he was injured, he was actually engaged in interstate commerce. *Seaboard Air Line R. Co. v. Moore*, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

In a case where the plaintiff had brought a suit under the state law, and a final judgment was rendered against her upon the ground that the railroad company was not negligent, but a subsequent judgment in an action brought under the statute was affirmed by the United States Supreme Court, it was held that the defendant was entitled to offset against such judgment the amount of costs awarded it in the unsuccessful action under the state law. *Troxell v. Delaware, L. & W. R. Co.* 205 Fed. 830.

The plaintiff is not in a position to raise the question of the effect of a seasonable excuse for not bringing the action within the one year prescribed by the act of 1908, based upon the bad faith of the defendant, where the first complaint was filed more than a year after the accident and the amendment thereto was filed more than four years after the accident, but in neither the original complaint nor in this amendment was there any excuse given for the failure to bring the action within the time limited, and the excuse for the delay was first alleged in an amendment to the complaint made more than five years after the accident. *Morrison v. Baltimore & O. R. Co.* 40 App. D. C. 391.

²⁰⁶ *Southern R. Co. v. Howerton*, — Ind. App. —, 101 N. E. 121.

²⁰⁷ The defendant waived his right to rely upon the Federal statute where the issue is not raised by the pleading, and the trial court's attention was not called to it in any way, and it was raised for the first time on appeal. *Chicago, R. I. & G. R. Co. v. Rogers*, — Tex. Civ. App. —, 150 S. W. 281.

In *Midland Valley R. Co. v. Lemoyne*, 104 Ark. 327, 148 S. W. 654, the case was tried on the theory that the state statute was applicable, and it was only upon a rehearing in the Supreme Court that any question of the Federal statute arose; consequently the court refused to consider the objection, but said that the amendment of 1910 provided for a survival of causes the same as the state statute under which the cause was tried, so that no injustice was done the defendant by applying the state statute.

²⁰⁸ An objection by an interstate railroad sued for the death of a railroad employee, that, if liable at all, it was under the Federal act liable only to the personal representative of the deceased, and not to the

In two cases in the state courts, it has been held that, by proceeding to trial under pleadings which in no wise show that the Federal statute is applicable, evidence to that effect will be excluded or ignored.²⁰⁹ But in another state court, it was expressly held that where the facts showed that the Federal act was applicable, and was available to sustain the judgment for the plaintiff, the judgment would be sustained, notwithstanding it was not invoked at the trial, and the case was tried under and in pursuance of the laws of the state without reference to the statute.²¹⁰ It should be noted, however, that in the latter case, the complaint, although not mentioning the act, did allege facts sufficient to show that the plaintiff was engaged in interstate commerce, so as to render the statute applicable.

3. Election of remedies.

Inasmuch as the Federal act supersedes all state legislation, an employee who has a right of action under the statute has but one remedy, namely, that under the statute, and he is not, by bringing an action at common law, barred by the doctrine of election of remedies from subsequently bringing his action under the statute.²¹¹

As to effect of choosing by mistake

plaintiffs, who were his widow and parents, was interposed in time so that the state court erred in overruling it, where the petition stated a case under the state statute, and the carrier, having called attention to the Federal statute by special exception, and having suggested that the state statute might not be the applicable one, made the specific objection grounded on the Federal statute after the evidence disclosed that the real case was controlled by such statute. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, reversing — *Tex. Civ. App.* —, 148 S. W. 1099.

²⁰⁹ Evidence that the railroad and the injured employee were engaged in interstate commerce is properly excluded where the complaint alleged that the plaintiff, at the time of the injury, was engaged in operating an intrastate train, and these allegations were not denied or in any way challenged in the answer. *Fleming v. Norfolk S. R. Co.* 160 N. C. 196, 76 S. E. 212.

There is no abuse of discretion in sustaining a motion to strike an amendment of the answer filed after all the evidence is adduced, to make the pleading conform thereto, notwithstanding such evidence shows that the cause of action was one to which the Federal act would apply. *Bradbury v. Chicago, R. I. & P. R. Co.* 149 Iowa, 51, 40 L.R.A.(N.S.) 684, 128 N. W. 1.

²¹⁰ *Southern R. Co. v. Howerton*, — *Ind. App.* —, 101 N. E. 121.

²¹¹ *Oliver v. Northern P. R. Co.* 196 Fed. 432.

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remedy not legally available, see notes to *Clark v. Heath*, 8 L.R.A.(N.S.) 144, and *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153.

4. Administration for sole purpose of bringing action.

In the only state apparently in which the question has been raised, it has been held that administration may be had and a personal representative appointed for the sole purpose of bringing an action under the act.²¹² And this is true even if the injury occurred outside the state.²¹³

5. Time within which action must be brought.

An action cannot be brought under the sanction of the act of 1906, which is not within one year of the date of the accident complained of.²¹⁴

The amendment of a petition in an action brought by the sole surviving parent in her individual capacity, by which, without stating any new facts as the ground of action, she sets up for the first time the right to sue as personal representative, is not equivalent to the commencement of a new action, for the purpose of applying the two-years limitation prescribed by the Federal act of 1908.²¹⁵

²¹² Although ordinarily there is no necessity for administration on the estate of a deceased, letters of administration may be granted for the sole purpose of enabling the surviving wife to bring a suit under the Federal act. *Gulf, C. & S. F. R. Co. v. Beezley*, — *Tex. Civ. App.* —, 153, S. W. 651.

The inchoate right to the damages alone constitutes a sufficient predicate for the administration. *Eastern R. Co. v. Ellis*, — *Tex. Civ. App.* —, 153 S. W. 701.

In *Rivera v. Atchison, T. & S. F. R. Co.* — *Tex. Civ. App.* —, 149 S. W. 223, it was held that the county court of a state has power to grant letters of administration for the purpose of bringing a suit under the Federal act.

As to what assets will give jurisdiction to appoint administrator, see note to *Manning v. Leighton*, 24 L.R.A. 684.

²¹³ Administration may be had in Texas, where the deceased and surviving beneficiaries reside, though the injury and death took place in the territory of New Mexico. *Rivera v. Atchison, T. & S. F. R. Co.* — *Tex. Civ. App.* —, 149 S. W. 223.

²¹⁴ *Winfree v. Northern P. R. Co.* 44 L.R.A.(N.S.) 841, 97 C. C. A. 392, 173 Fed. 65, affirmed in 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273.

²¹⁵ *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135.

In *Eastern R. Co. v. Ellis*, — *Tex. Civ. App.* —, 153 S. W. 701, where the action was brought by the widow in her own

In one case it was held that, in order to take advantage of the failure of the plaintiff to bring the action within the two years prescribed by statute, the defendant must plead such failure.²¹⁶

6. Recovery under state law when action under statute fails.

Although the action was brought under the statute, and it appears that there is no cause of action under the statute, nevertheless the suit should not be dismissed if the plaintiff has made out a suit at common law.²¹⁷ So, where the plaintiff's petition alleges two causes of action, one under the Federal act and the other under the law of the state, she will not be required to elect upon which cause of action she will rely for recovery.²¹⁸ But a contrary de-

name, and not as administratrix, the court was evidently of the opinion that the petition might be amended so as to permit the widow to show her status as administratrix, notwithstanding the time for bringing an action under the act had expired, since it reversed the judgment and remanded the case and refused to render judgment thereon at the request of the defendant.

As to the relation of new pleadings to statute of limitations, see notes to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A. (N.S.) 259, and *Bourdreaux v. Tucson Gas, Electric Light & P. Co.* 33 L.R.A. (N.S.) 196.

²¹⁶ In *Burnett v. Atlantic Coast Line R. Co.* — N. C. —, 79 S. E. 414, it was held that the provision that no action should be maintained under the act unless commenced within two years from the date the cause of action accrued was a statute of limitation only, and was not a condition inherent in and annexed to the right of action. Consequently, the defendant, in order to take advantage thereof, must plead the failure to commence the action within the time limit.

²¹⁷ In *Jones v. Chesapeake & O. R. Co.* 149 Ky. 566, 149 S. W. 951, where the complaint contained the necessary allegations to recover under the Federal act, it was held error to dismiss the suit upon the ground that the employee was not engaged in interstate commerce, where the evidence was such that the jury might have found him entitled to recover at common law because of the gross negligence of his foreman, which caused the injury. The court said: "The act referred to did not repeal the common law as applicable to Lewis county. It at most only superseded that law; therefore, when appellant brought his action under the congressional act, and the lower court determined that his evidence did not show him to be entitled to recover under that act, he was

cision was handed down in a case where the state law radically differed from the Federal act, in that mere proof of the defective or unsafe condition of a car would make out a prima facie case of negligence against the railroad company.²¹⁹

7. Final judgment in state court as bar to action under statute.

A judgment in an action brought by a widow in her individual capacity for herself and children, to recover damages from an interstate carrier for the death of her husband while in its employ, which was prosecuted and tried on the theory that it involved a cause of action under the state law, under which there could be no recovery for the negligence of the fellow servants of the deceased, is not a bar to a subsequent

then entitled to have his case submitted under the common law."

²¹⁸ *Bankson v. Illinois C. R. Co.* 196 Fed. 171. The court said: "If the defendant, through its own neglect or some of its employees, has inflicted an injury upon the deceased which caused his death, and it is legally liable therefor, whether that injury was inflicted while the decedent was engaged in interstate commerce or while he was not so engaged, the defendant should respond therefor; but, of course, it can be required to respond but once, and whether or not the recovery shall be under the employers' liability act of Congress for the benefit of the dependent relatives of the deceased, if there are any, or shall be for the benefit of his estate, the defendant is not particularly interested, except as this may bear on the amount of the recovery. All that it is interested in is that it shall not be required to respond in damages if it is not liable therefor; or, if liable, that it shall be required to respond but once for the same acts of negligence. No reason is perceived why, if the plaintiff, at the time of commencing the action, is uncertain as to whether under the facts she is entitled to recover under the employers' liability act of Congress, or the general law of negligence in force in the states of Iowa or Illinois, she may not state in different counts of her petition the acts of negligence she relies upon, and recover either under the act of Congress or the general law of negligence, as the facts when developed may show; and it seems entirely clear that under the Iowa practice act she cannot, upon filing her petition, be required to then elect upon which of said causes of action she will rely for recovery."

²¹⁹ *South Covington & C. Street R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742. The court said: "It will be noticed that the Ohio statute differs radically from the employers' liability act in giving a basis upon which the recovery can be had, since

action by the widow as administratrix brought against the carrier under the Federal act, in which recovery was asked because of the negligence of such fellow servants. 219a

under § 6243 of the Ohio statutes a prima facie case of negligence on the part of the employer is made out when any defect or unsafe condition is shown in the cars, while under the Federal statute the plaintiff must show negligence under the rules ordinarily applicable to cases of that character. It was therefore impossible for the court to proceed under both statutes; it must of necessity proceed under one, and discard the other. In view, therefore, of the fact that the Federal act superseded the Ohio statute, it necessarily controlled this case, which is admitted by all parties to be a case of interstate commerce. In instructing under the Ohio statute, and in refusing to require the plaintiff to elect under which paragraph of the petition she would prosecute her case, the circuit court was in error."

^{219a} Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274.

The history of this case is somewhat interesting. The judgment recovered by the plaintiff in the original action under the state law (see 180 Fed. 871) was reversed by the circuit court of appeals (105 C. C. A. 593, 183 Fed. 373) upon the ground that there was no evidence of negligence on the part of the railroad company. Subsequently, the plaintiff was appointed administratrix of the estate of her deceased husband, and brought an action under the Federal act for the benefit of herself and children. The defendant set up the plea of *res judicata*, and a motion to strike out the same was denied (185 Fed. 540), and a judgment for the plaintiff was subsequently reversed (118 C. C. A. 272, 200 Fed. 44). It was this judgment of the circuit court which was reversed by the United States Supreme Court, and the judgment recovered in the district court was affirmed. Subsequently, it was held that the defendant railroad company was entitled to have set off against such judgment the costs taxed against the plaintiff in the first action under the state law, and it was also held that the plaintiff was not entitled to the costs paid upon the unsuccessful appeal to the circuit court of appeals from the order of the district court overruling the plaintiff's motion to strike off defendant's plea of *res judicata* (205 Fed. 830).

In sustaining the judgment of the district court, notwithstanding the former judgment against the plaintiff, the Supreme Court said: "The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under

XIV. Damages.

1. Elements and measure of damages.

In case the injured servant survives, he may recover such damages as will compen-

the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit. Furthermore, it is well settled that, to work an estoppel by judgment, there must have been identity of parties in the two actions.

. . . The circuit court of appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions (the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children), and held that, except in mere form, the actions were for the benefit of the same persons, and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical, and would have been curable by amendment. This conclusion was reached before this court announced its decision in *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. That action was brought under the Federal employers' liability act by the widow and son of the decedent, and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the circuit court of appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good reasons, had specifically provided that an action under the employers' liability act could be brought only by the personal representative; and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the *Birch* Case there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the employers' liability act, which renders the former suit and judgment a bar to the present action."

sate him for his expense, loss of time, suffering, and diminished earning power.²²⁰ But the mental worry of an injured employee over the loss of income and the future welfare of his wife and child is too remote to be considered.²²¹

In an action for the death of an employee brought for the benefit of the widow, children, or next of kin, under the original act, the right of recovery is independent of any legal liability of the injured person to the beneficiary,²²² but is measured solely by the pecuniary loss suffered by such beneficiary or beneficiaries.²²³ Therefore a charge is erroneous which permits a widow and her children to recover for the general loss sus-

tained, and not solely for the pecuniary loss.²²⁴ So, also, a charge is erroneous which permits a recovery not only for pecuniary loss, but also for an excess of the decedent's earnings during his expectancy of life.²²⁵

It has been held by the Supreme Court that there can be no recovery for the loss by a wife of the "care and advice" of her husband in addition to her loss of support and maintenance.²²⁶ In other cases, however, it has been held that the jury may consider the pecuniary loss suffered by a child in being deprived of the father's care, attention, and training.²²⁷

The loss to the parent of the society and

²²⁰ Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192.

²²¹ Ferebee v. Norfolk Southern R. Co. — N. C. —, 79 S. E. 685.

²²² Michigan C. R. Co. v. Vreeland, supra.

²²³ In speaking of the damages or loss recoverable under this act the Supreme Court of the United States in Michigan C. R. Co. v. Vreeland, supra, said: "The damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

In McCULLOUGH v. CHICAGO, R. I. & P. R. Co. ante, 23, it was held that the recovery by parents for the death of an adult child under the Federal employers' liability act is limited to compensation for such prospective gifts of money, property, or services as they should reasonably expect to receive in the course of their lives from deceased, without any allowance for suffering or bereavement.

The measure of damages in an action founded upon the Federal act, brought by the administrator for the benefit of the widow and children, is the pecuniary loss which they sustain. Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803. See also Bennett v. Southern R. Co. — S. C. —, 79 S. E. 710.

²²⁴ Fogarty v. Northern P. R. Co. — Wash. —, 133 Pac. 609.

²²⁵ Southern R. Co. v. Hill, supra.

An instruction to the effect that the measure of damages for the loss of life of an employee is the present value of his net income, and this is to be ascertained by deducting his net gross income and then estimating the present value of the accumulation from such net income based upon this expectation of life is error, since the damages are restricted to the actual pecuniary loss. Dooley v. Seaboard Air Line R. Co. — N. C. —, 79 S. E. 970.

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²²⁶ In Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, reversing 189 Fed. 495, the court said: "Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonymous with 'support' and 'maintenance,' for the court said that it was a deprivation to be measured over and above support and maintenance."

²²⁷ In Cain v. Southern R. Co. 199 Fed. 211, it was held that the value of a father's services in attention to, and care and superintendence of, his children and family, and in the education of his children, of which they are deprived by his death, is also to be considered as an element of pecuniary damages.

In St. Louis & S. F. R. Co. v. Duke, 112 C. C. A. 564, 192 Fed. 306, which was a suit for the benefit of the surviving wife and children, it was held that the jury might consider the pecuniary loss which the children suffered because deprived of the care, attention, instruction, and training of the father, but could not consider sympathy, bereavement, nor any sentimental considerations connected with the father's care. The court said: "The rule is that compensatory damages only can be awarded in such cases as this. The actual pecuniary loss resulting to the widow and children occasioned by the death of the father is all that can be allowed."

In St. Louis, S. F. & T. R. Co. v. Geer, — Tex. Civ. App. —, 149 S. W. 1178, which was an action by the administrator for the benefit of the surviving widow and child, the court approved a charge to the effect that by pecuniary aid there was meant, in the case of the infant child, the reasonable pecuniary value of the nurture, care, and admonition which the child would have received from the deceased had he lived during the child's minority.

So, in Michigan C. R. Co. v. Vreeland, supra, the court, in holding that a widow cannot recover for loss of "care and advice," said: "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kind-

companionship of a son is not a pecuniary loss, and therefore is not an element of damages recoverable under the act.²²⁸ Nor is the loss of the society and companionship of a husband and father to be considered.²²⁹ Nor is the mental anguish of the survivors to be considered.²³⁰ Punitive damages are not recoverable.²³¹

Under the amendment of 1910, which provides that the employee's action survives for the benefit of the widow and next of kin, it has been held that, in an action

ness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages."

²²⁸ It has been held that the loss of the society or companionship of a son is a deprivation not to be measured by any money standard, and is not a pecuniary loss under the Federal statute. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 457, 33 Sup. Ct. Rep. 224.

²²⁹ In *St. Louis, S. F. & T. R. Co. v. Geer*, supra, which was an action for the benefit of the surviving widow and child, the court approved an instruction to the effect that the jury were not to allow anything for any grief or sorrow on account of the death, nor for the loss of society, affection, or companionship.

See also *Cain v. Southern R. Co.* supra.

²³⁰ *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306; *Garrett v. Louisville & N. R. Co.* 117 C. C. A. 109, 197 Fed. 715; *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23.

Before the amendment of 1910, in an action brought for the statutory beneficiaries to recover damages for the death of an employee, the recovery is limited to the pecuniary injury or loss sustained by the beneficiaries from the death of the deceased, and the measure of damages is compensation for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries as of legal right or otherwise from the continued life of the deceased, and there should be excluded all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased. *Cain v. Southern R. Co.* supra.

²³¹ *Cain v. Southern R. Co.* supra.

²³² In *St. Louis & S. F. R. Co. v. Conarty*, — Ark. —, 155 S. W. 93, the court said: "The statute as thus amended forbids the prosecution of more than one action, and permits only one recovery; but 47 L.R.A.(N.S.)

for the benefit of the widow and next of kin, a recovery may be had for the pain and suffering of the deceased, as well as for the pecuniary loss."²³³

The means and earning capacity of a son, and the amount of his contributions to his parents, may be considered.²³³

While a pecuniary loss would undoubtedly be presumed in the case of a widow or child, it has been held that there is no such presumption in case of decedent's relatives or even parents.²³⁴ There must be some

the action is prosecuted, after the death of the injured person, for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person, as well as for pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. In the present case no action had been instituted by the injured employee, and plaintiff prosecuted only one cause of action, and seeks only one recovery for the various elements of damages for which the statute authorizes a recovery of compensation. There was therefore nothing to call for an election between different causes of action."

²³³ In *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23, it was held that, upon the question of the amount to be allowed parents for the death of a child under the Federal employers' liability act, evidence may be considered of the means and earning capacity of the son and of the parents, and the extent of contributions which he had made to them.

²³⁴ In *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23, in speaking of the compensation recoverable by parents, the court said: "Where recovery is claimed for the benefit of parents, for the death of a child, it is material to show whether the decedent was a minor or adult. If a minor, the question whether his services during the remaining years of his minority would have been pecuniarily valuable to his parents may be inquired into as affecting the measure of damage. If the decedent was adult, then this question is eliminated. There remains, however, the somewhat narrow ground of "prospective gifts," either of money, property, or services, which the parents could have reasonably expected to receive in the course of their lives from the decedent. Under this act, pecuniary loss only can be considered. Compensation cannot be had for suffering or bereavement. It has been held that a presumption of nominal damages will obtain in favor of the parents. *Atchison T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877, and cases cited therein. But there is no presumption in favor of substantial pecuniary loss to parents or de-

evidence to guide the jury in estimating the extent of the pecuniary loss.²³⁵ Evidence merely that a son had made contributions to his parents is insufficient to support a verdict for a substantial sum.²³⁶ Care and consideration is not an element of damage where there is no evidence from which the pecuniary value thereof can be estimated.²³⁷

It is for the jury to apportion the damages among the beneficiaries entitled thereto.²³⁸

2. Amount of damages.

As to measure of damages generally in case of injury or death, see notes cited in Index to L.R.A. Notes, under title Damages, §§ 57-67.

The amount recoverable is not limited by any state statute.²³⁹ In the note below will be found a number of cases in which the size of the verdict was considered with reference to the question whether or not it was excessive.²⁴⁰ W. M. G.

pendent relatives, except such inference or presumption as may naturally arise out of evidence tending to show such loss."

²³⁵ In *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23, which was an action brought under the Federal act for the benefit of the surviving parent of the employee, the court, in respect to the question of the amount of a pecuniary loss sustained by the parent, said: "Some fair guide ought to be furnished to the jury for the exercise of their judgment; they should not be permitted to render a finding solely upon the earning capacity of the decedent, nor upon the amount of damage accruing to him or to his estate; nor should they be required or permitted to make a mere guess without the aid of pertinent facts tending to show the extent of pecuniary loss."

²³⁶ In *McCULLOUGH v. CHICAGO, R. I. & P. R. Co.* ante, 23, it was held that evidence of contributions by a son to his parents without anything to show their amount is not sufficient under the Federal employers' liability act, to sustain a verdict in their favor for his death for \$5,000.

²³⁷ The court should not instruct the jury that, in estimating the damages recoverable in an action brought against a railway carrier by the parent of an employee killed in the carrier's service, they may take into consideration the loss of any "care and consideration he might take of them or have for them during his life," where there is no allegation of any such loss, or any evidence relating to the subject, from which its apparent value may be estimated. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224.

But a verdict against the defendant railroad company will not be set aside merely because there was no direct evidence as to the age or health of the widow of the deceased employee, nor any evidence as to the health of a child who was born after his death. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, — L.R.A. (N.S.) —.

²³⁸ Where the action is brought for the benefit of the widow and minor child of the deceased employee, it is error to direct the jury to assess the damages in a single sum; they must be apportioned. *Fogarty v. Northern P. R. Co.* — Wash. —, 133 Pac. 609.

²³⁹ In *Hyde v. Southern R. Co.* 31 App. 47 L.R.A. (N.S.)

D. C. 466, it was held that the amount of recovery under the Federal employers' liability act, in an action brought within the District of Columbia, was not limited by the provisions of § 1301, District of Columbia Code [31 Stat. at L. 1394, chap. 854], which limits all recovery for damages for injuries resulting in death from wrongful act, neglect, or default of any person or corporation to \$10,000.

²⁴⁰ In *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887, where the jury rendered a verdict for \$2,500 less than the maximum statutory amount, it was held that such action might well imply that the jury had made due allowance for any offset defendant was entitled to by reason of the employee's contributory negligence. In this case the verdict was for \$7,500.

In *Cain v. Southern R. Co.* 199 Fed. 211, there was a verdict of \$10,000 for the plaintiff, but the court reduced the same to \$7,500, upon the ground that there was contributory negligence on the part of the deceased, which, under the undisputed facts, was of such a character as would at common law have entirely barred recovery, and from the size of the verdict awarded by the jury, it was evident that they had not taken such contributory negligence into consideration.

In *Barker v. Kansas City, M. & O. R. Co.* 88 Kan. 767, 43 L.R.A. (N.S.) 1121, 129 Pac. 1151, it was held that a verdict of \$7,520 would not be excessive for injuries to a fireman on a switch engine, where the jury allowed \$1,000 for mental pain and suffering, \$2,000 for injury to back and spine, and \$4,520 for permanent injuries.

A verdict of \$8,600 is not excessive, where the plaintiff was a locomotive fireman twenty-eight years of age, and was earning \$125 a month, and the injury was a very serious one, incapacitating him for labor for the year that had elapsed between the time of the injury and the time of the trial, and there was medical testimony tending to show that the injury was permanent, at least unless relief could be secured by an operation, and it was merely a matter of conjecture whether an operation would afford anything more than temporary relief. *Rowlands v. Chicago & N. W. R. Co.* 149 Wis. 51, 135 N. W. 156.

A verdict of \$20,000 is not excessive where the deceased was a young man twenty-nine years of age, and left surviving him a wife and three small children, was

exemplary in habits, devoted to his family, and was receiving an average of over \$100 a month, all of which he expended for the benefit of his family, and there was probability of promotion in his line of work whereby he might have received a larger salary. *Gulf, C. & S. F. R. Co. v. Beezley*, — *Tex. Civ. App.* —, 153 S. W. 651.

A verdict of \$35,000 is so large that it would appear that the jury had ignored the instruction of the court to reduce the damages in proportion to the contributory negligence of the plaintiff,—the court having instructed the jury that the plaintiff was negligent. *Neil v. Idaho & W. N. R. Co.* 22 Idaho, 74, 125 Pac. 331.

\$35,000 is excessive in the case of a conductor who was forty years of age when injured, and was earning about \$125 a month. *Ibid.* W. M. G.

UNITED STATES SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

SPENCER MELTON.

(218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676.)

Error to state court — frivolousness of Federal question.

1. A writ of error to review a judgment of the highest court of a state will not be dismissed on the ground that the Federal question relied upon to confer jurisdiction has been so conclusively foreclosed by prior decisions of the Federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior

decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below.

Same — Federal question — how raised — full faith and credit.

2. The full faith and credit clause of the Federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a Federal question for review in the Federal Supreme Court by writ of error to a state court.

Same — full faith and credit.

3. The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no question under the full faith and credit clause of the Federal Constitution for review in the Federal Supreme Court by writ of error to a state court, where there is no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved.

Constitutional law — equal protection of the laws — classification of railway employees — police power.

4. The modification of the fellow-servant rule as to railway employees, made by Ind. act of March 4, 1893, § 1, does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to all employees doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, but such general classification of railway employees is a proper exercise of the police power.

(May 31, 1910.)

Note. — Constitutionality of statutes abrogating the fellow-servant rule.

This subject is discussed in a note to *Bradford Constr. Co. v. Heffin*, 12 L.R.A. (N.S.) 1040, and the present note is supplementary thereto.

As to operation and effect of Federal employers' liability act, see note on page 38, ante.

As to what employees and employments are within the purview of statutes abrogating the fellow-servant rule, see note to *Missouri P. R. Co. v. Smith*, post, 113.

As to the constitutionality of statutes forbidding the avoidance of liability to employee or reduction of his damages by relief or indemnity contract, see notes to *McGuire v. Chicago, B. & Q. R. Co.* 33 L.R.A. (N.S.) 706, and *Washington v. Atlantic Coast Line R. Co.* 38 L.R.A. (N.S.) 867.

As these statutes differ materially from one another, and as the construction placed on similar statutes by the various courts is also different, it has been deemed best to 47 L.R.A. (N.S.)

treat the statutes by jurisdictions; a summary will be added at the close of the note, showing the general result of the decisions.

Alabama.

In speaking of the Alabama employers' liability act, the court in *Boggs v. Alabama Consol. Coal & I. Co.* 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878, said: "It may be that only those persons, natural or artificial, operating railroads, make use of signals, locomotives, cars, and the like upon railways, and hence that subdivision 5 affects employers only who are engaged in the operation of railroads. But the classification here is based upon the fact that the operation of railroads, by whomsoever operated, involves great and peculiar hazards. The statute is in part a police regulation."

Arkansas.

The Arkansas statute which abrogates the doctrine of common employment as regards

ERROR to the Kentucky Court of Appeals to review a judgment affirming a judgment of the Circuit Court for Hopkins County in plaintiff's favor in an action founded upon the Indiana employers' liability law. Affirmed.

The facts are stated in the opinion.

Messrs. Benjamin D. Warfield and Henry Lane Stone, for plaintiff in error:

All that this court has decided is that it is competent to provide a right of action in favor of railroad employees who are exposed to the hazards of operating railroads, when no similar legislation is enacted in behalf of persons engaged in other than railroad pursuits.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136;

railroad companies, all corporations of every kind, and every company, whether incorporated or not, engaged in the mining of coal, has been upheld by the supreme court of the state, with respect to a domestic corporation engaged in the lumber business, on the ground that it was a reasonable exercise of the reserved right of the legislature to amend the company's charter. Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796. (Act of March 8, 1907.) The court said: "Why should not the employer suffer the consequences resulting from the negligence of his employee, instead of the employee who is injured by such negligence? The employee has no control over his fellow servant, did not employ him, and cannot discharge him. . . . The act does not make him liable for such damages unless the employee is, at the time, in the exercise of due care. Acts of legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference in the reason for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations; a difference in degree, and not in kind. We think the act in question is constitutional as to corporations."

In a later case the same ruling was made by that court in regard to a foreign corporation which was operating a railroad. Aluminum Co. v. Ramsey, 89 Ark. 522, 117 S. W. 568.

The Federal Supreme Court, to which an appeal was taken, declined to express any definite opinion concerning the applicability of the principle thus invoked to foreign corporations, or concerning the general question raised by the contention of counsel that the statute was discriminatory, in that it included all corporations, and not individuals or partnerships. 222 U. S. 251, 254, 56 L. ed. 185, 188, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 184. The judgment of the state court was affirmed for the reason that the statute made a distinction between railroads operating in the state and individuals; that this distinction had been

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The statute, as construed and explained in Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; American Car & Foundry Co. v. Inzer, 172 Ind. 56, 87 N. E. 722; and Indianapolis Street R. Co. v. Kane, 169 Ind. 40, 80 N. E. 841, 81 N. E. 721, imposes liability upon railroads, and in behalf of their employees, only. Every other employer of labor in Indiana, except a railroad, is protected from liability to employees by the common-law defenses of fel-

upheld by the Federal Supreme Court as not offending against the Constitution of the United States; and that the company in question, being engaged in operating a railroad, was not in a position to raise the question of an unlawful discrimination by "appropriating the grievance that corporations engaged in mining, but not operating railroads, might have on account of the distinction made between them and individuals."

The Arkansas statute was also held to be valid, and was enforced against a domestic corporation engaged in mining, in Soard v. Western Anthracite Coal & Min. Co. 92 Ark. 502, 123 S. W. 759.

California.

The California Code which provides that the employer shall be liable for injuries to a servant caused by a co-employee engaged in another department of labor, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employee injured is engaged, was upheld in Patton v. Los Angeles P. Co. 18 Cal. App. 522, 123 Pac. 613, against the contention that it denied equal protection of the laws, and denied certain citizens privileges which were granted to others. The court said: "There is a good reason why the persons who are employed upon the same machine should be denied right of an action for damages against their employer where such damages are caused by the negligence of one of them, and that those employed upon the different machines or trains should not be so restricted as to such remedy. Men working together on the same machine or car generally have an opportunity to view the actions of each other; under the eyes of each other they are easily and readily apprised of any negligent act which threatens injury to them, and can better protect themselves. The classification made by the statute is not, therefore, arbitrary, but it comports with the rule that there must be a difference in the situation of the employee which justifies the special protection being

low servants and assumed risks. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7, 14 Am. Neg. Cas. 467.

It is contrary to the 14th Amendment to the Constitution of the United States for a state legislature to enact statutes aimed against one class of persons only, and leaving all other classes of persons subject to the more favorable rules of the common law, unless the basis of the attempted classification rests upon some difference which bears a reasonable and just relation to the act in respect to which the classifi-

cation is proposed, and is not made arbitrarily and without such basis.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*), 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

Unless the statute is limited by construction so as to exclude plaintiff from its operation, it is unconstitutional and void.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; *Akeson v. Chicago, B. & Q. R.*

extended to the one class and withheld from the other."

Colorado.

The Colorado statute which in general terms declares all employers to be liable to their servants for injuries caused by the negligence of other servants has been pronounced valid against the objection that "the imposition of this liability upon an employer, without taking into consideration the nature of the business or the manner of carrying it on, works a great hardship and injustice upon employers, and deprives them of a defense which the common law gives them without permitting them to be heard on the subject of their own wrong or negligence." *Vindicator (Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108. The doctrine of this case was reiterated in *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323; *Colorado & S. R. Co. v. Davis*, — Colo. App. —, 127 Pac. 249.

But the validity of the Colorado act has been questioned because of the failure of the legislature to comply with certain constitutional provisions as to the method of taking the final vote. See the Colorado cases cited *supra*. And in a Federal court it was held that this statute never became a law. *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180.

Florida.

The Florida statute imposing liability upon railroad companies for injury to their employees who are free from fault, through the negligence of coemployees, does not deny to such companies due process of law or the equal protection of the law, and is not violative of the 14th Amendment of the Federal Constitution. *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 So. 428, 19 Ann. Cas. 192. The court said that the contention that the statute imposed an unjust discrimination against railroad carriers because it did not extend to all classes of carriers alike was untenable. The constitutionality of the Florida statute was

also recognized in *Taylor v. Prairie Pebble Phosphate Co.* 61 Fla. 455, 54 So. 904, and in *Atlantic Coast Line R. Co. v. Beazley*, 64 Fla. 311, 45 So. 761.

Indiana.

The Indiana statute is set out at some length in the earlier note. As is there shown, it follows along the general lines of the English employers' liability act, but applies only to "every railroad or other corporation."

It has been held, however, that imposing upon private corporations a liability for injuries to employees which will not exist in case of individuals or partnerships, for injuries arising from the same cause, under the same conditions, violates the constitutional provision guarantying equal protection of the laws. *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 520. The Bough Case was followed in *American Car & Foundry Co. v. Applegate*, 42 Ind. App. 342, 85 N. E. 724; *American Car & Foundry Co. v. Inzer*, 172 Ind. 56, 87 N. E. 722.

But, as applied to railroads alone, the statute has been upheld by a long list of cases which are cited in the earlier note.

Although the supreme court of the state has said that the constitutionality of the law must be regarded as settled, and will not be considered further, nevertheless the validity has been discussed and upheld in a number of recent cases in that court: *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 168 Ind. 467, 80 N. E. 415, writ of error dismissed for want of jurisdiction, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688; *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212; *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 485, writ of error dismissed for want of jurisdiction, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688; *Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 172 Ind. 19, 87 N. E. 644; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954.

These cases hold generally that the stat-

Co. 106 Iowa, 54, 75 N. W. 676, 4 Am. Neg. Rep. 384; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 161, 55 Pac. 875, 5 Am. Neg. Rep. 339; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Givens v. Southern R. Co.* 94 Miss. 830, 22 L.R.A.(N.S.) 971, 49 So. 180; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Indianapolis Traction & Ter-*

minal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; *Cleveland, C. C. & St. L. R. Co. v. Foland*, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165.

Messrs. Clifton J. Waddill and Waddill & Dempsey also for plaintiff in error.

Messrs. James W. Clay, William L. Gordon, William J. Cox, Maurice K. Gordon, and J. F. Clay, for defendant in error:

The statute in question is constitutional in so far as it applies to railroads.

Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind.

ute, as applied to railroad companies, is constitutional.

But in *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033, the defendant railroad contended that the statute in question violated the constitutional provision because it applied only to corporations operating railroads, and not to persons engaged in that occupation. The court, however, in upholding the constitutionality of the statute, said that the spirit and purpose of the statute must be looked to in interpreting it, and that the spirit and purpose of the employers' liability act, so far as railroads were concerned, was the protection of employees engaged in the dangerous and hazardous work of operating railroads, and the court said: "We hold that it [the statute] applies to every corporation, company, co-partnership, or person engaged in the dangerous and hazardous business of operating a railroad, and their employees who are engaged in such dangerous and hazardous work." This decision certainly seems to extend the statute very broadly by judicial construction.

The constitutionality of the Indiana statute as applied to railroad employees subjected to railroad hazards was also upheld in *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581, affirming 170 Ill. App. 140. The argument was made that the act on its face applied to any railroad employee, but the court pointed out that by the construction placed upon the act by the state court, it applied only to employees incurring railroad hazards.

It is to be noted that in *LOUISVILLE & N. R. Co. v. MELTON* the Indiana statute was upheld even when its application was not limited to employees engaged in and about the operation of trains.

Iowa.

The provision of the Iowa statute that no contract which restricted the liability of a railroad company for injuries to servants caused by the negligence of fellow

servants should be legal or binding was upheld in *Mumford v. Chicago, R. I. & P. R. Co.* 128 Iowa, 685, 104 N. W. 1135, against the contention that it interfered with the fundamental right of freedom of contract. The Iowa statute was also upheld in *O'Brien v. Chicago & N. W. R. Co.* 116 Fed. 502.

The Iowa statute making railroad companies liable for injury to employees through the negligence of fellow servants, and forbidding the avoidance of such liability by a release or indemnity contract with the employees, has been held not to deprive such companies of the equal protection of the laws, but the argument was directed chiefly to the clause relative to contracts. *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902, second appeal, 138 Iowa, 664, 116 N. W. 801. The decision in this case was affirmed by the United States Supreme Court in 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

Michigan.

The Michigan statute deprives "every common carrier railroad company" of the defense of the fellow-servant doctrine. This statute has been upheld against the contention that it was invalid as applying only to common carrier railroads, and not to private railroads, that it deprived the common carrier railroad company of property without due process of law, and that it interfered with the freedom of contract. *Son-smith v. Pere Marquette R. Co.* — Mich. —, 138 N. W. 347. The constitutionality of the Michigan statute was also upheld upon the authority of the *Son-smith Case* in *Quick v. Detroit & M. R. Co.* — Mich. —, 141 N. W. 631; *Fernette v. Pere Marquette R. Co.* — Mich. —, 141 N. W. 1084.

In connection with the Michigan statute it should be noted that the Federal statute discussed in a note at page 38, ante, is also confined to "every common carrier by railroad," and this statute has also been upheld, as is shown in that note.

438, 78 N. E. 1033; Bedford Quarries Co. v. Bough, 163 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529; Pittsburgh, C. C. & St. L. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688; Georgia R. Co. v. Ivey, 73 Ga. 504; Georgia R. & Bkg. Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Georgia R. & Bkg. Co. v. Hicks, 95 Ga. 301, 22 S. E. 613; Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; Galveston, H. & S. A. R. Co. v. Mohrmann, 42 Tex. Civ. App. 374, 93 S. W. 1090; Sherman v. Texas & N. O. R. Co. 99 Tex. 571, 91 S. W. 561; Texas & P. R. Co. v. Carlin, 60

L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777, 189 U. S. 354, 47 L. ed. 849, 23 Sup. Ct. Rep. 585, 13 Am. Neg. Rep. 354; Hancock v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679; Rutherford v. Southern R. Co. 56 S. C. 446, 35 S. E. 136; Mott v. Southern R. Co. 131 N. C. 234, 42 S. E. 601; Sigman v. Southern R. Co. 135 N. C. 181, 47 S. E. 420; Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 311, 120 N. W. 756, 21 Am. Neg. Rep. 394; Chesapeake & O. R. Co. v. Hoffman, 109 Va. 44, 63 S. E. 432.

The state may distinguish, select, and

Mississippi.

The Mississippi court, referring to the clause of the state Constitution, § 193, which provides that every railroad employee shall have the same rights and remedies for an injury suffered from the act or omission of the corporation or its employees as are allowed to persons not employees, where it results from the negligence of a superior agent or officer, or one having the right to control or direct the service of the party injured, and also when the injury results from the negligence of a fellow servant in another department of labor from that of the party injured, stated that, according to the theory established by previous decisions, the only ground upon which this provision could be upheld is that which is afforded by "the fact of the inherent danger in attending the operation of railroads by the highly dangerous agency of steam." *Givens v. Southern R. Co.* 94 Miss. 830, 22 L.R.A. (N.S.) 971, 49 So. 180. One of the cases cited in support of this statement was *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533, which affirmed the invalidity of the enactment which purported to extend the operation of the constitutional provision to "corporations" of all kinds. The second precedent referred to was *Bradford Constr. Co. v. Heflin*, 88 Miss. 314, 12 L.R.A. (N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077, where the invalidity of the amending act was again affirmed, but the constitutional provision itself was declared not to deny railway companies the "equal protection of the laws." In the third case mentioned (*Mobile, J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360), the inherently dangerous character of railroad work was again relied on as a ground for holding the constitutional provision to be valid. The statute was held to inure to the benefit of the foreman of a crew, who, while standing aside to let a train pass, was killed as a result of its derailment. On appeal to the Federal Supreme Court this judgment was affirmed. See *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 47 L.R.A. (N.S.)

1912 A, 463, 2 N. C. C. A. 24. Commenting upon the argument of counsel "that the provision has been construed in the present case as applicable to an employee not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision so construed and applied, is invalid, as a denial of the equal protection of the law," the court said: "This contention, shortly stated, comes to this: that although a classification of railway employees may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary, and a denial of the equal protection of the law, the moment it is found to embrace employees not exposed to hazards peculiar to railway operation. But this court has never so construed the limitation imposed by the 14th Amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy, because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees generally is repugnant to the clause of the Constitution guarantying the equal protection of the law, merely because it is not limited to those engaged in the actual operation of trains, is without merit. The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose." The court referred to *LOUISVILLE & N. R. Co. v. MELTON*, in which its views with regard to the whole matter of classification had been expounded.

Missouri.

The Missouri statute making owners of mines liable for injuries to employees because of the negligence of fellow servants has been upheld against the contention that it denied the mine owner equal protection of the laws and took his property without

classify objects of legislation, and necessarily this power must have a wide range of discretion.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The true test is not the comparative danger, but was the employee at the time of injury in the class prescribed by the legislature, did the classification embrace all within the same class, and is the classification based upon a reasonable ground, and

due process of law. *Hawkins v. Smith*, 242 Mo. 688, 147 S. W. 1042. It was further held that the statute was not invalid because it excluded from its operation persons engaged in the operation, construction, or repairing of the mills, flumes, and tramways above ground, and because it further excluded from its operation mines which had not yet reached the point of production. The court said that the dangers of underground mining were of such a character as to form a good basis for classification equally with the dangers inherent in railroading.

Nebraska.

The Nebraska act providing that every railroad company operating a railway engine, car, or train in the state of Nebraska shall be liable to any of its employees who, at the time of injury, are engaged in construction or repair work, or in the use and operation of any engine, car, or train for said company, for all damages which may result from the negligence of any of its officers, agents, or employees, is a valid law under the Constitution of Nebraska, and is not repugnant to the 14th Amendment of the Federal Constitution. *Swoboda v. Union P. R. Co.* 87 Neb. 200, 138 Am. St. Rep. 483, 127 N. W. 215.

The Nebraska statute which establishes the doctrine of comparative negligence was upheld in *Missouri P. R. Co. v. Castle*, 97 C. C. A. 124, 172 Fed. 841, against the contention that such provision was repugnant to the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of a citizen of the United States, deprives the defendant company of its property without due process of law, and denies to it the equal protection of the laws. This decision was affirmed in 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

North Carolina.

The North Carolina statute provides that any servant or employee of any railroad company operating in the state who shall suffer any injury to his person in the course of his services or employment with such company by the negligence, incom-

petency, or carelessness of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, should be entitled to maintain an action against such company, and that any contract or agreement, express or implied, made by any employee of said company, to waive the benefit of the statute, should be null and void.

Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Chicago, K. & W. R. Co. v. Fontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857.

petency, or carelessness of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, should be entitled to maintain an action against such company, and that any contract or agreement, express or implied, made by any employee of said company, to waive the benefit of the statute, should be null and void. In *Coley v. North Carolina R. Co.* 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43, subsequent appeal, 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195, it was held that the statute was an unconditional abrogation of the doctrines of fellow servant and assumption of risk, as applied to railroad companies, that the statute was valid in its entirety, operating to abrogate the defense of assumption of risk, whether resting on contract, express or implied, and whether pleaded directly or under the doctrine of fellow servant.

In *Mott v. Southern R. Co.* 131 N. C. 234, 42 S. E. 601, it was held that the act was not restricted to employees running the train, but embraced injuries sustained by any servant or employee of any railroad company "in the course of his services or employment with said company."

Oklahoma.

The Oklahoma Constitution which abrogates the fellow-servant rule as to all employees of steam and street railways, and of all persons, firms, or corporations engaged in operating mines, has been held not to violate the equal protection provisions of the Federal Constitution. *Missouri, K. & T. R. Co. v. Richardson*, — Tex. Civ. App. —, 125 S. W. 623. To the same effect, *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164.

In upholding the Oklahoma Constitution, the court in *Kreps v. Brady*, post, 106, said in a headnote: "For the purpose of abrogating or modifying the common-law rule of fellow servants, it is competent for the lawmaking power of a state, without offending against the 'equal protection' clause of the Federal Constitution (14th Amendment), to classify railroad, street railway, and mine employees because of the hazard attached to those employments; and

Mr. Justice White delivered the opinion of the court:

For personal injuries, Spencer Melton recovered a judgment against the plaintiff in error in the circuit court of Hopkins county, Kentucky. The court of appeals affirmed the judgment (127 Ky. 276, 105 S. W. 386, 110 S. W. 233, 112 S. W. 618), whereupon this writ of error was prosecuted.

Melton, a carpenter, was injured on March 21, 1905, while in the employ of the railway company. He was one of a construction crew, composed of a foreman and six men, who usually did what is described as bridge carpentering. On the date mentioned the crew was engaged, alongside the track of the railway company at Howell, Indiana, in constructing the foundation of

a coal tippie at which the engines might coal. A bent or frame of timber, composed of heavy pieces fastened together, and intended to be used as part of the foundation of the tippie, which was lying flat upon the ground, was being raised for the purpose of placing it in the foundation. The lifting was accomplished by means of a block and tackle. A pulley was fastened by an iron chain to an upright piece of timber, and through the pulley a rope passed, which was attached at one end to the bent, so that, on hauling on the rope at the other end, the bent or frame was slowly lifted up. Most of the men were engaged in hauling on the rope, while the foreman and Melton, under his orders, were standing beneath the bent, and were engaged in placing props under the bent to prevent its

a constitutional provision doing this, in language broad enough to include all such employees, is not to be restricted to those employees only who are engaged in the specially hazardous work of such vocations, but extends to all employees doing work essential to be done in the carrying on of the business of railroading, mining, etc."

South Dakota.

The South Dakota statute which renders every common carrier liable to his servants for injuries caused by the negligence of other servants has been held invalid, as denying the equal protection of the laws. *Chicago, M. & St. P. R. Co. v. Westby*, post, p. —. The opinion was also expressed that the enactment could not be validated by a construction which limited its purview to railroad companies, or to common carriers and their employees when they engage in dangerous occupations.

Texas.

The Texas statute which applies to all railroad companies, and provides that all persons intrusted with authority or control by any railway company are vice principals, and not fellow servants, has been upheld against the contention that, as it does not comprehend all common carriers, it denies railroad companies the equal protection of the laws. *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486.

The statute has also been upheld in *Austin Rapid Transit R. Co. v. Groethe*, — Tex. Civ. App. —, 31 S. W. 197, affirmed in 88 Tex. 262, 31 S. W. 196; *Galveston, H. & S. A. R. Co. v. Gibson*, — Tex. Civ. App. —, 54 S. W. 779; *Missouri, K. & T. R. Co. v. Smith*, 45 Tex. Civ. App. 128, 99 S. W. 743; *Missouri, K. & T. R. Co. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 601; *Mexican Nat. R. Co. v. Jackson*, 55 C. C. A. 315, 118 Fed. 549, 13 Am. Neg. Rep. 245.

The Texas fellow-servant act has been held to be valid, although applied in the case of injuries to servants engaged in in-

terstate commerce. *Missouri, K. & T. R. Co. v. Nelson*, 39 Tex. Civ. App. 269, 87 S. W. 706.

The Texas statute of 1909, which provides that every corporation, receiver, or other person operating a railroad shall be liable to any persons injured while "employed by such carrier, operating such railroad," was held not to violate the constitutional provision against equal protection of the laws, although it should be construed to apply to all of the employees of a railroad, whether they were engaged in operating the train or not. *Houston & T. C. R. Co. v. Bright*, — Tex. Civ. App. —, 156 S. W. 304. To the same effect, *St. Louis, S. F. & T. R. Co. v. Jenkins*, — Tex. Civ. App. —, 137 S. W. 711; *St. Louis, S. F. & T. R. Co. v. Taylor*, — Tex. Civ. App. —, 134 S. W. 819.

The same statute has been held not to be an undue interference with interstate commerce because that is a subject relative to which the state may act, and the statute is merely inoperative if Congress has already acted upon the subject. *Houston & T. C. R. Co. v. Bright*, —, Tex. Civ. App. —, 156 S. W. 304.

The Texas act of 1911 has been held to be valid as not denying equal protection of the laws, although it is made applicable to all of the employees of the railroad. *Texas & N. O. R. Co. v. Yerkes*, — Tex. Civ. App. —, 156 S. W. 579.

Virginia.

The provision of the Virginia state Constitution, § 162, which abrogates the doctrine of common employment as regards certain specified servants of railroad corporations, has been held not to be in conflict with any of the clauses of the Federal Constitution and its amendments. *Day v. Atlantic Coast Line R. Co.* 102 C. C. A. 654, 179 Fed. 26 (doctrine laid down in general terms); *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432 (statute does not deny equal protection of the laws).

lowering, when the strain upon the rope passing through the pulley was relaxed. While Melton was in this position a link of the chain which held the pulley at the top of the upright post broke, and the bent fell to the ground with Melton underneath, inflicting upon him serious and permanent injuries. The chain which broke was furnished by the foreman of the gang, and had been put in position under his directions.

Melton was a resident of Hopkins county, Kentucky, and he there commenced this action. The right to recover was based upon the charge that the injury was occasioned through the furnishing by the corporation of unsafe tools to do the work of raising the bent. Besides generally controverting the cause of the injuries, as al-

leged, the answer of the company set up the defenses of contributory negligence and assumption of the risk. Thereafter Melton was allowed to file an amendment to his petition. By the amendment it was substantially alleged that he was injured without any fault on his part, and solely owing to a defect in the condition of the works or tools connected with or in use in the business of the defendant, and that such defect was the result of negligence on the part of the foreman, who was the person intrusted with the duty of keeping such tools or works in a proper condition, and the accident was also charged to have been caused by the negligent orders of the foreman, to whose directions Melton was bound to conform. The sufficiency of the facts alleged to entitle to recovery was expressly

Wisconsin.

The Wisconsin statute which provides that every railroad company shall be liable to a servant who is injured through the negligence of any other servant has been held constitutional in respect of all classes of servants. *Kiley v. Chicago, M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 464, first appeal 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394; *Ladd v. Minneapolis, St. P. & S. Ste. M. R. Co.* 142 Wis. 165, 125 N. W. 468.

On the first appeal of the *Kiley Case*, 138 Wis. 215, 119 N. W. 309, 21 Am. Neg. Rep. 394, the court said: "It is strenuously urged that the imposition of these burdens and liabilities on railroad companies only, as a class, violates their right to the equal protection of the law, and that, being a classification based upon the character of the corporation, it furnishes no reasonable distinction or necessity for separating them into a class for purposes of legislation. To ascertain wherein distinction is made by the legislature between railroad companies and individuals and other corporations and associations we must consider the nature and object of the regulation, as well as the provisions prescribing rules for the regulation of railroad companies as a class. The context of this statute shows that railroad companies are separated into a class for legislative regulation respecting their liability to their employees for injuries caused by their negligence or the negligence of other employees in the course of their employment. Is the railroad business distinguished in character from all other businesses so as to justify special regulation of it, as is done by this law? This, we think, must be answered in the affirmative. The business of operating a railroad differs from others in its nature, in its relation to the public, and in the peculiar dangers and hazards as regards its employees and the public. These characteristics clearly distinguish the railroad from any other business, and call for regulation to meet the conditions and exigencies pe-

culiar to it, and such as are wholly inapplicable to any other business. The object of this law is to attain reasonable protection to its employees and to secure the safety of the public. The legislature seeks to attain this through the imposition of these unusual burdens and liabilities, thereby securing from railroad companies the exercise of a degree of care in the selection of competent and careful employees for the conduct of the business commensurate with the hazards and dangers to its employees and the insecurity of the public. Securing the safety of the public in addition to the protection of its employees is an important feature which distinguishes a railroad business from any other, and is an important consideration in separating railroads into a class by themselves for legislative purposes." Under the doctrine thus laid down, a fence builder was held to be entitled to recover for an injury to his eye caused by a flying staple.

In the second appeal of the *Kiley Case*, 142 Wis. 154, 125 N. W. 464, the court said: "If the law can only be viewed as a classification of laborers or employees based upon the peculiar risks which men who operate trains necessarily meet, and which are not met by men who are employed by firms or corporations engaged in other occupation then it may be admitted for the sake of the argument that the classification attempted in this law is indefensible, because in that case it should have been confined to those employees who met such peculiar risks, namely, those engaged in or about the operation of trains, while the law (with two exceptions, to be noticed later) in fact includes all classes of employees, many of whom meet no peculiar risk, but only the same risks which the employees of ordinary business concerns are daily meeting. It is not denied that a number of courts have condemned similar laws upon this very ground; notably the courts of Iowa and Minnesota; and it may be admitted that such was, for a time, at least, the prevailing doctrine."

based upon the provisions of the first and second subsections of § 1 of an act of the legislature of Indiana of March 4, 1893, known as the employers' liability statute, reading as follows:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that every railroad . . . operating in this state shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

"First. When such injury was suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition.

"Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform."

The court, on the motion of the railway company, having required Melton to determine whether to rely upon the common law or the statute, he elected to base his right to recover on the statute. Thereupon the railway company answered the amended petition, and therein stated as follows:

"Defendant says that the said Indiana statute pleaded cannot and does not apply to the facts of this case, the plaintiff cannot rely thereon; and that under the law of Indiana, as to the character of the work then in hand, the plaintiff was a fellow servant with the said foreman of the construction crew, for whose negligence the defendant is not liable."

Before trial, permission being granted, the railway company, by an additional amendment, defended on the ground that the Indiana statute relied upon, if held ap-

plicable to the facts alleged, was repugnant to the Constitution of Indiana and to the equal protection clause of the 14th Amendment. The averments on this subject were lengthy, and concluded as follows: "Defendant distinctly raises the Federal question that the said statute, in so far as made to apply to the facts in this case, is violative of said provision of the Constitution of the United States and void." The provision referred to, as shown by the context, was the equal protection clause of the 14th Amendment.

On the trial, counsel for the railway company offered as evidence of the common law of the state of Indiana on the subject of fellow servants the opinions of the supreme court of Indiana in the following cases: *New Pittsburgh Coal & Coke Co. v. Peterson* (filed October 31, 1893), 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Southern Indiana R. Co. v. Harrell* (filed October 9, 1903), 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; *Indianapolis & G. Rapid Transit Co. v. Foreman* (filed January 29, 1904), 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669.

At the close of the evidence for plaintiff, and also upon the conclusion of all the evidence, the railway company unsuccessfully moved the court to peremptorily instruct the jury to find in its favor for the following reasons:

"1. There is no evidence of actionable negligence proven.

"2. The Indiana statute upon which this action is based does not apply to the facts proven.

"3. In so far as the terms of the Indiana statute apply to the facts proven, they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the Constitution of Indiana and of § 1, article 14 of the Constitution of the United States, being § 1 of the 14th Amendment thereto.

"4. The said Indiana statutes were not intended to be enforced out of the state of

Conclusion.

In conclusion it may be stated that by the more recent decisions, statutes abolishing the fellow-servant rule as to all corporations have been held invalid in Indiana and Mississippi, but upheld in Arkansas; that the South Dakota statute confined in its application to common carriers has been held invalid by the Federal circuit court of appeals; that statutes abolishing the fellow-servant rule as to railroads and mines have been upheld in Missouri and Oklahoma; that statutes applying to railroads only have been upheld in Alabama, Indiana, Nebraska, North Carolina, Texas, 47 L.R.A. (N.S.)

and Wisconsin; and that the Federal and Michigan statutes confined to common carriers by railroad have been upheld.

A statute abolishing entirely the fellow-servant doctrine has been sustained in Colorado, while statutes establishing the superior servant doctrine have been upheld in Mississippi, Texas, and Virginia; and in California a statute establishing the departmental doctrine, and abolishing the defense afforded by the fellow-servant rule where the negligent servant was at work at another machine than that at which the injured servant was at work, has also been upheld.

W. M. G.

Indiana, and are against the policy of the state of Kentucky, and not enforceable in a Kentucky forum."

The railway company, in its request for instructions, which were refused, and to which refusals it excepted, substantially asked that the general principles, of the common law of Indiana as to fellow servant and assumption of the risk, as exemplified by the Indiana decisions which it had offered in evidence, be applied to the case. The court, on the contrary, in the instructions which it gave, substantially applied the provisions of the Indiana statute, as by it construed. In the motion for a new trial fifteen reasons were stated, those which made reference to the statute or to the Constitution of the United States being the following:

"14. The court erred in applying the Indiana statute to the facts of this case. The court erred in enforcing the Indiana statute in a Kentucky forum.

"15. The court erred in upholding and applying the Indiana statute pleaded in this case, when same, in so far as applicable to the facts proven in this case, is unconstitutional and void. It is discriminatory against defendant, and denies it the equal protection of the law. It is violative of the Constitution of the state of Indiana and of § 1 of article 14 of the Constitution of the United States, which guarantees to defendant the equal protection of the law."

The court below held that the supreme court of Indiana had construed the statute as applicable both to persons and corporations operating railroads. It further held that the statute embraced the case in hand because Melton came within the category of persons injured in the operation of a railroad, as "the construction of a coal tippie is . . . essential to the operation of a railroad." As thus construed, the repugnancy of the statute to the equal protection clause of the Constitution of the United States was considered. It was decided that, for the purpose of abrogating or modifying the common-law doctrine of fellow servant, it was competent for the law-making power of a state, without offending against the equal protection clause, to classify railroad employees because of the hazard attached to their vocation, and that a statute doing this need not be confined to employees who were engaged in and about the mere movement of trains, but could also validly include other employees doing work essential to be done to enable the carrying on of railroad operations. Thus, referring to the alleged distinction between railroad operatives engaged in train move-

ment and those who were not, the court said:

"We are unable to see the force of this distinction. A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tippie is therefore essential to the operating of a railroad. As has been well said, the legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. *Indianapolis Street R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; *Schoolcraft v. Louisville & N. R. Co.* (*Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.*) 92 Ky. 233, 14 L.R.A. 579, 17 S. W. 567; *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; *Georgia R. Co. v. Ivey*, 73 Ga. 504."

The railway company asked a rehearing for the sole purpose of a reconsideration of what was referred to as the very important Federal question involved, viz., "the unconstitutionality of the Indiana statute, as applied to the facts of this case." The court permitted the question whether a rehearing should be granted to be orally argued, and, after such argument, in a brief opinion denied the request. Two members of the court, however, dissented, on the ground that the statute as construed was repugnant to the equal protection clause of the 14th Amendment. This writ of error was then prosecuted, and the only reference to the Constitution of the United States made in the assignment of error filed with the application for the writ was that embraced in the contention that the Indiana statute could not be constitutionally applied to the facts without causing the statute to be repugnant to the 14th Amendment.

We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous

cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

Coming to the merits, we at once premise that we are not concerned with the construction affixed by the court below to the Indiana statute, unless it be that that construction offends against some Federal right properly asserted and open to our consideration. In the argument at bar in behalf of the railway company two rights of this character are insisted upon. First, it is said that the court below, in applying the statute, has caused it to embrace a class of employees which the statute did not include, and thereby gave it a wrongful construction, in violation of the full faith and credit clause of the Constitution of the United States. Second, that, in any event, the statute as construed is repugnant to the equal protection clause of the 14th Amendment. We separately dispose of these propositions.

The full faith and credit clause. The contentions as to this proposition rest upon the assumption that it has been conclusive-

ly settled by the supreme court of Indiana that the statute only changed the general rule prevailing in that state in respect to the doctrine of fellow servant as to railroad employees actually engaged in the hazard of train service, and therefore did not include an employee engaged in the character of work which Melton was performing when injured, and that to give the statute a contrary meaning was to violate the full faith and credit clause. If, however, the premise upon which the proposition rests, and the legal deduction based upon that premise, be, for the sake of the argument, conceded, the contention is, nevertheless, without merit, because of the failure of the railway company to plead or in any adequate way call the attention of the court below to the fact that, in connection with the proper construction of the statute, the benefit of the due faith and credit clause of the Constitution of the United States was relied on. We say this because the statement which we have previously made of the case fails to show from first to last, even up to and including the application for rehearing, the assertion of any claim to the protection of the full faith and credit clause. Indeed, that statement not only shows a failure to make such claim, but discloses such direct and express action on the part of the railway company as justly to give rise to the inference that a reliance upon any claim of Federal right resulting from the full faith and credit clause was not thought to be involved in the case. We say this because the frequent and reiterated assertions of Federal right, based solely upon the equal protection clause of the 14th Amendment, sustain such conclusion.

Further, even if, for the sake of the argument only, the failure to plead the full faith and credit clause, or to direct the attention of the court below to the fact that reliance was placed upon that clause, could be supplied upon the theory that, as the cause of action was based upon an Indiana statute, by implication the due faith and credit clause was necessarily involved, nevertheless the contention would be without merit. This follows because, as pointed out in *Finney v. Guy*, 189 U. S. 335, 340, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558, and *Allen v. Allegheny Co.* 196 U. S. 458, 463, 49 L. ed. 551, 555, 25 Sup. Ct. Rep. 311, it is not true to say that necessarily in every case where the court of one state is called upon to determine the proper construction of a statute of another state, a question under the Constitution of the United States arises. Although the Indiana statute was at issue and its meaning was necessarily involved, the duty of con-

struing it rested upon the court below. The general rule is that, in the absence of a statute to the contrary, if a settled construction by the court of last resort of a state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566, and cases cited. As, however, it is not asserted that there was a statute of Kentucky controlling the courts of that state in construing the statutes of other states, and as there was no pleading or proof as to the existence of any such settled construction, it follows that there is nothing presented, which can be held to have deprived the court below of its power to exercise its independent judgment in interpreting the statute. Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved; and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194.

The equal protection of the law clause. That the 14th Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the 14th Amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. 47 L.R.A. (N.S.)

Rep. 136; *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688. But while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only, consistently with equality and uniformity, embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. The argument is thus stated: "Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment, and not upon the character of the employer." Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet, as in operating railroads some employees are subject to risks peculiar to such operation, and others to risks which, however serious they may be, are not, in the proper sense, risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this: that by the operation of the equal protection clause of the 14th Amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided

for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent.

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594, while declaring that the power of a state to distinguish, select, and classify objects of legislation was, of course, not within limitation, it was said, "necessarily this power must have a wide range of discretion." After referring to various decisions of this court, it was observed:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Again considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, it was reiterated that the legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical, and not palpably arbitrary.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, a statute of Minnesota, providing that the liability of railroad companies for damages to employees should not be diminished by reason of accident occurring through the negligence of fellow servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employees engaged in construction of new and unopened railroads. In the course 47 L.R.A. (N.S.)

of the opinion the court said (p. 598): "The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the 14th Amendment." These principles were again applied in *Martin v. Pittsburgh & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87, and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the *Tullis Case*, which came here on certificate, the nature and character of the work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the 14th Amendment, will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the *Pontius case* there was approvingly cited a decision of the court of appeals of the eighth circuit (*Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 362), wherein it was held that, under the same statute, an employee injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, where, upon the authority of the *Tullis case*, the court affirmed a judgment of the supreme court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passersby in a street beneath an overhead bridge, was struck by a tie thrown from the structure.

While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employees sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinion rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in Indiana (Indianapolis Traction Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954, and Cleveland, C. C. & St. L. R. Co. v. Foland, decided April 20, 1910, 91 N. E. 594) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the 14th Amendment, unequivocally held that the statute must be construed as restricted to employees engaged in train service.

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Piff. in Err.,

v.

MARIE M. WESTBY, Admr., etc., of Mar-
tin Westby, Deceased.

(102 C. C. A. 65, 178 Fed. 619.)

Employers' liability law — equal pro- tection of laws — classification — requisites.

1. The employers' liability law of South Dakota (Laws 1907, chap. 219) excepts from the general law of the state all common carriers and all their employees, subjects the former to and grants to the latter causes of action for injuries to the employees caused by the negligence of their fellow servants, and for those to which their own negligence contributes, while no such liabilities are imposed upon other employers, and no such rights are granted to other employees. The 14th Amendment to the Constitution forbids any state to "deny to any person the equal protection of the laws." Held:

(1) Legislatures of states, for some sound reason of necessity or propriety inherent in the subjects of their legislation, may classify those subjects and make laws applicable to one class that are inapplicable to another, but may not make such classification arbitrarily.

(2) There are three indispensable con-

Headnotes by SANBORN, Circuit Judge.

Note. — As to validity of statutes abrogating the fellow-servant rule, see note to Louisville & N. R. Co. v. Melton, ante, 84. 47 L.R.A.(N.S.)

ditions to a constitutional imposition by a state of liabilities or burdens upon, and to a constitutional grant by a state of rights or privileges to, the members of a class that other members of the state may not bear or enjoy:

(a) There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of all other members of the state in relation to the subjects of the discriminatory legislation as presents a just, natural reason for the difference made in their liabilities and burdens, and in their rights and privileges.

(b) No one who does not belong to the class may be included therein, and all the members of the class must be treated alike.

(c) All who are in a situation and circumstances relative to the subjects of the discriminatory legislation indistinguishable from those of the members of the class must be brought under the influence of the law, and treated by it in the same way as are the members of the class.

(3) The employers' liability law of South Dakota fulfils neither of these conditions, and is violative of the prohibition of unequal laws contained in the 14th Amendment, because there is no sound reason of necessity or propriety for the difference of liabilities and rights it makes between the masters and servants in the class it forms and other masters and servants in the state in the same situation and circumstances relative to its subject-matter as the members of the class, and because it does not subject to its provisions all masters and servants who are in the same situation and circumstances relative to its subject-matter as the members of the class it forms.

Same — construction.

2. The employers' liability act of South Dakota, which, by its terms, subjects every common carrier engaged in commerce in the state to liability for, and grants to every employee of every such carrier a cause of action for, injuries to the employee caused by the negligence of a fellow servant, and for those contributed to by his own negligence, may not be limited by construction to a constitutional class, to common carriers using the agency of steam or other powerful agency, and operating engines, trains, or other ponderous machinery, and their servants engaged in hazardous and dangerous occupations, and then sustained.

Statute — partial invalidity — when sustainable.

3. Where a part of a statute is constitutional and a part is unconstitutional, the former may be sustained in proper cases, while the latter fails.

Indispensable conditions of such a result, however, are that: (a) The constitutional part and the unconstitutional part are capable of separation so that each part may be read and may stand by itself; (b) the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legis-

lature in enacting the law; (c) the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part, and to give effect to the former alone.

Constitutional law — legislative classification — consideration — judicial legislation.

4. Where the legislature of a state has included in a law by general language numerous subjects or persons, and has made no limitation or exception, the legal presumption is that it is intended to make none, and it would be judicial legislation for a court to do so.

Same — limitation by judicial construction.

5. A statute of a state which includes by general language in a single class those within and those without the constitutional class may not be limited by judicial construction to the latter class and then sustained.

(April 12, 1910.)

ERROR to the Circuit Court of the United States for the District of South Dakota to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and River and William K. Munger, District Judges.

Messrs. William G. Porter and Charles E. Vroman, for plaintiff in error:

The statute denies to the railway company equal protection of the law, in that its classification is arbitrary and regardless of the fact that the railway company may be affected by the statute when engaged in some clerical or other business, the nature of which does not warrant classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 356; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Schus v. Power-Simpson Co. 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68; Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 956; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; Malone v. Burlington, C. R. & N. R. Co. 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; Luce v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 75, 24 N. W. 600; Matson v. Chicago, R. I. & P. R. Co. 68 Iowa, 22, 25 N. W. 911; Pearson v. Chicago, M. & St. 47 L.R.A.(N.S.)

P. R. Co. 47 Minn. 9, 49 N. W. 302; Smith v. Burlington, C. R. & N. R. Co. 59 Iowa, 73, 12 N. W. 763; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; McLeod v. Chicago & N. W. R. Co. 125 Iowa, 270, 101 N. W. 77; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686.

The act grants privileges to a class of employees without any justification for the classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 225; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Schus v. Powers-Simpson Co. 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68; Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; Luce v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 75, 24 N. W. 600; Matson v. Chicago, R. I. & P. R. Co. 68 Iowa, 22, 25 N. W. 911; Smith v. Burlington, C. R. & N. R. Co. 59 Iowa, 73, 12 N. W. 763; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; McLeod v. Chicago & N. W. R. Co. 125 Iowa, 270, 101 N. W. 77; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686.

The act grants privileges to a class of employees while others, engaged in the same employment, under the same circumstances, are excluded, and are not given equal protection of the law.

Lodi Twp. v. State, 51 N. J. L. 402, 6 L.R.A. 56, 18 Atl. 749; State ex rel. Van Riper v. Parsons, 40 N. J. L. 123, 29 Am. Rep. 210; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Re Washington Street, 132 Pa. 257, 7 L.R.A. 193, 19 Atl. 219; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Angell v. Cass County, 11 N. D. 256, 91 N. W. 72; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; Van Harlingen v. Doyle, 134 Cal. 53, 54 L.R.A. 771, 66 Pac. 44; State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; Re Keymer, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667; Dixon v. Poe, 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 732; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558,

46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*), 183 U. S. 79, 109, 46 L. ed. 92, 108, 22 Sup. Ct. Rep. 30; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Crescent Liquor Co. v. Platt*, 148 Fed. 900; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *Longview v. Crawfordsville*, 164 Ind. 124, 68 L.R.A. 622, 73 N. E. 78, 3 Ann. Cas. 496; *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691; *Sutton v. State*, 96 Tenn. 710, 33 L.R.A. 589, 36 S. W. 697; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42; *Henderson v. Walker*, 55 Ga. 481; *McKivergan v. Alexander & E. Lumber Co.* 124 Wis. 60, 102 N. W. 332, 17 Am. Neg. Rep. 751; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486.

The statute, in assuming to affect "every common carrier," excludes some whose business is inherently hazardous, and includes others whose business is not inherently hazardous, and so unwarrantably favors some and unjustly discriminates against others.

Cooley, Const. Lim. 6th ed. p. 482; *Clutchinson*, Carr. 3d ed. § 68; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074.

Messrs. A. B. Kitttridge, Hans Urdahl, and Edwin R. Winans for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

At about 9 o'clock in the morning on a bright day in December, as Martin Westby, a section foreman, was walking west on the northerly track of the Chicago, Milwaukee, & St. Paul Railway Company at Madison, in South Dakota, one of its passenger trains, which was backing from the station in order to change engines, overtook and struck him. The plaintiff below was the widow and administratrix of his estate, and she brought this action and recovered a judgment for the benefit of herself and their minor children under the employers' liability act of February 20, 1907 (chap. 47 L.R.A.(N.S.)

219 of the Session Laws of South Dakota for 1907), which provides:

"Section 1. That every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employees, or in case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"Sec. 2. That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was less than the negligence of the employer, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

There are many specifications of alleged error in this case which involve grave questions of law; but the face of the record discloses an error which was probably inadvertently made, but from which there seems to be no escape. It is that the court struck out the testimony of Mr. Miller, a witness for the defendant, and the conductor of the train that struck Westby, upon the issue whether or not that train was executing a switching movement when the accident happened. The materiality and importance of this testimony will appear from a brief statement of the pleadings, the course of the trial, and the charge of the court relative to this issue.

The administratrix alleged in her complaint, among other things, that Mr. Westby was one of the section foremen and yardmasters of the defendant; that he knew its rules; that rule 60 was that "when a train is pushed by an engine, except when switching and making up trains in yards, a trainman must be stationed on the front of the leading car with proper signals so as to perceive the first sign of danger and immediately signal the engineer;" that it had always been the custom at Madison to obey this and other rules; that Westby relied upon this rule and the custom of obeying it, and while he was engaged in the discharge of his duty as section foreman the defendant backed the passenger train upon him without any trainman upon the leading car and

struck him. The defendant in its answer denied all negligence on its part, and among other things denied that it had been the custom of its employees at Madison to obey rule 60, and that Mr. Westby relied upon the rule or upon any such custom, and averred that the rule was inapplicable to the train which struck him because it was switching, and that he was guilty of negligence which directly contributed to his death. These facts were disclosed by the trial. The accident happened in the railroad yard at Madison where there were many railroad tracks. Among these were two called the "Bristol-Madison track" and the "Wessington Springs-Madison track," which extended east and west, parallel to each other, and about 14 feet apart from center to center, from a point about 600 feet east of Union avenue to a point several hundred feet west of that avenue. Union avenue crossed these tracks at right angles. One hundred and thirty-three feet west of it and on the north side of the tracks was a tool-house, and about 1,300 feet east of it was the depot. The Bristol-Madison track was the northerly track, and there was a switch about 600 feet east of Union avenue over which passenger trains coming from the west on the Bristol-Madison track passed on to the Wessington Springs-Madison track to reach the depot.

Two passenger trains going east, one from Bristol on the Bristol-Madison track and one from Wessington Springs on the Wessington Springs-Madison track, were due at Madison about the time of the accident, and the Bristol-Madison train changed engines there. When that train arrived, the Wessington Springs train had not come in, and the Bristol train stopped about 30 feet west of Union avenue, and Westby, who, with two section men, was at work on a switch just south of the Wessington Springs track, talked with some of its crew. The Bristol train then went on across the switch upon the Wessington Springs track and to the station, delivered its passengers and baggage, and then backed up across the switch again onto its own track and across Union avenue in order to change its engine. When it passed over the switch, the conductor and the brakeman got off the rear end of the train to attend to the switch and the train respectively, and left no one there. The train backed slowly up along its own track. The Wessington Springs train was then coming in from the west, and as the rear of the Bristol train backed up over Union avenue, Westby had left his work just south of the Wessington Springs track, had crossed that track, and was walking along on the Bristol track toward the tool-house in order to get some plugs. As he

walked along this track, the rear of the Bristol train overtook and knocked him down. If there had been a trainman on the rear of the train, it is probable that he would have seen Westby, would have given him a signal, and would have saved him; but there was no one on the rear of the train at the time of the accident. If Mr. Westby had looked to the east along the north track, which was free from all obstructions, either when he went upon it or while he was walking along it, it is probable that he would have seen the train backing towards him, and that he would have saved himself. Testimony was introduced before the jury that the fatal movement of the Bristol train, was, and that it was not, a switching movement, and the court instructed the jury that "in determining whether the employees in charge of the train were negligent, you will consider the evidence of the witnesses as to whether this train movement that resulted in the death of Westby came within rule 60, or whether it was a switching movement, so as to exclude it from that."

Mr. Miller, the conductor of the Bristol train, testified upon this issue without objection on Saturday afternoon, April 26, 1909, as follows:

Q. Take this movement from the time you moved back, gave the signal to move back to change that engine, and to get out of the way of the other train, up to the time you returned to the station again, what was the character of that movement?

A. It would be switching. We could not call it anything else.

Q. How many classes of movements are there of trains and cars?

A. Two.

Q. What are they?

A. One would be switching and the other would be leaving a station.

Q. What would you call the latter?

A. Road movement.

Q. Train line movement?

A. Yes, sir.

Q. Traffic movement?

A. Yes, sir.

Q. You may state whether or not the movement of cars and trains fall in one or the other of these classes.

A. Yes, it would be either switching or otherwise.

Q. Either switching or train line movement?

A. Making preparation for completing the train would be switching, putting it together ready for the engine.

Q. How many switches do you go through to get back to the point where you took off the engine to put on another?

A. Two.

Q. And in returning how many?

A. The same two.

On the following Monday after Mr. Peterson had testified that he was, and for five years had been, trainmaster of the Iowa & Dakota division of the defendant's railroad, and that the movement of this train was a switching movement, he was asked what he knew "in regard to the custom as to the observance of rule 60 where trains are being switched as to a party being put on the rear car." Thereupon the court sustained the objection of the plaintiff below that the question was incompetent, irrelevant, and immaterial, and granted her motion "that the testimony of the witness Miller given on Saturday afternoon be stricken out because it is incompetent, irrelevant, and immaterial." As the issue whether or not the movement of the train at the time of the accident was switching, and was therefore excepted from rule 60, was made by the pleadings, tried by the evidence, and was so material that it was submitted to the jury by the court, there is no escape from the conclusion that it was an error of law to withdraw from the jury the testimony of the conductor upon this issue.

Counsel for the plaintiff called attention to the fact that Miller also testified that it was not customary in moving trains backward, as the Bristol train was moved at the time of the accident, to place a trainman or anyone on the rear car for the purpose of warning trackmen or section men working around the yards, and they argue that the question to Peterson, which was asked just before the motion to strike out Miller's testimony was made, was directed to this issue, and that it was the portion of Miller's testimony directed to this issue, and that alone, that was stricken out. It may be that in the thought of counsel and court at the time this motion was made this was the purpose and extent of the motion and of the ruling. But the question before us is not now what counsel and court thought about it, but what the motion and the ruling meant to the jury. The pleadings, the evidence, and the charge have been read again in view of the contention of counsel upon this subject without finding any safe ground for holding either that the jury were told, or that they understood, that the motion granted did not withdraw from their consideration just what it stated, and that was the testimony of "Miller given on Saturday afternoon," and that testimony was all the testimony he gave in the case. When an attempt is made to limit the motion to part of his testimony, the question at once arises to what part, and there is nothing in the record which answers it. Moreover, the ques-

tion asked Peterson just before the motion was made was not directed, as is the part of Miller's testimony to which this court is asked to limit the motion, to the custom "for the purpose of warning trackmen or section men working around the yards," but it called for the general custom where trains were being switched, as he had testified that this train was, regardless of the purpose of the custom. Our reluctant conclusion is that the record forbids a limitation of this motion, and that the jury must have understood it to mean what counsel said when he made it, that the ruling upon it necessitates another trial of this action.

The court below overruled objections made at the trial of this case and to the charge of the court on the ground that the employers' liability law of South Dakota was unconstitutional. Prior to the act of February 20, 1907, employers in South Dakota were not liable for injuries or deaths of their employees which the latter's negligence contributed to cause, nor for those caused by the negligence of their fellow servants, and this is still the general law of that state. That statute of 1907 excepted from this general law, which still governs the rights of all other masters and servants in that state, common carriers and their servants, subjected the former to, and granted to the latter, causes of action for injuries to the servants caused by the negligence of their fellow servants, and for injuries to which their own negligence contributed, while no such liabilities were imposed upon other employers and no such rights were granted to other servants. The 14th Amendment to the Constitution of the United States forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." How may such legislation escape this inhibition? The answer is, by classification, and the concession is freely made that the legislatures of the states may lawfully classify the subjects of their laws and make provisions applicable to one class of subjects that have no application to another class. But the members of these classes may not be selected arbitrarily without just or sound reason inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law.

In the face of the constitutional prohibition of unequal laws, there are three indispensable conditions to a constitutional imposition of liabilities or burdens upon, or a constitutional grant of rights or privileges to, the members of one class that other members of the state do not bear or enjoy:

(1) There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 107-112, 46 L. ed. 92, 107-109, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247 (filed February 21, 1910); *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 252, 41 N. W. 974; *State v. Loomis*, 115 Mo. 307, 314, 21 L.R.A. 789, 22 S. W. 350; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533, 549. (2) No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby. (3) All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class. "An act of class legislation, to stand in the face of the Constitution, must include all who belong to the class; not all who bear similarity in some characteristic to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class." *Sams v. St. Louis & M. River R. Co.* 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686, 691; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 224, 8 L.R.A. 419, 45 N. W. 156; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L.R.A. 56, 18 Atl. 749.

It is evident from a casual reading of the three conditions which have been stated 47 L.R.A. (N.S.)

that, if either of them be disregarded, parties within or without the legislative class must be deprived of the equal protection of the laws, and the question at once arises: Does this statute of South Dakota comply with these conditions?

The subject-matter of the statute is the liability of masters for injuries to their servants caused by the negligence of their fellow servants, and for those to which their own negligence contributes. There is a sound and natural reason why railroad companies should be liable, while other employers are not, for the injuries of their servants engaged in the operation of their engines and trains and in the construction and repair of tracks and roadbeds on which engines and trains are in operation, and in any other like hazardous occupations, although those injuries are incurred by the negligence of fellow servants. It is that the occupation of these servants is more hazardous and more dangerous than that of servants in ordinary occupations, and that the fellow servants on whose care their safety largely depends are so numerous and many of them are so distant from them in place or in work that they have little, if any, opportunity to learn their characters for care and prudence. If the act under consideration limited its beneficiaries to servants of this class, it might escape the ban of the Constitution and be sustained. But it confers its causes of action upon all the servants of all common carriers, whether these servants are engaged in dangerous or in comparatively safe occupations; whether they are driving engines, operating trains, and repairing railroad tracks, or making tariffs, keeping books, trying lawsuits, conducting or driving street cars, or stage-coaches, or cabs, or omnibuses, or wagons, loading and unloading drays or trucks, or operating a telegraph or a telephone or an express business, so that the danger of their occupations utterly fails to distinguish their situation and circumstances from those of the servants of other masters, some of whom, like the servants in this legislative class, have dangerous and others comparatively safe occupations.

All who pursue the business of carrying passengers or goods or information for hire for the public generally, railroad companies, express companies, telegraph companies, telephone companies, street car companies, owners and operators of omnibuses, cabs, carriages, carts, drays, trucks, sleds, boats, and many other vehicles, are common carriers. *Hutchinson, Carr*, 2d ed. §§ 58-69; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 463, 497, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141. A little reflection upon the vast amount of trans-

portation conducted by common carriers in taking passengers and goods to and from railroads and vessels, and in carrying them through parts of the country which the railroads do not reach, makes the fact apparent that railroad companies constitute but a small percentage of the number of common carriers, and convinces that a large proportion and probably a large majority of all the servants of all common carriers are not engaged in any dangerous occupation whatever. Under this statute, if a bookkeeper or any other servant of a common carrier who is engaged in the performance of clerical duties in its general offices, and such a servant of a merchant or manufacturer engaged in the same occupation, under the same circumstances, are each injured by the negligence of a fellow servant, the common carrier is liable for the damages his servant sustained, while the merchant or manufacturer is exempt from any liability for the damages which his employee suffered. A girl working for a telephone company may recover from it the damages she sustains though the negligence of her fellow servant which her own negligence contributed to cause; but a girl operating a telephone for a hotel keeper or a merchant, and discharging the same duties, under the same circumstances, has no remedy for her injuries. A common carrier is liable for the injuries of his servant engaged in loading, unloading, or driving a dray, a wagon, or a truck, caused by the negligence of his fellow servant; but a merchant or a manufacturer, or any other person, is exempt from liability for such injuries to his servants engaged in doing the same work, under the same circumstances. A telegraph operator employed by a telegraph company may recover of his master for injuries caused by the negligence of his fellow servant which his own negligence contributed to cause; but a telegraph operator employed by a bank or a commission company to discharge the same duties under the same circumstances can recover nothing for such injuries.

Illustrations might be multiplied indefinitely; but these seem to be ample to show that this statute denies the equal protection of the law to persons in the same situations and circumstances relative to the subject-matter of this legislation. There is no reason of necessity or propriety—there is no reason whatever that occurs to us—why a common carrier should be subjected to liability to his bookkeeper or to his clerk in his general offices, or to his driver or loader of his dray or truck, or to any other of his servants who is not actually engaged in some such hazardous occupation as operating engines or trains, or handling or working about machinery, while the mer-

chant, the manufacturer, and all other persons are exempt from such liabilities to their servants engaged in the performance of the same work, under the same circumstances. And there is no just reason—nay, there is no reason whatever that we can ascertain—why such servants of common carriers who are not engaged in any dangerous or hazardous occupation should be granted the right and privilege of recoveries from their masters for damages caused by the negligence of their fellow servants which their own negligence contributed to cause, while the servants of other persons, doing the same work, in the same situation and circumstances, are denied this right and privilege. The discrimination which this statute works violates the indispensable conditions of a constitutional classification. There is no difference between the situation and circumstances of all the members of the class which the statute forms and those of all other masters and servants in the state relative to the subject-matter of this legislation that presents any natural or sound or just reason of necessity or propriety for the difference in their liabilities and rights it attempts to make, and it does not bring under its influence all masters and servants who are in a situation and in circumstances relative to its subject-matter indistinguishable from those of members of the class. All employees of those who are not common carriers, who are engaged under similar circumstances in the same or similar occupations to those of the employees of common carriers that are not engaged in dangerous occupations, are entitled to the same rights of action and to the same privileges that are granted to such servants of common carriers, and the denial of them by this statute is a denial of the equal protection of the laws. And all common carriers are entitled to the same exemptions from liability to their employees who are not engaged in any dangerous occupation for injuries caused by the negligence of their fellow servants which their own negligence contributed to cause that other employers enjoy. The statute deprives them of this exemption and thereby denies to them the equal protection of the laws. Because there is no sound reason of necessity or propriety for the difference of liabilities and rights which this law makes between the members of the class it forms and the other masters and servants in the state in the same situation and circumstances as members of the class, and because it does not include and subject to its provisions all masters and servants in the state who are in the same situation and circumstances relative to the subject-matter of the legislation as are members of the class it

forms, the conclusion has been irresistibly forced upon our minds that this statute denies to many citizens the equal protection of the laws and violates the 14th Amendment to the Constitution.

Perhaps the most learned and exhaustive opinion upon this question is that of Chief Justice Whitfield in *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533. Support for the conclusion which has been reached may be found in that opinion and in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 107-112, 46 L. ed. 92, 107-109, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 559, 560, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247, filed February 21, 1910; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 251, 41 N. W. 974; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954, 956, 957; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 674, 14 L.R.A.(N.S.) 418, 80 N. E. 529, 533; *Sams v. St. Louis & M. River R. Co.* 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686, 689, 691; *State v. Loomis*, 115 Mo. 307, 314, 21 L.R.A. 789, 22 S. W. 350; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 223, 8 L.R.A. 419, 45 N. W. 156; *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943, 945, 946; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Missouri P. R. Co. v. Haley*, 25 Kan. 35; *Union P. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571. Counsel for the defendant in error have called attention to, and we have considered, the facts that the national employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, pp. 891, 892, Supp. 1909, p. 1148), creates a class that includes every common carrier engaged in commerce among the states and in the territories and in the District of Columbia; that it was sustained, so far as it related to the territories and the District of Columbia, in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; and that in employers' liability cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 492, 52 L. ed. 297, 306, 28 Sup. Ct. Rep. 141, the supreme court dismissed the criticism that this law placed all common carriers in a disfavored and all its employees in a favored class with the remark that this consideration concerned the expediency of the act, not the power of Congress to enact it. But the prohibition of the 14th Amendment was not directed against 47 L.R.A.(N.S.)

and did not limit or affect the power of Congress. Its command is "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws;" and the cases in which the national employers' liability acts have been considered involved and hence decided no question of the violation of that Amendment. It is, however, significant that when the Congress came to pass act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1909, p. 1171, in lieu of that of 1906, which had been held unconstitutional so far as it related to commerce among the states, it restricted the class formed by that act to "every common carrier by railroad" engaging in interstate or other specified commerce and their employees. In the cases of *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161, and *Missouri P. R. Co. v. Castle*, 97 C. C. A. 124, 172 Fed. 841, cited by counsel for the plaintiff in error, the statutes under consideration limited the classes they formed to railway companies and their employees, and did not attempt to include in them all common carriers and their servants. The remark of Mr. Justice Field in the former case that it was "simply a question of legislative discretion whether the same liabilities should be applied to carriers by canal and stage-coaches and to persons and to corporations using steam in manufactories" was *obiter dictum*, is not broad enough in its terms to cover all common carriers, and is not in accord with the later considered decisions of the supreme court in the *Ellis Case*, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255, and the *Greene Case*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247 (filed February 21, 1910), that "it is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

The most searching investigation and deliberate reflection have disclosed no such reasonable ground for—no difference between those within and those without—the class formed by this South Dakota statute which bears any just or proper relation to the classification attempted by it; and, tested by this rule of the Supreme Court, it cannot be sustained.

Nor can this statute lawfully be limited by construction either in its terms or in its effect to railroad companies or to common carriers and their employees engaged in dangerous occupations, and be thus brought out from under the ban of the Constitution and sustained. That if the act had been thus restricted by the legislature that passed it it might not have been violative of the 14th Amendment may be conceded, but is not decided. It is also true that where a statute is constitutional in part and unconstitutional in part, the former part in proper cases may be sustained, while the latter part fails. But indispensable conditions of such a result are: (1) That the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself (*Baldwin v. Franks*, 120 U. S. 679, 685, 686, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763); (2) that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legislature in enacting it; and (3) that the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part, and to give effect to the former only. *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. ed. 318, 319; *United States v. Reese*, 92 U. S. 214, 218, 221, 23 L. ed. 563, 565; *The Trade-Mark Cases*, 100 U. S. 82, 99, 25 L. ed. 550, 553; *United States v. Harris*, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. Ct. Rep. 601; *Poindexter v. Greenhow*, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; *Sprague v. Thompson*, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; *Income Tax Cases (Pollock v. Farmers' Loan & T. Co.)* 158 U. S. 601, 636, 39 L. ed. 1109, 1125, 15 Sup. Ct. Rep. 912; *Cella Commission Co. v. Bohlinger*, 8 L.R.A.(N.S.) 337, 78 C. C. A. 467, 471, 147 Fed. 419, 423; *Ballard v. Mississippi Cotton Oil Co.* 81 Mass. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 554, 555.

In *United States v. Reese*, 92 U. S. 214, 218, 221, 23 L. ed. 563-565, Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters, while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of the race, color, or previous condition of servitude of the voter." The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the two

portions of the act applicable to them were readily separable. But the argument failed. The supreme court said: "We are therefore directly called upon to decide whether a penal statute . . . which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

The *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, Congress possessed the constitutional authority to protect trademarks in interstate and foreign commerce, and it enacted a statute which by its terms protected trademarks in all commerce. The court was urged to restrict this law by construction to trademarks in interstate and foreign commerce and to sustain it. But it cited and quoted from the opinion in the *Reese Case*, and held the act unconstitutional.

In *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, the same argument was again met and overthrown with this declaration, which was subsequently quoted and affirmed in *Income Tax Cases (Pollock v. Farmers' Loan & T. Co.)* 158 U. S., at page 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 920: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

In *Sprague v. Thompson*, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988, the legislature of Georgia had enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions. The supreme court of that state sustained it upon the ground that the body of the act was readily separable from the exceptions. The supreme court reversed that decision and said: "It was held, however, by the supreme court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted, in view of the illegality of the exceptions."

The act of the legislature of South Dakota expressly includes within the same general term "every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employees, or, in case of his death, to his personal representative," carriers and employees in the constitutional and those in the unconstitutional class; those engaged in hazardous and dangerous, and those employed in comparatively safe, occupations. The part of the statute applicable to the former class cannot be separated from that applicable to the latter class, so that each may be read and may stand by itself, because both classes are embodied in the general words "every common carrier" and "any employee," and are included in a single declaration. The unconstitutional part cannot be eliminated from the law by striking out or disregarding any words or clauses of the act. That result can be attained only by introducing into the statute words of limitation which would expressly restrict the general terms "every common carrier" and "any employee" to common carriers, using dangerous power and machinery and their employees engaged in dangerous occupations about them,—a species of legislation the courts are without the power to enact. *United States v. Reese*, 92 U. S. 221, 23 L. ed. 565. Such a limitation would exclude from the operation of the act far the larger number of the employers now within it and a large portion, probably a 47 L.R.A.(N.S.)

majority, of the employees within it, and it is far from plain that, if it was the intention of the legislature that the law should have this effect, the legislators would have enacted it with such a limitation. Indeed, the fact that they made no such limitation, and that they excepted none of the unconstitutional classes from the broad terms of the law, raises a conclusive legal presumption that they intended to make no such limitation or exception, and it would be judicial legislation for the courts to do so. *Cella Commission Co. v. Bohlinger*, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 473, 147 Fed. 419, 425; *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 27 U. S. App. 528, 65 Fed. 188, 194; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 60 U. S. App. 100, 88 Fed. 435, 437; *Union Cent. L. Ins. Co. v. Champlin*, 54 C. C. A. 208, 210, 116 Fed. 858, 860. The statute cannot be restricted lawfully by construction to the constitutional class because the part applicable to that class is not separable from the part applicable to the unconstitutional class, so that each may be read and may stand by itself, because it is not apparent that the legislature would have passed the act if it had been limited to the constitutional class, because the legislature excepted neither class, and the legal presumption is that it intended to except none, and because the statute cannot be restricted to the constitutional class by the elimination of words or clauses; but this result can be attained only by the introduction into it of express words or terms.

There are other questions of law urged upon our attention in this case; but, as they may not arise in another trial, no useful purpose would be served by discussing and deciding them now, for sufficient has been said and decided to determine the validity of the present judgment and to indicate the general course of proceedings hereafter, and the judgment is accordingly reversed, and the case is remanded to the court below, with directions to grant a new trial.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

A. T. KREPS, JR., et al., Pliffs. in Err.,

v.
JAMES A. BRADY.

(— Okla. —, 133 Pac. 216.)

Master and servant — abrogation of fellow-servant rule — constitutionality.

1. Section 36, art. 9, of the state Constitution.

Headnotes by BREWER, C.

tution, abrogating the common-law doctrine of fellow servant in the cases of employees of railroad, street railway, interurban railway, and mining companies, is not repugnant to the "equal protection" clause of the 14th Amendment to the Federal Constitution.

Same — mining — drilling for oil and gas.

2. Drilling a well in search of oil or gas is not mining within the meaning of § 36, art. 9, of the state Constitution.

Same — classification of employments — validity.

3. For the purpose of abrogating or modifying the common-law rule of fellow servants, it is competent for the lawmaking power of a state, without offending against the "equal protection" clause of the Federal Constitution (14th Amendment), to classify railroad, street railway, and mine employees because of the hazard attached to those employments; and a constitutional provision doing this, in language broad enough to include all such employees, is not to be restricted to those employees only who are engaged in the specially hazardous work of such vocations, but extends to all employees doing work essential to be done in the carrying on of the business of railroading, mining, etc.

Same — injury by fellow servant — liability.

4. Where the common-law doctrine of "fellow servant" has not been abrogated or modified by constitutional or statutory provisions, the master is not liable to a servant for an injury occasioned by such servant's collaborators in the performance of some mere detail of the common employment, where the performance of the thing done in no sense involved a nondelegable duty of the master.

(June 18, 1912.)

ERROR to the Superior Court for Muskege County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. N. B. Maxey, Thomas W. Leahy, and J. B. Campbell, for plaintiffs in error:

Plaintiff and the driller were fellow servants, and defendants were not liable for the negligent acts of the latter.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; Murray v. South Carolina R. Co. 1 McMull. L. 385, 36 Am. Dec. 268; Bartons-hill Coal Co. v. Reid, 3 Macq. H. L. Cas. 295, 4 Jur. N. S. 767, 6 Week. Rep. 664,

Note. — As to validity of statutes abrogating the fellow-servant rule, see note to Louisville & N. R. Co. v. Melton, ante, 84. 47 L.R.A. (N.S.)

19 Eng. Rul. Cas. 107; Glover v. Kansas City Bolt & Nut Co. 153 Mo. 327, 55 S. W. 88; Brunell v. Southern P. Co. 34 Or. 256, 56 Pac. 129, 5 Am. Neg. Rep. 711; Kirk v. Atlanta & C. Air-Line R. Co. 94 N. C. 625, 55 Am. Rep. 621; Olmstead v. Raleigh, 130 N. C. 243, 41 S. E. 292; Brown v. Central P. R. Co. 68 Cal. 171, 7 Pac. 447, 8 Pac. 828, 13 Am. Neg. Cas. 341; Mele v. Delaware & H. Canal Co. 27 Jones & S. 367, 14 N. Y. Supp. 630; Missouri P. R. Co. v. Watts, 63 Tex. 549; Missouri, K. & T. R. Co. v. Whitaker, 11 Tex. Civ. App. 668, 33 S. W. 716; Norfolk & W. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Jenkins v. Richmond & D. R. Co. 39 S. C. 507, 39 Am. St. Rep. 750, 18 S. E. 182; Adams v. Iron Cliffs Co. 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270; Justice v. Pennsylvania Co. 130 Ind. 321, 30 N. E. 303; Doughty v. Penobscot Log Driving Co. 76 Me. 143; Relyea v. Kansas City, Ft. S. & G. R. Co. 112 Mo. 86, 18 L.R.A. 817, 20 S. W. 480; Hawk v. McLeod Lumber Co. 166 Mo. 121, 65 S. W. 1022; Schaub v. Hannibal & St. J. R. Co. 106 Mo. 74, 16 S. W. 924; Ryan v. McCully, 123 Mo. 636, 27 S. W. 533; Card v. Eddy, 129 Mo. 510, 36 L.R.A. 806, 28 S. W. 979; Parker v. Hannibal & St. J. R. Co. 109 Mo. 362, 18 L.R.A. 802, 19 S. W. 1119; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

Messrs. John R. Thomas, Grant Foreman, Luther James, and Preston C. West, for defendant in error:

Where one servant has authority to superintend and direct the service of another, such superintending servant becomes a superior servant, for whose negligence the inferior servant can recover from the master.

Fraser v. Shroeder, 163 Ill. 459, 45 N. E. 288; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; Walker v. Gillette, 59 Kan. 214, 52 Pac. 442; Bloyd v. St. Louis & S. F. R. Co. 58 Ark. 66, 41 Am. St. Rep. 85, 22 S. W. 1089; Moon v. Richmond & A. R. Co. 78 Va. 745, 49 Am. Rep. 403; Chicago, St. P. M. & O. R. Co. v. Lundstrum, 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198; Cleveland, C. C. & St. L. R. Co. v. Keary, 3 Ohio St. 204.

Although Bartley and Brady were working together and doing manual labor at the time the latter was injured, this would not prevent him from recovering from the master if Bartley at such time had authority to superintend Brady's services.

Shumway v. Walworth & W. Mfg. Co. 98 Mich. 411, 57 N. W. 251, 15 Am. Neg. Cas. 10; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510, 10 Mor.

Min. Rep. 16; Missouri P. R. Co. v. Williams, 75 Tex. 4, 16 Am. St. Rep. 867, 12 S. W. 835; Illinois C. R. Co. v. Coleman, 22 Ky. L. Rep. 878, 59 S. W. 13.

The injury to plaintiff was the result of the negligent performance of a positive duty devolved by law upon the master, and for the nonperformance of which the master is responsible, no matter by whose hand the duty was actually performed.

Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 356, 64 L.R.A. 145, 75 Pac. 537; McCabe & S. Constr. Co. v. Wilson, 17 Okla. 355, 87 Pac. 320; Coalgate Co. v. Hurst, 25 Okla. 588, 107 Pac. 657; Petroleum Iron Works Co. v. Wantland, 28 Okla. 481, 114 Pac. 717; Henry v. Kaw Boiler Works, 87 Kan. 571, 125 Pac. 67; Heck v. International Smokeless Powder Co. 77 N. J. L. 4, 71 Atl. 150; Ulrickson v. Soderberg, 69 Wash. 347, 124 Pac. 909.

Brewer, C., filed the following opinion:

The defendant in error, Brady, as plaintiff, sued in the district court of Muskogee county for personal injuries, and obtained a verdict and judgment. The facts out of which the suit arose are substantially as follows: The plaintiffs in error, defendants below, were partners engaged in drilling oil wells under contracts with the owners of oil leases. While so engaged in drilling a well Brady was injured. It takes two men to operate a drill; in the oil fields four are assigned to each well and they work in two shifts (called towers) of two men each. These two men are known, one as a driller, the other as a tool dresser: Brady was a tool dresser. The drill is run by an engine. The driller operates the levers near the mouth of the well, except when steam is being raised, when he attends to the brake. He has charge of the hole being made and is responsible for its going down straight. The tool dresser fires and oils the engine, heats the bits, and helps to sharpen them, empties the baler, and in other ways assists the driller. When taking down the stem to which the bit is attached, he ascends into the derrick and pulls the lower end of the stem outside the girder, or girt, so that it may be lowered to the ground. The stem is a piece of steel 35 feet long to which the bit is attached. The derrick or rig is 20 feet square at the bottom; four corner posts extending upward and inward 72 feet to where the derrick is 3 or 4 feet square. A girder of heavy timber encircles these posts 10 feet from the ground; other girders 8 feet apart continue up to the top. Other timbers are used as braces to make the structure substantial. The stem works up and down in this derrick; it is taken down or out when-

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ever the bit needs sharpening, or the machinery is to be moved. The driller and the tool dresser must each be experienced men. They receive high wages; the driller commanding a slightly higher wage than the dresser. To take down the stem the tool dresser operates the engine and hoists the stem up into the derrick so high that the lower end may be swung clear of the lowest girder. The driller stands at the brake, and when the stem is so raised, he holds the brake, and the tool dresser goes up into the derrick, and, by means of a rope previously tied loosely around the stem, pulls or swings the stem outward over the girder, and the driller, using the brake, lowers the stem into a wagon on the ground.

On the day of the injury, Brady, operating the engine, raised the stem into the derrick preparatory to taking it down. The rope had been tied around it by the driller, before it was raised. Brady went up into the derrick and found he had not raised the stem high enough to clear the girder. The driller holloed up at him to take it out under the girder. In doing this he walked out on a walking beam where he could not support himself against the timbers of the derrick. He pulled down and outward on the rope; it came untied, and he lost his balance and fell to the ground and was injured. It was alleged as the gravamen of the action that the driller was negligent in tying the rope so that it could come untied.

It is contended by plaintiffs in error that Brady was the fellow servant of the driller, and that therefore they are not liable. The defendant in error answers this by saying: First. That the work in which the injury occurred was mining, and that § 36 of article 9 of the Constitution, having abrogated the common-law doctrine in mining cases, whether they were fellow servants is immaterial. Second. That, if it should be held that drilling an oil well is not mining within the meaning of the Constitution, then the case falls within what has been termed the "superior servant" or vice principal rule. The plaintiff in error replies: First, that the drilling of oil wells is not mining. Second, that if the production of oil and gas should be held to be embraced within the term "mining" used in the constitutional provision, then that the work being done in this case was not inherently dangerous, and involved none of the risks and hazards usually incident to mining operations, and therefore the provision could not apply to this class of servants, even though engaged in mining. These contentions cover all the points in the case.

The portion of the Constitution necessary to be studied follows: "Art. 9, § 36.

The common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty. . . . And every railroad company and every street railway company or interurban railway company, and every person, firm, or corporation engaged in underground mining in this state shall be liable under this section, for the acts of his or its receivers. Nothing contained in this section shall restrict the power of the legislature to extend to the employees of any person, firm, or corporation, the rights and remedies herein provided for." This clause (§ 36, art. 9, Const.) is not repugnant to the Federal Constitution. *Coalgate Co. v. Bross*, 25 Okla. 244, 138 Am. St. Rep. 915, 107 Pac. 425; *Missouri, K. & T. R. Co. v. Richardson*, 220 U. S. 601, 55 L. ed. 603, 31 Sup. Ct. Rep. 715, — Tex. Civ. App. —, 125 S. W. 623; *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164.

In passing, however, it is necessary to briefly notice the contention made here and supported by considerable authority, that this provision is only constitutional in so far as it is sought to affect employees actually engaged in the inherently dangerous employment of operating trains, street cars, mines, etc. In other words, that the inherent danger of the employment justifies the law and keeps it from being obnoxious to the "equal protection of the law" clause of the 14th Amendment. And that, as to employees not so engaged in the hazardous employment, it would be obnoxious to said clause. This contention has been sustained by a number of states in construing statutes abrogating the common law of fellow servants, notably in Mississippi, in the case of *Bradford Constr. Co. v. Hefflin*, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077. Minnesota, in the case of *Blomquist v. Great Northern R. Co.* 65 Minn. 69, 67 N. W. 804, by construction of the law abrogating the fellow-servant doctrine, limited its operation to "those employees . . . who are exposed to the peculiar dangers attending the operation of railroads, or what

are, for brevity, called 'railroad dangers.'" Indiana likewise by a line of decisions (*Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954) so limited the effect of a similar provision. These decisions were all based on what was supposed to be the views of the Supreme Court of the United States in various decisions, notably that of *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. In a late case in the Supreme Court of the United States, however (*Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, ante, 84, 30 Sup. Ct. Rep. 676), this same contention was held to be unsound. That case was taken to the supreme court on writ of error to the court of appeals of Kentucky (127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618), which had affirmed a judgment for personal injuries sustained by a carpenter engaged with others in erecting a coal tippie for the railroad. The injury occurring in Indiana, the law of Indiana abrogating the fellow-servant doctrine as to railroad employees was invoked. The contention of the railroad was that this carpenter, although in the employment of the railroad, was not engaged in work that involved the perils and hazards of railroading, and that, under the facts of that case, the Indiana statute would be unconstitutional, although admittedly constitutional in cases where the employee was engaged in train service. The court of appeals of Kentucky held that "for the purpose of abrogating or modifying the common-law doctrine of fellow servant, it was competent for the lawmaking power of a state, without offending against the equal protection clause, to classify railroad employees because of the hazard attached to their vocation, and that a statute doing this need not be confined to employees who were engaged in and about the mere movement of trains, but could also validly include other employees doing work essential to be done to enable the carrying on of railroad operations." [218 U. S. 47.]

The Supreme Court of the United States, after stating the holding of the Kentucky court and reviewing its own various decisions, affirms the case, and in the course of the opinion says: "And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the *Tullis Case* (175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136) which came here on certificate, the nature and character of the

work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the 14th Amendment will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 875, 15 Sup. Ct. Rep. 585, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the *Pontius* Case there was approvingly cited a decision of the court of appeals of the eighth circuit (*Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363), wherein it was held that under the same statute an employee injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, where, upon the authority of the *Tullis* Case, the court affirmed a judgment of the supreme court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passersby in a street beneath an overhead bridge, was struck by a tie thrown from the structure. While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employees, sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in *Indiana (Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954, and *Cleveland, C. C. & St. L. R. Co. v. Foland*, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165, decided April 20, 1910) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the 14th Amendment, unequivocally held that the statute must be construed as restricted to employees engaged in train service." See also *Mobile, J. & K. C. R. Co. v. Turnipseed*, 47 L.R.A.(N.S.)

219 U. S. 39, 55 L. ed. 78, 32 L.R.A.(N.S.) 228, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243.

This case, however, does not depend for its solution upon the nature of the work being done at the time of the injury. If prospecting for oil or gas, or the production of same, comes within the classification of the Constitution under the term "mining," as used therein, then the common-law doctrine of fellow servants cannot avail the defendants in this case. If not so embraced, then such doctrine must be applied to this case.

Does drilling a well in quest of oil and gas by a contractor with the owner of the lease constitute mining within the meaning of the Constitution? If so, this case must be affirmed; if not, then the inquiry must proceed to the application of the common law of fellow servant to the facts of the case as presented.

"It is a cardinal rule in the interpretation of constitutions that the instrument must be construed as to give effect to the intention of the people who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction." Section 8, *Black, Interpretation of Laws*.

"A constitution should be construed with reference to, but not overruled by, the doctrine of the common law and the legislation previously existing in the state." Section 11, *Black, Interpretation of Laws*.

"The words employed in a constitution are to be taken in their natural and popular sense, unless they are technical, legal terms, in which case they are to be taken in their technical signification." Section 16, *Black, Interpretation of Laws*.

"The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced." *Cooley, Const. Lim.* 69.

Does operating a well drill on the surface, even though for the discovery of oil, meet the popular idea or generally accepted definition of mining? It is true that oil is, technically speaking, a mineral; but would any person, upon approaching an oil well 6 or 8 inches in circumference, think of calling it a mine, or the act of boring it mining? We think not.

Webster's Dictionary is probably more often consulted by the people generally than any other. It defines a mine thus: "A subterranean cavity or passage, especially a pit or excavation in the earth, from which

metallic ores . . . or other mineral substances are taken by digging; distinguished from the pits from which stones are taken, and which are called quarries."

In *Marvel v. Merritt*, 116 U. S. 11, 29 L. ed. 550, 6 Sup. Ct. Rep. 207, the court, referring to mines and minerals, says: "The words used are not technical, either as having a special sense by commercial usage or as having a scientific meaning different from their popular meaning. They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law."

In defining the word "mine," Cyc. vol. 27, 331, says: "The primary meaning of the word 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals; a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging. It is also extended to a quarry or other place where anything is dug."

"A 'mine' is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels," etc. *Murray v. Allred*, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169.

"Mines," according to Jacob's Law Dictionary, "are quarries where anything is digged."

"To 'mine' is defined to dig a pit or mine; to dig in the earth for minerals, etc.; and appears to apply more especially to underground work." *Com. ex rel. Stein v. Brookwood Coal Co.* 25 Pa. Co. Ct. 55.

"Whether any excavation . . . be a mine or not depends upon the mode in which it is worked, and not on the substance obtained from it." *Rex v. Dunsford*, 2 Ad. & El. 568.

"A perpendicular shaft was sunk from the surface of the land for the purpose of raising the clay out of the strata, which was done by a steam engine and other mining apparatus; the excavations were like those which are made for working coal and metallic mines, and the mode of raising the clay was the same as that used in a coal mine [is a clay mine]." *Rex v. Brettell*, 3 Barn. & Ad. 424.

In testing the intention of the framers of this section, we find that, in the provision extending the benefits of the act to receivers of companies coming within the classification, the word "underground" is used in connection with mining. This appears to be significant of the intention pervading the whole section. If other than mining which requires underground work was intended in the first part of the section, what reason could be given for not extending the benefits thereof, where such other mines are in the hands of receivers? None can be per-

ceived. There is another reason why drilling for oil or gas was probably not intended to be embraced in the terms used. To prevent a conflict with the 14th Amendment to the Constitution of the United States, a classification of this kind must include all coming fairly within the class referred to. Drilling a well for water would be performed in the same manner as if drilling for oil or gas. By no stretch of the imagination could such an operation be held to be mining; therefore the act, if intended to embrace oil well drilling, and not to embrace drilling for water, would probably be objectionable to the Federal Constitution in not affording "equal protection of the law."

In ascertaining intent, we may also look to the laws of the two territories at the time and prior to the making of the Constitution. *Mansfield's Digest of the Laws of Arkansas* in force in the eastern part of the state contained no mining law. Oklahoma territory had merely some criminal laws regarding acts done about a mine. It had, however, passed in 1905, just prior to the assembling of the constitutional convention, a well-defined code of law relating to the production of "oil and gas." These laws use the terms "wells," and the work of securing either is called "operating." Nowhere is the term "mine" or "mining" used in the law in force when the convention was considering this provision. Section ———.

The first legislature, of which many members of the constitutional convention participated, passed a most comprehensive law relating to mines and mining, and without once using the term "oil" or "gas." Other legislation, complete in itself, dealt with "oil" and "gas," and nowhere in it used the term "mine" or "mining." These laws, practically contemporaneous with the making of the Constitution, may be considered in determining the intention of that body. From all of which we conclude that this case does not come under the provisions of the Constitution relied upon.

The remaining question is: Was Brady, according to this record, injured in consequence of the negligence of a fellow servant, within the meaning of that term as it is used in the rule which exempts the master from liability for injuries resulting from the negligence of a fellow servant? In this case but two persons were present when the injury occurred,—the plaintiff and the driller. At the time of trial the driller could not be found, and the facts of the injury rest solely on the plaintiff's testimony. It is not claimed but that the machinery, tools, appliances, apparatus, and instrumentalities used were all of a proper and suit-

able kind and were in good condition and free from defects. That the two men were both engaged in hard manual labor under the same employer, working in conjunction, in a common undertaking, to a common end, and that the thing done was not ordinarily dangerous, is shown by all the proof. That while prosecuting the work each did certain particular things, but that many of the varying acts and details necessarily needed to be done in each day's work, as the occasion arose, were done by whichever of the men happened to be best situated at the time to attend to it. Such was the detail of tying the rope on the stem. This was not the special duty of either. It was done by whichever of the two could do it most conveniently. It was a mere detail of the day's work. Under no decision that has been cited, or that we have found, would this be held to be a part of the master's work or fall within the master's duty.

In illustrating what would be the act of a fellow servant, even in the presence of the master, the court in *Blackman v. Thomson-Houston Electric Co.* 102 Ga. 71, 29 S. E. 123, 3 Am. Neg. Rep. 763, says: "There are some appliances so simple in their nature as even the most unskilled workman may be safely intrusted with their erection and use. Two pieces of timber used as a fulcrum and lever, in a broad sense, constitute an appliance. Their use involves the application of scientific principles of a high order; and yet these principles are so simple and so well understood that the negligence of a fellow servant in placing these two pieces of timber in position for use by other fellow servants could not be imputable to the master." This proposition has perhaps had the attention of as many courts and the application of the learning of as many wise men as any question in the law; and, while it is admitted in practically all courts that the master is not liable to his servant for an injury resulting from the negligence of a fellow servant in the same common service, yet the difficulty has been found in the application of the rule to the facts of a given case and in the development of exceptions to the general rule. The question always arises: Did the servants bear that relation toward each other? The courts seem to have been unable to announce any definite principles formulated into a general rule sufficiently comprehensive to govern in all the multitude of cases in which it is involved. We agree with the supreme court of Missouri in the case of *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 379, 18 L.R.A. 802, 19 S. W. 1123, in the statement: "The main and only difficulty has been to satisfactorily determine at all times whether the employment was a com-

mon service and the employees fellow servants within the meaning of the rule. And after due consideration we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general, its application specific, as the cases arise." However, in this jurisdiction the rule as to fellow servants and vice principals, in so far as it is involved in this case, seems to be settled. Indeed, the rule of vice principal, as stated in the opinions of this court noted below, could be extended much farther than it has been and yet not change the conclusion that in this case, as made in the record, the driller and tool dresser were fellow servants in the act that caused the injury. Indeed, upon a careful examination of the evidence and every authority cited by the defendant in error, we conclude that the decisions are extremely rare under which a doctrine of vice principal is announced so broad as to take this case out of the rule invoked.

In the case of *Van Winkle v. Brooks*, 29 Okla. 351, 116 Pac. 908, it is said in the syllabus: "In order to constitute a foreman or boss of a gang of laborers employed by a corporation in the construction of a water tank in connection with an oil mill a 'vice principal,' for whose negligence in the management of that part of the work the corporation will be liable for personal injuries to any of those employed under him and who were subject to his discretion and control, the master must confer upon such boss or foreman the entire and absolute management of the entire department, retaining no oversight and exercising no discretion of its own as to the conduct of such department, except that it is the positive duty of the master to use reasonable care in providing safe tools, machinery, and appliances to work with, a safe place to work in, safe materials to work on, and safe fellow servants and coemployees, and, if the work is such as to require it, to require safe and proper rules and regulations for conducting the same. Negligence in the performance of any of these positive duties will render the master liable without regard to the standing or authority of the employee through whose fault the injury is occasioned. If the injury is not the result of an omission to perform one of these positive duties of the master, but is occasioned by the negligence of such foreman, such foreman will be deemed a 'fellow servant' with the person injured, even though he has power to oversee the men and direct the work directly under his charge, unless his authority in his department is entire and absolute. If he is subject to the control of one or more over him in the manage-

ment of his department, he is a fellow servant with those under him."

This case follows the cases of Ruemmeli-Brun Co. v. Cahill, 14 Okla. 422, 79 Pac. 260, and Mollhoff v. Chicago, R. I. & P. R. Co. 15 Okla. 540, 82 Pac. 733, decided by the Oklahoma territorial supreme court, and while the injury in the Van Winkle Case occurred prior to statehood, as has been suggested, even a most liberal expansion of the rule therein announced would not avail to save this case, if we are to remain within the current of judicial decisions. See also Erickson v. Victoria Copper Min. Co. 130 Mich. 476, 90 N. W. 291.

It follows that under the views herein expressed the plaintiff below failed in the proof to establish any liability against the defendants. And as there was but one witness to the facts of the injury, and he the plaintiff, that a new trial would be a useless thing, and that the case should be reversed and judgment entered for defendants below.

Per Curiam:

Adopted in whole.

Petition for rehearing denied June 24, 1913.

KANSAS SUPREME COURT.

MISSOURI PACIFIC RAILWAY COMPANY, Appt.,

v.

BENJAMIN SMITH.

(82 Kan. 248, 108 Pac. 76.)

Fellow servant act — section man.

1. A section man engaged in track repairing, who is injured by the negligence

Headnotes by BENSON, J.

Note. — Employees and employments within the purview of statutes abrogating the fellow servant rule.

Introduction.

This subject was discussed in a note to Johnson v. Great Northern R. Co. 18 L.R.A.(N.S.) 477, and this note is supplementary thereto.

In the earlier note the discussion was limited to the statutes of a few states, and practically resolved itself into a determination of the question, What is a "railroad hazard" within the meaning of the fellow servant statutes, which by judicial construction had been limited in their application to servants who were subjected to the peculiar hazards of operating railroads. Since the preparation of the earlier note, a number of other states have 47 L.R.A.(N.S.)

of a fellow laborer, is within the protection of the fellow servant act.

Master — injury — notice.

2. A notice of such an injury and claim for damages, required by that act, mailed to an assistant claim agent of the railway company, whose duty it is to examine and act upon such claims, and who receives the notice and makes such examination in pursuance thereto, is notice to the company.

(April 9, 1910.)

APPEAL by defendant from a judgment of the District Court for Anderson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Benson, J.:

The plaintiff, a section man, engaged in track repairing, was tamping stone under a cross-tie when a fellow laborer who was tamping stone under another cross-tie behind him negligently struck the plaintiff's hand with a tamping pick, inflicting the injury for which the action was brought. A notice, as required by § 1 of chap. 341, of the Laws of 1905, was served by mail, addressed to the assistant claim agent of the defendant at Kansas City, Missouri. The injury occurred in this state. Demurrers to the petition and to the evidence were overruled. Special findings were returned by the jury, with a verdict for the plaintiff. The defendant appeals from the judgment thereon.

Messrs. B. P. Waggener and J. M. Challiss, for appellant:

The employee of a railroad injured by the negligence of a coemployee can recover only by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad.

passed similar statutes, or at least such statutes have been construed in other states, and the narrow construction placed upon the statutes has been repudiated in practically all of the new jurisdictions, so that the subject must be broadened to embrace the application of the statutes to all classes of employees.

The constitutionality of these statutes is discussed in a note to Louisville & N. R. Co. v. Melton, ante, 84.

The constitutionality and application of the Federal statute is treated in a note at page 38, ante.

The construction placed upon the fellow servant statutes differs greatly in the various jurisdictions. In Indiana, the application of the statute has been restricted to those servants whose injuries were caused by the actual operation of trains.

Missouri, *K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875, 5 Am. Neg. Rep. 339.

The word "agent" found in the fellow servant act is used in its ordinary and popular sense, and refers to that class of employees who, in connection with engineers, handle and direct the handling of trains.

26 Am. & Eng. Enc. Law, 609; 21 Am. & Eng. Enc. Law, 1012; *State ex rel. Ives v. Martindale*, 47 Kan. 147, 27 Pac. 852; *State v. Dinnisse*, 109 Mo. 434, 19 S. W. 92; *Denman v. Webster*, — Cal.—, 70 Pac. 1064; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533; *Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695; *Raeder v. Bensberg*, 6 Mo. App. 445; *Jensen v. State*,

60 Wis. 577, 19 N. W. 374; *Lynchburg v. Norfolk & W. R. Co.* 80 Va. 237, 56 Am. Rep. 592; *School Dist. v. Gautier*, 13 Okla. 194, 73 Pac. 954; *Re Barre Water Co.* 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 109.

The provisions of the fellow servant act as to whom notice may be served upon are jurisdictional, mandatory, and exclusive.

Missouri P. R. Co. v. Larussi, 88 C. C. A. 230, 161 Fed. 72; *Shattuck v. Chandler*, 40 Kan. 520, 10 Am. St. Rep. 227, 20 Pac. 225.

Benson, J., delivered the opinion of the court:

The defendant contends that section men, in doing the ordinary work of repairing track, are not within the purview of the statute imposing liability upon a railroad

In Texas, while the decisions are not entirely consistent, it may be said that under the earlier statute a construction was given similar to that given in Indiana, but the more recent statutes have been held to apply to all employees.

In Iowa, Kansas, Minnesota, and North Dakota, the so-called "railroad hazard" doctrine prevails, and a servant will not be deemed to be within the protection of the statute unless his injury was caused by a so-called railroad hazard. These hazards, however, are not confined to those created by the actual operation of trains, as is the rule in Indiana. It should be noted that a very important exception to this rule has sprung up in Minnesota. (See the last subdivision of this note).

In the other jurisdictions, the statutes have been held generally to apply to all employees of the railroad, and the statutes so construed have been upheld, some of them by the United States Supreme Court. See note on page 38, ante.

It should also be noted that in some statutes there are provisions excepting from the operation of the statutes employees in shops and offices.

Construction work.

There is considerable diversity of opinion as to the application of these statutes to servants engaged in construction work.

Thus in *Louisville & N. R. Co. v. Melton*, 127 Ky. 276, 105 S. W. 366, rehearing denied in 127 Ky. 291, 110 S. W. 233, 112 S. W. 618, recovery was allowed for injuries received in Indiana by a carpenter engaged in building a coal chute, by reason of the breaking of a chain used to lift the beams. This decision was sustained by the United States Supreme Court, 218 U. S. 36, 54 L. ed. 921, ante, 84, 30 Sup. Ct. Rep. 676, over the contention that the act as thus applied was unconstitutional. Under the construction given the Indiana statute to the state court, there could have been no recovery in this case. See the *Foland Case* cited later in this subdivision.

And an employee engaged in repairing

bridges for a railroad company, if injured while in the line of his duty, is within the beneficial influence of the statute, although at the time of the injury he was being transported from one place of work to another. *Gibler v. Quincy, O. & K. C. R. Co.* 148 Mo. App. 475, 128 S. W. 791.

So, a carpenter engaged in building a coal chute in the railway yards, who was run over and killed by an engine while returning from the bunk car, where he had been to get some tools necessary for his work, is within the purview of the Iowa fellow servant statute. *Voris v. Chicago, M. & St. P. R. Co.* — Mo. App. —, 157 S. W. 835.

And the employee of a railroad company at work upon a railroad bridge is within the protection of the statute. *Houston & T. C. R. Co. v. Bright*, — Tex. Civ. App. —, 156 S. W. 304.

In discussing what employees were within the Alabama employers' liability act, the court in *Boggs v. Alabama Consol. Coal & I. Co.* 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878, in holding that the trial court erred in sustaining a demurrer to a complaint on the ground that it showed that the plaintiff's intestate was employed as a carpenter in and about the defendant's mine, so that he was not of that class of railroad employees for whose benefit the statute was enacted, said: "We hold that employees engaged in or about a railroad, including therein employees brought by their employment into such close relation with the operation of the railroad as that it may be said, in a reasonable sense, that danger therefrom constitutes an ordinary danger of the service in which they are engaged, though they be not strictly railroad employees, as well as those engaged in the actual operation of the railroad, are fellow servants with those employees who operate signals, locomotives, trains, etc., on the railroad, and fall under the influence of the subdivision [of the statute]."

But a member of a bridge gang injured by the falling of piles is not within the protection of the statute. *Cleveland, C. C. & St. L. R. Co. v. Foland*, 174 Ind. 411, 91

company for injuries to an employee caused by the negligence of its agents or the mismanagement of its engineer or other employees. Laws 1907, chap. 81, § 1; Gen. Stat. 1909, § 6999. The defendant relies upon the opinion in *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 154, 55 Pac. 875, 876, 5 Am. Neg. Rep. 339. In that case it was held that an employee of a railway company, who was engaged in setting a curb around a depot and office building, and who was injured by a falling curbstone which had been negligently left in an insecure position by a fellow laborer, was not within the protection of the statute. It was said in the opinion: "No train was passing or near the place where Medaris was at work at the time the

injury was inflicted. It is true, also, that he was at work for a railroad company, and upon the land of a railroad company, but this does not entitle him to the benefits of the act. He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad."

In *Union Trust Co. v. Thomason*, 25 Kan. 1, a trackman riding upon a hand car from his work at the close of the day's service was hurt by a collision with another hand car, caused by the negligence of his fellow workmen in propelling the other car. It was held that he was injured while in the line of duty, and that the case was within the provisions of the statute. Mr. Chief Justice Horton, in delivering the opinion,

N. E. 594, rehearing denied in 174 Ind. 417, 92 N. E. 165.

The court said: "The rule is settled in this state that the reason for the statute, and the basis upon which its constitutionality is grounded, is that of the hazards attending the operation of trains."

So, employees engaged in work upon a railroad in the process of construction are not within the purview of the statute. *O'Neal v. South & W. R. Co.* 152 N. C. 404, 67 S. E. 1022; *Bailey v. Meadows Co.* 152 N. C. 603, 68 S. E. 11.

A blacksmith for a force engaged in constructing bridges, who was injured while attempting to hang up a coil of rope 20 miles from the terminus of the railroad, was not performing a service necessary to or connected with the use and operation of the railroad. *O'Neal v. South & W. R. Co.* supra.

Loading and unloading cars.

As was shown in the earlier note, there is great diversity of opinion as to whether employees engaged in loading or unloading cars are within the statute.

In those states in which the application of the statute has been confined to railroad hazards, it is generally held that they are not within the statute.

Thus, section hands unloading rails from a push car are not operating the car within the meaning of the Texas statute. *Texarkana & Ft. S. R. Co. v. Anderson*, 102 Tex. 402, 118 S. W. 127.

So, a section foreman, in aiding the men under him to load rails upon a car which is part of a train, is not engaged in operating a car, locomotive, or train within the Texas statute, where the car was stationary at the time, and he had no duty to perform with reference to the movement thereof. *St. Louis Southwestern R. Co. v. McGee*, — Tex. Civ. App. —, 141 S. W. 1054.

And a member of a repair and construction gang on a street railway is not, while engaged in unloading rails from a standing car, exposed to any of the peculiar hazards of using and operating a railroad, so as to come within the protection of the 47 L.R.A. (N.S.)

statute. *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954.

There is no "railroad hazard" present while employees are engaged in unloading logs from a car which is detached from the engine. *Nyland v. Duluth & N. W. R. Co.* — Minn. —, 143 N. W. 739.

And a servant engaged in loading a car with ice, who was injured by a piece of ice which was negligently pushed off the slide by another servant, is not within the purview of the North Dakota statute. *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453.

But the contrary rule prevails in other jurisdictions.

Thus, the employee of a mining company engaged in unloading cars upon the railroad operated by the company has been held to be exposed to railroad hazards. *Papkovich v. Oliver Iron Min. Co.* 100 Minn. 294, 123 N. W. 824. In this case the cars were being unloaded while in motion. A different rule has been applied in this state in a case where the car to be unloaded was standing on the tracks detached from the engine. *Nyland v. Duluth & N. W. R. Co.* supra.

And an employee engaged in loading lumber upon a railroad car who is injured by the negligent use of a rope used for hauling the logs is within the protection of the statute. *Jackson v. Ayden Lumber Co.* 158 N. C. 317, 74 S. E. 350.

Railroad employees engaged in unloading ties from a standing car, part of the employees being on the car and throwing the ties therefrom, and others being on the ground removing the ties to the place where they were to remain, are within the Wisconsin statute as being subjected to railroad hazards. *Luich v. Great Northern R. Co.* 152 Wis. 414, 140 N. W. 33.

The injury to a track hand engaged in replacing rails upon a track, by the dropping of a rail as it was being taken from a freight car, is one arising from a risk or hazard peculiar to the operation of railroads. *Meo v. Chicago & N. W. R. Co.* 138 Wis. 340, 120 N. W. 344.

quoted with approval from several Iowa cases where it had been held that trackmen, switchmen, and others whose duties require them to be upon the track, are more or less exposed to the hazards of the business of operating a railroad. In *Union P. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, it was held that the statute applied to a section man engaged in repairing a track. The injury had occurred by the negligence of a fellow employee in removing a rail from the push car. His duties did not require him to ride upon cars, nor was he exposed to the perils caused by the operation of trains, other than such as were incidental to his work upon the track. In the opinion the fact that a different rule had been applied in Iowa in recent cases, apparently departing

from earlier decisions, was ascribed to the fact that the Iowa Code had been changed so as to restrict the application of the statute to wrongs connected with the use and operation of the railroad. The decisions under the amended statute in Iowa appear to have limited its operation as stated in *Dunn v. Chicago*, R. I. & P. R. Co. 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 Ann. Cas. 226, so that a section hand in his ordinary work, wholly disconnected from the use and operation of the road, is excluded from its purview; but, as indicated in the majority opinion in that case, and more fully stated in a vigorous dissent, the decisions in that state have not uniformly sustained this view.

In the *Koehler Case*, 37 Kan. 463, 15 Pac.

A similar view is also taken under the mere recent Texas cases.

Thus, an employee engaged in distributing ties along the railroad by means of a push car, who, while straightening a tie that had been thrown off, is injured by another tie being slid off by another employee, is within the statute. *Freeman v. Shaw*, — Tex. Civ. App. —, 126 S. W. 53.

So, the fact that the push car at the very time of the injury was not being moved was held not to be controlling. *Ibid*.

Of course, if the injury was caused by movement of the car which was being loaded or unloaded, it could hardly be claimed that the injury was not within the purview of the statute, even in jurisdictions adopting the "railroad hazard" doctrine.

Thus, an employee whose duty it was to unload wood from cars upon a track may recover for injuries received by the sudden starting of the car while he was attempting to remove a block from the wheel of the car. *Texas & P. R. Co. v. Johnson*, 55 Tex. Civ. App. 495, 118 S. W. 1117.

Hand cars.

In all jurisdictions except Mississippi and Indiana, employees injured while at work with a hand car are held to be within the statute. This is true of the earlier as well as of the more recent cases.

Thus, removing a hand car from the track in order to permit a train to pass is work in connection with the operation of a railroad. *Cahill v. Illinois C. R. Co.* 148 Iowa, 241, 28 L.R.A.(N.S.) 1121, 125 N. W. 331.

And a section hand while riding to and from his work upon a hand car is engaged in the operation of a railroad. *Hider v. Minneapolis, St. P. & S. Ste. M. R. Co.* 115 Minn. 325, 132 N. W. 316.

So, an employee of a railroad company engaged in pushing a hand or push car within the yards of the railroad company, for the purpose of transporting lumber to and from its cars, mills, shops, etc., is operating a car within the meaning of the Texas statute. *Missouri, K. & T. R. Co. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 601, 47 L.R.A.(N.S.)

But an injury by the operation of a hand car is not within the scope of the constitutional provision in Mississippi repealing the fellow servant doctrine with respect to employees of railroad companies. *Givens v. Southern R. Co.* 94 Miss. 830, 22 L.R.A.(N.S.) 971, 49 So. 180. This decision was upon the ground that hand cars are no more inherently dangerous than other modes of transportation not in any way connected with railroads proper.

An injury received by a fall from a hand car is not within a statute making employers liable for injuries received by employees in the operation of a railroad, since the hazard is not so peculiar as to come within a proper classification of perils for which railroads may be rendered liable. *Richey v. Cleveland, C. C. & St. L. R. Co.* 176 Ind. 542, post, 121, 96 N. E. 694.

A section hand injured by falling off a hand car by reason of its being overcrowded is not within the protection of the statute. *Vandalia R. Co. v. Parker*, — Ind. —, 98 N. E. 705.

A railroad section hand thrown from a hand car by the application of the brakes by the brakeman without warning, on the signal of the foreman, cannot hold the railroad company liable for the resulting injuries. *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605. The basis of this decision was that the brakeman was a mere fellow servant of the section hand, and although the act of applying the brakes was done in accordance with a signal received from a vice principal, nevertheless, the signal did not require the brakeman to imperil the safety of the other men on the car by applying the brakes without giving them any warning.

Repairing tracks.

Employees engaged in repairing tracks have been generally held to be within the protection of the statute, although, as it will be seen, the injury was not caused by the operation of trains; but these decisions were handed down in jurisdictions which

567, a laborer engaged in loading rails upon a car; in the Brassfield Case, 51 Kan. 167, 32 Pac. 814, a section man unloading ties to be used in repairing track; and in the Pontius Case, 52 Kan. 264, 34 Pac. 739, a bridge carpenter engaged in loading timbers on a car,—were held to be within the operation of the statute, and in the cases named recoveries for injuries sustained through the negligence of a coemployee were sustained. In the case last cited, it was argued that the statute when so construed was obnoxious to the Federal Constitution; but, upon review in the Supreme Court of the United States, its constitutionality was sustained. Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585. In Atchison, T. & S.

F. R. Co. v. Vincent, 56 Kan. 344, 43 Pac. 251, 252, it appeared that two section men with a foreman were carrying a rail to place it in the track. By the negligence of the foreman one of the men was injured. In the opinion it was said: "The service in which Vincent (the injured man) was engaged was performed on the company's road, and, being necessary to its use and operation, places him within the provisions of the act which makes railroad companies liable to their employees for damages resulting from the negligence of a coemployee." p. 347.

It will be observed that there was no car or engine at or about the place of injury. In the Harris Case, supra, a hand car only was being used, while in other cases re-

had not adopted the railroad hazard doctrine.

Thus, a section hand engaged in track repairing who is injured by the negligence of a fellow laborer is within the protection of the fellow servant act. MISSOURI P. R. Co. v. SMITH.

So, the foreman of a section crew charged with keeping the track in repair has been held to be within the Mississippi Code of 1892, § 3559, abrogating the fellow servant rule as to railway employees. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243, affirming 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360.

Section men employed in removing bolts from the rails in a railroad track are engaged in operating a railroad. Prash v. Wabash R. Co. 151 Mo. App. 410, 132 S. W. 57.

The Oklahoma Constitution provides that the fellow servant doctrine "is abrogated as to every employee of every railroad company and every street railway company or interurban railway company." Consequently, a section laborer is entitled to recover for injury caused by the negligence of another section hand while carrying a heavy tie. St. Louis & S. F. R. Co. v. Cox, 31 Okla. 444, 122 Pac. 130.

The injury to a track hand engaged in replacing rails upon a track, by the dropping of a rail as it was being taken from a freight car, is one arising from a risk or hazard peculiar to the operation of railroads. Meo v. Chicago & N. W. R. Co. 138 Wis. 340, 120 N. W. 344.

Employees in shops, etc.

The work of a yard or shop employee who is injured by the negligent operation of a locomotive under steam and upon the tracks in a roundhouse is within the hazards peculiar to the operation of railroads. Hoveland v. Chicago, R. I. & P. R. Co. 110 Minn. 329, 125 N. W. 266.

And employees in railroad car shops engaged in removing a heavy brake beam of 47 L.R.A.(N.S.)

a locomotive from a truck are within the Kansas fellow servant statute. Madden v. Missouri P. R. Co. 167 Mo. App. 143, 161 S. W. 489.

A boiler maker at work in a railroad car shop is within the later Texas statute. St. Louis, S. F. & T. R. Co. v. Jenkins, — Tex. Civ. App. —, 137 S. W. 711.

So, also, is a woodworker in the railroad shops. Texas & N. O. R. Co. v. Yerkes, — Tex. Civ. App. —, 156 S. W. 579.

But a stricter rule has been applied in Iowa, where it has been held that substituting new wheels for old ones on an engine in a repair shop of a railroad is not "connected with the use and operation" of the railroad within the meaning of the fellow servant statute, although the engine to be repaired rests on rails connected with the main track of the system. Slaats v. Chicago, M. & St. P. R. Co. 149 Iowa, 735, post, 129, 129 N. W. 63, Ann. Cas. 1912 D, 642.

A stone mason employed by a railroad company in setting curbing around a depot and office building, who was injured by the falling of a curbstone which was left standing in an insecure position by a coemployee, is not within the protection of the fellow servant act. Missouri, K. & T. R. Co. v. Medaris, 60 Kan. 151, 55 Pac. 875, 5 Am. Neg. Rep. 339.

Employees in yards.

An employee of a brewing company who, while in the course of his duties, was obliged to cross certain tracks laid in the private yard of the brewing company over which was operated a locomotive and cars by a railroad company for the sole benefit of the brewing company, has been held to be exposed to the peculiar hazards of a railroad. Schoen v. Chicago, St. P. M. & O. R. Co. 112 Minn. 38, 45 L.R.A.(N.S.) 841, 127 N. W. 433.

Miscellaneous occupations.

An employee of a railroad company engaged in digging a well to supply its locomotives with water is within the statute.

ferred to standing cars were being loaded or unloaded, and there was no movement of trains, cars, or engines upon the track at the time or place of the injuries.

The Missouri supreme court, in *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 214, held that a section man, while stationed underneath a portion of the track elevated over a street to give signals to fellow laborers above when to throw down discarded ties, in order that passers-by might not be hurt, was, while attempting to remove a child from danger, within the protection of a statute making railroad companies liable for injuries sustained by any servant of such railroad, by reason of the negligence of any other

servant or agent thereof. The Missouri statute construed in the opinion provides that every railroad corporation . . . shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof. . . . Mo. Rev. Stat. 1899, § 2873. In an elaborate review of the authorities in Missouri and other states, including our own, the court said: "It is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employee may recover if injured by the negligence of a fellow servant while they are engaged in do-

Metz v. Chicago, B. & Q. R. Co. 88 Neb. 459, 129 N. W. 994.

An employee engaged in building a fence, who was injured by being struck in the eye by a staple which was thrown out of a post by other employees pulling upon the wire, is within the protection of the Wisconsin statute. *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394, second appeal, 142 Wis. 154, 125 N. W. 464.

The fact that a lumber company operates a railroad for the carriage of logs does not bring employees engaged exclusively in sawing logs in the loading yard, preparatory to their being placed upon the cars, within the operation of the statute abolishing the fellow servant rule. *Twiddy v. Dare Lumber Co.* 154 N. C. 237, post, 135, 70 S. E. 282.

An assistant station agent, in directing one of his assistants to run alongside of a train to get a hoop by means of which he had just delivered an order from a despatcher to a moving train passing the station, is in no respect engaged either in managing, conducting, or running the locomotive and train, and consequently his assistant, who was injured while obeying his orders, was not within the protection of the statute. *Gray v. Wabash R. Co.* 157 Mo. App. 92, 137 S. W. 324.

In *Quinn v. Glenn Lumber Co.* — Tex. Civ. App. —, 118 S. W. 733, it was held that the Texas fellow servant act did not apply to the case of an injured employee of a sawmill.

It has been held that the crew of a locomotive hired to a steel company by a railroad company, to move freight cars between the furnaces and the dumping ground of the steel company, are not within the protection of the Wisconsin statute, since they did not incur any risk or hazard peculiar to the operation of a railroad. *Knitter v. Chicago, L. S. & E. R. Co.* 103 C. C. A. 74, 179 Fed. 494.

An employee of a logging contractor, whose duties consist of fastening the tongs of a logging cable by means of which logs are drawn from the woods to the vicinity of the pile from which they are to be loaded

onto the skidding car, and then of fastening other tongs to the logs by means of which they are drawn onto the pile, the motive power being furnished by an engine placed at one end of the skidding car, is not engaged in operating a railroad, although the engine furnishes the motive power for moving the skidding car over spurs connecting with a logging road. *Hampton v. Woolsey*, — Tex. Civ. App. —, 139 S. W. 888.

Injuries caused by moving trains.

It would seem that there could be no question but that employees injured by moving trains were within the protection of the statute.

Thus, in *Mobile, J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360, affirmed in 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243, where a section foreman was killed while walking along a piece of new railroad not yet ballasted, by the derailment of a train which was being run at a negligent rate of speed, the court said: "Section 193 of the Constitution, nevertheless, protects the injured employee, not against what he himself is doing, but against what his coemployees of certain kinds are doing. The inquiry is not whether he is at the time operating a train, and thus exposing other employees to a peril, but whether, in the discharge of his duty, he is where the negligence of certain coemployees operating the train may injure him."

A car repairer who was injured by being hit by telephone poles which fell off a freight car which was being moved along by hand was held to be within the protection of the statute, in *Peters v. St. Louis & S. F. R. Co.* 150 Mo. App. 721, 131 S. W. 917, opinion of lower court adopted by Supreme Court, 160 Mo. App. 629, 140 S. W. 1197. The court said: "It seems to us that the statute was intended to cover all cases where the employee was killed by the negligent act in moving cars of any character used on the railroad tracks, and re-

ing any work for the railroad which was directly necessary for the operation of the railroad." p. 495.

In Georgia a recovery against a railroad company for the death of an employee working upon one of its bridges, caused by the negligence of a fellow employee, was sustained. *Georgia R. Co. v. Ivey*, 73 Ga. 499. The court said that an earlier decision declaring that principle had been powerfully assailed, but had been long recognized as law; that it was firmly established in the jurisprudence of the state; and that both the employee and the railroad corporation had contracted with each other in the light of the law as thus construed.

A statute of Minnesota makes railway companies liable to their servants for dam-

ages caused by the negligence of a fellow servant. Construing this statute, it was held that a railroad company was liable to a section man who, while engaged with the rest of the crew in performing his ordinary duties in lifting and carrying a rail to repair the track, was injured by the negligence of a fellow servant in releasing his hold and dropping the rail. It is stated in the opinion that the work was being done in great haste so as to accomplish it before the arrival of a coming train. The court said: "We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are in some respects similar to those used in some other kinds of business, but that if

regardless of the question whether the car at the time of the injury was being propelled by steam, electric, horse power, or even by means of pinch bars, or by pushing the same by hand."

An employee engaged in repairing or working upon a standing car, and injured by reason of a moving engine or car being negligently brought into connection therewith, is within the protection of the statute. *Russell v. Chicago, R. I. & P. R. Co.* — Iowa, —, 141 N. W. 1077.

In *Pratt v. Missouri P. R. Co.* 139 Mo. App. 502, 122 S. W. 1125, the court said that it was immaterial that the train was being operated in a terminal yard instead of upon a highway.

A brakeman standing by the side of a passing train in order to mount the caboose as it reaches him, in the line of his duty, does not assume the risk of the negligence of another brakeman in throwing off from the caboose a piece of ice, although it was thrown off merely for the accommodation of the station agent. *Galveston, H. & S. A. R. Co. v. Heneby*, — Tex. Civ. App. —, 115 S. W. 57.

In *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581, it was held that a yard switchman while engaged in switching cars in the yard of the company is entitled to recover for injuries caused by the negligence of his immediate superior, the yard foreman. This case arose in Illinois, but was decided under the Indiana act.

Under the Montana act a railroad company has been held liable for injury to a conductor caused by the negligence of a yard foreman in sending cars against the caboose in which the conductor was sleeping. *Moyse v. Northern P. R. Co.* 41 Mont. 272, 108 Pac. 1082.

Particular statutory provisions.

An employee in a railroad blacksmith shop injured while operating a steam hammer for the purpose of flattening iron washers to be used in the repair of locomotives, by reason of the negligence of another em-

ployee in causing the hammer to descend at an improper time, is "engaged in construction or repair work" within the meaning of the Nebraska statute. *Swoboda v. Union P. R. Co.* 87 Neb. 200, 138 Am. St. Rep. 483, 127 N. W. 215.

A car repairer engaged in repairing a car which had broken down while *en route* has been held to be within art 9, § 15, of the South Carolina Constitution, providing that "every employee of any railroad corporation" shall have the same rights and remedies for any injury suffered by him from the acts or omissions of the corporation or its superior agents of officers as are allowed by the law to persons not employees. *Whisonant v. Atlanta & C. Air Line R. Co.* 86 S. C. 300, 68 S. E. 566.

A section hand engaged in carrying rails on the track is within the meaning of art. 9, § 15, of the South Carolina Constitution, which provides that "every employee of any railroad corporation" shall have the same rights and remedies for injuries suffered by him from the acts or omissions of the corporation or its superior agents or officers as are allowed to other persons not employees. *Hallums v. Southern R. Co.* 82 S. C. 299, 64 S. E. 147, 17 Ann. Cas. 511.

Statutes excepting employees in shops and factories.

The Michigan statute (No. 104, Pub. Acts 1909) expressly provides that the provisions of the act shall not apply to employees working in shops and offices. It has been held under this statute that an employee engaged in aiding in the construction of an addition to a roundhouse used for the storage of engines was within the protection of the statute, and was not in the exception noted. *Ferguson v. Lake Shore & M. S. R. Co.* 169 Mich. 260, 135 N. W. 268.

A similar clause is contained in the Wisconsin statute, and a boiler maker in railroad car shops at one place is, while repairing a boiler in a roundhouse in another place, within the exception "employees working in shops or offices." *Ruck v.*

there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies." *Blomquist v. Great Northern R. Co.* 65 Minn. 69, 67 N. W. 804.

Mr. Justice Brewer, in an opinion in the circuit court of appeals, reviewed the Kansas statute and the Kansas cases referred to in this opinion, except the *Medaris Case*, which had not been decided, and held that they authorized a recovery by an employee in a roundhouse for an injury caused by the negligence of a fellow employee while handling a driving rod in putting an engine in order for use. *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363, 365. In the opinion, referring to the *Harris Case*, it was said: "It will be seen that this injury in no way resulted from the actual movement of trains, but occurred while the party injured and the negligent coemployee were engaged in

the work of putting the track in condition for use. p. 91. Then, after quoting from the *Koehler Case*, it was said: "A roundhouse is as much a necessity for railroading as a stable for the livery business. He was not engaged in repairing an old engine or constructing a new one, but in putting that engine which had recently arrived in condition for immediate use. He was, as in those cases, not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract, to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains, as much so as that of repairing the track." p. 92.

The opinion last cited suggests the grounds upon which the *Medaris Case* is

Chicago, M. & St. P. R. Co. 153 Wis. 158, 140 N. W. 1074.

Machinists regularly employed to repair locomotives in a roundhouse are "shop employees" within the meaning of the Wisconsin statute. *Koecher v. Minneapolis, St. P. & S. Ste. M. R. Co.* — Minn. —, 142 N. W. 874.

In the *Ruck Case*, the court said: "A shop employee who goes into the shop yard, or even a great distance from the shop, for the purpose of performing the kind of labor which is ordinarily done in the shop, is, we think, within this exception. The words 'employees working in shops or offices' must therefore, we think, include that class employed for such service, whether actually within the walls of the shop or not, so long as they are employed for shop work, although outside the shop at the time of injury."

"Rule of haste" in Minnesota.

In Minnesota a rule has grown up known as the "rule of haste," under which it is held that if the employee is engaged in altering or repairing a track upon which trains are operated, or are to be operated, and by reason thereof the work has to be done with great and unusual haste, and such haste is an essential element in causing the accident, it can be fairly said that the employment involves an element of hazard peculiar to the railroad business, and the statute applies.

Thus, in *Christiansen v. Chicago, M. & St. P. R. Co.* 107 Minn. 341, 120 N. W. 300, it was held that where the evidence showed that the members of a gang of track repairers were being hastened in their work in order to get out of the way of an approaching train, it was a question for the jury to decide whether or not they were being subjected to the peculiar hazards of the operation of a railroad. 47 L.R.A.(N.S.)

So, the work of removing merchandise from wrecked cars, the result of a collision in a railroad yard, may embrace elements of danger peculiar to railroading when performed in haste under the direction of a foreman, and under unusual circumstances, such as working at night and over hours, for the purpose of clearing the track for the movement of trains. *Hanson v. Northern P. R. Co.* 108 Minn. 94, 22 L.R.A.(N.S.) 968, 121 N. W. 607.

Where the plaintiff was employed by a mining company in laying a switch and side track for the operation of trains, and the jury found that the foreman gave orders to hasten the work, the evidence was sufficient to sustain a verdict based on the theory that this was a railroad hazard. *Jelos v. Oliver Iron Min. Co.* 121 Minn. 473, 141 N. W. 843.

It is held in some of the later cases that, though the necessity for haste did not in fact exist, still if there was an order to hasten the work on account of the operation of trains, the statute applies. *Janssen v. Great Northern R. Co.* 109 Minn. 285, 123 N. W. 664; *Pylaczinski v. Great Northern R. Co.* 120 Minn. 74, 139 N. W. 147.

Whether or not the plaintiff, who was engaged in loading ties on a push car, and had been directed to hasten by the foreman in charge, as a passenger train was coming, was subjected to the peculiar hazards of operating a railroad, is a question for the jury. *Pylaczinski v. Great Northern R. Co.* supra. To the same effect, *Janssen v. Great Northern R. Co.* supra.

The "rule of haste," however, is not applicable where there is no evidence that the work was done with any haste at all, except as the men hurried in order that they might have a longer period of rest. *Nyland v. Duluth & N. W. R. Co.* — Minn. —, 143 N. W. 739.

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easily distinguishable from the Harris Case and other cases where recoveries have been sustained although the service did not include any participation in the movement of trains. In those cases, and in the one now under consideration, the work was upon the track; but this exposed the laborers to the hazards of passing trains, requiring vigilance and attention in proportion to the frequency of their passage.

The constitutionality of the statute was upheld in Chicago, K. & W. R. Co. v. Pontius, and in Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. Similar statutes have been upheld in other decisions, state and Federal, cited in Callahan v. St. Louis Merchants' Bridge Terminal R. Co. *supra*. Such legislation applying to particular bodies or associations imposing upon them additional liabilities is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. Missouri P. R. Co. v. Mackey, *supra*. The same opinion holds that such statutes are not obnoxious to the 14th Amendment. Nor are they unreasonable (Thompson v. Central R. & Bkg. Co. 54 Ga. 509), violative of the principle of equality, or otherwise unconstitutional (Labatt, Mast. & S. §§ 643 et seq.).

It is contended that the language of the statute, "negligence of its agents, . . . mismanagement of its engineers or other employees" (Laws 1905, chap. 341, § 1), excludes employees whose negligence caused the injury, except those of the same class, i. e., agents in charge of stations, and engineers, and others operating or participating in the movement of trains. The decisions of this court already referred to have determined adversely to this contention. The negligence of a fellow servant in the same service with the injured party is held to bind the company. It would overturn a rule long followed and firmly fixed in our jurisprudence, to hold otherwise, and would be contrary to the trend of judicial decisions.

Error is alleged in the admission of a copy of a notice served under that clause of the statute imported into it by amendment, requiring notice to the company within a specified time. A carbon copy of such a notice was produced by the plaintiff, and testimony given that a duplicate had been mailed to the defendant's assistant claim agent at Kansas City, and that it was not in the possession of the plaintiff. Notice to produce it had not been given, and an objection was made to the copy. It was shown, however, that the person to whom the notice was addressed had appeared with-

in the time given by the statute for giving it, and examined the plaintiff concerning the claim, promised to report to the general claim agent thereon, and requested that no further action be taken for sixty days, which request was acceded to. It was also shown that this claim agent, when thus making the examination, had in his possession the notice so mailed to him. Receipt of the notice was shown by the fact that it was seen in that officer's hands. Evidence was given tending to show that it was his duty to examine such claims, and he did in fact examine this one. The provision of the statute that service may be made upon certain agents does not exclude a proper notice given to the company in some other manner (Central Branch R. Co. v. Ingram, 20 Kan. 66), especially when acted upon by its officers charged with such duties. A failure to show the service of the statutory notice, however, would not have been fatal, for the record shows that the section foreman took and forwarded to the company a written statement signed by the plaintiff, stating the injuries and giving time and place, within a few days after the occurrence. The company produced and placed this written statement in evidence. It had sufficient notice. Smith v. Chicago, R. I. & P. R. Co. 82 Kan. 136, 28 L.R.A. (N.S.) 1255, 107 Pac. 635.

The fact that the opinion in the Medaris Case was relied upon by the defendant as a departure from former decisions in the interpretation of the statute is believed to justify this review of the subject. The present case does not fall within the class to which the Medaris Case belongs, but is within the principles announced in former decisions.

The judgment is affirmed.

INDIANA SUPREME COURT.

WALTER C. RICHEY, Appt.,
v.

CLEVELAND, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY.

(176 Ind. 542, 96 N. E. 694.)

Master and servant — liability act —
personal negligence of foreman.

1. Under a statute making the employer liable for injury to a servant through the negligence of another servant to whose order the injured employee is bound to con-

Note. — As to what employees and employments are within the purview of statutes abrogating the fellow-servant rule, see note to Missouri P. R. Co. v. Smith, ante, 113.

form and does conform, and who is at the time acting in the place of and performing the duty of the employer, a railroad company is liable for injury to an employee who, while obeying an order of his foreman, is injured by the foreman's negligent act in the operation of the appliance upon which the order is to be carried out.

Same — fall from hand car — liability.

2. An injury received by a fall from a hand car is not within statute making employers liable for injuries received by employees in the operation of a railroad, since the hazard is not so peculiar as to come within a proper classification of perils for which railroads alone may be rendered liable.

Courts — appellate jurisdiction — constitutional question.

3. The mere presence in a case of a constitutional question does not confer jurisdiction of the whole case upon the appellate court charged with the determination of such questions.

(Morris, J., dissents from proposition 2.)

(November 28, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bartholomew County sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. Hord & Adams and Herbert C. Jones for appellant.

Messrs. Carter & Morrison for appellee.

Myers, J., delivered the opinion of the court:

This cause was transferred to the supreme court by the appellate court, with its recommendations. Appellant instituted an action for damages for personal injuries. Two paragraphs of complaint were filed, one of which was withdrawn, and a demurrer was sustained to the other, from which ruling plaintiff appeals.

The material allegations of the complaint on the subject of the negligence claimed are: That on the 27th day of March, 1905, plaintiff was an employee in the service of the defendant, doing common labor as a section hand in repairing and maintaining the railroad tracks of the defendant, and doing other varied services, on a section about 3 miles long, extending in a northwesterly direction from the town of Waldron to Wheeler Creek, which section, with the hand cars, tools, implements, and the employees, were under the control, supervision, and subject to the orders of an employee of said defendant known as a "section foreman," and that at said time this plaintiff and other section

hands laboring for defendant were under the control of and subject to the orders of the section foreman, who was engaged in the same common service, and was a coemployee and fellow servant with the plaintiff and the other employees on the section. That the section foreman during all of the time, in performing the service of the corporation, was then and there acting in the place of, and performing the duties of, the corporation in that behalf, as its duty authorized agent. That upon said day, and for a long time prior thereto, plaintiff was under the absolute control and subject to the orders and direction of the section foreman, in performing his work and labor upon the section; that upon the day aforesaid, and a long time prior thereto, defendant owned a machine commonly called a "hand car," which was then, and for a long time before said time had been under the exclusive control of the section foreman, and which was used by defendant, under the supervision and control of the section foreman for the purpose of transporting the section foreman and the section hands under his control, and subject to his order, along the line of said section, for the purposes of performing the duties of the corporation, and also for the purpose of carrying tools, implements, lifting jacks, cross-ties, railroad iron, spikes, dirt, iron rails, gravel, and other material, used in repairing and maintaining the roadbed of the corporation, and for performing other duties pertaining thereto; that the hand car was a large and heavy machine, with iron wheels, and was propelled by an appliance that was operated by hand by the employees of the company. That the car was also equipped with a brake for checking and stopping it. That upon said day plaintiff, and other employees of defendant were unloading cross-ties at the town of Waldron, when the section foreman gave this plaintiff and other employees working on said section a special order to desist from that work and to load upon said hand car their shovels, picks, lifting jacks, and other tools belonging to the defendant, and he specifically ordered plaintiff and the employees working upon said section (which order and direction he was authorized to give) to get upon the hand car, and proceed with him to the west end of said section at Wheeler creek, to make repairs on defendant's roadbed by surfacing it. That while proceeding under said order and direction of the foreman, who had charge of and management of the brakes, and the management of the car by virtue of the authority vested in him by the defendant to do so, and while traveling upon the hand car subject to the orders of the section foreman to perform the duties required of them,

while said hand car, was running at the rate of 12 miles an hour, on a down grade over defendant's road, and while it was being propelled by this plaintiff and the other employees under the order and direction of the section foreman, who was then present upon the car, ordering and directing its movement, and who was the only person authorized to operate the brakes on the hand car, or who had any authority to direct the operating of the car, which was then heavily loaded with implements and tools, said section foreman carelessly and negligently and with great force, without any notice to this plaintiff and the other employees on said car, suddenly applied the brakes to the car, when there was no necessity therefor, at a point more than 1 mile from their destination, whereby the speed of the car was quickly, suddenly, and violently reduced from 12 miles an hour to 3 miles an hour, by said section foreman, who was a large and heavy man, negligently and carelessly throwing his entire weight upon the brakes, by reason of which negligent conduct said plaintiff was thrown forward off the car to the ground upon the railway bed, and was greatly injured. That at the time plaintiff was so injured, he was obeying the orders and directions of the section foreman, who then and there had competent authority in that behalf from this defendant to order and direct him, and the section foreman at the time was his superior in authority upon the section, and the section foreman, this plaintiff, and the other employees upon the section at the time were engaged in the same common service in the said department of the defendant as fellow servants performing the duties and labors of the corporation, and at the time of receiving the injury, and during the negligent conduct of the section foreman, and at all said times, plaintiff exercised due care and diligence to prevent said injury, and during all of said time he was free from fault or negligence contributing in any degree to his injury.

Upon these allegations appellant claims liability under subdivisions 2 and 4 of the employers' liability act (Acts 1893, p. 294, Burns' Anno. Stat. 1908, § 8017), on the ground that the act enlarges the liability of the operators of railroads where injury results from the negligence of any person in their service to whose order the injured employee is bound to conform and does conform, or who is "at the time acting in the place of and performing the duty of the corporation," and claims to recover by virtue of the order to change work and go upon the car, to which order he was bound to conform, and the negligent act of the section foreman, as the act of the principal. 47 L.R.A.(N.S.)

Appellee contends that the act of giving an order to change the work and to go upon the car was general and less broad than the scope of the employment, the giving of which was not negligent, and that the injury did not arise proximately from that order, or in attempting to obey it, but from the act of the foreman in suddenly stopping the hand car, in the doing of which he was but a fellow servant within the common-law rule and the statute, and reliance is placed by appellee upon the cases of *Justice v. Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303, and *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605, upon the theory that the foreman and appellant, in the matter of being transported with the tools to and from their work, were mere fellow servants. It was held, in the case first cited that at common law a section foreman in employing and discharging men is a vice-principal, but that in directing them, after their employment, he is a fellow servant. The case was determined prior to the enactment of the employers' liability act, which under some conditions enlarges the liability of railroads to those who are coemployees and fellow servants. It was held in the case of *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943, that the second clause of the fourth subdivision of the act only qualifies the liability expressed in such clause. The second clause of subdivision 4 is a declaration of the common-law liability. *Thacker v. Chicago, I. & L. Co.* supra. Subdivision 2 of § 8017, supra, raises a liability when injury arises from the negligence of one to whose order or direction the injured party was bound to conform and did conform.

Do these subdivisions undertake to create a liability from obedience to an order only, or also from the negligent act of one whose position is such that others are bound from the fact of his position to obey, or conform to his orders, irrespective of the thing about which he is acting, or the manner in which or the circumstances under which it is done, from which injury arises? That is, does liability arise from the fact of direct conformity to an order only, or does the negligent act of the one occupying a position which commands obedience create liability where the act is done during the time of conforming to the order?

It has been held that an order must be special, as contradistinguished from a general order, as broad as the scope of the service and the employment; but these cases will be found to present somewhat exceptional facts. *Indianapolis Street R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; *McElwaine-Richards Co. v. Wall*, 166

Ind. 267, 76 N. E. 408; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 160, 68 N. E. 262; Indiana Mfg. Co. v. Buskirk, 32 Ind. App. 414, 68 N. E. 925; Grand Rapids & I. R. Co. v. Pettit, 27 Ind. App. 120, 60 N. E. 1000.

It has also been held that a special order may arise within the scope of the general employment, and that a general order is one under which the servant works at his discretion, without compulsion of an order. The order here to go upon the hand car was less broad than the general scope of the employment, under the allegations of the complaint, and the injury arose in conforming to it. *McElwaine-Richards Co. v. Wall*, 166 Ind. 267, 76 N. E. 408; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; Indianapolis Street R. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721.

It has been intimated, if not decided, that an order need not be negligent in itself, in order to authorize a recovery, if injury arises while complying with it, by an act of one authorized to give it. *Muncie Pulp Co. v. Davis*, 162 Ind. 558, 561, 70 N. E. 875; Indianapolis Gas Co. v. Shumack, 23 Ind. App. 87, 54 N. E. 414.

The complaint is not grounded alone upon the theory that the order was special, and negligent, but upon the fact of obedience to the direction of the foreman, as to going upon the hand car, and the direct negligence of the latter in precipitating his weight upon the brake, and suddenly stopping the car without notice or warning to appellant. If there arises a cause of action from obedience to an order to do a thing by one authorized to give it, from the doing of which an injury arises, does it follow that the negligent doing of the thing by the person authorized to give the order to do it gives rise to a cause of action, from that fact, or does the statute mean still to maintain the relation of fellow servants, when the superior is at the time engaged in the same or common service, and impose liability only when the superior servant is discharging the duty of the master, and not that of a fellow servant?

It is alleged that the foreman had exclusive control over the hand car, and was the only person who had authority to control its movements and operation. The case is not like that of *Thacker v. Chicago, I. & L. R. Co.* supra, as to the first, second, and third paragraphs of complaint, which were held bad because the order given by the foreman to stop the car was not negligent in itself, but executed by another in a negligent manner, while the fourth paragraph of complaint was held good because it alleged the giving of the order by the foreman 47 L.R.A.(N.S.)

to stop the car suddenly. Here the allegation is that the foreman himself did the negligent act. The case falls squarely within the rule declared in the *Thacker Case* as to the fourth paragraph of complaint, provided the section foreman was acting for the master in the movement of the car in the discharge of the master's duty, or a duty imposed upon the superior. The force to be imputed to the statute does not arise merely from the relation of fellow servants, for the act recognizes them as such, but attaches to the act of one who, for the time being, is acting for the master by virtue of his authority over his fellow servants in discharging the duties of the master. The condition of superior rank is not alone sufficient. It must be such that the servant is at the time acting in the place of or discharging the duty of the master, or one to whose order others must conform. *Cleveland, C. C. & St. L. R. Co. v. Foland*, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165.

So that the question is narrowed to the proposition whether the act of the section foreman, in suddenly stopping the hand car, was done in the performance of an order to which appellant was bound to conform, or whether he was at the time acting for, or discharging the duty of, the master. The statute has not changed the fellow-servant rule except as the fellow servant falls within some of the classifications out of which liability arises, and the master ordinarily is not liable for the manner of handling appliances furnished, nor for the changing perils of the general employment, nor for a fellow servant's negligence in the detail of the work, unless the servant brings himself within the exception. *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529.

The statute declares the common law, and under some conditions does not increase the class of those who are at common law vice principals, while in others it does increase the class whose acts give rise to liability. *Ft. Wayne Iron & Steel Co. v. Parsell*, 168 Ind. 223, 79 N. E. 439; *Dill v. Marmon*, 164 Ind. 507, 69 L.R.A. 163, 73 N. E. 67; *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026, 13 Am. Neg. Rep. 267.

In the foregoing case this court quotes with approval from 1 *Sherman & Redfield on Negligence*, 5th ed. § 233, where it is said: "The test to be applied in each case, under this principle, is to inquire what would have been the duty of the master had he been personally present. To whom did he delegate that duty, he being absent? That delegate, whether he be high or low,

should be deemed with respect to that duty a vice principal. Foremost among the powers of a master, as already pointed out, is the power of giving orders. Foremost among his duties is that of general superintendence. He is equally responsible where he deposes to another the duty of giving orders which he ought to give himself if present; and if he deposes his power and duty of superintendence, he is responsible for the failure of his deputy to properly superintend. . . . The master's responsibility for the acts of his vice principal is to be determined, not merely by the character of the act which the latter performs, but also by the character of that which he fails to perform. If therefore, a vice principal, invested with the power and duty of superintendence, negligently permits any act to be done which it would be the duty of the master, if present, to prevent, the master is responsible to a servant injured thereby, simply because of the failure of his superintending vice principal to prevent it being done. And the master is none the less liable if the negligent act is done by the vice principal himself." This is the direct rule in the case of *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87, 54 N. E. 414, and in *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605, though in neither case was the question raised or decided as to the applicability of the employers' liability act, both parties in each case treating the question as if it did apply, while here the question of its application is directly presented.

In going upon the hand car, and in being carried upon it, appellant was acting in obedience to an order of one who had authority to direct him. It was not necessary that the injury should arise directly from obedience to that order, but it is sufficient if it arises while complying with it. In the case of *Louisville N. A. & C. R. Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927, 6 Am. Neg. Rep. 269, it was held that it was not necessary that the order or direction be negligent; but it is sufficient if the employee was bound to conform, and was conforming at the time of the injury, to the order or direction of the person whose negligence caused the injury. In that case it was said: "The order to loose the truck was the proximate cause of plaintiff's injury. And it was both directing the plaintiff into a dangerous situation that he was bound to enter, and then ordering the truck turned loose upon him without warning, that constitutes the actionable wrong." In the case of *Thacker v. Chicago, I. & L. R. Co. supra*, the section men were obeying a general order, when the foreman gave the negligent special order, which another

obeyed, and which caused the injury to Thacker. Here appellant acted upon an order to go upon the car, and while being carried upon it, in conformity to the order, and in its continuity of execution, he was injured by the direct negligence of the foreman. There was an intimate connection between appellant's conforming to the order in being upon the car, and the action of the foreman which caused the injury. In other words, the order to go upon the car was a proper and continuing one, and was not negligent. The injury arose subsequently in conforming to that order and under the English cases, in construing the British act upon which our own is modeled, a liability arises. *Wild v. Waygood* [1892] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, and *Millward v. Midland R. Co.* L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453. These were followed in the *Wagner* and *Thacker Cases*. See *Dresser, Employers' Liability*, p. 304.

The court is of the opinion that this complaint, if otherwise sufficient, is good under the rule announced as to the fourth paragraph of complaint in the *Thacker Case*, and the rule in the *Shumack Case* and the doctrine of *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026, 13 Am. Neg. Rep. 267, and *Louisville, N. A. & C. R. Co. v. Wagner, supra*, upon the theory that the act of the section foreman in doing a negligent thing himself from which the injury arose was as potent as his giving an order to do it; that it necessarily involved the same mental process to determine to do what he did as if he had given an order to another to do it as he did it, and that the master's duty to exercise reasonable care to make and keep the appliance reasonably safe was imposed upon the section foreman; and that this duty was extended to the operation of the hand car, so far as he himself was concerned in operating it, as applied to the question of keeping it safe, for it would be the refinement of reasoning to say that he, by giving the order to another, would create a liability, but if he did the thing himself, it would not. *Thacker v. Chicago, I. & L. R. Co. supra*; *Toledo, St. L. & W. R. Co. v. Pavey*, 39 Ind. App. 284, 79 N. E. 529; *Frandsen v. Chicago, R. I. & P. R. Co.* 36 Iowa, 372.

A more serious question arises over the proposition as to whether, under the employers' liability act, it can be said as a matter of law that appellant's injury arose from the operation of a railroad train. If the case, under the facts pleaded, can be said to fall within the statute, it must be because the running of the hand car was

the "operation" of a railroad, within the restricted meaning of the operation of trains, which the court has been constrained to give the act, in order to uphold it in any respect, and that is the real question here. The statutes of other states and the construction given to them do not materially aid us, owing to the difference in the statutes and the different constitutional provisions. In Iowa, the language of the act is "connected with the use and operation of any railway, on or about which they shall be employed." Code, § 2071. See also *Ca-hill v. Illinois C. R. Co.* 148 Iowa, 241, 28 L.R.A.(N.S.) 1121, 125 N. W. 331; *Johnson v. Great Northern R. Co.* 18 L.R.A.(N.S.) 477, and valuable notes (104 Minn. 444, 116 N. W. 936; *Hanson v. Northern P. R. Co.* 22 L.R.A.(N.S.) 969, and note, 121 N. W. 607, 108 Minn. 94. In Kansas the language is "any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees." Kansas Gen. Stat. 1909, § 6999. In Minnesota, "by reason of the negligence of any other servant thereof." Rev. Laws 1905, § 2042.

The Texas statute restricts liability to those "engaged in the work of operating cars, locomotives, or trains." *Sayles's Anno. Civ. Stat.* 1897, art. 4560f. South Carolina extends the liability to employees the same as to those who are not employees and to injuries resulting "from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow-servant, engaged in another department of labor from that of the party injured, or of a fellow servant, on another train of cars, or one engaged about a different piece of work." Const. 1895, art. 9, § 15. By the statute of Arkansas vice principals are defined as well as those who are fellow servants. The Mississippi Constitution is similar to the South Carolina act, and the Code follows it. *Mias. Const.* art. 7, § 193. The language of the Missouri statute is, "while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof," and defines vice principals and fellow servants. *Mo. Anno. Stat.* 1906, § 2873. The Montana act provides that the liability for injury to a servant "acting under the orders of his superior shall be the same . . . as if such servant or employee were a passenger." Code Montana, § 905 (Rev. Codes, § 4286). The Ohio Code declares who are superiors and who are fellow servants, and provides for liability in addition to the liability then existing, when arising from the negligence of the superior. 47 L.R.A.(N.S.)

87 Ohio Laws, p. 149; *Bates's Anno. Stat.* 2d ed. 1787-1904, § 3365-22.

It may be conceded that the hazard of the service upon which liability is predicated is extended in most jurisdictions farther than we can extend it under our Constitution. In order to give effect, so far as could possibly be done, to the employer's liability act, so as to escape the constitutional objection of special or class legislation, the court has been compelled to draw the line of separation at the character of the employment, and not the character of the employer, and, as applied to railroads, at the employment which is hazardous in its discharge, as affected by the operation of trains; for, as pointed out in the case of *Cleveland C. C. & St. L. R. Co. v. Foland*, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165, if a railroad employee in constructing a bridge is injured, and the railway is liable, and an employee of a private person doing the same work is injured, and there is no liability, the statute would clearly fall within the constitutional prohibition. *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; *Bedford Quarries Co. v. Bough* (1907) 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Longview v. Crawfordville* (1905) 164 Ind. 117, 68 L.R.A. 622, 73 N. E. 78, 3 Ann. Cas. 496; *Sellers v. Hayes* (1904) 163 Ind. 422, 72 N. E. 119; *McKinster v. Sager*, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; *Rushville v. Hayes* (1904) 162 Ind. 193, 70 N. E. 134; *Street v. Varney Electrical Supply Co.* (1903) 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; *Dixon v. Poe* (1902) 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518; *Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) (1901) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Johnson v. St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Lavallee v. St. Paul M. & M. R. Co.* (1889) 40 Minn. 249, 41 N. W. 974; *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Slocum v. Bear Valley Irrig. Co.* (1898) 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403; *Ballard v. Mississippi Cotton Oil Co.* (1902) 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533. If we should hold that the liability depends upon the employer, and not upon the character of the employment, we would then be forced to hold that a mechanic in a railway shop, repairing a locomotive or car, wholly disconnected from any danger different from that of a mechanic employed by a private person, corporation, or person, other than

those operating railroads, would have a cause of action against a railway company, while an employee of a private person or corporation, doing the same work, and suffering the same injury, from a like cause, would not have a cause of action. In its attempt to uphold the law so far as it could be done, by basing it upon the character of the employment, and not of the employer, so as to avoid the constitutional objection, this court, in the case of Pittsburgh, C. C. & St. L. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582, followed the rule in Iowa, Minnesota, and Kansas, of classification by the character of service, and upheld the act as to railroads, by putting them in a class by themselves, on account of the hazards in operating trains. This was followed in the case of Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943. This classification of railroads by themselves was approved by the Supreme Court of the United States in the case of Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, following the rule declared by the supreme courts of Iowa and Kansas, as a classification by employment, and not by the employer. Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; McAunich v. Mississippi & M. R. Co. 20 Iowa, 338; Missouri P. R. Co. v. Haley, 25 Kan. 35, 53.

In the case of Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, the Supreme Court of the United States, in construing a statute similar to that of Iowa, puts the decision upon the same ground as the McAunich Case.

A classification of railroads has been upheld on the same grounds in Minnesota. Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974, and Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156.

A Mississippi statute was held invalid because if imposition of liabilities upon all corporations, irrespective of the nature of their business, which were not imposed on natural persons. Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533.

In Bedford Quarries Co. v. Bough (1907) 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529, the court was again forced, in order to sustain any part of the law, to apply the rule of distinction as to the character of the employment, and to hold that the act was invalid except as to corporations or persons operating railroads, because it imposed obligations upon them that were not imposed on private persons or copartnerships in the same business, and under the same circumstances and conditions.

Coming to the case of Indianapolis Street

R. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721, as was pointed out in the Foland Case on petition for rehearing (174 Ind. 417, 92 N. E. 165), the question was not raised as to whether a bridge carpenter came within the provisions of the act, both parties treating it as if he did, and the court adopted the theory of the parties in that case; but the question was squarely presented in Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954. Besides, the judgment in the Kane Case was affirmed, and the rule is that, while the court will search the record to affirm a case, it will not do so to reverse it. The rule is too broadly stated in the Kinney Case and in the Foland Case, following it, if it is understood as limiting liability to those engaged in train service; but we do not so understand those cases, or so intend to hold, or limit it, but that it applies to the hazards of the operation of railroad engines and trains. Bearing in mind that the ground for the classification is the character of the employment from which the hazard arises, it may be that in a specific case a workman upon the tracks is subject to the hazards peculiar to the running of trains themselves, from collision, derailment, falling or projecting materials, or from other causes where employment on or about the track or on or about bridges is affected by their operation, or in movements on the track, and affected by their operation in the necessary work upon it. At least it cannot be said as a matter of law that there is no hazard from the operation of trains, in working upon the track, or where operation of trains produces hazard, nor even that it is a less hazard than direct operation of trains.

To escape the constitutional objection as herein pointed out, we think the general doctrine stated in the cases of Indianapolis Traction & Terminal Co. v. Kinney, supra, and Cleveland, C. C. & St. L. R. Co. v. Foland, supra, must be adhered to, and that each specific case must be governed by the question whether the service in which the employee is at the time engaged is such as subjects him to danger and injury from the operating of trains, whether actually engaged as an operative on a train, or not. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243.

This brings us to the consideration of the case of Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, ante, 84, 30 Sup. St. Rep. 676. In the case of Tullis v. Lake Erie & W. Co. supra, the Supreme Court of the United States upheld the constitutionality of the employers' liability act of this state, upon the ground that the con-

struction put upon it by this court, as applying to the hazards connected with the operating of railways, was a reasonable classification, and held that it did not offend against the equal protection clause of the Federal Constitution and the construction of our own constitution, and the acts arising under it, not presenting a Federal question, are not the subject of review by that court. In the Melton Case the court uses language that though properly involved in the Federal question, as to the equal protection and due process of law clauses of the 14th Amendment, was not sufficiently guarded in view of the rule in the Tullis Case, and of the construction by this court of the act in its relation to our own Constitution. An examination of the case discloses that the sole question before the court was as to the constitutionality of the act as applied to the 14th Amendment to the Federal Constitution; and that this is so appears not only from the opinion itself, but from views, expressed in the case of *Mobile, J. & K. C. R. Co. v. Turnipseed*, supra. Incidentally, it will be noticed that while the question of the full faith and credit clause of the Federal Constitution was sought to be invoked in that case as binding upon the courts of Kentucky, by the construction placed upon our statute, the court expressly declines to consider the question, because it was in no wise presented to the Kentucky court of appeals, and it follows that it was not determined in that case, and the only question conferring jurisdiction upon the Supreme Court was the question involving the 14th Amendment, which, as we understand it, was the only question before the court, in the discussion of which the court refers to the construction put upon the statute by this court as too restricted. Upon the theory that no Federal question was involved in the construction of the statute by this court, that court dismissed for want of jurisdiction the appeals from the decisions of this court in the cases of *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033, and *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 168 Ind. 467, 80 N. E. 415, and *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, in each of which the question under our constitution was directly involved. See *Pittsburg, C. C. & St. L. R. Co. v. Lighthouse*, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688.

If, as seems to be the case, the supreme court in the Melton Case regards the construction by this court as too restricted, with respect to the character of employees, as restricted to those in the train service, we agree with it; but we do not so understand the rule. We understand and hold that it 47 L.R.A.(N.S.)

should be limited to those who incur the hazard of and injury by and from the operating of trains; but we cannot go further without offending the prohibition of our own constitution against special and class legislation. To adopt the broad construction apparently given in the case of *Louisville & N. R. Co. v. Melton*, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618, and followed on appeal to the Supreme Court of the United States, could but lead to the entire overthrow of the act; but it seems to us that there is a line of possible harmony in the cases, on principle, though it could not harmonize our views with the rule adopted by the court of appeals of Kentucky in the case just cited as applying to a bridge carpenter, whose injury was in no wise caused by or connected with the hazard of operating trains, or different from that in any other business of a like character. The distinction lies not from including employees in a class, owing to the impracticability, if not the impossibility, of enacting a statute that would, in and of itself, apply to every condition or character of modern employments it may be sought to apply it to, but in the application of the statute in a particular case, irrespective of the general classification, to those whose employment for the time being exposes them to the hazards of, and injury from, the operating of trains.

We are asked by the appellate court to overrule *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212, upon the ground that, when a constitutional question is presented in that court, it has but one duty to perform, and that is to transfer it to this court; and, as this court must pass upon the point whether a constitutional question is involved, it ought to assume jurisdiction of the case for all purposes. There would seem to be some ground for this claim, stated in the abstract; but the difficulty lies in the fact that notwithstanding a constitutional question presented upon the record has been definitely and specifically settled, it would be possible to divest the jurisdiction of that court, by the simple device of putting a constitutional question in the record, which can be done in a very great number of cases, however devoid of merit, and evade the very object of the creation of the court by curtailing its jurisdiction, in that way, so that it seems to us the better and safer rule is the one announced in the case of *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, supra, and cases following it. That is the well-established rule in the Supreme Court of the United States, as shown by those cases, in which, under the guise of procuring deci-

sions upon Federal questions, it is sought to procure decisions upon purely state questions, whether by appeal, writ of error, or certiorari. *Watkins v. American Nat. Bank*, 199 U. S. 599, 50 L. ed. 327, 26 Sup. Ct. Rep. 746; *Bonia v. Gulf Co.* 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; *Warder v. Loomis*, 197 U. S. 619, 49 L. ed. 909, 25 Sup. Ct. Rep. 799; *Spencer v. Duplan Silk Co.* 191 U. S. 520, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

The difficulty confronting us in this case, in view of the holding in the cases of *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605; and *Toledo, St. L. & W. R. Co. v. Pavey*, 39 Ind. App. 284, 79 N. E. 529, is that in none of those cases, as in the case of *Indianapolis Street R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721, was the question raised as to liability under the employers' liability act.

We are, however, in view of later cases in which the question was directly raised, constrained to hold that appellant does not state a cause of action under the employers' liability act, the theory upon which his action is grounded, and that the judgment must be affirmed. It is so ordered.

Morris, J., dissents from so much of the opinion as holds that appellant's injury was not one arising from the hazards of operating a railroad train.

IOWA SUPREME COURT.

PETER SLAATS, Appt.,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY.

(149 Iowa, 735, 129 N. W. 63.)

Master and servant — injury in repair shop — connection with operation of road.

Substituting new wheels for old on an engine in a repair shop of a railroad is not "connected with the use and operation" of the railway within the meaning of a statute abolishing the fellow-servant rule in case of wrongs so connected, although the engines to be repaired rest on rails con-

Note.—As to what employees and employments are within the purview of statutes abrogating the fellow-servant rule, see note to *Missouri P. R. Co. v. Smith*, ante, 113.

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nected with the main track of the system, and therefore a helper injured by the starting by a fellow servant without warning, while he is in a position of danger, of an engine to move another upon which such substitution is being made, cannot hold the railroad company liable for the injury.

(Weaver, J., dissents.)

(December 17, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Dubuque County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Hurd, Lenehan, & Kiesel, for appellant:

The injury was connected with the use and operation of a railway.

Missouri P. R. Co. v. Haley, 25 Kan. 35; *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Blomquist v. Great Northern R. Co.* 65 Minn. 69, 67 N. W. 804; *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 9, 49 N. W. 302; *Weisel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576, 7 Am. Neg. Rep. 635; *Nichols v. Chicago, M. & St. P. R. Co.* 60 Minn. 319, 62 N. W. 386; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260, 16 Am. Neg. Cas. 336; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; *Turner v. Terminal R. Asso.* 132 Mo. App. 38, 111 S. W. 841; *Hardt v. Chicago, M. & St. P. R. Co.* 130 Wis. 512, 110 N. W. 427; *Butler v. Chicago, B. & Q. R. Co.* 87 Iowa, 206, 54 N. W. 208; *Smith v. Humes-ton & S. R. Co.* 78 Iowa, 584, 43 N. W. 545; *Keatley v. Illinois C. R. Co.* 94 Iowa, 685, 63 N. W. 560; *Canon v. Chicago, M. & St. P. R. Co.* 101 Iowa, 613, 70 N. W. 755, 2 Am. Neg. Rep. 131; *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676, 4 Am. Neg. Rep. 384; *Jenson v. Omaha & St. L. R. Co.* 115 Iowa, 404, 88 N. W. 952; *Stebbins v. Crooked Creek R. & Coal Co.* 116 Iowa, 513, 90 N. W. 355; *Williams v. Iowa C. R. Co.* 121 Iowa, 270, 96 N. W. 774; *Hughes v. Iowa C. R. Co.* 128 Iowa, 207, 103 N. W. 339.

The location of the rails is not material, so long as the injury is caused by a moving engine or car.

2 Labatt, Mast. & S. p. 2041, § 707; *Malone v. Burlington, C. R. & N. R. Co.* 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; *Gulf, C. & S. F. R. Co. v. Howard*, 97 Tex. 513, 80 S. W. 229; *Lodwick Lumber Co. v. Taylor*, 39 Tex. Civ. App. 302, 87 S. W. 359; *Hines v. Stanley-G. I. Electric Mfg.*

Co. 199 Mass. 522, 85 N. E. 851; *Turner v. Terminal R. Asso.* 132 Mo. App. 38, 111 S. W. 841; *Cunningham v. Neal*, 101 Tex. 338, 15 L.R.A.(N.S.) 479, 107 S. W. 539, 49 Tex. Civ. App. 613, 109 S. W. 455; *Johnson v. Great Northern R. Co.* 104 Minn. 444, 18 L.R.A.(N.S.) 477, 116 N. W. 936; *Mace v. H. A. Boedker & Co.* 127 Iowa, 721, 104 N. W. 475; *Cahill v. Illinois C. R. Co.* 148 Iowa, 241, 28 L.R.A.(N.S.) 1121, 125 N. W. 331.

Messrs. Glenn Brown and Cook, Hughes, & Sutherland, for appellee:

The statute does not apply to injuries received by plaintiff while engaged in the repairing of an engine in defendant's repair shop.

Potter v. Chicago, R. I. & P. R. Co. 46 Iowa, 399; *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124, 14 Am. Neg. Cas. 630; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1042; *American Car & Foundry Co. v. Inzer*, 172 Ind. 56, 87 N. E. 722; *Indianapolis Traction Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; *Perry v. Old Colony R. Co.* 164 Mass. 296, 41 N. E. 289; *Dunn v. Chicago, R. I. & P. R. Co.* 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 Ann. Cas. 226; *State v. Brin*, 30 Minn. 522, 16 N. W. 406; *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210; *Millvale v. Evergreen R. Co.* 131 Pa. 1, 7 L.R.A. 369, 18 Atl. 993; *Massachusetts Loan & Trust Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588; *Old Colony Trust Co. v. Allentown & B. Rapid Transit Co.* 192 Pa. 596, 44 Atl. 319; *Houston & T. C. R. Co. v. Weaver*, — Tex. Civ. App. —, 41 S. W. 846; *Davis v. State*, 105 Ga. 808, 32 S. E. 158.

Ladd, J., delivered the opinion of the court:

A crew, consisting of two machinists and five helpers, was employed by defendant in stripping engines when brought into its machine shops for repair, and in replacing the parts when put in a state of repair. The plaintiff was one of the helpers, and his duty was to block the wheels of the engine when placed over the draw pit in the shop by putting wooden blocks or iron nuts or burrs under the wheel, and removing these when the engine was ready to be taken away. This pit was in the shop with movable rails over it, these being connected with others extending to the turntable on the outside and then on with the main tracks of the railroad. When the wheels were to be put on an engine, it was "jacked up and rested on supports, the rails of the pit were then removed, and the wheels put in place. Then, for the purpose of putting in

the second set of drivers, the track would be replaced and the engine would be removed so that the drivers which had been attached would rest on the permanent track beyond the pit, when the same plan would be followed for putting on the drivers which has been described. . . . The engine, after the drive wheels were under it, was removed by another engine, but sometimes by pinch bars." On July 13, 1907, a switch engine was employed to remove that on which the wheels had been replaced. The repairs had not been completed, and, for this reason, two of the helpers sat on the frame, holding up part of the machinery so it could move. After helping couple the live with the dead engine, plaintiff stepped back to see if the blocking was out. Noticing a small burr on the rail, he undertook to brush it out with his hand, when, without warning, the engine started and his hand was so crushed that he lost three fingers. The evidence was such as to carry the issue of absence of contributory negligence to the jury, and no question is raised but that the jury might have found that the injury was the direct consequence of the employee's negligence in failing to warn plaintiff before moving the engine. As he was a coemployee of plaintiff, however, a finding for defendant was directed by the court, and the sole issue of law is whether the facts bring the case within the provisions of § 2071 of the Code. As plaintiff's employment was such as to expose him to the dangers incident to the moving of the dead engine, and the negligence of the engineer, if any, was in starting the same without warning, it is evident that the determination of the question depends on whether the work being done was in any manner connected with the use and operation of the railroad. The section of the statute referred to, in so far as pertinent to the inquiry, reads: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." In a sense, everything such a corporation does is in some manner connected with the use and operation of its railway, for that is the purpose of its existence. Thus the work of those who solicit freight or passengers for transportation, or enter into traffic arrangements with other roads, or procure rolling stock or fuel for the

engines and the like, is connected with the successful operation of the enterprise, but no one pretends that work in any of these lines is within the purview of this statute. See *Malone v. Burlington, C. R. & N. R. Co.* 61 Iowa, 326, 47 Am. Rep. 813, 16 N. W. 203. It has reference, as we think, to the physical use and operation of the railway, and the question for determination is whether the accident occurred on or about a railway or in the operation thereof. The record leaves no doubt but that the engines were in the machine shop, as distinguished from a roundhouse. Into the latter, engines in service are run for repair and cleaning necessary to their continued use on the road. Roundhouses are constructed along the way for this purpose, and are made use of in connection with the actual use of the road. Their relation thereto is somewhat like the stable to the livery. But the machine shops are the hospitals. The engines, cars, and the like are only taken there when disabled, and withdrawn from use when this is essential to refit them for actual service in the operation of the railway. Manifestly, when so withdrawn and in course of reconstruction or repair, they are in no wise connected with the operation of the railway. As well say the steam shovels, pile drivers, and the like, being repaired in the same shop, are so connected. Such reconstruction and repair might proceed as well were the shop that of an individual or other corporation and located apart from the railroad. Over the shop in question the operating department of the railroad exercised no control. Tracks were laid on the floor, and on these the engines and cars were stripped, and so, too, the different parts were assembled and put together, and the engines or car moved about thereon during repair or construction. These tracks were connected with those in the yard and then with the railway; but does this make the tracks in the shop a part of the railroad in the sense in which that word is employed in § 2071? If so, then the tracks in a manufacturing plant on which locomotives are constructed by individuals or corporations other than railways constitute railroads, and employees working thereon are within the protection of the above section. The mere laying of tracks on the floor does not make a railway, nor does the movement of an engine or car thereon necessarily constitute the operation of a railway. If so, this might be effected by the use of a pinch bar, or a moving crane, or any kind of electric device. A company or individual, engaged solely in manufacturing or repairing, might make such use of tracks entirely within plant in the convenient performance of its work and without connection with a railroad, as that 47 L.R.A.(N.S.)

term is understood. Of course, a company or individual may operate a railway solely for the purpose of carrying property belonging to it or him, and such an one has been held to be within the terms of similar statutes. *Lodwick Lumber Co. v. Taylor*, 39 Tex. Civ. App. 302, 87 S. W. 358; *Schus v. Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68; *Kline v. Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681; *Kibbe v. Stevenson Iron Min. Co.* 69 C. C. A. 145, 136 Fed. 147; *Hines v. Stanley-G. I. Electric Mfg. Co.* 199 Mass. 522, 85 N. E. 851; *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455, id. 101 Tex. 338, 15 L.R.A.(N.S.) 479, 107 S. W. 539. See *Mace v. H. A. Boedker & Co.* 127 Iowa, 721, 104 N. W. 475.

But we have discovered no decision to the effect that a railroad is operated save when in use for the transportation of freight of some kind, or passengers, or both. Such is the use of all railways; and, when not so employed, they are not in use. It is the use the rails are put to, and not the form of rails, which determines whether they constitute a railway. The mere moving of the dismantled engine which had been withdrawn from service and sent to the hospital for remedy by the live engine was neither connected with the use nor the operation of the railway, but was in the preparation for use in that connection. The work of these shops may as well have been carried on apart from the defendant and without interfering with the operation of its road. The elimination of the fellow-servant rule, effected by this statute, repeatedly has been justified against the charge of discrimination on the ground that the hazards of the employment are peculiar to railroading. *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676, 4 Am. Neg. Rep. 384. These hazards are not only from the nature of the work in movement of vehicles and machinery of great weight and velocity by steam on tracks, but because of the coemployees being widely separated, and not in a situation directly to influence the actions of one another. The hazard in performing other work may be quite as great, but is of a different kind; and, on this ground, the classification has been upheld and the legislative intent declared. Other courts may have interpreted similar statutes more broadly, and possibly in doing so correctly expressed the designs of the respective legislatures in enacting them. See *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; dissenting opinion in *Dunn v. Chicago, R. I. & P. R. Co.* 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 Ann. Cas. 226. But this court, since *Deppe v. Chicago, R. I. &*

P. R. Co. 36 Iowa, 52, has adhered to the proposition that the general assembly, in framing the several statutes, did not purpose to afford protection to railroad employees not extended to others in like situation. "The purpose of the lawmakers," as said in the Akeson Case, "was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation." In what way do the hazards of work in a railroad machine shop differ from those incident to employment in other shops where heavy machinery is handled? None whatever. The machine shop is not recognized in title X of the Code treating of railroads as an essential part thereof. No one will pretend that chapter 4 thereof authorizes the condemnation of land on which to erect such shops, and every section of chapter 5, of which § 2071 is a part, emphasizes the thought that by the word "railway" as employed therein is meant all those facilities made use of in the movement of trains, cars, vehicles, and the like on the track constructed for the carriage of freight and passengers. In many decisions, this court has declared that by "operation" of a railway is meant the movement of engines, cars, and machinery on the tracks, and, to be within the protection of the statute, the wrong must be in such movement or connected therewith. *Akeson v. Chicago, B. & Q. R. Co.* supra; *Stroble v. Chicago, M. & St. P. R. Co.* 70 Iowa, 560, 59 Am. Rep. 456, 31 N. W. 63; *Smith v. Humeston & S. R. Co.* 78 Iowa, 583, 43 N. W. 545; *Larson v. Illinois C. R. Co.* 91 Iowa, 81, 58 N. W. 1076; *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124, 14 Am. Neg. Cas. 630; *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 96, 78 N. W. 800, 6 Am. Neg. Rep. 60; *Dunn v. Chicago, R. I. & P. R. Co.* 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 Ann. Cas. 226. In the first case it was said that if the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a coemployee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection."

We are of opinion that the rails on the shop floor did not constitute a railway within the meaning of the statute, nor was the movement of the dismantled engine on the rails therein by the live engine the use and operation of a railway. See *Perry v. Old Colony R. Co.* 164 Mass. 296, 41 N. E. 239; *Potter v. Chicago, R. I. & P. R. Co.* 46 47 L.R.A.(N.S.)

Iowa, 399; *Hathaway v. Illinois C. R. Co.* 92 Iowa, 337, 60 N. W. 651.

The ruling of the District Court is approved, and its judgment is affirmed.

Weaver, J., dissenting:

In my judgment the majority opinion draws a distinction which cannot be logically maintained, and reaches a result not to be reconciled with our own holdings in numerous cases. It concedes the sufficiency of the showing to sustain the charge of negligence, and the want of contributory negligence, and disposes of the appeal on the sole ground that said negligence was not "in any manner connected with the use and operation of the railway," and is not therefore within the statutory exception to the rule which relieves the employer from liability for injuries resulting to a servant from the negligence of a fellow servant. The statute, it will be observed, protects the servant not merely against injury arising from the movement of trains while transporting passengers and freights, but against the consequence of any negligence by any agent or employee of the company when that negligence is "in any manner connected with the use and operation of the railway." I shall not wrestle with the impossible task of reconciling all the decisions of this court in the construction and application of the statute in question. With apparent obliviousness to the unequivocal language of the act, there was for a time a visible tendency to hold that, to be entitled to its benefits, the injured person must not only be able to trace his hurts directly to negligence in the actual movement of a train or car, but he must also show that at the time of his injury he was himself employed in some labor connected with the actual operation of the railway. Such manifest misconstruction could not long be justified, and it has to a great extent been tacitly abandoned or expressly disapproved. Stated in brief terms, the tendency of the greater number of our more recent holdings is to the effect that the negligence of any employee in the performance of any duty directly affecting the safety of others engaged in the operation of the road, or in any labor of any kind which directly exposes them to the hazards attending such operations, is negligence "connected with the operation of a railway" within the meaning of the statute.

For instance, we have held that the work of an employee charged with the repair of a bridge (*Locke v. Sioux City & P. R. Co.* 46 Iowa, 113); of a coal shoveler in loading a standing engine (*Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676, 4 Am. Neg. Rep. 384); of an employee controlling the operation of a ditching car

(*Nelson v. Chicago, M. & St. P. R. Co.* 73 Iowa, 576, 35 N. W. 611); of a shoveler loading cars from a gravel pit (*Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406); of section men removing a hand car from the track (*Frandsen v. Chicago, R. I. & P. R. Co.* 36 Iowa, 372; *Cahill v. Illinois C. R. Co.* 148 Iowa, 241, 28 L.R.A. (N.S.) 1121, 125 N. W. 331); of a section foreman in repairing the track (*Haden v. Sioux City & P. R. Co.* 92 Iowa, 226, 60 N. W. 537); of a car inspector inspecting a standing train (*Canon v. Chicago, M. & St. P. R. Co.* 101 Iowa, 613, 70 N. W. 755, 2 Am. Neg. Rep. 131); of a car repairer in the railway yards (*Hughes v. Iowa C. R. Co.* 128 Iowa, 211, 103 N. W. 339); of a water carrier for a bridge crew (*Keatley v. Illinois C. R. Co.* 94 Iowa, 685, 63 N. W. 560); of a car cleaner working on a car standing on a side track (*Jensen v. Omaha & St. L. R. Co.* 115 Iowa, 404, 88 N. W. 952); of a shophand repairing the window of a car standing at a station platform (*Pierce v. Central Iowa R. Co.* 73 Iowa, 140, 34 N. W. 783); of a switchman upon a temporary or dummy track used in construction work by a contractor (*Mace v. H. A. Boedker & Co.* 127 Iowa, 721, 104 N. W. 475).—is “connected with the operation of a railway” in the statutory sense of that phrase. Even in this case the majority opinion seems to concede that if the engine had been undergoing repairs in a roundhouse instead of the company’s shop, a different rule might apply. In short, it may be stated as the recognized general rule that wherever the employee may be and whatever may be the nature of his work, if he is thereby exposed to the hazards peculiar to or attendant upon the operation of a railway, he is within the protection of the statute. Bearing this definition in mind, the fallacy pervading the majority opinion is clearly apparent. It crops out noticeably in the suggestion that a literal interpretation of the statute might be made to cover the case of an agent or employee who solicits freight or passengers for his road. Such service has no more connection with the operation of a railroad than has the service of the job printer who supplies its advertising matter. What is meant by the words “in any manner connected with the operation of a railway” is neither ambiguous, obscure, nor difficult of application until the court itself creates clouds and uncertainty by making finely drawn distinctions. A railroad is “operated” not alone in the direct physical act of hauling freight and passengers over its main line from station to station, but as well in every movement of its rolling stock of any kind over any part of its sys-

tem of tracks auxiliary thereto, and negligence in such movements is negligence connected with the operation of the road without regard to the special function of the particular track on which it occurs. It is a matter of common observation that the transportation business of a railroad calls into existence at every station of importance a network of tracks. Some are used for storage; others extend to and into grain elevators, stock pens, factories, and industrial establishments of every kind. Others still reach into the company’s roundhouses and shops. That the use of these tracks is connected with and part of the operation of the road would seem to be too clear to call for argument or demonstration. Not all work of car repairing is done in the shops. Much of it, especially that of a minor character, is done while the cars stand in the open on a side track designated for that purpose. If a mechanic while at work upon a car standing upon the repair track in the company’s yard is injured by the negligence of an engineer in suddenly moving such car without warning, or by bringing his engine into collision with it, no one could reasonably contend that such want of care was not connected with the use or operation of the railway. If the convenience of the company or the facilitation of the work of repair requires a movement of the car undergoing repair from one location on the repair track to another, and an engine is used for that purpose, pushing or pulling the car to the desired position, why is not such work a part of the use and operation of the road?

We have held that the act of pulling a cable which operates a loading or unloading device is an operation within the statute. *Stebbins v. Crooked Creek R. & Coal Co.* 116 Iowa, 513, 90 N. W. 355; *Williams v. Iowa C. R. Co.* 121 Iowa, 270, 96 N. W. 774. The same has been held as to the operation of a ditching machine by locomotive power. If such movements of a locomotive fall within the definition of “use and operation” as used in the statute, the necessity and propriety of such classification would be in no wise affected if the company should cover its repair track with a roof and inclose it with walls in which gates or doors are provided for the entrance and exit of cars. Yet we should be compelled to draw that distinction if the reasoning adopted by the majority in this case is to prevail. If an engine becomes disabled upon the main track, we may assume that the company would despatch another to take it in tow, haul it to the station where repairs are to be made, thence out through the yards to the shop track, and thence to its proper location within the shop,—one con-

tinuous transportation or haul, and moved every foot of the way by the company's own motive power over its own track. When the progress of repair requires the great machine to be moved from one room to another, or from one location in the same room to another, again the live engine is called to move it from place to place over tracks constructed for that purpose. When the work is complete, once more the other engine appears and hauls its fellow out over the same system of tracks to receive coal and water and resume active service. In thus transporting its dead engine from the place of the accident to its shop, the company was assuredly using and operating its road. If so, then when and where in any of the movements to which that engine was subjected did that use cease? It was in every stage of its progress upon the company's tracks, which constitute an important part and parcel of its track system. It was at every stage a part of the company's rolling stock moved about upon the company's tracks and by the company's motive power. True, it was not at the time being used for hauling passengers or articles of commerce, and neither is the lone engine which makes its way to the water tank, coalshed, or cinder pit in preparation for such service, yet in each instance the movement is a part of the use for which the railway is constructed. In other words, a very important part of the use and operation of the road consists in aiding and facilitating its own repair and the up-keep and renewal of its rolling track. I respectfully insist that the majority opinion does not answer the appellant's contention when it says that repairs such as were here being made could have as well been done in the shop of some individual or independent corporation. It is a sufficient reply that these repairs were not being so made. If an individual or corporation operating an independent car or repair shop shall build an establishment and undertake work of such magnitude as to justify the construction of railroad tracks over which it moves its products from place to place, I can conceive of no reason why it should be exempted from liability under the statute. *Mace v. H. A. Boedker & Co.* 127 Iowa, 721, 104 N. W. 475; *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406; *Schus v. Powers-Simpson Co.* 85 Minn. 447, 60 L.R.A. 887, 89 N. W. 68.

The operation of the statute here in question is not limited to railroad corporations or to railroads doing business as common carriers. In any event, if a railroad corporation sees fit not to send its cars and engines to an independent shop, but builds its own in connection with and as a part of its own system, and extends its tracks into

and through the shop buildings, and over these tracks operates its locomotives, it strikes me as being a very strained interpretation of the statute which draws the line of its protection at the shop door, and says to the servant engaged in hauling a disabled engine he may cross the threshold and complete his trip only at the price of assuming all risk of injury from the negligence of his fellow servants. Doubtless the majority does not want to be understood literally when it says that no case is to be found that holds that a railroad is "operated" only "when in use for the transportation of freight or passengers." It is true, of course, that such is the primary and principal business for which the ordinary commercial railroad is intended, but there is a great variety of ways in which it may be and is operated otherwise than in handling freight or passengers. If the movement of unattached engines, the hauling of wrecking cars, pay cars, pile drivers, and disabled engines, the use of devices for loading and unloading cars by locomotive power, and other methods by which such power is utilized in the company's own service, are not a part of the use and operation of the railway, and have no connection therewith, then we should at once clarify the situation by overruling a dozen or more of our well-established precedents. In *Stebbins v. Crooked Creek R. & Coal Co.* 116 Iowa, 515, 90 N. W. 356, where negligence in pulling a cable operating a loading device was held to be within the statute, this court said: "It is argued by counsel for appellant that inasmuch as this loading of rails had no connection with the operation of any train, and might have been accomplished by means of power furnished by a stationary engine, or from any other source, as well as by the use of a locomotive engine on the track, the act was not so connected with the operation of a railroad as to be within the statute. But the statute is not limited in its application to those employees who are immediately connected with the operation of trains. . . . The plaintiff in this case was engaged in transferring rails from one car to another by means of the use of a locomotive engine moving on the railroad track. The engine was furnishing the motive power to draw the rails across from one car to the other, and we think this was a part of the hazardous business of operating a railroad. The danger was not necessarily the same as it would have been had the power used been a stationary engine or a horse. The operation involved the use of heavy machinery and the great power of a locomotive engine." The language here quoted is singularly apt in its application to the circumstances with

which we are now dealing. In the *Akeson Case*, above cited, the servant was not injured by the movement of any car or engine, but by the negligence of a fellow servant in moving a plank resting on the tender of a standing engine. Neither of them had any direct part in the train service, and the engine about which they were at work was not at the time hauling passengers or freight, and yet the court sustained a recovery of damages, saying: "The use and operation of a railroad does not consist in the movement of trains alone." In *Pyne v. Chicago, B. & Q. R. Co.* 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 281, it was held that whatever the employee's business may have been, if it brings him within the hazard peculiar to the business of using and operating a railroad, and while in the line of duty the negligence of a coemployee causes him to receive "an injury from a passing train or from any other appliances used in the use and operation of the road, he may recover." In *Jensen v. Omaha & St. L. R. Co.* 115 Iowa, 406, 88 N. W. 953, referring to some of our earlier cases, we said: "Language has been employed which, standing alone and literally construed, might seem to imply that no employee, unless he be a trainman, and no injury except such as is received in the movement of trains, is contemplated by the statute. This interpretation we have in numerous cases held to be entirely too narrow." To the same effect many others of our decisions might be cited, but I will not further prolong this dissent to quote therefrom. The case of *Potter v. Chicago, R. I. & P. R. Co.* 46 Iowa, 399, so largely relied upon by the appellee, is not in point either in fact or principle. It is true the injury there complained of occurred in a railway shop, but there was no claim or pretense that it was occasioned by any negligence in the movement or operation of a locomotive, or other act having to do with the use and operation of the road.

I wish to further suggest that whether a given act or circumstance is "in any manner connected with the operation of a railway" is a question of fact for the jury, and not of law for the court. *Schroeder v. Chicago, R. I. & P. R. Co.* 41 Iowa, 344; *Hughes v. Iowa C. R. Co.* 128 Iowa, 214, 103 N. W. 339.

While the facts before us are involved in little if any dispute, they are such the court cannot properly say that reasonable minds may not differ in the inferences to be drawn therefrom, and for this reason also the plaintiff should have been permitted to go to the jury.

In my opinion, the judgment below should be reversed.

47 L.R.A. (N.S.)

NORTH CAROLINA SUPREME COURT.

J. W. TWIDDY

v.

DARE LUMBER COMPANY, Appt.

(154 N. C. 237, 70 S. E. 282.)

Master — abolition of fellow servant rule — lumber companies.

That a lumber company operates a railroad for the carriage of logs does not bring employees engaged exclusively in sawing logs in the loading yard, preparatory to their being placed on the cars, within the operation of a statute abolishing the fellow servant rule with respect to employees of railroad companies.

(February 22, 1911.)

APPEAL by defendant from a judgment of the Superior Court for Dare County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Messrs. D. M. Stringfield and Ward & Grimes, for appellant:

The plaintiff is not protected by the fellow servant act.

Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; *Sigman v. Southern R. Co.* 135 N. C. 181, 47 S. E. 420; *Coley v. North Carolina R. Co.* 129 N. C. 410, 57 L.R.A. 834, 40 S. E. 195; *Bird v. United States Leather Co.* 143 N. C. 283, 55 S. E. 727.

Messrs. B. G. Crisp and Winston & Matthews, for appellee:

The fellow servant law applies in this case.

Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; *Simpson v. Enfield Lumber Co.* 133 N. C. 96, 45 S. E. 469; *Bissell v. Greenleaf-Johnson Lumber Co.* 152 N. C. 123, 67 S. E. 259; *Coley v. North Carolina R. Co.* 129 N. C. 409, 57 L.R.A. 834, 40 S. E. 195; *Fitzgerald v. Southern R. Co.* 141 N. C. 530, 6 L.R.A. (N.S.) 337, 54 S. E. 391; *Hemphill v. Buck Creek Lumber Co.* 141 N. C. 489, 54 S. E. 420.

The following verdict was rendered by the jury:

"(1) Was plaintiff injured by the negligence of defendant as alleged? Answer: Yes.

"(2) Did plaintiff contribute to his own

Note. — As to what employees and employments are within the purview of statutes abrogating the fellow servant rule, see note to *Missouri P. R. Co. v. Smith*, ante, 113.

injury by his negligence as alleged in the answer? Answer: No.

"(3) Was the defendant injured by the negligence of a fellow servant as alleged in the answer? Answer: ———.

"(4) What damage, if any, is plaintiff entitled to recover? Answer: Damages up to the present time. \$1,000; ten years, 200 days to the year, \$1.00 per day, \$2,000; five years, 200 days to the year, \$.75 per day, \$750; five years, 200 days to the year, \$.50 per day, \$500—\$4.250."

Hoke, J., delivered the opinion of the court:

The evidence tended to show that defendant, an incorporated lumber company, under its charter and in furtherance of its business, was operating a steam railroad, the chief purpose being to carry the logs from the woods to defendant's mill. That on and about the 2d day of October, 1908, the plaintiff, an employee of the company, was seriously injured while engaged in sawing logs on a loading yard of the company. That in this part of the work the custom was that, after or as the timber was felled in the woods, the logs were dragged to a convenient position near the railroad track by means of a skidder, a stationary machine placed close to the track, operated by steam, and, in connection with this machine or as a part of it, there was also a "loader," which picked up the logs and placed them on the cars after they had been sawed into proper lengths for the purpose. That plaintiff was one of a gang of hands engaged in sawing these logs into the lengths required, and at the time of the injury he, with another hand, was working on a log with a crosscut saw, and was hurt by the log rolling around on his leg and crushing it, the log having been cut through at the other end by two hands engaged in a like service. The negligence imputed to defendant was the failure of the employees at the other end of the log to give plaintiff proper and timely warning that the log was about to roll, and the objection chiefly urged to the validity of the trial was that in determining the question of defendant's responsibility in this aspect of the evidence, the judge allowed the jury to consider the case as affected by our statute in reference to negligence of fellow servants. This statute (Revisal 1905, § 2846), on matters relevant to the present inquiry, provides that "any servant or employee of any railroad company operating in this state who shall suffer injury to his person . . . in the course of his services or employment with such company, by the negligence, carelessness, or incompetence of any other servant,

employee, or agent of the company, . . . shall be entitled to maintain an action against such company." Construing this statute, the court has frequently held that its force and effect was to abolish, so far as railroads were concerned, the doctrine known as the fellow servant doctrine, and make the company responsible for the negligent acts of its employees in the course of their service and employment. *Mabry v. North Carolina R. Co.* 139 N. C. 388, 52 S. E. 124. And we have held, further, that, while the act does not extend to a railroad company in process of construction and before operations commence (*O'Neal v. South & W. R. Co.* 152 N. C. 404, 67 S. E. 1022; *Nicholson v. Transylvania R. Co.* 138 N. C. 516, 51 S. E. 40), as to all railroads being operated in the state, it applies to their employees in the course of any department of the work embraced in or incidental to the operation of the road. Referring to this question in the *Nicholson* Case, supra, the court among other things, said: "In *Mott v. Southern R. Co.* 131 N. C. 237, 42 S. E. 601, it was sought to curtail and restrict the act so that it should apply only to railroad employees engaged in operating trains, but the court held to the contrary, and said: 'The language of the statute is both comprehensive and explicit. It embraces injuries sustained by (quoting the act) "any servant or employee of any railway company . . . in the course of his services or employment with said company." The plaintiff was an employee and was injured in the course of his service or employment.' In that case the plaintiff, working in the repair shops, was injured by the negligence of a fellow servant while removing a red-hot tire from an engine, and it was held that he could recover." The same ruling was repeated in *Sigman v. Southern R. Co.* 135 N. C. 184, 47 S. E. 421, where it is said: "The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow servant law, chap. 56, Priv. Laws 1897, applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service."

The court has also held in many well-approved decisions that these lumber roads, to the extent that they operate a railroad, are and should be considered as railroads, and that the statute in question as construed and applied extends in full force and effect to all employees in the course of their service in the operation of the company's railroad or any department of it. *Thomas*

v. Hammer Lumber Co. 153 N. C. 351, 32 L.R.A.(N.S.) 584, 69 S. E. 275; Blackburn v. Cherokee Lumber Co. 152 N. C. 361, 67 S. E. 915; Bissell v. Greenleaf-Johnson Lumber Co. 152 N. C. 123, 67 S. E. 259; Snipes v. Camp Mfg. Co. 152 N. C. 42, 67 S. E. 27; Sawyer v. Roanoke R. & Lumber Co. 145 N. C. 27, 22 L.R.A.(N.S.) 200, 58 S. E. 598; Hairston v. United States Leather Co. 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698; Liles v. Fosburg Lumber Co. 142 N. C. 39, 54 S. E. 795; Hemphill v. Buck Creek Lumber Co. 141 N. C. 487, 54 S. E. 420; Simpson v. Enfield Lumber Co. 133 N. C. 96, 45 S. E. 469; Craft v. Albe-marle Timber Co. 132 N. C. 156, 43 S. E. 597. But this position, though fully established and sustained by these and many other decisions that could be cited, does not extend the effect of the fellow servant statute to employees of lumber companies who are in no way connected with the operation of these railroads. The act, in terms, uses the words "railroad companies" and no other, and may not be applied to employees who are engaged in the lumbering features of the business. In the case before us, as we interpret the testimony, the plaintiff was properly in the lumbering department of the business. So far as the evidence now discloses, he was not a part of the train crew, nor was he directly engaged in operating either the skidder or the loader, and, while he was at the time at work on a loading yard, he was, as stated, engaged in the lumbering features of the work, and could in no proper sense be considered an employee of a railroad or any department of it.

We are of opinion, therefore, that the act in question has no application, and there was error in allowing the jury to determine the question of defendants responsibility as in any way affected by it. While we have specially considered and passed upon the operation of the fellow servant act, because that was the exception chiefly discussed before us, we deem it not amiss to say that on the facts as they now appear there does not seem to have been an actionable wrong established against the defendant company, but the evidence tends rather to disclose one of those unfortunate, but unavoidable, accidents which sometimes occur in heavy work of this character, and bringing the case within the principle considered and applied in several recent decisions of the court, as in Brookshire Case, 152 N. C. 669, 68 S. E. 215.

For the error indicated, then, defendant is entitled to a new trial, and it is so ordered.

47 L.R.A.(N.S.)

ARKANSAS SUPREME COURT.

P. H. McLAUGHLIN, Appt.,

v.

CITY OF HOPE.

(— Ark. —, 155 S. W. 910.)

Pleading — defective complaint — remedy.

1. Motion to make more definite, and not demurrer, is the proper remedy where a cause of action is defectively stated in the complaint.

Water — pollution by sewage — necessity of compensation.

2. The turning of sewage by a municipal corporation into a stream, to the injury of lower riparian property, is within a constitutional provision requiring compensation for damaging property for public use.

Damages — pollution of stream — permanent injury.

3. The damages to be awarded for the turning of sewage into a stream by the permanent plant of a municipal corporation should be assessed on the theory of a permanent taking under the right of eminent domain.

Eminent domain — pollution of stream — injury to lessee.

4. A lessee of a water power who places a mill on the stream with intent to utilize the power, and is compelled to abandon it because of the pollution of the stream, is entitled to damages to the extent of his leasehold interest against the one guilty of the pollution.

(March 31, 1913.)

Note. — Right of municipality to create nuisance by pollution at point where its sewers discharge.

The limitations of scope stated at the beginning of the note in 20 L.R.A.(N.S.) 1050, apply to the present note, which is merely intended to supplement that note and the earlier notes there referred to. As to the prescriptive right of a municipality or individual to pollute a stream with sewage or other harmful substance, see note to Miles City v. Board of Health, 25 L.R.A.(N.S.) 589.

As shown in the earlier notes above referred to, the great weight of authority is to the effect that a municipal corporation which discharges sewage into a stream to the material damage of a riparian proprietor is bound in some form to compensate him for such damage, although the municipality is free from negligence, and the damages are necessarily incident to the discharge of the sewage at the point in question.

This rule is also supported by the following cases decided since that note: McLAUGHLIN v. HOPE; Crane v. Roselle, 236 Ill. 97, 86 N. E. 181; Fox v. Joliet, 150 Ill. App. 491; Georgetown v. Kelly, — Ky. —, 123 S. W. 251; Henderson v. Robinson,

A PPEAL by plaintiff from a judgment of the Circuit Court for Hempstead County sustaining a demurrer to the amended complaint in an action brought to recover damages for pollution of a stream upon land leased by plaintiff for a mill site. Reversed.

Statement by Kirby, J.:

P. H. McLaughlin brought suit for damages against the city of Hope, arising from the construction of its sewer system, which discharged the sewage of the city into Hanegan's branch, which flowed through certain lands, the property of S. B. Henry, part of which upon the branch had been leased by him for a mill site, and upon which a sawmill had been erected for the

purpose of manufacturing certain timber, belonging to said Henry and purchased by McLaughlin of him, into ties.

The complaint alleges that the mill was located on said stream of water for the purpose of using it in making steam to propel the machinery for manufacturing the timber into finished ties. That, after leasing the mill site from the owner of the land, he moved his mill and located it on the banks of the branch, and used the water therefrom in the operation of the machinery. That after the mill had been located and put in condition for operation, and the contract for the manufacture of the ties entered into, and some of the timber cut and delivered at the mill, and some ties manufactured, the sewage from the city of Hope

— Ky. —, 153 S. W. 224; Henderson v. Herron, — Ky. —, 153 S. W. 440; Atty. Gen. ex rel. Emmons v. Grand Rapids, — Mich. —, 141 N. W. 890; Batchner v. Staples, 120 Minn. 86, 139 N. W. 140; Thompson v. Winona, 96 Miss. 591, 51 So. 129, Ann. Cas. 1912 B, 449; Kellogg v. Kirksville, 132 Mo. App. 519, 112 S. W. 296, subsequent appeal 149 Mo. App. 1, 129 S. W. 57; Moser v. Burlington, — N. C. —, 78 S. E. 74; Little v. Lenoir, 151 N. C. 415, 66 S. E. 337; Donnell v. Greensboro, — N. C. —, 80 S. E. 377; Lawatsch v. Kingston, 68 Misc. 236, 124 N. Y. Supp. 578; Fonda v. Sharon Springs, 70 Misc. 101, 128 N. Y. Supp. 127; Colbert v. Ardmore, 31 Okla. 537, 122 Pac. 508; Parrish v. Yorkville, — S. C. —, 79 S. E. 635.

So, a municipality has been held liable for creating a nuisance by the discharge of sewage upon land of a private individual. Hines v. Nevada, 150 Iowa, 620, 32 L.R.A. (N.S.) 797, 130 N. W. 181; Whitten v. Haverhill, 204 Mass. 95, 90 N. E. 409; Ulmen v. Mt. Angel, 57 Or. 547, 36 L.R.A. (N.S.) 140, 112 Pac. 529 (contamination of well).

It should perhaps, be noted here that the first proposition in the note in 20 L.R.A. (N.S.) 1050, has reference merely to the substantive question as to the obligation of the municipality in some form to make compensation for the damage inflicted, and no intimation was intended as to the remedy available against the municipality, assuming its liability. Hence, that proposition is not necessarily opposed to the statement in Parrish v. Yorkville, — S. C. —, 79 S. E. 635, that an action in tort will not lie against the municipality for the damages, although the pollution of the stream amounts to a taking of private property for public use within the meaning of the constitutional guaranty. That question, however, in common with other questions relating to the remedy, is excluded from these notes.

It will be observed that in Metz v. Asheville, 150 N. C. 748, 22 L.R.A. (N.S.) 940, 64 S. E. 881, denying the liability of a municipality for the death of a person from typhoid fever caused by emptying sewage

into a stream running near his dwelling, the action was not based upon damage to real property; the decision was upon the general ground of the immunity of a municipality from liability for acts in performance of its governmental functions.

The intimation in Phillips v. Armada, 155 Mich. 260, 118 N. W. 941, cited at p. 1054 of the note in 20 L.R.A. (N.S.) —, that a municipality might not be liable to a lower riparian proprietor for the pollution of a stream by the discharge of sewage therein, was apparently withdrawn in Atty. Gen. ex rel. Emmons v. Grand Rapids, — Mich. —, 141 N. W. 890, where the court, in holding a municipality liable in such circumstances, said: "Our attention has not been called to any statute giving the city the right to use Grand river below its limits as a sewer for the purpose of carrying away its waste and refuse in an unreasonable manner; and, if it were attempted by statute to give such a right, the statute would be unconstitutional, unless it first provided that the owners of property along the river should be compensated for damages to be first determined by constitutional methods for destruction of such property rights."

In Batchner v. Staples, 120 Minn. 86, 139 N. W. 140, the complaint was held to allege negligence on the part of the municipality, which in any event would render it liable; but the court said that the complaint might also be sustained on the theory that it showed an invasion of the plaintiff's property rights.

Some of the cases above cited, e. g., Parrish v. Yorkville, supra, Donnell v. Greensboro, supra, expressly declare that such pollution by a municipality constitutes a "taking" of private property for public use, within the meaning of the Constitution; and most of the others doubtless assume that such pollution constitutes a taking or at least a "damaging" of property, within the purview of the constitutional guaranty. In this view, of course, the municipality is liable, even assuming that the discharge of the sewage into the stream was expressly or impliedly authorized by statute.

However, as shown in the former notes,

was discharged into Hanegan's branch and carried on down through and crossing the lands described in the complaint, and so polluted the water therein as made it unfit for generating steam, and appellant was compelled to abandon the use of it for that purpose; and there was no other water on the premises that could be used for the purpose of operating the mill. It alleged further that the city of Hope, its agents, officers, and servants, so constructed its sewers as to discharge the sewage from said city of Hope into said branch, and to cause noxious odors to spread over and about said mill site and mill premises to such an extent that plaintiff was compelled to abandon; that said noxious odors rendered said mill premises uncomfortable, undesirable,

and unhealthful as a place for people to work; that as a result plaintiff was unable to get any hands to help carry on the work; and that plaintiff himself was unable to endure the noxious odors and was forced to abandon his said mill site. Damages were also claimed for the loss of profits that could have been realized on the manufacture of the timber into ties.

A demurrer was interposed and sustained to this amended complaint, and from the judgment dismissing it, plaintiff prosecutes this appeal.

Messrs. Jobe & Montgomery, for appellant:

Plaintiff had a property right in the premises and in the stream of water, and

a few cases have taken the position that, in the absence of negligence, the municipality is not liable for damages necessarily resulting from the discharge of sewage into a stream, if its act in that respect is authorized by statute, it being held in those cases that the damage to the riparian property does not amount to a taking of property within the constitutional guaranty against taking private property for public use without compensation.

Even if that position—which is clearly against the great weight of authority—were to be conceded, it would probably prove ineffectual in most instances to relieve the municipality from liability, for the reason that it is very rarely that the power to discharge sewage into a stream is expressly granted, and the courts would not be inclined to construe a statute so as to grant such power by implication, or at least to authorize a municipality to exercise such power with immunity from liability. For the same reason, in the majority of cases the courts are not confronted with the necessity of determining the question of liability as one of constitutional law. Moreover, even if it were to be conceded that pollution of a stream to the damage of riparian property could not be regarded as a taking of property within the constitutional provision, the addition made in many states of the word "damaging," to the constitutional guaranty, would seem to remove the difficulty.

In view of the opinion of the Iowa supreme court in *Vogt v. Grinnell*, 133 Iowa, 363, 110 N. W. 603, discussed in the note in 20 L.R.A.(N.S.) 1050, the decision in *Hines v. Nevada*, 150 Iowa, 620, 32 L.R.A.(N.S.) 797, 130 N. W. 181, is, perhaps, to be regarded as resting, either upon the ground that the municipality was negligent, or upon the ground that the discharge of sewage into the stream was not authorized by statute, although the court declared generally, and without any apparent reservation, that "the city has no more right to create a nuisance to the injury of another than has the individual citizen, and if it does so, it is amenable to the remedies 47 L.R.A.(N.S.)

which the law provides for the redress of such wrongs."

Although the question whether the constitutional guaranties may be successfully invoked as a ground for municipal liability is not entirely academic, as is apparent from a few cases cited in the note in 48 L.R.A. 691, denying the liability of a municipality when acting under a statute construed to authorize the discharge of the sewage into the stream, yet the point above suggested, that it is not ordinarily necessary to invoke constitutional guaranties in order to hold the municipality liable, even assuming that it was free from negligence, and that the damages were necessarily incident to the discharge of the sewage at the point in question, is illustrated by the English cases cited at page 694 of the note in 48 L.R.A., where statutes, though broad in terms, were construed not to authorize municipal authorities to pollute streams to the damage of riparian proprietors without making compensation therefor. It was, of course, necessary to rest the decisions in these cases on the ground of statutory construction.

So, in the later case of *London County Council v. Price's Candle Co.* 75 J. P. 329, 9 L. G. R. 660, the House of Lords declared that the court of appeals, in 72 J. P. 429, [1908] 2 Ch. 526, 78 L. J. Ch. N. S. 1, 99 L. T. N. S. 571, 24 Times L. R. 822, 7 L. G. R. 84, was right in holding that the plea put forward by municipal authorities, that the system of sewers, as existing, could not be worked without causing a nuisance, was no defense in a suit by a riparian owner.

The disposition of the English courts, notwithstanding the absence of an imperative constitutional guaranty, to protect riparian proprietors against uncompensated damage by the pollution of streams by municipal sewage, is shown in the following quotation from the opinion of the court of appeal in the case last cited ([1908] 2 Ch. 526, 543): "Certain general principles have been laid down for our guidance in cases of this nature. In the first place, there is a presumption that a public body,

had a right to enjoy it, and if an injury is committed denying him the free use and enjoyment of said premises and stream of water, he would certainly have a cause for complaint against the one committing such injury.

Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433; *St. Louis, I. M. & S. R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

The defendant city is liable for the damages sustained by plaintiff.

Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; 15 Cyc. 662; *Dickerson v. Okolona*, 98 Ark. 206, 36 L.R.A.(N.S.) 1104, 135 S. W. 863; *Carmichael v. Texarkana*, 94 Fed. 561; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Good v. Altoona City*, 162 Pa. 493, 42 Am. St. Rep. 840, 29 Atl. 741.

There was a legal injury committed by the defendant in violation of the rights of the appellant.

Ferguson v. Firmenich Mfg. Co. 7 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *St. Louis Southwestern R. Co. v. Mackey*, 95 Ark. 297, 129 S. W. 78; *St. Louis, I. M. & S. R. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786; *White v. East Lake Land Co.* 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; *Taggart v. Jaffrey*, 75 N. H. 473, 28 L.R.A.(N.S.) 1050, 139 Am. St. Rep. 729, 76 Atl. 123; *Barrett v. Mt. Greenwood Cemetery Asso.* 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891; *Winchell v. Waukesha*,

110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668.

Mr. O. A. Graves, for appellee:

The complaint does not state a cause of action.

Valparaiso v. Hagen, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062.

Municipal corporations are not liable in damages for the negligent or tortious acts of their officers and agents.

Arkadelphia v. Windham, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Collier v. Ft. Smith*, 73 Ark. 447, 68 L.R.A. 237, 84 S. W. 480; *Gray v. Batesville*, 74 Ark. 519, 86 S. W. 295.

Kirby, J., delivered the opinion of the court:

The allegations of the complaint are not as definite and certain relative to the damages claimed for the injury as should have been made; but, where the complaint states a cause of action defectively, the defect is reached by motion to make more definite and certain, and not by demurrer. *St. Louis, I. M. & S. R. Co. v. Moss*, 75 Ark. 64, 86 S. W. 828; *Murrell v. Henry*, 70 Ark. 163, 66 S. W. 647.

When the facts stated in a complaint, with every reasonable inference deducible therefrom, constitute a cause of action, the demurrer should be overruled. *Claxton v. Kay*, 101 Ark. 352, 142 S. W. 517; *Cox v. Smith*, 93 Ark. 373, 137 Am. St. Rep. 89, 125 S. W. 437. Is a cause of action stated? *McLaughlin*, the allegations of the complaint being true, moved his mill and set it up on the banks of this branch, first having acquired a site by lease from the owner of the land, expecting to use the water of the

whether a trading body or not, is not authorized to create a nuisance or otherwise to affect private rights unless compensation is provided. In the second place, this presumption must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation. In the third place, if the statute expressly confers a power, but adds a proviso that no nuisance must be created, it is no defense to say that the work, in truth, cannot be done without creating a nuisance."

The second proposition is, of course, not necessarily true where, as in the United States, the statute, even if explicit on the point, must be subjected to the test of constitutional principles.

Another illustration of the fundamental character of municipal liability, even in a jurisdiction in which the constitutionality of a statute cannot be challenged in the courts, is afforded by *Weber v. Berlin*, 8 Ont. L. Rep. 302, where the court declared that a private person would undoubtedly be liable to a riparian owner for polluting

a stream with sewage and that there was no good reason for distinguishing the liability of municipal authorities from that of a private person. In this case the municipality was held liable for damages from corruption of a stream not only by ordinary substances, but also by substances deposited in the sewer in violation of the law by private concerns which had the right to connect with the sewer.

In *Miles City v. State Bd. of Health*, 39 Mont. 405, 25 L.R.A.(N.S.) 589, 102 Pac. 696, the court, upon appeal by the city upheld an order of the state board of health, under a statute forbidding the pollution of streams which are the sources of water supply, prohibiting a municipality from discharging its raw sewage into a stream which another municipality used as its source of water supply. The protection of municipal water supply, however, is not within the scope of this note. See, on that subject, note to *Durham v. Eno Cotton Mills*, 11 L.R.A.(N.S.) 1163. G. H. P.

branch in making steam for the operation of the plant; and there being no other water available, and by the discharge of the sewage of the city into the stream and polluting its waters, and because of the noxious odors arising therefrom, he was compelled to abandon his mill site and move his mill. The owner of the land was also joined as a party to the suit.

It is contended by the city that no negligence, lack of skill, or want of care in the construction of its sewer system is alleged, and that it could not be held liable for the negligent and tortious acts of its officers in any event, under the authority of *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Collier v. Ft. Smith*, 73 Ark. 447, 68 L.R.A. 237, 84 S. W. 480, and *Gray v. Bateville*, 74 Ark. 519, 86 S. W. 295.

Cities and towns in the state have power to open, construct, and keep in order and repair sewers and drains, and to enter upon and condemn private property for such purposes. *Kirby's Dig.* §§ 2906-2920. If the statute does not expressly confer such power to be exercised without the city's limits, it is granted by implication, being indispensably necessary to carry into effect the express power granted by the statute, to open, construct, and keep in order sewers and drains.

Our Constitution provides: "Private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." Const. 1874, art. 2, § 22.

Plaintiff does not seek to recover damages arising from the negligent, unskilful, or wrongful construction of the sewer system, but only for discharging the sewage into the stream upon the lands of his lessor, and polluting it to such an extent as to render worthless his leasehold estate as a mill site and make the abandonment of it necessary. The statute does not, as in some states, expressly authorize the discharge of the sewage into natural streams or drains and creeks, and, if it did, the question would still remain whether, under the Constitution, the legislature had any such power without requiring compensation made to the owner of the stream. The owner of the land on a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. He must also submit to the natural wash and drainage coming from cities and towns.

In 1 *Lewis on Eminent Domain*, § 60, it is said: "All the authorities agree that . . . [small] streams [incapable of navi-

gation] are wholly private property, and that the title of the riparian owner extends to the middle of the stream." And in § 61: "It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from its premises in the quantity, quality, and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past this land. This right is a part of his property in the land, and, in many cases, constitutes its most valuable element. It necessarily follows, therefore, that any violation of this right, in the exercise of the power of eminent domain, is a taking of private property for which compensation must be made." In § 84 it is said that "any injury to riparian rights for public use is a taking for which compensation must be made. 'These riparian rights . . . are property and are valuable, and . . . cannot be abridged or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation.'" See also *Mills, Em. Dom.* §§ 79-182; *Gould, Waters*, § 204; *Wood, Nuisances*, §§ 332-427; *Angell, Watercourses*, §§ 457, 458.

Our court has held that it is the right of each proprietor along the natural drain of each water course, to insist that the water shall continue to flow as it has been accustomed to do. *St. Louis Southwestern R. Co. v. Mackey*, 95 Ark. 297, 129 S. W. 78; *St. Louis, I. M. & S. R. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786.

Nichols on Eminent Domain, § 167, says: "No private riparian proprietor has the right to pour drainage or other noxious matter into a private stream, so as to materially or unreasonably pollute the water, or has any constitutional right to pollute the water at all. Upon the question whether a city or town may be authorized to gather the house sewage of its inhabitants and pour it into a private stream without compensating the owners below, the cases, though not numerous, are in direct conflict, though the majority deny the existence of such a right."

After a review of the authorities in a well-considered opinion, the supreme court of Oklahoma, in *Markwardt v. Guthrie*, 18 Okla. 32, 9 L.R.A.(N.S.) 1150, 90 Pac. 26, 11 Ann. Cas. 581, announces this conclusion: "(1) That the settled doctrine of the English courts, as well as some of our state courts, is that a lower riparian pro-

prietor is entitled to recover damages for the pollution of the waters of a stream by a municipal corporation, by the discharge of sewage into the stream, on the broad ground of common sense and natural justice; (2) that the Supreme Court of the United States and a number of the state courts base their decisions on the ground that it is a taking of private property for public use, within the meaning of the Federal Constitution; (3) that other states hold that it is a damage to property, within the meaning of their constitutional prohibitions against the taking or damaging of property without just compensation; and (4) a number of the states hold that the lower riparian proprietor is entitled to recover damages for injury to his health, comfort, and repose, on the ground that it is the maintenance of a nuisance. While these decisions are based upon different grounds, yet, upon whatever ground they may exist, they all, with the exception of the decisions of the Indiana courts, seem to uniformly hold that, under such circumstances, damages are recoverable; and many of them hold that, where the evidence is clear and convincing, injunction will lie to restrain the continuance of the nuisance." For other cases denying the right of a city to discharge its sewage into private streams to the injury of the owners, without compensation therefor, see *Mansfield v. Balliett*, 65 Ohio St. 451, 58 L.R.A. 628, 63 N. E. 86; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L.R.A. 691, and cases in editor's note, 77 Am. St. Rep. 312.

If the turning of the sewage into the branch, and the pollution of the water thereof to the damage of the riparian owners, be not regarded as a taking of the property for public use, within the meaning of the Constitution, it certainly is a damage thereof for public use, within its meaning for which compensation must be made. *Hot Springs R. Co. v. Williamson*, 45 Ark. 429; *Dickerson v. Okolona*, 98 Ark. 206, 36 L.R.A. (N.S.) 1194, 135 S. W. 863; *Tate v. St. Paul*, 56 Minn. 530, 45 Am. St. Rep. 501, 58 N. W. 158; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552.

Since the city's action in constructing its sewer system so as to turn the sewage into said branch indicates an intention to acquire a permanent right to continue to so use it and pollute the stream, the damages to the owner, should be assessed upon that basis, and as though the city were proceeding to acquire it under its power of eminent domain. 1 *Farnum, Water Rights*, § 139A.

McLaughlin, having moved, and set up his mill upon the banks of this stream 47 L.R.A. (N.S.)

under a lease, with the right to use the waters thereof in the operation of his mill, and the mill site being rendered worthless, and its value, for the purpose for which the land was leased, destroyed, by the draining of the sewage of the city into the branch, was entitled to damages to the extent of the injury to his leasehold interest. *Nichols, Em. Dom.* § 174; 2 *Lewis, Em. Dom.* §§ 719, 950.

Our statute authorizes the bringing of a suit where a corporation authorized by law to appropriate private property for its use may have done so, and appellants had the right to prosecute this suit against the city of Hope, a cause of action being sufficiently alleged in their complaint. *Kirby's Dig.* §§ 2903-2905.

The court erred in sustaining the demurrer to the amended complaint, and the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and, if necessary, permit such amendments to the complaint as will render it more definite and certain as to the amount of damages claimed, and for trial in accordance with law.

MASSACHUSETTS SUPREME JUDICIAL COURT.

PHILIP RYAN

v.

PATRICK F. KEANE et al.

(211 Mass. 543, 98 N. E. 590.)

Master and servant — jostling customer — liability.

A liveryman is liable for injury to a customer through the act of his employee in negligently or wilfully colliding with the customer while he is returning to the stable after having assisted in preparing a rig for use a short distance therefrom.

(May 21, 1912.)

EXCEPTIONS by defendants to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for injuries alleged to have been suffered through a collision with one of defendants' servants,

Note. — Liability of master for negligent injury to third person through personal contact with servant.

The foregoing case presents a very interesting question which does not seem to have been passed upon by any other court, name-

which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Peabody, Arnold, Batchelder, & Luther, for defendants:

The defendants cannot be held liable for acts of their servants outside the scope of their authority.

Fleischner v. Durgin, 207 Mass. 435, 33 L.R.A.(N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291; Smith v. Peach, 200 Mass. 504, 86 N. E. 908; Fairbanks v. Boston Storage Warehouse Co. 189 Mass. 419, 13 L.R.A.(N.S.) 422, 109 Am. St. Rep. 646, 75 N. E. 737; Berry v. Boston Elev. R. Co. 188 Mass. 536, 74 N. E. 933; Brown v. Boston Ice Co. 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644; Perlstein v. American Exp. Co. 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194; Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; Walton v. New York C. Sleeping R. Co. 139 Mass. 556, 2 N. E. 101.

Messrs. Charles H. Cronin and Joseph P. Walsh for plaintiff.

De Courcy, J., delivered the opinion of the court:

It was not in dispute that the plaintiff's injury was suffered through a collision with one Boylan, an employee of the defendants. As to the manner in which the two men came in contact the jury presumably believed the plaintiff's story, which was that he was crossing the yard toward the wagon which he had hired, when Boylan came along in a hurry, called out, "Get out of my way," and immediately afterwards jostled the plaintiff or pushed him aside, when he had ample unobstructed space in which to pass. On these facts the plaintiff could recover under his count for an assault, or under that alleging negligence.

That Boylan was in the employ of the defendants at the time of the accident was admitted by the defendant Keane and by Boylan, and is apparent from the uncontradicted testimony. He had been sent by his

employer to get the wagon, had helped the driver to hitch in the horse, and was hurrying back in a direct course from the wagon yard to the stable in order to resume his other routine duties as stableman. Although he had completed one of his daily tasks, he remained in the service of the defendants and subject to their directions, and the relation of employer and employee, with its accompanying legal rights and obligations, continued while the employee was going from one to another portion of his day's work. O'Brien v. Boston & A. R. Co. 138 Mass. 387, 52 Am. Rep. 279.

The jury were warranted in finding that Boylan was acting within the scope of his employment at the time when he ran into the plaintiff. Probably this would not be questioned if he were driving the horse at the time and drove the wagon against the plaintiff. In the act of returning to the stable, he was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if, in hurrying to do his work at a busy hour in the morning, he carelessly or wilfully jostled against and injured the plaintiff, the defendants are liable for his act. The evidence does not show that Boylan assaulted the plaintiff wilfully, or that he was actuated by ill-will or by a desire to carry out any purpose of his own, and the judge's charge fully protected the rights of the defendants in this regard. Howe v. Newmarch, 12 Allen, 49; Aiken v. Holyoke Street R. Co. 184 Mass. 269, 68 N. E. 238; Brough v. Towle, 187 Mass. 590, 73 N. E. 851; Collins v. Wise, 190 Mass. 206, 76 N. E. 657, 20 Am. Neg. Rep. 106; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761.

The plaintiff's due care is not questioned. The rulings requested, so far as they were not embodied in the charge, were rightly refused.

Exceptions overruled.

ly, as to whether the master is liable for injuries caused by the negligence of his servant in coming in personal contact with a third person, where the servant is not in charge of instrumentalities belonging to the master. It is suggested that such a question is one which is not likely to arise, because in the great majority of cases the injuries caused in such a manner are either very slight, so that no effort is made to hold the master liable for the same, or else they are of such a character that the third person bases his action upon an assault wilful in its character, rather than upon mere negligence.

The case of Price v. Simon, 62 N. J. L. 153, 40 Atl. 689, 4 Am. Neg. Rep. 417, sup-
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ports the conclusion reached by the court in RYAN v. KEANE. In the former case an ice peddler who, with his tongs in his hand, was hurrying from a house wherein he had delivered ice to his wagon, collided with a child, causing injuries for which the master of the ice peddler was held liable. In this case, however, it appears that the injuries were caused by the tongs, but it is difficult to see upon what theory the master could be held liable under such circumstances which would not also hold him liable if the injury had been due to personal contact. In such a case it would be primarily necessary, of course, to show that the servant was engaged in the master's business at the time of the injury.

W. M. G.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

ANTON PETERSON

v.

AMERICAN ICE COMPANY, Plff. in Err.

(83 N. J. L. 579, 83 Atl. 872.)

Master and servant — assumption of risk — weather conditions.

Where the plaintiff, a carpenter of experience, was employed to repair a pitched roof upon defendant's shed, and, having worked thereon for two days, upon the third day slipped upon snow and ice which collected while he was working, and fell from the roof, injuring himself, held, that the danger incident to the snow and ice upon the roof was as obvious to the plaintiff as to the master, and was a risk assumed by the plaintiff in the performance of his work.

(June 20, 1912.)

ERROR to the Circuit Court for Camden County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Wescott & Wescott for plaintiff in error.

Messrs. Carrow & Kraft for defendant in error.

Minturn, J., delivered the opinion of the court:

While working at his employment as a carpenter, engaged in constructing a new roof upon defendant's coal shed in Camden, the plaintiff slipped and fell from the roof, sustaining the injuries which present the basis for this suit, and for which he recovered a verdict at the circuit. He had been engaged at his trade for ten years, and had worked on the roof in question for two days prior to the accident.

On the morning of the accident it began to snow, and at noon, when the plaintiff was directed by the foreman to finish the work, there was about an inch of snow upon the roof. He worked there until between 3 and 4 o'clock, when he slipped and fell. He

Headnote by MINTURN, J.

Note. — As to servant's assumption of risk as affected by his knowledge and appreciation of the danger, and as to the assumption by the servant of obvious risks, see Index to L.R.A. Notes, Master and Servant, § 113.

As to servant's assumption of risk of dangers created by the master's negligence, see note to Scheurer v. Banner Rubber Co. 28 L.R.A. (N.S.) 1213.
47 L.R.A. (N.S.)

testified that he saw no ice there, that it was not freezing, and that the weather was inclined to be mild. The roof was pitched slightly, and there was nothing incident to the work at the time to indicate to the plaintiff a dangerous condition, and he admitted he was used to working under such conditions. A witness for the plaintiff, a fellow worker, testified that there was not enough snow upon the roof to trouble them, and that he saw no ice upon the roof until after the plaintiff fell. The defendant met this situation with proof that there was no ice upon the roof.

The legal question involved as to the master's liability, under these circumstances, was raised upon a motion to nonsuit, and a motion to direct a verdict, both of which motions were refused by the trial court, and the case is here upon exceptions to those rulings. The claim of the plaintiff is predicated upon the contention, as outlined in the brief, that if the plaintiff did not know of the existence of the ice under the snow upon the roof, and could not, by the exercise of reasonable care, discern it, and that if the defendant by the exercise of reasonable care could have known of the ice so hidden, and failed to possess himself of that knowledge, the defendant is liable for the damage. It is difficult to perceive how liability can be imposed upon the master for a failure to discover a condition which it is conceded was not within the power and trained experience of the plaintiff to observe and discover, and which, in the legal postulate advanced to support the action, could not be discovered by him in the exercise of reasonable care. The argument, in effect, superimposes upon the master the possession of a power of vision and a faculty of discernment and foresight to observe danger, which it denies to the servant, and therein lies its fallacy as a legal contention. The negligence of the master, if it exist, must be predicated upon the neglect to observe some duty cast upon it by the law, and in this case it is difficult to perceive what the duty was. If it be said that the obligation was to give the employee a safe place wherein to work, that duty was discharged in legal contemplation when the plaintiff, knowing from years of experience the nature of the work and the dangers incident to it, and having the same opportunities of observation, to say the least, as the master, undertook to perform the work in which the danger of slipping by accident in inclement weather naturally inherited in the discharge of the employment, and entered as a factor in the contract between the parties.

The risk the plaintiff took, therefore, in working upon the roof under such con-

ditions, was necessarily an obvious risk, inherent in the nature of his employment and assumed by him as *quid pro quo* for the compensation he received. *McAndrews v. Burns*, 39 N. J. L. 120; *Caffery v. V. J. Hedden & Sons*, 79 N. J. L. 556, 76 Atl. 981. Underlying the doctrine of assumption of risk by an employee is the basic maxim, *colenti non fit injuria*. Lord Herschell, upon the philosophy inherent in this maxim, applied it in *Smith v. Baker*, [1891] A. C. 360, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, and in his opinion states a hypothetical case, where one agreed to take part in an operation necessitating the production of gaseous fumes injurious to health. It was also held to apply under the common-law relationship, but inapplicable under the English employers' liability act of 1880, in *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, and that case was followed and the same rule applied in *Baddeley v. Granville*, L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822. The learned editor of the English *Ruling Cases* states the modern application of the rule to be that "the danger is as well known or as manifest to the servant as to the master, the servant enters or continues in the employment at his own risk." 17 Eng. Rul. Cas. 239, citing *Ladd v. New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331. The modern cases illustrative of the application of this principle are collected in valuable reference notes in 7 Ann. Cas. 430, and volume 12, p. 621, of the same work.

The most recent authoritative pronouncement upon this subject by this court is the case of *Mika v. Passaic Print Works*, 76 N. J. L. 561, 70 Atl. 327, where the authorities in this state are collected by Judge Vroom in his opinion, and the doctrine enunciated that the rule of assumption of obvious risk by an employee exists in this state, notwithstanding the dereliction of a statutory duty upon the part of the employer, which duty was superimposed as a safeguard for employees under the provisions of the employers' liability act of 1904 (*Pamph. Laws*, p. 152). The line of divergence between the English courts and the law in this state, as settled in the *Mika* case, arises, it will be perceived, entirely out of the effect to be given to the statutory duty imposed upon the master; but, as that question does not enter into this decision, it is sufficient to say that the common-law doctrine as herein outlined and illustrated by what may be said to be a uniformity of decision, but at times a diver-

gence of view in its application, precludes a recovery in this case.

The judgment under review will be reversed.

UTAH SUPREME COURT.

GEORGE B. SWEETSER et al., Respts.,
v.

JESSE W. FOX, JR., et al., Appts.

(— Utah, —, 134 Pac. 599.)

Parties — striking names of deceased partners — effect.

1. In an action upon a judgment recovered by members of a partnership, the names of deceased partners may be stricken out on motion of plaintiffs.

Limitation of action — on judgment — when begins.

2. The limitation period upon a judgment begins to run from the time of its rendition or entry, and not from the expiration of the time for review on appeal, if no appeal is in fact taken, notwithstanding a provision that an action shall be deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

(May 9, 1911.)

Note. — Limitation of actions: is running of statute against judgment postponed until expiration of time for appeal or motion to avoid.

While there is very little direct authority on this question and the cases are in conflict, the opinion in *SWEETSER v. FOX* seems to be well reasoned and sound, and the conclusion therein reached to be correct. As stated in 23 Cyc. 1509: "The statute of limitations begins to run against a judgment from the date of its rendition or of its entry, provided it is then final and suable, and is not stayed or superseded for any cause;" and, as shown in the opinion in *SWEETSER v. FOX*, although an action may be "pending" for some purposes until the time for an appeal has expired, or, as at common law, so long as the judgment remains unsatisfied, yet it is the general rule that a judgment may be enforced either by execution or by an action immediately after its rendition or entry, unless execution be stayed and the judgment suspended as provided by law. See 23 Cyc. 1427. And it seems clear that the statute begins to run against the cause of action as soon as an action may be maintained to enforce any right.

So, in *Peoria County v. Gordon*, 82 Ill. 435, where it appears that an appeal from a judgment had been duly prayed and allowed, but not perfected by the filing of an appeal bond until after the adjournment of

APPEAL by defendants from a judgment of the District Court for Salt Lake County in plaintiffs' favor in an action brought to enforce payment of a judgment on certain promissory notes. Reversed.

The facts are stated in the opinion.

Messrs. Burton & Johnson for appellants.

Messrs. Dey, Hoppaugh, & Fabian, for respondents:

The court did not err in permitting the amendment striking out the names of George B. Sweetser and J. Howard Sweetser as plaintiffs, and in permitting the action to proceed in the names of the four remaining plaintiffs.

Pugmire v. Diamond Coal & Coke Co. 26 Utah, 115, 72 Pac. 385; 31 Cyc. 482; Holt v. Thacher, 52 Vt. 592; York v. Nash, 42 Or. 321, 71 Pac. 59; Hamill v. Ashley, 11 Colo. 180, 17 Pac. 502; Durkee v. Conklin, 13 Colo. App. 313, 57 Pac. 486; Lewis Lumber Co. v. Camody, 137 Ala. 578, 35 So. 126; Benson v. San Diego, 100 Fed. 158; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600; Lake Erie & W. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103; Nebraska v. Hayden, 89 Fed. 46.

The statute of limitations does not commence to run until the accrual of a cause of action capable of immediate and complete enforcement.

25 Cyc. 1065-1067; Howe v. Sears, 30 Utah, 344, 84 Pac. 1107; Buswell, Limitations, § 27.

the court for the term, it was held that the statute of limitations began to run against the action founded upon the judgment immediately upon the adjournment of the court, as between that time and the filing of the bond, the judgment was in full force and effect and no appeal pending, and an action upon the judgment clearly could have been commenced; and after the statute had commenced to run within this time, its operation was not suspended by the appeal.

On the other hand, in Feeney v. Hinckley, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580, quite fully discussed and dissented from in SWEETSER v. FOX, it was held, under a statute providing that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied,"—that the statute of limitations barring action upon a judgment commences to run, although there has been no appeal therefrom, only when the time has fully elapsed, within which such an appeal might have been taken.

As shown, however, in SWEETSER v. FOX, and as stated therein: "The opinion in that case [Feeney v. Hinckley] is based upon what is assumed to be the law rather than what the law actually is." And it may be noted that, in the Feeney Case, two of 47 L.R.A.(N.S.)

A cause of action on a judgment does not accrue until the judgment is final, and it does not become final until the time for appeal has passed.

23 Cyc. 1503; Hunt v. Monroe, 32 Utah, 436, 11 L.R.A.(N.S.) 249, 91 Pac. 269; Gillmore v. American Cent. Ins. Co. 65 Cal. 63, 2 Pac. 882; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757; Re Blythe, 99 Cal. 472, 34 Pac. 108; Story v. Story & I. Commercial Co. 100 Cal. 41, 34 Pac. 675; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; Feeney v. Hinckley, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580; Vance v. Heath, — Utah, —, 129 Pac. 365; Hills v. Sherwood, 33 Cal. 479; Woodbury v. Bowman, 13 Cal. 634; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Sharon v. Hill, 26 Fed. 337; Day v. De Jonge, 66 Mich. 550, 33 N. W. 527; Haynes v. Ordway, 52 N. H. 284; Small v. Haskins, 26 Vt. 209; Ketchum v. Thatcher, 12 Mo. App. 185; Glenn v. Brush, 3 Colo. 26; Smith v. Farmers' Bank, 21 Ky. L. Rep. 375, 51 S. W. 451; Hall v. Calvert, — Tenn. —, 46 S. W. 1120; Delk v. Yelton, 103 Tenn. 476, 53 S. W. 729; Texas Trunk R. Co. v. Jackson Bros. 85 Tex. 607, 22 S. W. 1030; Buckner v. Lancaster, — Tex. Civ. App. —, 40 S. W. 631; Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038:

the justices of the supreme court dissented from the decision, and that the commissioners' decision in the same case, reported in 64 Pac. 408, and concurred in by all of the three commissioners sitting in the case, was to the contrary.

The Feeney Case, however, was followed in Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038, an appeal from an order giving leave to issue execution on a judgment more than five years after the date of its entry,—the court saying: "Moreover, at the time this execution was issued, the judgment in question was not barred by the statute of limitations. As a foundation for a cause of action, it did not become final until six months from the date of its entry. In the case of Feeney v. Hinckley, 134 Cal. 470, 86 Am. St. Rep. 290, 66 Pac. 580, it was held that an action upon a judgment is not barred until five years have elapsed from the time at which it became final. Adding to the five years provided in the statute of limitations the six months in which an appeal may be taken, and which must elapse before the judgment becomes final, it will be seen that the judgment of foreclosure would not be barred by limitation until the period of five years and six months after its entry. This period had not expired at the time the execution in question was issued."

A. C. W.

Re Rebman, 80 C. C. A. 594, 150 Fed. 759; Brown v. Bell, 133 Am. St. Rep. 72, note.

Frick, J., delivered the opinion of the court:

On the 29th day of December, 1897, all of the plaintiffs above named as partners, doing business as such, obtained judgment in the circuit court of the United States in and for the district of Utah, against all of the defendants above named. On the 12th day of June, 1906, an action in the name of all of the plaintiffs as partners was commenced on the judgment aforesaid against all of the defendants. Separate demurrers were filed by the defendants, which were overruled, and they then filed separate answers, in which the only defense that is material here was that the action was barred by the provisions of Comp. Laws 1907, § 2874, which provides: "An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States," must be commenced "within eight years." Plaintiffs replied that the defendant Christopherson was absent from the state of Utah for "more than one year after said cause of action had accrued and prior to the commencement of this action."

Nearly two years after this action was commenced, all of the plaintiffs above named, except George D. Sweetser and J. Howard Sweetser, filed an application in which they set forth that at and prior to the time the judgment upon which this action is based was obtained, all of the plaintiffs were copartners and were doing business as such, and that thereafter, and before this action was commenced, the said George D. Sweetser and J. Howard Sweetser died, leaving the other four as the surviving members of the said copartnership; and further alleged that the four named are the sole owners of said judgment as surviving partners, as aforesaid. Pursuant to the foregoing application they asked that the names of the first two be stricken out, and that the action proceed in the name of the four surviving partners as plaintiffs. The court granted the application and permitted the action to proceed in the name of the four surviving partners, who, the court found, were the real and only parties in interest. Notwithstanding that order, all of the names of the original plaintiffs are retained in the title of the action, even in this court.

The defendants insist that the district court erred in allowing the application aforesaid. Nothing is made to appear wherein the defendants are in any way prejudiced by striking out the two names as aforesaid. If it were assumed, there-

fore, that the court had committed technical error in striking out the names, yet, as there is no claim nor evidence of prejudice, the judgment cannot be reversed upon the ground just stated.

But we can see no reason whatever why, under the facts disclosed by this record, the district court was not justified in striking out the names of the two deceased partners as plaintiffs, and in permitting the action to proceed to judgment, in the names of the other surviving partners. This assignment, therefore, must be overruled.

Proceeding now to a consideration of the only serious question in the case, namely, the defense that the action is barred by our statute of limitations, we remark that the court found that the action in question was commenced eight years and 165 days after the entry of the judgment upon which it is based, and that the defendant Christopherson was absent from the state of Utah during that time for "a period of not more than 164 days." The court, however, held that the action was not barred, and entered judgment against all of the defendants for the full amount of the judgment, including interest. The defendants appeal, and insist that the district court erred in holding that the action upon the judgment was not barred by the provisions of the statute we have referred to, and in rendering judgment against them. Upon the other hand, plaintiffs contend that the action is not barred because of what is contained in Comp. Laws 1907, § 3490, which provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." That section has been in force in this state continuously since some time prior to 1888. It constituted § 3706 of Comp. Laws 1888, and was thereafter carried into the Revised Statutes of 1898 as § 3490. The section is an exact copy of § 1049 of the California Code of Civil Procedure.

It is conceded that the judgment in question was not appealed, and that no motion for a new trial was ever filed. In other words, it is conceded that the judgment was never assailed in any way by anyone. Plaintiffs contend that, notwithstanding that fact, the judgment did not become final until the time for an appeal had passed, namely, until six months from the time of its entry, while the defendants insist that the judgment became a final and enforceable judgment immediately upon being rendered and entered as provided by law, and hence eight years, plus 165 days,

had elapsed when this action was commenced. The question that we must determine, therefore, is, When did the statute of limitations begin to run on the judgment in question?

Counsel for plaintiffs contend that the foregoing question is determined in their favor by the supreme court of California in the case of *Feeney v. Hinckley*, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580, and that, in view that our statute (§ 3490, supra) is a copy of the California statute upon which the California supreme court bases its decision in the case just referred to, we should follow that decision. If the case just referred to is to be followed, then this opinion should end right here, since no distinction can be drawn between the principle involved in this case and in the California case referred to. The case of *Feeney v. Hinckley*, supra, was decided in November, 1901, many years after § 3490, supra, was in force in Utah. We are therefore not confronted with a situation where a statute from another state is adopted after the same had been authoritatively construed and applied by the courts of the latter. Notwithstanding this fact, we were loth to disagree with the conclusion reached by the supreme court of California, and have done so only upon mature deliberation and after having carefully considered both the reasoning and authorities upon which the decision in *Feeney v. Hinckley* is said to be based. In our judgment the decision in that case is based upon what is assumed to be the law rather than upon what the law actually is.

The decision seems to be based upon the conception that because the statute (§ 3490) provides that an action should be deemed pending until the appeal, if one is taken, be determined, or, if no appeal be taken, then until the time for an appeal has expired, for that reason a judgment is not to be deemed final, for the purpose of setting in motion the statute of limitations, until the time has elapsed within which an appeal can be taken, and that if it were held otherwise the judgment creditor would not have the full time given by the statute of limitations in which to bring an action upon a judgment. In arriving at such a conclusion, the California supreme court, we think, committed at least two errors. The first one consisted in assuming that § 3490 in some way greatly changed or affected the rule prevailing at common law with regard to when actions were deemed pending.

The rule in that regard in force at common law is well stated by the court of appeals of New York in the case of *Weg-*
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man v. Childs, 41 N. Y. 159, where it is stated thus: "An action is pending in a court, though judgment has been recovered therein, as long as such judgment remains unsatisfied." To the same effect are *Gates v. Newman*, 18 Ind. App. 398, 46 N. E. 654; *Ulshafer v. Stewart*, 71 Pa. 174; *Wright v. Nostrand*, 94 N. Y. 45; *Chapin v. James*, 11 R. I. 89, 23 Am. Rep. 412; *Ex parte Howland*, 3 Okla. Crim. Rep. 142, 104 Pac. 927, Ann. Cas. 1912 A, 840; *Day v. Holland*, 15 Or. 464, 15 Pac. 855; *Shirley v. Birch*, 16 Or. 13, 18 Pac. 344; 6 Words & Phrases, 5277.

Section 3490, supra, therefore, belongs to that class of statutes wherein it was sought to declare and make certain an existing rule of practice or procedure rather than to create a new one. Moreover, when other provisions of the Code which have a bearing upon the subject are kept in mind, and are given proper force, it, in our judgment, is conclusive that neither in adopting the rule at common law nor by what is said in the statute was it intended to declare that, although actions be pending after judgment, they are necessarily pending for all purposes. In our judgment actions remain pending after judgment only for the purpose of enforcing them and to institute the proceedings provided by law to reverse or to modify them. For the purpose of enforcing the judgment, it is just as much final immediately after its rendition and entry in the court of original jurisdiction, unless it is expressly otherwise provided by some statute, as it is after an appeal is terminated. For the purpose of *res judicata* or estoppel this may, however, not be so. If this distinction be kept in mind no difficulty will be encountered in applying the remedies incident to the enforcement of judgments.

It is certainly elementary law that a judgment may be enforced either by execution or by an action immediately after rendition, unless execution be stayed and the judgment suspended in accordance with law or some fixed rule of practice or procedure. The law in this respect is clearly stated by the author of *Freeman on Judgments*, 4th ed. vol. 2, § 432. in the following words: "The right to bring an action upon a judgment at any time after its rendition until it is barred by some statute of limitations, though plaintiff retains the power to collect it, if he can, by execution, is almost universally conceded, and such concession has not, so far as we are aware, been attended by any such abuse of the privilege conceded as calls for legislative interposition." The abuse here referred to is the one sometimes alluded to of bringing successive actions upon the same judgment.

To the same effect is 2 Black on Judgments, § 958.

The cases supporting the foregoing doctrine are very numerous. We shall refer to a few only, namely: *Morse v. Pearl*, 67 N. H. 317, 68 Am. St. Rep. 672, 36 Atl. 255; *Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 67 Pac. 252, 56 L.R.A. 812, 90 Am. St. Rep. 748 (see the editor's note to this case, page 755); *Schuyler County Bank v. Bradbury*, 56 Kan. 355, 43 Pac. 254; *Snyder v. Hitchcock*, 94 Mich. 313, 54 N. W. 43; *Cain v. Williams*, 16 Nev. 426; *Gilmore v. H. W. Baker Co.* 14 Wash. 52, 44 Pac. 101; *Suydam v. Hoyt*, 25 N. J. L. 230; *Union Trust Co. v. Rochester & P. R. Co. (C. C.)* 29 Fed. 609-611; *Johnson v. Foran*, 59 Md. 460.

But, entirely apart from these authorities, our statute (Comp. Laws 1907, § 3307) clearly contemplates the enforcement of judgments given for the payment of money immediately after they are entered, since it is there provided that an appeal from a "judgment or order directing the payment of money . . . does not stay the execution of the same, unless a written undertaking be executed on the part of the appellant by two or more sureties to the effect," etc. Again, § 3320 provides for restitution in case a judgment is reversed or modified on appeal after its enforcement, and also affords protection to the purchaser under execution sales in such cases. It is idle, therefore, to contend that in this state the enforcement of judgments is or was intended to be held in abeyance by what is said in § 3490, since it manifestly was not intended that the provisions of that section are alone controlling simply because they in some respects are contrary to other statutory provisions relating to the enforcement of judgments. A judgment in this state is therefore not suspended or superseded unless and until that is accomplished in accordance with our statute relating to that subject.

In connection with the question just considered, it must also be kept in mind that the courts are practically unanimous in holding that, where the purpose of the action is merely to enforce the judgment, a plea of another action pending cannot successfully be interposed in the action commenced upon a judgment before the time for appeal has expired. The only plea that is of any avail in such an action is that the judgment has been suspended by the execution of a supersedeas bond as provided by law or some other statutory method. From among the numerous cases that might be cited in support of the foregoing doctrine, we refer to the following: *Rogers v. Odell*, 39 N. H. 417; *Steers v.* 47 L.R.A. (N.S.)

Shaw, 53 N. J. L. 358, 21 Atl. 940; *Merritt v. Fowler*, 76 Hun, 424, 27 N. Y. Supp. 1047; *Litchfield v. Brooklyn*, 13 Misc. 693, 34 N. Y. Supp. 1090; *Oncida County Bank v. Bonney*, 101 N. Y. 173, 4 N. E. 332; *North Muskegon v. Clark*, 10 C. C. A. 591, 22 U. S. App. 522, 62 Fed. 694; *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. ed. 383. Moreover, in all of the cases to which we have referred so far, where the question was raised, it is expressly held that the statute of limitations begins to run upon a judgment immediately after its rendition if, under the local law, it is then enforceable. We shall therefore not cite the cases upon that question again.

The full faith and credit clause of the Federal Constitution also applies as soon as the judgment is enforceable, and is not held in abeyance until the time for appeal has elapsed. How can anyone doubt that the plaintiffs here could have maintained an action upon the judgment in question in the courts of this state or of any other state in the Union at any time after it was rendered in the United States circuit court? If anyone entertains any doubt upon that question, a mere cursory reading of the numerous authorities upon that subject will at once dispel it.

Our statute provides that an action upon a judgment must be commenced within eight years. Eight years from what time? Clearly from the time a cause of action has arisen.

It is a rule of universal application that a cause or right of action arises the moment an action may be maintained to enforce it, and that the statute of limitations is then set in motion. The test, therefore, is, Can an action be maintained upon the particular cause of action in question? If it can, the statute begins to run. This test is not questioned in *Feeney v. Hinckley*, but it is actually invoked in that case. It is there held, however, that a cause of action does not arise upon a judgment until an appeal, if one is taken, is determined, or, if none is taken, until the time for an appeal has elapsed. That conclusion, as we have seen, is, however, contrary to the overwhelming weight of authority, and in our judgment is the second error into which the supreme court of California has fallen in the *Feeney Case*. That court, however, seeks to sustain its conclusion upon the ground that a judgment may not be considered final until the time for an appeal has elapsed. It has accordingly repeatedly been held in that state that a judgment roll may not be used as evidence for the purpose of establishing pleas of estoppel or *res judicata* pending an appeal or during the time an appeal can be taken.

The correctness of that doctrine may be conceded, and yet it in no way militates against the fact that a judgment may nevertheless be used as evidence for some purpose other than estoppel and *res judicata*. The reason why a judgment roll pending an appeal, or during the time when one may be taken, may not be used as evidence of an estoppel or *res judicata* of any particular fact or facts involved in the litigation which terminated in the judgment evidenced by the judgment roll, is palpably obvious. So long as the judgment may be modified or reversed upon a direct proceeding on appeal or otherwise, the facts that were involved in the litigation cannot be said to be *res judicata*. That is, they are not finally fixed and determined, but, are still subject to be changed or entirely overthrown. But this in no way affects the right of the judgment creditor to enforce his judgment either by execution or by another action. This right he had at common law, and is continued in force by our statute. If the judgment debtor desires to prevent the immediate exercise of the right, he may appeal and supersede or suspend the judgment, as provided by the statute. It is clear, therefore, that, although a judgment may not be used as evidence for all purposes, it may nevertheless be used as evidence to prove its own existence. For the latter purpose the judgment may, and in the very nature of things must, be used as evidence, even in case of an appeal. If this were not so, no appeal could be prosecuted, since there could be no evidence to establish the judgment which is the subject of the appeal. At common law, as well as under our statute, a judgment may also be used as evidence of its own existence when it is sought to be enforced either upon execution or by bringing an action upon it. This is inevitable, and the supreme court of California has clearly demonstrated that such is the case.

In a much later case than *Feeney v. Hinckley*, namely, *McKannay v. Horton*, 151 Cal. 711, 13 L.R.A.(N.S.) 661, 121 Am. St. Rep. 146, 91 Pac. 598, that court enforced a judgment immediately after its rendition, notwithstanding the objection made that such could not be done because the time for appeal in that case had not yet expired. It may well be asked, How was it possible for the supreme court of California to sustain the enforcement of the judgment of the lower court, unless it regarded the same as final and enforceable and received it as evidence to prove its own existence? The judgment in that case at least was enforced, although an appeal was permissible at the time it was en-

forced. If, therefore, a judgment may be enforced before the time for an appeal has elapsed, it must be done upon the theory that it exists as a final and enforceable judgment, and that its existence may be established by the production of the judgment roll. In other words, the judgment may thus be used as evidence to prove its own existence. It may be contended, however, that in the later California case the judgment was by a statute made enforceable forthwith. But such, as we have shown, is in legal effect also the case under our statute. There is no difference in principle between the right of immediate enforcement of a judgment and its actual enforcement. There is therefore no difference in principle between the later California case and the one at bar, or, for that matter, between the judgment in the California case and any judgment entered in the courts of this state which is enforceable under our statute.

But it is further contended by the plaintiffs that this court is committed to the doctrine laid down in the case of *Feeney v. Hinckley* by the results reached in *Howe v. Sears*, 30 Utah, 344, 84 Pac. 1107, and in *Vance v. Heath*, — Utah, —, 129 Pac. 365. There is absolutely nothing in *Howe v. Sears* that in any way supports the California doctrine. Indeed, if the facts in *Howe v. Sears* are kept in mind, the decision is at least negative authority in favor of the defendants. For example, if in that case this court had intended to follow the doctrine laid down in *Feeney v. Hinckley*, then no argument was required to show that the statute of limitations had not run in that case, for the reason that confessedly the action would not have been barred for nearly, if not quite, six months after its commencement in any event. Nor is there anything said in the case of *Vance v. Heath* contrary to the conclusions reached here. Indeed, the latter case is in perfect harmony with our present conclusions. What is held in the *Vance Case* is that a judgment may not be used as evidence of estoppel or *res judicata* with regard to any particular fact or facts involved in the litigation pending an appeal, or so long as the time for one has not expired. There is nothing said or intimated in that case that a judgment is not a final and enforceable judgment immediately after it is rendered, nor that it cannot be used as evidence to prove its own existence so long as it is not sought to use the judgment as evidence to establish an estoppel or *res judicata*.

There can be no doubt that, for the purpose of enforcing it, a judgment is evidence of its own existence immediately

upon being rendered and entered as provided by law. Nor is there any doubt whatever that an action may be maintained upon such a judgment in any court of competent jurisdiction in any state in the Union, including the one in which it is rendered, just as soon as it is rendered and entered as aforesaid. The cause of action upon a judgment, whether of a Federal or a state court, therefore arises as soon as the judgment has a legal existence, which is immediately upon its rendition in the court from which it emanates, or, if the law requires that it be entered in some book before it is enforceable, then from the time of such entry. In other words, a cause of action arises from the time a judgment is legally enforceable by execution or by action. In this state this may be done immediately after the judgment is or ought to have been entered. The statute of limitations is set in motion at that time, and unless an action is commenced within eight years thereafter, the cause of action is barred: The fact that in this state a judgment may be enforced by execution during the full period of eight years in no way affects the question involved here. A party has the right to commence an action upon a judgment notwithstanding the fact that he can also enforce it by execution. Besides, he may desire to bring an action in a foreign state, and this he may do as soon as the judgment is called into existence in the manner authorized by law, unless there is some express statute to the contrary. The right to commence an action upon the judgment in question therefore expired eight years from and after the 30th day of December, 1897, or on December 30, 1905, unless the statute, for some legal reason, was suspended during that time. It is contended, and the court so found, that as against the defendant Christopherson it was suspended for a period of 164 days, and no more. If it be assumed that, under the evidence in this case, plaintiffs were entitled to add the entire period of 164 days to the eight years against the defendant Christopherson, yet, for the reasons hereinbefore stated, the action was not commenced in time even as against him.

In view of what has been said, therefore, the court erred in its conclusion of law and in entering judgment against the defendants. Under the undisputed evidence the action was not commenced until eight years and 165 days had elapsed, and therefore the right to maintain it was barred when the present action was commenced.

The judgment is therefore reversed, and the cause is remanded to the District
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Court, with directions to grant a new trial. Costs to appellants.

McCarty, Ch. J., and Straup, J., concur.

NEW YORK COURT OF APPEALS.

RE APPLICATION OF CITY OF ROCHESTER To Acquire Lands to Widen Frank Street.

(208 N. Y. 188, 101 N. E. 875.)

Eminent domain — disqualification of commissioner — property subject to assessment.

1. One whose property is subject to assessment to pay for land taken by a city under right of eminent domain is not competent to act as a commissioner in the condemnation proceeding, although the statute makes incompetent only those interested in the property to be taken.

Same — waiver of incompetency — failure to object.

2. Failure of the property owner to object to the competency of commissioners appointed by the court in proceedings to condemn his land for public use until the award is made does not constitute a waiver of the disqualification, if he did not learn the facts which rendered them incompetent during the proceedings before them.

(April 22, 1913.)

Note. — Interest which will disqualify one to serve as commissioner or juror in eminent domain proceedings.

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A PPEAL by a property owner from an order of the Appellate Division of the Supreme Court, Fourth Department, modifying a resolution of the Common Council of the City of Rochester, approving the report of commissioners in proceedings for the widening of Frank street. Reversed.

The facts are stated in the opinion.

Mr. Edward C. Randall for appellant.
Messrs. William W. Webb and Albert L. Shepard, for respondent:

Claimant waived all objections to the petition.

2 Lewis, Em. Dom. 3d ed. §§ 562, 580, 611, pp. 996, 1028, 1075.

The statute specifically and affirmatively qualified the two commissioners objected to

in spite of the fact that they were property owners within the district.

People ex rel. Smith v. Taylor, 34 Barb. 481; Re Baker, 173 N. Y. 254, 65 N. E. 1100.

Collin, J., delivered the opinion of the court:

The appellant, Otis Elevator Company, asserts that the common council of the city of Rochester should have rejected the report of the commissioners in this proceeding, for the reason, among others, that two of the three commissioners were interested, because each owned lands within the district upon which their award was to be assessed.

I. Preliminary statement.

This note includes cases dealing with the question of interest which will disqualify one to act in assessment of damages in eminent domain proceedings, whether such party is locally denominated commissioner, juror, viewer, appraiser, or by other appellation. But cases are excluded where it appeared that the sole function of the person in question was to assess benefits. The note also excludes in general cases dealing with the constitutionality of statutes in relation to the selection of the tribunal or persons to assess benefits or damages; such cases being decided generally upon other grounds than those discussed in this note; such, for instance, as whether a proper method of appointment is provided, so that an impartial tribunal would probably be secured, or whether the alleged interest or partiality renders the statute unconstitutional where a right of appeal is given.

Questions as to waiver of objection, as to when the objection must be raised, and as to the effect upon the proceedings of the service of a disqualified person, are also beyond the scope of the note.

It should perhaps, also be added that this note does not deal with such questions as whether it should affirmatively appear that the parties possessed the necessary qualifications, the note being limited to the consideration of interest as a disqualification, and not considering generally the necessary affirmative qualifications of the parties in eminent domain proceedings.

Generally as to judicial power over the right of eminent domain, see extended note to Grafton v. St. Paul, M. & M. R. Co. 22 L.R.A.(N.S.) 1.

As to power of court to set aside award for misconduct of commissioners or jurors, see note to Re Milwaukee Light, Heat, & Traction Co. 27 L.R.A.(N.S.) 567.

There is a great deal of conflict in the decisions upon the question here annotated. The conflict is largely due to the wording of particular statutes; and no doubt in part, also, to the differences in statutory duties of the various officers, and the effect of their decisions; that is, whether it is 47 L.R.A.(N.S.)

determinative or only advisory. But these differences frequently fail to be brought out in the cases, and in order to determine whether two decisions apparently in direct conflict are actually so, it might in some instances be necessary to consult the statutes of the states in which they were rendered. However, even after all possible explanations are made of apparent confusion of authority, no doubt there remain substantial conflicts. Not only are there conflicts in applying the general rule to similar facts, but in applying it to the peculiar circumstances of different cases, there being much inconsistency, as will appear from the discussion of the cases.

II. General principles.

In 15 Cyc. 872, it is said: "Where private property is taken for public use, it is only necessary that the proceedings to ascertain the value of the property and the compensation to be made to the owner be conducted in some equitable and fair mode, to be provided by law, either with or without the intervention of a jury. . . . A condemnation proceeding is judicial in its character, and should be had before an impartial tribunal."

It has been said that a property owner is entitled to an impartial as well as a disinterested jury in eminent domain proceedings, and that a juror who is specially interested in having a street opened, by reason of some special gain or convenience to him, which he expects to derive more than the community generally, is disqualified, and may be rejected for cause. *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634.

But if the benefit to be derived by a commissioner appointed to assess damages in eminent domain proceedings is only such as he shares with the public generally, it will not disqualify him (*Parham v. Inferior Ct. Justices*, 9 Ga. 341); although he has been in favor of the improvement, and advocated its being made (*State ex rel. McMullen v. District Ct.* 50 Minn. 14, 52 N. W. 223).

It is interesting to note in this connection the application of the general principle

The proceeding was instituted, under provisions of the charter of the city of Rochester, to acquire lands for the widening of Frank street of that city. The appellant owned a large part of those lands. Regularly in the course of the proceeding the common council directed that the expense of the public improvement be assessed upon all the lots and parcels of land located in 9 designated wards of the city. There were in the city 22 wards. Thereafter the city applied, after due notice to the interested parties, to the county court of Monroe county for the appointment of commissioners to ascertain and report to the common council the compensation to be awarded to the owners of the property to be taken. The

appellant appeared upon the application and consented that commissioners be appointed, and the court thereupon appointed three persons such commissioners. The total compensation awarded was \$56,750, of which \$50,000 was to the appellant. Pursuant to the provisions of the charter of the city, the common council assigned a time and place for hearing the objections of any person interested in the confirmation of the award, and at the hearing appellant duly raised the objection, among others, that two of the commissioners were disqualified to act, because each of them owned land in the district to be assessed, and was personally interested in the award by reason of his liability to pay a part of

laid down in *Parham v. Inferior Ct. Justices*, supra, to a case apparently on the border line between the principles of that case and *Kundinger v. Saginaw*, supra. The court in the *Parham* Case held that partiality on the part of a viewer of a proposed highway would not be presumed merely because he kept a shop on the line of the road, and his trade would be increased by its opening, and refused an injunction therefore to prevent the opening of the road.

It has been said that the smallest pecuniary interest disqualifies one from acting in the proceedings (*New Boston Petition*, 49 N. H. 328), and that unquestionably an interest in the award, however slight or remote, would disqualify a commissioner in eminent domain proceedings, and be fatal to the award (*Re Grade Crossing Comrs.* 69 Misc. 23, 124 N. Y. Supp. 1025): the latter case holding, however, that a merely nominal party to the proceedings, who had no interest in the award, was not disqualified.

And in *Re Friend*, 53 Me. 387, the court said that it was well settled that any interest, however small, is sufficient to render one who is required to act in a judicial capacity incompetent. To the same effect is *page v. Contoocook Valley R. Co.* 21 N. H. 438. But in *Andover v. Oxford County*, 86 Me. 185, 29 Atl. 982, the court added the qualification to the statement in the *Friend* Case that any "direct interest," however small, would disqualify; that an interest which disqualified may be small, but it must be an interest direct, definite, capable of demonstration; not remote, uncertain, contingent, or unsubstantial, or merely speculative or theoretical.

In *Flagg v. Worcester*, 8 Cush. 60, it was said: "It is not, therefore, a pecuniary interest only or chiefly, that disqualifies a juror: but anything which may operate to create a prejudice or bias in the mind, either against a party or his cause, is deemed an adequate cause of challenge. Nor is the degree of influence which may be supposed to exist at all material. It is sufficient if it exist at all, because any amount, however slight, may be the source of an improper bias. The law

cannot undertake to measure the extent to which the mind may be swayed in each particular case. That which would influence materially the judgment of one may have but little or no effect on the mind of another. Therefore it is, that the fact that there exists a cause of bias, such as kindred, prejudice, interest in the question, though not in the event of the suit, are held sufficient to disqualify a juror, without any inquiry as to its effect on his impartiality."

One who has an interest in a landowner's financial condition has been held disqualified to act as commissioner in proceedings to take his land under eminent domain. *Re Terminal R. Co.* 16 App. Div. 515, 44 N. Y. Supp. 1012.

In *Re Board of Water Supply*, 74 Misc. 146, 134 N. Y. Supp. 36, it was said that each commissioner must be absolutely fair and impartial; that any corrupt bias or other bias or cause unbalancing the judicial poise of the commissioner would result in instant removal.

But in *Terminal R. Co. v. Gerbereux*, 55 Misc. 1, 104 N. Y. Supp. 737, the court said that while it would, on the one hand, adhere rigidly to the rule that commissioners must, as matter of law, be disinterested, it would not, on the other hand, hastily hold that they were disqualified by interest when no misconduct was shown, and it did not appear that they had, or could be reasonably suspected of having, any present interest in the land; that suspicion of interest must be based on established facts, and the mere suggestion of possibility of interest was not enough to disqualify.

The term "competent" in a statute requiring the appointment of competent persons as commissioners in proceedings to establish a drainage district has been said to mean that a commissioner should be a person "who is not only possessed of sufficient skill and intelligence to properly discharge the duties to be performed by a commissioner under the statute, but who is also disinterested, and not near of kin to any party to the cause." *King's Lake Drainage & Levee Dist. v. Jamison*, 176 Mo. 577, 75 S. W. 679.

it, and introduced proof that the appellant and its counsel were ignorant of such fact until after the award was made. The confirmation of the report and award was made, and was affirmed by the appellate division upon the appeal, permitted by a provision of the charter of the city, of the Otis Elevator Company.

A provision of the charter authorized the court, the prescribed antecedent acts having been done, to "appoint three commissioners of appraisal who are residents and freeholders of the city . . . not interested in any of the real estate, rights, or easements sought to be taken, nor of kin to any owner thereof, or to any person having any estate, right, or interest therein, or lien, charge, or encumbrance thereon." Laws

1907, chap. 755, § 438. The fact that a commissioner of appraisal owned land to be assessed was not, therefore, a disqualification under the language of this provision, and the counsel for the respondent asserts that the provision specifically and affirmatively qualified the commissioners objected to. We have reached a contrary conclusion.

The common council of the city, pursuant to a provision of the charter, directed that the whole of the expense of the improvement be assessed "per front foot" upon the property within the designated wards. Manifestly, therefore, and it is an unquestioned fact, the part of the expense to be paid by each landowner of those wards depended upon the aggregate expense of the improvement, and consequently upon the

In *King's Lake Drainage & Levee Dist. v. Jamison*, supra, it was held that although other statutes relating to highway commissioners and appraisers provided for the appointment of "disinterested" persons, one whose wife owned land affected by the proceedings was not qualified as a commissioner, on the theory that, in enacting the statute in question, it was not intended to disqualify one otherwise "competent" because he was interested in the matter, and that where there was an intent to disqualify on account of interest, it had been expressly so provided. See this case also, under heading, "Ownership of land affected by the proceedings," *infra*.

In *State, Winans, Prosecutor, v. Crane*, 38 N. J. L. 394, it was held that where one of four commissioners who signed the return was disqualified on account of pecuniary interest, the proceedings in which he acted could not be sustained on the plea of necessity, on the theory that if a majority were interested the road could not be laid out unless they were permitted to act. The court indicated that the decision applied also to a similar case then pending in which two of the four commissioners were disqualified, holding that the necessity for laying out the highway was not sufficiently great to justify an exception to the rule forbidding one to be a judge in his own cause.

It was also held in *State, Winans, Prosecutor, v. Crane* supra, that the maxim that a person cannot be a judge in his own cause was so fundamentally a part of judicial authority that the legislature could not, in the absence of a constitutional provision, authorize action to the contrary: and could not therefore by curative statute legalize the proceedings of highway commissioners in which one pecuniarily interested had participated, although there was without him a majority who concurred. It was said that a majority could have legally acted without the interested commissioner, but since he had taken part in the proceedings, the whole was voidable, and to sanction the act of the legislature ratifying it in such a mode would be indirectly crippling

the natural force and effect of the maxim, and be a deprivation of its protection; also that the maxim could no more be materially invaded by the legislature than it could pass an act that a judge might decide according to law, or for the party who gave him the most money.

It has been held that a statute providing that "no judge of any court can sit as such in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties," does not apply to commissioners of highways. *Foot v. Stiles*, 57 N. Y. 399; *People v. Wheeler*, 21 N. Y. 82. To a similar effect is *Re Ogden Street*, 63 Hun, 188, 17 N. Y. Supp. 744, and *Groton v. Hurlburt*, 22 Conn. 178.

III. Bias and prejudice in general.

It has been said that the actual existence of bias or prejudice, not a mere apprehension of it, should render a commissioner in eminent domain proceedings an unfit or improper person. *Re Low*, 124 N. Y. Supp. 1050, affirmed in 142 App. Div. 533, 127 N. Y. Supp. 26, holding that the evidence did not show such a "rancorous" condition of mind on the part of the commissioner as to indicate that he had ceased to occupy an impartial position between the litigants.

It is not error, upon an appeal from an award in eminent domain proceedings, to exclude a juror who is the son of another appellant, and who appears to the court to have "strong feelings in relation to the case," although, upon examination, he denies any bias in the matter. *March v. Portsmouth & C. R. Co.* 19 N. H. 372.

It has been said that it would be most unreasonable and unjust to presume that because a commissioner in eminent domain proceedings by a city entertained some ill feeling against the attorney for the city, he would act prejudicially to its interest or the interests of its taxpayers. *Re Low*, supra.

Where, before the taking of testimony, the son of a commissioner appointed to ap-

awards of compensation by the commissioners of appraisal. An award to the appellant greater than that actually made would have increased the sum to be paid by each of such owners, including the two commissioners. The property rights and interests of the two commissioners were therefore affected by their action and award.

The plain dictates of justice and fair dealing, compliance with which, through general principles and precedents investing it with certitude and continuity, is the vitality of the law, require that a man shall not be a judge in his own cause. "The learned wisdom of enlightened nations and the unlettered ideas of ruder societies are in full accordance upon this point; and wherever tribunals of justice have existed,

all men have agreed that a judge shall never have the power to decide where he is himself a party." *Washington Ins. Co. v. Price*, Hopk. Ch. 1. The rule is rooted in sound reason. Self-interest and selfishness are persuasive or compelling forces in all ordinary affairs, and rare, indeed, is the person in whom mental rectitude and a clear and impartial judgment are not impaired by them in determining an issue between himself and another. It is, moreover, essential to the purpose and the perpetuity of the law as the supreme power enforcing justice and order among men that it and the tribunals which declare and administer it secure to themselves without intermission or substantial diminution the respect and confidence of those subject to

praise land taken by a railroad is taken into the company's employ as station agent, the report of the commissioners should be set aside as open to suspicion. *New York, W. S. & B. R. Co. v. Townsend*, 36 Hun, 630. See in this connection other cases under heading "employees," *infra*.

One who has been acting as the representative and agent of a railroad company in procuring the right of way is disqualified to act as a commissioner to award damages for the taking of land in the construction of the railroad. *Rochester, S. & E. R. Co. v. Tolan*, 116 App. Div. 696, 101 N. Y. Supp. 433. The court said that it was better that a rehearing be had than that a decision of the commissioners should remain in any degree open to the charge of partiality or favor.

It was held in condemnation proceedings by a railroad company that bias on the part of a commissioner in favor of the company would not be implied merely from the following facts: That twenty years before, the commissioner had been employed as a ticket seller by a railroad to which the plaintiff was a related or subsidiary corporation; that prior to a certain date thirteen years previous he had, while a legislative employee, traveled on passes on such railroad; that he had acknowledged certain local papers in the office of plaintiff's attorneys, and had on one occasion employed and paid such attorneys for services.

An interest in the passage of an act under which commissioners are appointed to award compensation for land taken by a city under eminent domain is not a disqualification as a commissioner under a statute requiring that commissioners be disinterested. *Re Lands*, 20 Misc. 520, 46 N. Y. Supp. 640.

The question whether a report of receivers should be set aside because they were informed before it was made up of the amount of a previous award for a road over the same route, and of the fact that it had been set aside, is one for the discretion of the court, and its decision will not be disturbed on appeal. *Re Perry Twp. Road*, 36 Pa. Super. Ct. 131.
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The English statute provides that in certain cases in proceedings to determine the amount of compensation to be allowed for the compulsory taking of private property for public use, each party shall appoint an arbitrator, and the two appointees shall choose an umpire. 6 Halsbury, *Laws of England*, pp. 69-92. And it has been held that an award in proceedings to take land for railway purposes would not be set aside by reason of the fact that during the pendency of the proceedings the umpire was retained by the company as a witness in another arbitration to take land for the same purpose, and, while the proceedings were pending, testified in the other case as to the value of land located 3 miles distant from that in this action. *Re Haigh* [1896] 1 Q. B. 640, 65 L. J. Q. B. N. S. 511, 74 L. T. N. S. 655, 44 Week. Rep. 618. The decision is placed largely upon the ground of necessity; but it was said also that there was no such necessary incompatibility between the position as a witness and an umpire as would justify the court in saying that he could not act in the latter capacity in a different inquiry, although he obviously could not act in both capacities in the same inquiry.

But in *Clout v. Metropolitan R. Co.* 46 L. T. N. S. 141, while it was held that the objection had been waived, it was said by one of the judges that he desired to state distinctly that the objection—*vis.*, that the umpire in eminent domain proceedings by a railroad company had been retained by the company as a witness in other similar proceedings, and shortly before and soon after the making of his award testified in behalf of the company in respect to the value of other property in the immediate neighborhood—was a proper one had it been taken in time; that one who gave evidence placed his mind under such a bias that he ought not to undertake the duty of arbitrator or umpire in a similar matter.

See also *Louisiana & A. R. Co. v. Moseley*, 115 La. 758, 40 So. 37, 5 Ann. Cas. 920, under subd. XIV., *infra*.

their jurisdiction. In *People ex rel. Roe v. Suffolk Common Pleas*, 18 Wend. 560, 552, Judge Bronson well said: "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." So vital is deemed the observance of this principle that it has been held that a judge disqualified under a statute cannot act even with the consent of the parties interested, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice. *Oakley v. Aspinwall*, 3 N. Y. 547; *St. John v. Andrews Inst.* 192 N. Y. 382, 387, 85 N. E. 143.

The Constitution of the state expressly

IV. Formation or expression of opinion.

Upon principle it appears that one should be disqualified from acting as commissioner or juror to assess damages in eminent domain proceedings, or to determine the necessity of the improvement, if he has formed or expressed an opinion upon the point which, as an officer, he must decide; and the cases generally take this view of the matter. However, if one has formed an opinion upon another question in the proceedings than that upon which he is called upon to pass, there is ground for argument that he is not such an interested party as to be disqualified. For instance, if one has formed and expressed an opinion in regard to the advisability of the laying out of a highway, he shall be disqualified to pass upon the question of its necessity; yet, after that question has been determined, he might not be disqualified to assess the damages. (See also heading "Petitioners," *infra.*) However, in view of the insistence, in principle, at least, that jurors and commissioners in such proceedings be as disinterested as possible, it would seem proper upon a challenge for cause to exclude a juror or commissioner who has favored or opposed the improvement from acting in the assessment of damages. But the few authorities on this point have not adopted literally the general principles laid down. For instance, in *St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298, it was held that one was not disqualified to act as a commissioner to assess damages and benefits for the widening of a street by reason of the fact that while the city council had the propriety of the improvement under consideration, he was opposed to it on the ground that the city might make better use of the money, and at the request of interested parties appeared before the mayor to oppose the improvement. The court said that when the ordinance was signed, that was an end of the question of public policy, and the questions arising after that were entirely new issues, to pass upon which one otherwise qualified would not be disqualified because

guards the citizen against an unjust or illegal exercise of the right to deprive him of his property through eminent domain. It provides that just compensation shall be made for all property thus taken, injured, or destroyed, to be ascertained by a jury or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Const. art. 1, §§ 6, 7. The rule that the courts should zealously secure to all the parties in actions or proceedings submitted to them an unbiased hearing and decision should be as rigidly adhered to in a proceeding affecting the right to own and enjoy property as in an action in a duly constituted court. The exercise of the right of eminent domain involves a hearing upon notice to the parties inter-

of his attitude toward the ordinance when it was a matter undetermined.

And in *Readington v. Dilley*, 24 N. J. L. 209, it was held that the mere fact that freeholders appointed to assess damages from the alteration of a highway signed a remonstrance against the alteration was not sufficient ground to set aside the assessment.

The rule that one is disqualified as a commissioner or juror who has formed and expressed an opinion upon the point which he is called upon to decide is supported by the following cases: *Inhabitants of Readington v. Dilley*, *supra* (holding that one who, from personal knowledge, had formed and expressed an opinion as to the amount of damages sustained by a certain party on account of the alteration of a road, was disqualified to assess damages sustained by such party; and that an assessment in which he joined would be set aside); *Re East 222d Street*, 122 N. Y. Supp. 320 (holding that one who, as a minority member of a board of commissioners, made a separate report showing that he had formed an opinion on the merits, was disqualified from acting on a reassessment made necessary because of an erroneous award of a majority of the commissioners); *Re Underhill*, 32 Hun, 449 (where a drainage commissioner one of whose duties was to pass upon the necessity of a drain was regarded as disqualified on account of having formed and expressed an opinion in favor of the drain; the disqualification, however, being apparently assumed).

On the other hand it has been said that it by no means followed that a juror was partial because he had expressed an opinion on the matter; that his belief might not have been the result of malice or prejudice, but of his own knowledge of the subject. *Muire v. Smith*, 2 Rob. (Va.) 458, holding that where the findings of a jury as to the public convenience from the establishment of a ferry were merely advisory to the court, it was error to quash the proceedings because, upon examination, several of the jurors admitted having formed or expressed opinions in the matter, or having signed and

ested, the receiving and weighing of evidence, a determination based upon the evidence, is judicial in character, and the commissioners of appraisal should not have an interest, as the law defines the word, in the proceeding.

The courts of this state extend to the rule that a coun shall not be a judge in his own cause a broad signification and a liberal application. The accuracy of such statement is attested by the exceptions to the rule. In *People ex rel. Howlett v. Syracuse*, 63 N. Y. 291, 295, one of three commissioners to award compensation and assess the expense in eminent domain was a trustee of a church liable to assessment. A ground of attacking the validity of the proceeding was that the commissioner was, by reason

circulated a petition for the ferry, but also stated that they were uninfluenced by such opinion, and could render an impartial verdict.

The fact that one, several years before, signed an application for a road over substantially the same route, does not necessarily create such an interest on his part in its establishment as to disqualify him to act as a surveyor to view the highway and pass upon the question of its necessity. *State, Smith, Prosecutor, v. Vendervere*, 25 N. J. L. 669.

And in *Moore v. Sandown*, 19 N. H. 93, where the petition of a town for permission to discontinue a highway had been referred by the court to the road commissioners, as required by statute, it was held error for the court to remove one of the commissioners and substitute another in his place because, eight years before, the commissioner had signed a petition for a highway over the route in question.

Also in *Re McCandless Twp. Road*, 110 Pa. 605, 1 Atl. 594, while it was held that the point was not directly presented by the record, the court indicated that its holding in any event would have been that one who signed a petition for a highway was not on that account disqualified from acting as a viewer three years later, in proceedings to discontinue the road, although it was said that it would doubtless have been better to have had viewers who had no connection with the former proceeding.

And an apparent expression of opinion by one as attorney has been held not to constitute a disqualification as a commissioner, the theory being that the arguments of the advocate are not necessarily his personal beliefs. *Re Low*, 124 N. Y. Supp. 1050, where it was held that a commissioner in eminent domain proceedings by a city was not disqualified merely by reason of the fact that in other eminent domain proceedings by the city he had, as counsel for other property owners, contended in argument that "the commissioners, in arriving at a value to be given to a property owner, must take into consideration that he is forced to sell his property. He must, whether he

of such fact, incompetent to act by reason of interest. It was held that he was competent. Judge Andrews, writing for the court, said: "It does not appear that he was a pew owner, or had any pecuniary interest which would be affected by an assessment of the church property. The title was vested in the corporation. The trustees are charged with the control and management of the temporalities of the church, but are not subject to personal liability for its debts or assessments. . . . The duty imposed upon the commissioners of assessments in this case required the exercise of judgment and discretion. This is true, to a greater or less extent, in most cases of boards appointed for the discharge of duties connected with the administration of the

wants to or not, allow the city to have it, and therefore he is entitled to the very highest amount that the commissioners believe should be paid to him." The court said it was a matter of common occurrence for counsel to advance arguments and lay down propositions in which they have no, or but very little, faith; but it did not necessarily follow that the counsel, when afterwards acting in a judicial capacity, would adopt as law propositions argued by them at the bar.

In *Gingrich v. Harrisburg*, P. Mt. J. & L. R. Co. 1 Pearson (Pa.) 74, one of the viewers had expressed an opinion in relation to another view and other property than that in question, "that no man ought to have a cent of damages on account of the railroad passing over his land;" and the court said that had it known of such expression of opinion, it would not have appointed him; but as it did not relate to that case, it might well be questioned whether or not it would have been a valid objection.

Upon application to the court for the appointment of commissioners to open a street, the court, in *Green v. Wood*, 6 Abb. Pr. 277, sustained an objection to one of the parties suggested as commissioner, on the ground that he had expressed opinions on questions arising in the case, which, if carried out, would defeat the application. It was said that such questions should be submitted to commissioners who have not become committed upon them.

It has been held, however, that the mere fact that one has given the owners of land a detailed estimate of the damages sustained by the construction of a railroad would not disqualify him from later acting as arbitrator to assess the damages, under a statute providing that an arbitrator should not be disqualified by reason merely of the fact that he is professionally employed by either party, or that he had previously expressed an opinion as to the amount of the compensation, if he is not personally interested in the compensation. *Re Nicolson & R. Comr.* 6 Manitoba L. Rep. 419. The court ruled against the contention that the statute referred to a mere passing casual opinion, and stated that while it agreed

local affairs of municipalities, but it has not been supposed that a remote interest in the subject to which the appointment relates would disqualify a member of the board from acting under his appointment. Great public inconvenience would result from establishing such a rule. There are many town and city officers who are called upon to discharge public duties which may remotely affect their pecuniary interests. Assessors are officers of this kind, but they are not incapacitated from assessing the property of other citizens by the fact that they own property also liable to assessment, the taxation of which may be affected by the rate of assessment of the other property within their jurisdiction. In the proceeding under consideration the parties were

the public and the owners of the property liable to assessment. The commissioner who was trustee was not the owner or interested, in a legal sense, in the property of the religious corporation of which he was an officer, and was not disqualified from acting as commissioner." In *Re Ryers*, 72 N. Y. 1, 15, 28 Am. Rep. 88, the county judge of Richmond county appointed commissioners of drainage under the general drainage act, whose official duty it was, first, to determine upon the necessity of the work, and then to carry it forward, determining the lands to be taken, the lands to be benefited, and the amounts of the assessments. The county judge was the owner of some of the lands to be affected. The statute existing at the time put upon a

with the general principle urged, that the arbitrator should be perfectly indifferent between the parties, it could not, in this instance, disqualify one upon a ground that the statute expressly stated should not be a disqualification.

In the abstract reported in *Re Highway*, 3 N. J. L. 948, an objection was made to the appointment of a surveyor of the town through which the road ran, the objector offering to prove that the surveyor had given an opinion as to the propriety of laying out the road; but the objection was overruled, the court saying that the statute made it its duty to appoint surveyors of the town through which the road ran except in one case, and this was not that case.

In *Bogue v. DeLong*, 147 Mich. 63, 110 N. W. 119, it was held that a member of a township board was not disqualified to act upon an appeal from a decision of a commission establishing a highway by reason of the fact that he had voted for a resolution authorizing the commissioner to expend a certain sum in opening the highway; but the ground of the decision seems to be that the return of the officer, which the court said must be taken as true, stated that the member was not an interested party, and was without prejudice or partiality.

See also the cases of *State ex rel. McMullen v. District Ct.* 50 Minn. 14, 52 N. W. 223, and *Parham v. Inferior Ct. Justices*, 9 Ga. 341, under subd. II., *supra*.

V. Prior service in regard to same or similar subject-matter.

Prior service has been held generally to disqualify a commissioner or juror in eminent domain proceedings, where he has previously acted in determining the same or part of the same questions upon which he would be called upon to pass in the subsequent proceedings. Jurors in eminent domain proceedings have been held disqualified on account of prior service in the same proceedings in the following cases: *Hester v. Chambers*, 84 Mich. 562, 48 N. W. 152 (where the jury disagreed and were discharged); *Folmar v. Folmar*, 68 Ala. 120 47 L.R.A. (N.S.)

(where the first proceedings had been set aside); *Hunter v. Matthews*, 12 Leigh, 228 (where a second inquisition in proceedings to construct a dam was made necessary by the fact that the dam caused a more extended overflow than was contemplated, and damages had, therefore, to be assessed for lands not included in the first inquisition, but the subsequent proceedings necessarily passed on some of the same questions decided in the first).

The fact that an appraiser in eminent domain proceedings has formerly, as a member of a real estate board, taken part in the appraisal of the same property, is a proper ground for his removal and the appointment of another in his place. *State ex rel. Turnblad v. District Ct.* 87 Minn. 268, 91 N. W. 1111. The court said that this fact might tend to prevent him from entering upon a new inquiry with that degree of disinterestedness which the law imposes upon all such arbitrators.

And where provision was made by statute for a substitute in case any of the township board were incompetent to act in the proceedings to establish a highway, it was held in *Locke v. Highway Comr.* 107 Mich. 631, 65 N. W. 558, that members of the board, whose decision in former proceedings as to the necessity of the highway and as to damages had been set aside, were disqualified to act in subsequent proceedings for the same purpose.

But the authority of the above case is not unchallenged. In *Cowan v. Glover*, 3 A. K. Marsh. 356, it was held that an inquisition in eminent domain proceedings would not be quashed because one of the jurors had previously served on another inquisition which had been quashed by the court. The court said it did not appear on what grounds the first inquisition had been quashed; that it might have been for no objection to the jury; and if not, the circumstance of the same persons having served on both inquisitions formed no cause for setting aside the later proceedings.

In *Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949, also where an order of commissioners for the construction of a highway

county judge the power to appoint commissioners in a proceeding to drain lands in his county, and put it upon him alone. He had no authority to call in another county judge or other officer to act in his place. This court, assuming, but not deciding, that the interest of the county judge was disqualifying, held the appointment of the commissioners legal under the rule of necessity, and formulated the rule: "That where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his person or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by constitution or by statute as that his refusal to act will prevent

any proceeding in it, then he may act so far as that there may not be a failure of remedy, or, as it is sometimes expressed, a failure of justice." In *Leonard v. Mulry*, 93 N. Y. 392, 396, we said: "So far as there are limitations to this rule [of disqualification for judicial power because of interest], they are noted in *Re Ryers*, 72 N. Y. 7, 28 Am. Rep. 88." It may be added that the legislature of the state have by enactments created other exceptions to the rule, particular reference to which need not be made here. The interests affected by those exceptions are so remote and minute that the legislature may well have believed they would not influence the judgment, and therefore, and from public necessity, they

was, upon appeal, set aside as to one party only, because he did not receive proper notice, and the cause was certified back to the commissioners for further proceedings, and the original petition was refiled, it was held that whether the further proceedings be regarded as new or as a continuation of the old, the viewers who had formerly acted might be reappointed. The court said it was not claimed that they had any partiality or prejudice, and by reason of their familiarity with the road and the surrounding land they were perhaps better qualified than anyone else to do the work.

And in *Road Comrs. v. Morgan*, 47 Pa. 276, under a statute providing for the summoning in eminent domain proceedings of a jury of "reputable disinterested citizens," who might be rejected if it was shown that they were "interested in the event of the suit, but not otherwise," it was held that parties who had served upon a jury to assess damages for the establishment of a road could, after the assessment had been set aside on the ground that the plaintiff, and not the justice, had selected the jury, serve upon a second jury, before the same justice, in the same cause. The court said that the jurors were not interested in the sense of the statute, and its express words could not be disregarded; that it does not necessarily follow that because a juror has heard a case once, a bias is so fixed in his mind in favor of his former judgment that it will control him notwithstanding new light shed upon the controversy: that while this was the presumption of the common law, the statute overturned it.

In several cases it has been held that a juror who had served upon similar proceedings to take other land than that in question was not disqualified: *Palmer v. Clement*, 49 Mich. 45, 12 N. W. 903 (holding that one was not disqualified from serving as a juror in proceedings to take lands for a private way because he had sat in other ineffectual proceedings by the petitioner to obtain a right of way to reach the same lands); *People ex rel. Vandusen v. First Judge*, 2 Hill, 398 (holding that a juror in proceedings to condemn land for a

railroad was not disqualified by reason merely of the fact that he had previously been an appraiser of damages of lands taken for another railroad in the same county, the court saying that he was on this account the better qualified to discharge a like duty in relation to this road); *Levee Comrs. v. Dillard*, 76 Miss. 641, 25 So. 292 (holding that a juror in condemnation proceedings by a board of levee commissioners was not disqualified by reason of the fact that, at the same term of court, he had acted as a juror to assess damages for the taking by the board of other land, belonging to other persons).

Commissioners who have been appointed to award damages for the construction of a road, but who have been prevented from acting, may be reappointed. *Miller v. Kramer*, 154 Iowa, 523, 134 N. W. 538.

In *Re Road*, 34 Pa. 413, the court said that if it appeared that any of the road viewers were on a former view in the same matter, it might not regard them as incompetent if this view was substantially but a recommitment of the case because of some formal error in the first proceeding; that it generally preferred to leave questions of partiality of viewers to the judgment of the lower court.

And in *Re Union Twp. Road*, 29 Pa. Super. Ct. 573, the court said that the road viewers having failed to act under the first appointment, it was very clear that the court had power at the next regular term to appoint the same or other viewers upon the same petition.

In *Hannibal & St. J. R. Co. v. Rowland*, 29 Mo. 337, it was held that commissioners who had adopted an erroneous method of estimating damages for the construction of a railroad, and reported that the damages would be nothing in case the company performed certain acts, were not disqualified from again acting under proper instructions from the court to estimate the damages in money, the proceedings not being regarded as a review within the meaning of a statute providing for the appointment of other commissioners upon a review.

But where commissioners in eminent do-

wisely determined that they should be disregarded.

No exception to the rule applies to the interests of the two commissioners in this case, who owned property liable to be assessed under their award. The interest of each was financial and proprietary, direct, definite, capable of demonstration, and was affected by the proceeding. The rule of necessity did not apply to them, because the section of the city charter providing for the appointment of commissioners could have been complied with by the appointment of others who had the statutory qualifications and did not own property in the district to be assessed. They were incompetent to act, and the proceeding was a nullity unless the statutory qualifications were ex-

clusive. *Oakley v. Aspinwall*, 3 N. Y. 547; *Diveny v. Elmira*, 51 N. Y. 506; *Leonard v. Mulry*, 93 N. Y. 392. This conclusion does not involve to any extent the consideration of whether or not the disqualifying interests affected the award.

The provisions of the charter that the court "may appoint three commissioners of appraisal who are residents and freeholders of the city . . . not interested in any of the real estate or easements sought to be taken, nor of kin to any owner thereof, or any person having any estate, right, or easement therein, or lien, charge, or encumbrance thereon," did not qualify the two commissioners. At the time the provision was enacted, the common-law rule that the commissioners should be disinterested exist-

main proceedings assess the damages in such successive and unequal amounts as to show either that they followed an erroneous rule, or made awards without reason or evidence to support them, the matter of a reassessment should be referred to new commissioners. *Re East 222d Street*, 122 N. Y. Supp. 320.

Since a township board may determine once for all the question of the necessity of a highway, and the various appellants from the decision of a highway commissioner establishing the road do not have the right to a separate decision upon the question of its necessity, the members of the board are not disqualified from hearing an appeal because they have just participated in hearing similar appeals of others. *Bogue v. DeLong*, 147 Mich. 63, 110 N. W. 119.

The fact that jurors have served in other eminent domain proceedings within three years previous does not disqualify them, under a statute prescribing the qualification of jurors in such proceedings, and providing that the "practice and proceedings relative to impaneling, summoning, and excusing jurors" shall be the same as the practice and proceedings relative to petit jurors in courts of record, although jurors in the latter instance, who have served within three years previous as members of a jury, are disqualified since the terms "practice and proceedings" do not apply to the qualification of jurors, but only to the manner of "impaneling, summoning, and excusing" them. *Detroit v. Heineman*, 128 Mich. 537, 87 N. W. 618.

In *Brock v. Hishen*, 40 Wis. 674, while under the circumstances it was held that the objection was waived, it was said that had it been made when the commissioners were selected, the name of a commissioner who, as supervisor, had acted on a previous petition to lay out the highway in question, would have been stricken from the list.

VI. Other claimants or creditors or party liable for damages.

One is disqualified as a juror to assess damages against a town for changing a

street grade who owns property on another street, a quarter of a mile distant from that in controversy, and feels himself injured by repairs and alterations on that street, and has a similar claim against the town for damages he has sustained. *Flagg v. Worcester*, 8 Cush. 69.

A report of viewers appointed to assess damages for the construction of a railroad will not be set aside merely because one of the viewers, who owned land three quarters of a mile from the railroad, had a claim for damages against the company for laying out a county road through his land in place of one destroyed in the location of the railroad, under a statute providing for the appointment of disinterested persons, "none of whom shall be residents or owners of property upon or adjoining the line of such railroad." *Newbecker v. Susquehanna R. Co.* 1 Pearson (Pa.) 57. But the court said that the situation of this viewer's property, if known by it, would very properly have influenced its discretion in making the appointment; but that it was no more a legal bar than would have been the fact that the viewer claimed damages on account of stone or gravel dug by the company on his premises, where the same were situated many miles from the line of the railroad.

VII. Residents and taxpayers.

It has been held that at common law, as against a challenge for cause, a resident and taxpayer of the city is disqualified as a juror to assess damages and benefits for the taking of property by the city under eminent domain. *Portland v. Kamm*, 5 Or. 362.

And in *Elliott v. Wallowa County*, 57 Or. 236, 109 Pac. 130, Ann. Cas. 1913 A, 117, the court said that in civil cases it was the uniform rule that a taxpayer was not a qualified juror in any case in which the county was liable to pay the judgment recovered.

The proposition that a taxpayer of a corporation liable for damage in eminent domain proceedings is not a disinterested party, so as to be qualified to assess the

ed. The statute is not at variance with and did not affect the rule. The principle that a common-law right existing at the date of the enactment of a statute relating to the same subject is not taken away by the statute, unless its language clearly and directly so provides, or it is inescapably repugnant, applies.

A serious question is, Did the appellant dispense with the qualification of disinterestedness on the part of the two commissioners? It raised no objection to their competency prior to or through the protracted hearing before them. It first raised the question upon the hearing by the common council of the objections to the confirmation of the report. The court acquired jurisdiction of the subject-matter

and the persons, and the appointment of the interested persons as commissioners was not a jurisdictional error. *Re Baker*, 173 N. Y. 249, 65 N. E. 1100; *Re New York, W. S. & B. R. Co.* 35 Hun, 575. It was, however, the duty of the court to appoint as commissioners competent and qualified persons. The statute placed no right of interference or responsibility therein upon the persons interested in the proceeding or the city of Rochester. The appellant was not negligent in failing throughout the proceeding to search into the qualifications of the commissioners, inasmuch as it was not under any duty in that regard. The appointment was, in effect, an adjudication that the persons appointed were eligible under the provisions of the statute and the common law.

damages, is supported also by the cases of *Pond v. Milford*, 35 Conn. 32; *New Boston's Petition*, 49 N. H. 328; *Nashua's Petition*, 12 N. H. 425; and *Mitchell v. Holderness*, 29 N. H. 523. In the latter case, however, it was held that a commissioner who resided in a near-by town which would be considerably benefited by the construction of a highway, and might be required eventually to bear part of its cost, was not disqualified on account of interest from participating in determining the question whether the road should be laid out, provided he did not take part in determining the subsequent question as to whether his town should bear part of the cost, under a statute rendering towns in the vicinity liable to bear part of the expense.

In *Nashua's Petition*, 12 N. H. 425, a statutory provision that if any of the commissioners were "interested in the road prayed for" he should not serve, was regarded as controlling upon an application for the discontinuance of a road, the court saying that the spirit of the act applied to such cases; but, even if the statute was silent on the matter, the commissioner would be incompetent upon general principles, where his interest, however remote, might be affected; and that as a citizen of the town, he would be relieved from any tax for keeping the road in repair if it were discontinued.

And in *New Boston's Petition*, 49 N. H. 328, where part of the expense was assessed by the county commissioners to a town benefited by the construction of the highway, it was held that a commissioner who was a stockholder in a corporation doing business and paying taxes in that town was disqualified from acting in the proceedings, because his corporation would receive pecuniary advantages from the laying out of the highway, and because as a taxpayer it was interested in the amount of the assessment to the town. It was said that the statute was peremptory; if one of the commissioners was interested, he should not serve. The judgment rendered upon report of the commissioners was set aside, although it appears there were three commissioners, and 47 L.R.A. (N.S.)

that their decision in favor of laying out the highway was unanimous.

In *Portland v. Kamm*, supra, where it was held that a resident and taxpayer in a city was disqualified as a juror to assess damages and benefits for the opening of a street, the court said, in regard to the argument that all taxpayers of the county might have an interest in a case where the county was a party, and that every taxpayer of the state might have a remote pecuniary interest in the event of an action for a fine or forfeiture, that it was only necessary to pass upon the question before it; and that in this instance jurors might have been obtained outside of the corporate limits of the city, against whom the objection of interest could not have been urged. Quoting from an earlier decision of the court, it was said that the theory of trial by jury is that jurors shall stand absolutely indifferent between the parties; that they shall be as free from interest or prejudice as it is possible to be; and jurors who were taxpayers were directly responsible for a ratable proportion of whatever verdict might be rendered against the city.

Residence in a city seeking to acquire land by eminent domain, irrespective of the matter of taxation, has been held to disqualify a commissioner in the proceedings. *Re Rochester*, 31 N. Y. S. R. 75, 10 N. Y. Supp. 436, where it was held that residents of the city were disqualified as commissioners to determine the amount of compensation to be paid by the city for land taken for park purposes; and the court said that the fact that it was not shown that they were taxpayers was not material: that at common law, the incompetency existed because of residence within the locality, and that there might be an interest not created by financial responsibility which the law recognized as sufficient to disqualify them. Also that the fact that the legislature has struck out the word "disinterested" from the statute did not make inhabitants of the city competent who were not before competent, in the absence of a statute removing the incompetency.

On the other hand, there are a number

The appellant here is upon ground different from that upon which stood the appellants in *Re New York, W. S. & B. R. Co. supra*, wherein the latter assumed the duty of informing themselves in regard to the qualifications of the disqualified appointee by proposing him and suggesting his appointment. Waiver is usually a matter of intention as indicated by the language or conduct, and knowledge, actual or constructive, of the existence of the right or condition alleged to have been waived is an essential prerequisite to its relinquishment. *Jewell v. Jewell*, 84 Me. 304, 18 L.R.A. 473, 24 Atl. 858; *Vyvyan v. Vyvyan*, 30 Beav. 65, 4 DeG. F. & J. 183, 31 L. J. Ch. N. S. 158, 8 Jur. N. S. 3, 5 L. T. N. S. 511, 10 Week. Rep. 179. The appellant did not know of the interests of the commissioners in the proceeding until after the award was made, and we conclude that it did not waive their incompetency.

Upon the hearing before the commissioners the respondent introduced testimony

in proof that the building of the appellant encroached about 4 feet upon Frank street as actually laid out, as relevant to the determination of the compensation to be awarded the appellant. The appellant now asserts that the admission of the testimony was error on the part of the commissioners, in that ownership of or title to the 4 feet could not be tried in the proceeding. We are of the opinion that no exception nor the form of the award presents the question, which, therefore, is not decided or considered.

A careful scrutiny of the record does not disclose any exception which requires discussion in this opinion.

The orders should be reversed and proceedings remitted to the County Court, with directions to appoint other commissioners, with costs to appellant in all courts.

Cullen, Ch. J., and Werner, Willard Bartlett, Hiscock, Chase, and Hogan, JJ., concur.

of cases holding that the interest of one as a taxpayer of a town or county liable for damages in eminent domain proceedings is too remote to disqualify him as a commissioner or juror to assess the damages. But frequently these cases have been decided under special statutory provisions making such parties competent. For instance, in *Johnston v. Rankin*, 70 N. C. 550, it was said that while no man may be a judge or juror in an action in which he is interested, that remote and indirect interest which every person has in an action by reason of his residence within the municipality, which is a party to, or interested in, the action, has never been held to disqualify him as either; that otherwise a justice of the peace or judge living in a town or county could never hear an action in which the town or county was a party. But the statute in that case provided that compensation should be assessed by a jury composed of citizens of the town.

It has been said that it is competent for the legislature to provide that the interest of a person merely as a corporator or a taxpayer of a municipal corporation should not constitute a disqualification as juror, judge, or commissioner, in an action where the corporation is a party; that public policy and the interests of the case require this; and that the ground upon which such rulings are usually placed is that such an interest is so remote, indirect, and slight that it may be fairly supposed to be incapable of affecting the judgment or influencing the conduct. *Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581. For other cases approving the above rule, see *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769; *Illinois C. R. Co. v. Swalm*, 83 Miss. 631, 36 So. 147; *State, Bowker, Prosecutrix, v. Wright*, 54 N. J. L. 130, 23 Atl. 116. The court in the latter case said that residents 47 L.R.A.(N.S.)

were rightly supposed to have a greater knowledge of the facts they must decide than nonresidents, and their interest as taxpayers had by long usage been regarded as too remote and small to disqualify them on the ground of interest.

The view taken by the early Massachusetts and Maine cases was that the fact that a commissioner had a remote and contingent interest in the establishment of a highway, by reason of being a taxpayer in the town through which it passed, did not disqualify him to act in the proceedings. *Wilbraham v. Hampden County*, 11 Pick. 322; *Danvers v. Essex County*, 2 Met. 185; *Andover v. Oxford County*, 86 Me. 185, 29 Atl. 982.

In *Danvers v. Essex County, supra*, the court said that this view was rendered the stronger because, after the decision in the *Wilbraham Case*, it had been provided by statute that if a commissioner resided in a town through which the road was to pass, another should be called in his place, and the interest of a resident inhabitant was greater than that of a mere nonresident holder of real estate liable to taxation.

And in *Andover v. Oxford County, supra*, it was said that *prima facie* the interest of a taxpayer would be against the building of the road; but that as a taxpayer in any other town of the county, his apparent interest would be in the same direction, for the county would be liable to pay damages for land taken; and if liability to pay taxes that might be applied to the building of a highway was a test of disqualification, no citizen of the county could act as a commissioner in such proceedings; but that liability for taxation for public works is not such an interest as disqualifies action in their construction.

But the rule laid down in *Wilbraham v. Hampden County, supra*, that a taxable resident was not disqualified, was changed

by statute, providing that a commissioner shall be disqualified from acting in respect to a road if any part of it lies within the town in which he resides. *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; *Tolland v. Berkshire County*, 13 Gray, 12.

The above statute has been construed not to disqualify a commissioner from acting in proceedings to lay out a highway, where the highway was entirely outside of the town in which he resided, but extended to its limits and connected with a road leading into the town (*Monterey v. Berkshire County*, 7 Cush. 394); or where the question of the convenience and necessity of the road had been determined by a competent board, the termini and various intermediate points fixed, so that the road might be considered as divided into sections, and the commissioner acted in the location of the road in a section in which he had no interest, although he resided in a town through which it passed (*Rutland v. Worcester County*, 20 Pick. 71).

In *Boston & A. R. Co. v. Hampden County*, 116 Mass. 73, it was held that a special commissioner was properly called upon to act in place of a county commissioner in proceedings to alter a railroad and street crossing, where the latter resided in the town in which the crossing was located. The statute, the court said, expressly provided that if any part of the road upon which the county commissioners were to act lay within a town in which either of them resided, he was disqualified, unless a board could not be organized without him.

To the same effect is *Haverhill Bridge Props. v. Essex County*, 103 Mass. 120, 4 Am. Rep. 518, holding that a special commissioner was, under the Massachusetts statute, properly substituted in proceedings to lay out a bridge as a highway, in place of a commissioner who was an inhabitant of a town in which the bridge was located.

Also the disqualifying provision of the Massachusetts statute relating to highways in case of a resident commissioner has been held not to disqualify a commissioner who was a resident of a town authorized by statute to remove a dam which obstructed drainage, although the act authorizing the removal provided that damages should be assessed "in the same manner" as in the case of the laying out of highways. *Phillips v. Middlesex County*, 122 Mass. 258. The court said that the phrase "in the same manner" meant by the same proceedings, so far as they were applicable, and that the judgment of the commissioners in the matter of removal of the dam was to be exercised on an entirely different question from that in the statute relating to highways, and a disqualification in the latter statute would not apply.

Under a statute requiring the appointment of "indifferent persons," freeholders of a city have been held incompetent to estimate damages to pavements in the city by the laying of pipes, the argument being that as the houses of proprietors were assessed for pavements opposite their lots, 47 L.R.A. (N.S.)

the more that was obtained from the county, the less the freeholders would be called upon to pay. *New York v. Manhattan Co.* 1 Caines, 507. The principal contention was, however, as to whether the objection had been waived.

In *Parsell v. State*, 30 N. J. L. 530, it was held that residents and taxpayers of a township in which a proposed road was located were not disqualified to assess the damages, under a statute providing that no one should be appointed through whose lands the road passed, or who was objectionable for any other reason which the court, in its discretion, deemed sufficient, regard being had to the appointment of persons in the townships where the road was to be laid. The latter provision the court held required the appointment of surveyors of the township in which the road was located, unless there was some reason which, in the exercise of sound discretion, the court thought should prevent their appointment; and the mere fact that they were taxpayers in the township, it was held, would not warrant a refusal to appoint them.

Where the owners of adjacent property, and not the inhabitants of a city generally, are assessed for taking land for a street, a juror is not disqualified to act in the proceedings merely because he is a resident of the city,—at least, under a statute providing that freeholders and inhabitants of the city should be competent jurors in any cause in which the trustees (who had the power of highway commissioners) were a party, notwithstanding any remote interest which they might have as members of the town corporation. *Brooklyn v. Patchen*, 8 Wend. 47.

And in *Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co.* 17 W. Va. 812, it was said that, under a statute providing that no one should be incompetent as a juror because he was an inhabitant of the town, or liable to county levies, a juror in condemnation proceedings by one railroad against another was not disqualified on account of the fact that he was a citizen and taxpayer of the county in which the land sought to be acquired was located.

The fact that one is an inhabitant of a town seeking to condemn land does not disqualify him as a juror in proceedings, where the Code provides that the interest of a juror as a member or citizen of a municipality shall not be a ground of challenge, and the statute under which the proceedings are had provides for the same right of challenge as in other civil cases. *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

In *Rex v. Glace Bay*, 24 Can. Law Times Occ. N. 140, 36 N. S. 456, it was held under statute that a rate payer of the town was not an interested person, so as to disqualify him from acting in the making of an award for property taken by the town under eminent domain.

It has been held that the facts that one is a resident of a city which is largely interested as a shareholder and creditor of

a railroad company, and that he pays taxes upon his income in said city, but has no real estate therein, does not disqualify him as an arbitrator in proceedings by the company to take land under eminent domain. *Re McQuillan*, 12 Out. Pr. 294.

Where a taxpayer conveys his property before acting as a commissioner to lay out a highway, and would not, under the circumstances, be liable for taxes assessed for its construction, he is not disqualified as a commissioner. *Gray v. Middletown*, 56 Vt. 56.

The objection to a juror to assess damages against a city on account of a change of street grade, on the ground that he is a taxpayer, cannot be raised by the city, since his interest, if any, is in its favor. *Conklin v. Keokuk*, 73 Iowa, 343, 35 N. W. 444.

See also cases under subd. X., *infra*.

VIII. *Ownership of land affected by the proceedings.*

The fact that one is the owner of land which it is proposed to take under eminent domain, or which is likely to be assessed on account of an improvement therefor, has generally been held a disqualification. But in applying particular statutes, there has arisen considerable conflict in this regard. For instance in *State. Coward, Prosecutor, v. North Plainfield*, 63 N. J. L. 61, 42 Atl. 805, it was held that a commissioner in proceedings to open a street was not disqualified because he owned lots situated a hundred feet beyond the area of the benefit as fixed by the commissioners, although apparently one of the duties of the commissioners was to determine how far the benefit of the improvement extended, and consequently to determine whether the lots of the commissioner in question were benefited. But the court said that the statute required that the commissioners should be responsible freeholders of the borough; and that being so, they were necessarily required to determine whether or not the area of benefit included the lands they owned, no matter in what part of the borough they might be located; and unless it clearly appeared that the determination was not justified by the facts, their conclusion on this point was not to be interfered with.

And in *Foot v. Stiles*, 57 N. Y. 399, the court declared the law to be that the statutory duties of a commissioner of highways in that state were not such as at common law disqualified the commissioner from acting in proceedings to lay out a highway, although he owned land over which the highway passed. The commissioners, it was said, had no power to assess damages, but could only apply for authority to summon a jury; they could simply meet and "hear reasons" for or against laying out the highway, and file their report with the town clerk. The case, however, was one of trespass by a landowner, the defendant justifying that, as overseer, he had removed obstructions from the highway; and the court said that if it was wrong in the view above 47 L.R.A. (N.S.)

indicated, this action could not be maintained, because the proceedings could not be treated as a nullity, but action should have been brought to set them aside.

In *People ex rel. Tompkins v. Landreth*, 1 Hun, 544, also, although the decision apparently rests upon the ground of laches, the court indicated that it was of opinion that a highway commissioner might participate in laying out a highway over his own land. It was said that such commissioners, like assessors, must act in matters in which they have a pecuniary interest; that roads must be laid out and taxes must be assessed, and the injustice that may be done must be borne, or roads cease to be laid out and taxes assessed; that the statute makes no provision for substituting another in place of a highway commissioner, and if the interest of the public demands a highway over his land, how can it be laid out if he cannot act? But the damages were assessed by other commissioners, appointed by the court, upon application of the highway commissioners.

And in *Re Southern Boulevard*, 3 Abb. Pr. N. S. 447, upon the ground that highway commissioners perform duties of an administrative or quasi judicial nature, and that the maxim that no one shall be a judge in his own cause applied only to judicial officers, it was held that under statutes prescribing only that commissioners should be residents of the county, a commissioner in eminent domain proceedings was not disqualified because he owned land taken for the construction of a highway, although it appears that the duties of the commissioners were to estimate and apportion the damages. The court said, however, that the commissioner objected to did not act in the appraisal of his own land; that at common law a majority of the commissioners were authorized to exercise the powers and duties confided to them, and also that the objection should have been made at the time of the appointment of the commissioner.

To a similar effect is *Thompson v. Love*, 42 Ohio St. 61, where under a statute requiring that in the laying out or altering of highways, the county commissioner should appoint three disinterested freeholders as viewers to assess damages and benefits and report to the commissioners, and that the latter should "if, in their opinion, public utility required it," enter an order that the improvement be made, it was held that a commissioner was not disqualified to act in the proceedings because he owned land subject to assessment for benefits, and after the filing of the viewers' report, but before final order for the improvement, had signed the petition therefor. The court took the view that the proceedings of the commissioners up to and including the entering of the order were not of a judicial nature. It also said that it did not appear but that the other two commissioners were not as much disqualified as the one in question, and it seemed to be admitted that he could act if it was a necessity that he should; that this was conclusive upon the matter, but that,

upon principle, the facts did not show a disqualification.

A statute providing for the appointment of disinterested freeholders, none of whom shall be owners of property "upon or adjoining the line" of a railroad, to assess damages from its construction, does not, as matter of law, disqualify one whose land does not touch the railroad, but is located three quarters of a mile therefrom. *Newbecker v. Susquehanna R. Co.* 1 Pearson (Pa.) 57.

In one Pennsylvania case it seems to have been held that a report of viewers of highways was not invalidated because two of the viewers owned land across which the road passed. *Re Nelson's Mill Road*, 2 Leg. Op. (Pa.) 54, cited in 25 Am. Dig. Century ed. col. 1297.

But, as stated above, the weight of authority is apparently that an owner of land affected by the proceedings is disqualified to act as a commissioner therein: *RE ROCHESTER* (holding owner of land subject to assessment disqualified); *Re Road*, 8 Del. Co. Rep. 79 (holding that a landowner along whose division line a proposed highway passed was disqualified as a viewer); *Re Street*, 4 Luzerne Leg. Reg. 464 (holding that an owner of property liable to assessment for benefits for the opening of a street was disqualified as a viewer, although it might eventually be found by a disinterested jury that his property was not so benefited as to subject it to assessment); *Re Main Street*, 137 Pa. 590, 20 Atl. 711 (holding that an owner of property subject to assessment for widening of a street was disqualified as a viewer to assess damages and benefits, although the property was located on another part of the street): *State v. Delesdernier*, 11 Me. 473 (holding that an owner of land taken for a highway was incompetent to pass upon the question of its necessity or convenience, or to accept the return of a committee locating the road); *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394 (holding a commissioner appointed to lay out a highway and assess damages and benefits disqualified because of ownership of land assessed for benefits); *Wilson v. Burr Oak*, 97 Mich. 240, 49 N. W. 572 (holding that one financially interested in the laying out of a proposed highway, by reason of the ownership of land near the same, was disqualified to act in the proceedings); *Bradley v. Frankfort*, 99 Ind. 417 (holding, under statute requiring that, if any commissioner was interested, he should be incompetent, that one who was financially interested in the opening of a street, owing to ownership of property upon it which would be benefited thereby, was disqualified as a commissioner in the proceedings); *State, Kingsland, Prosecutor, v. Union Twp.* 37 N. J. L. 268 (holding that the interest of a commissioner on account of ownership of land subject to assessment for improvement of a highway was a ground for setting aside the proceedings).

Ownership of property liable to assessment will disqualify a commissioner in em- 47 L.R.A. (N.S.)

inent domain proceedings, under a statute providing that if any commissioner is specially interested in a proposed special assessment, he shall be disqualified from serving in that case. *Hunt v. Chicago*, 60 Ill. 183.

In *State, Winans, Prosecutor, v. Crane*, supra, it was said that the interest of a landowner whose property was assessed for benefits for the laying out of a highway was very different from that of a mere general taxpayer, which in some cases from necessity might be disregarded, or could be relieved against by the legislature.

In *State v. Conover*, 7 N. J. L. 203, the court approved the setting aside of the report of the proceedings of freeholders in laying out a highway where one of the parties was an owner of land through which the road ran, and participated in the proceedings, but did not sign the report.

It has been held, however, that the fact that a commissioner owns land adjacent to, but not crossed by, a proposed highway, does not create such an interest on his part in its establishment as to render void proceedings in which he participated, although he is also one of the petitioners for the road. *Webster v. Washington County*, 26 Minn. 220, 2 N. W. 697. It was said that no claim of damages to the commissioner could arise by reason of the opening of the road; that his only interest was that of an adjacent proprietor, indirectly benefited by the proximity of a new road, and the benefit he thus enjoyed would be participated in, though perhaps in unequal degree, by proprietors of all lands accessible to the road, and to a greater or less extent by the whole public that might have occasion to use it; that the interest was not such a direct and private one, as distinguished from one enjoyed in common with the public, as, in the absence of a disqualifying statute, would make void acts of the party affected by it.

It has been held also that since two statutes passed at the same session of the legislature, relating to the same subject, and not directly repugnant, may be considered as one enactment, where one of the statutes provides for assessment of damages in condemnation proceedings by three disinterested freeholders, and the other by a jury of disinterested freeholders not owning land within 1 mile of the contemplated road, the latter provision applied to appraisers under the first act, so as to disqualify those who own land within such distance. *McMahon v. Cincinnati & C. S. L. R. Co.* 5 Ind. 413.

A commissioner is disqualified to act in proceedings to vacate a highway where he owns land on each side thereof, and the absolute title to the land forming the highway would revert to him upon the discontinuance of the road. *People ex rel. Thompson v. Belden*, 132 App. Div. 558, 116 N. Y. Supp. 929.

The Indiana statute provides that one who is the owner of land along a proposed highway shall be incompetent as a viewer

thereof. *Daggy v. Green*, 12 Ind. 303, holding the report of disqualified viewers a nullity.

Attention is called in this connection to the fact that such cases as *Bickford v. Franconia*, 73 N. H. 194, 60 Atl. 98, and *Kieckenapp v. Wheeling*, 64 Minn. 547, 67 N. W. 662, holding that the proceedings for the establishment of a highway were not absolutely void, but only voidable, because of the participation of one who owns land crossed by the highway, apparently assume that such ownership disqualifies the party to act in the proceedings.

Although a statute authorizing the establishment of a drainage district provides only for the appointment of "competent persons as commissioners" in the proceedings, one is disqualified to act as commissioner whose wife owns land in the proposed district, although, as finally laid out by the commissioners, such lands are excluded, where they are subject to overflow and are benefited by the improvement, but, by reason of being excluded, are not required to pay for benefits. *King's Lake Drainage & Levee Dist. v. Jamison*, 176 Mo. 557, 75 S. W. 679. It was held that the report of the commissioners should be set aside, although two of the commissioners who acted were competent.

See also the case of *Re Friend*, 53 Me. 387, under heading "Stockholders," *infra*.

IX. Trustees.

The fact that one is a trustee of a church which, as a corporation, owns property liable to assessment for the opening of a street, does not disqualify him from acting as commissioner to award damages and assess the expenses of the improvement. *People ex rel. Howlett v. Syracuse*, 63 N. Y. 291. The court said: "It does not appear that he was a pew owner or had any pecuniary interest which would be affected by an assessment of the church property. The title was vested in the corporation. The trustees are charged with the control and management of the temporalities of the church, but are not subject to personal liability for its debts or assessments."

Also in *Re South 7th Street*, 48 Barb. 12, it was held that the fact that one held as trustee the legal title to land taken under eminent domain did not disqualify him as a commissioner to estimate the damages, where he has no beneficial interest in the award. The court said that the commissioner had no interest in the question of damages; that he could as well act in the assessment of damages as town and city assessors, who assess the property of their own relatives; and that any other rule would be impossible in the impartial management of cities and towns, where many of the questions are such as affect the private interest of a large number of people.

Although the two judges disagreed as to whether one who had subscribed for stock in a company to be formed for canal

purposes, but had made no payment at that time, and was never required to pay any instalment, could be considered a stockholder, so as to disqualify him from acting as juror in condemning land for the company, it was held in *Chesapeake & O. Canal Co. v. Binney*, 4 Cranch, C. C. 68, Fed. Cas. No. 2,645, that even regarding him as a stockholder he was not disqualified, on account of an equitable transfer of his interest, which placed him in the position of a mere trustee.

See also *People ex rel. Flint v. Cline*, 23 Barb. 197, under subd. XV., *infra*.

X. City officers.

A member of a city council is not disqualified from appointment as a commissioner of an improvement district in the city, under a statute providing only that commissioners shall be owners of real property in the district. *McDonnell v. Improvement Dist.* 97 Ark. 334, 133 S. W. 1126.

In *State ex rel. Andrews v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095, where damages for the opening of a street were assessed, according to the city charter, by the board of public works, the court said that the mere fact that the board of public works was composed of city officials did not make them less fair or impartial; that they were acting under the responsibility of an official oath, and had no more interest in the matter than other citizens, and that such board was a fair and impartial tribunal to assess the damages.

The fact that one is an assistant alderman of a town corporation which owns property liable to assessment for the opening of a street does not disqualify him as a commissioner to assess the damages. *Re 26th Street*, 12 Wend. 203. It was said that the corporation property did not belong to the council, nor did they pay the assessment otherwise than nominally; that the taxes of the commissioner in question were neither enhanced nor diminished in consequence of his office, and were no different from those of any other citizen of the town who contributed as much to the public burden.

But in *Pierce v. Bangor*, 105 Me. 413, 74 Atl. 1039, it was said that municipal officers were not disinterested parties to assess the value of land taken by the city under eminent domain; that they were financially interested in the result; and absolutely ineligible at common law.

And in *Re Abell*, 2 N. B. Eq. Rep. 271, under a statute providing that arbitrators in eminent domain proceedings should be disinterested, but that no person should be deemed disqualified on account of ownership of property subject to taxation, it was held that an alderman of a city seeking to acquire land by eminent domain was disqualified. The court said that the city council, consisting of the mayor and aldermen, had the entire control of the city government, including the administration of its fiscal affairs; that it was the duty of

the alderman to guard the taxpayers, and to see that the expenditures of the city were kept within proper limits, and as low as possible, consistent with good government; and though he was under no personal liability, he was practically one of the defendants, and could scarcely be considered as free from a bias in the direction in which his duty to the city led him.

XI. Petitioners.

There is considerable conflict of authority upon the point whether petitioners for a highway are such interested parties as to disqualify them to participate in the proceedings for its establishment. Part of the conflict may be due to the differences in statutory duties of the officers in such proceedings; for instance, it appears, as before stated, that a petitioner should be disqualified to pass upon the question of the necessity of a highway; but if the duties were dissociated, he might not be disqualified, after its necessity had been adjudicated, to assess the damages. But the duties are often performed by the same officer, and are not always precisely stated in the cases.

The following cases hold that petitioners for a highway are disqualified to participate in the proceedings for its establishment: *Re Public Road*, 5 Harr. (Del.) 242; *Epler v. Niman*, 5 Ind. 459 (as viewer, under statute requiring disinterested freeholders); *Conant's Appeal*, 102 Me. 477, 120 Am. St. Rep. 512, 67 Atl. 564 (as selectman to determine upon the location and propriety of the highway); *Ex parte Hinkley*, 8 Me. 146 (as one of the locating committee of the highway); *Almand v. Rockdale County*, 78 Ga. 199 (as juror to assess damages); *Keaton v. Godfrey*, 152 N. C. 16, 67 S. E. 47 (same).

Petitioners are not "indifferent" persons under a statute requiring the appointment of suitable indifferent persons to mark out a highway. *Anthony v. South Kingstown*, 13 R. I. 129.

The disqualification of a petitioner to act as a juror to assess damages for the opening of a highway is not removed by statute rendering citizens of a county, town, or city competent as jurors in cases where such corporations are parties. *Almand v. Rockdale County*, 78 Ga. 199.

A petitioner for the widening of a street is disqualified as a commissioner to assess the damages, under a statute providing that if a commissioner is interested in the matter of the assessment, the council shall appoint some discreet and impartial person in his place. *Hendrickson v. Point Pleasant*, 65 N. J. L. 535, 47 Atl. 465. It was said that the council must approve the commissioner's report, and that this commission was interested in making the assessment at such sum as would secure the approval of the council and thereby promote the improvement. The fact that the interested commissioner participated in the 47 L.R.A. (N.S.)

proceedings was regarded as a ground for setting them aside.

The appointment of one who signed the original petition as a re-viewer in proceedings for the establishment of a highway is such an irregularity as to require the setting aside of subsequent proceedings. *Re Ohio & R. Twp. Road*, 166 Pa. 132, 31 Atl. 74; *Re Road*, 4 Serg. & R. 200; *Re Road*, 4 Yeates, 479; *Re Road*, 5 Binn. 612.

In *Re Road*, 4 Yeates, 479, the court said it was inconsistent with the first principles of justice that the same person should be both judge and party.

And in *State ex rel. Iola v. Nelson*, 57 Wis. 147, 15 N. W. 14, although it was held that the irregularity in appointing a petitioner as a commissioner for alteration of a highway had been waived, the court said that it was settled that such a party was not disinterested within the meaning of the statute, and was therefore not qualified to act as a commissioner.

Also in *Williams v. Mitchell*, 49 Wis. 285, 5 N. W. 798, the court said that upon objection to a petitioner's acting as commissioner to pass upon a proposed alteration of a highway, it was the plain duty of the court to strike his name from the list; and that were the proceedings being reviewed in a direct action to set the same aside, it was probable that the determination of the commissioners would be reversed because they were not disinterested.

To the same effect is *State v. Delesdernier*, 11 Me. 473, holding that a petitioner is disqualified to act on a committee to lay out a road under a statute requiring the appointment of disinterested parties; also *Thompson v. Multnomah County*, 2 Or. 34, where the proceedings were set aside because petitioners were appointed as viewers of a highway. In the former case the court said that much was confided to the judgment of such a committee; that it was to estimate the damages, and frequently had discretionary power as to the location of the road; that it should have regard to the private interest and convenience of others over whose land the road was laid, as well as the public interest; and it was not intended to require the citizen to submit the question whether his property shall be thus taken, and also the question of damages, to the decision of those who had petitioned for the road.

Where, before a petition was presented to court, the names of certain petitioners were erased, in order that they might be appointed viewers, and the court, without knowledge of these facts, appointed them as viewers, it was held in *Re Road*, 129 Pa. 527, 19 Atl. 855, that their report should be set aside.

On the other hand, it has been held that parties who petitioned the legislature for the establishment of a ferry were not disqualified as jurors to inquire into the public convenience resulting from its establishment. *Somerville v. Wimbish*, 7 Gratt. 205.

And signers of a mere memorial to the

court for the establishment of a highway are not disqualified as viewers to mark out the road and report upon its convenience, where the application for the road was made by others, and the petitioners are not parties to the controversy. *White v. Coleman*, 6 Gratt. 138.

Also in *Crowley v. Gallatin County*, 14 Mont. 292, 36 Pac. 313, it was held that the proceedings would not be set aside because a petitioner was also appointed a viewer. The court said that while probably the better rule would exclude from the viewers those who petition for, as well as those who oppose, the opening of the road, since no statute was violated in appointing a petitioner, and since the action of the viewers was neither final nor controlling, but their recommendation at most was only advisory, and subject to be disregarded by the board of commissioners, and on the question of damages the parties had a right to demand a jury and to appeal, the objection that a viewer was also a petitioner was not sufficient to avoid the proceedings.

In *Parham v. Inferior Ct. Justices*, 9 Ga. 341, under statute directing the appointment of discreet and proper persons to make the view, it was held that an injunction would not be granted to prevent the opening of a highway merely because one of the viewers was a petitioner and principal promotor thereof.

Under a statute providing that in the laying out of highways, the town clerk shall deposit in a box the names of all residents of the town those names are on the list of those selected and returned as jurors "who are not interested in the lands through which such road is to pass," and shall draw the names of twelve persons as jurors to certify to the necessity of the highway, there was apparently a division of opinion in the case of *People ex rel. Edwards v. Potter*, 36 Hun. 181, as to whether the names of persons who had signed the application for a highway should be excluded in the drawing of jurors, on the ground of interest; although it was held by a majority of the court that the proceedings would not be set aside, as no substantial rights of the parties had been affected by failure to include the names of petitioners.

But under this statute in *People ex rel. Downey v. Dains*, 38 Hun. 43, where petitioners had been drawn as jurors, the court upheld the regularity of the proceedings, saying that the question was not properly raised; but, conceding that it was, the petitioners were not disqualified under the statute.

And in *Buckley v. Drake*, 41 Hun. 384, the court said that under the phrase "interested in the land" the legislature could not have intended to include those who signed the application for a road through it; that an applicant for a highway is no more interested in the land than a freeholder who is in favor of the road, and has not signed the application; and such 47 L.R.A. (N.S.)

a juror would undoubtedly be proper; that some method of challenge to review jurors who had expressed an opinion could have been provided, if an absolutely impartial jury was designed; and it was held accordingly that one who had signed the petition for the highway was not disqualified as a juror to certify to its necessity.

See also *Webster v. Washington County*, 26 Minn. 220, 2 N. W. 697, and *Thompson v. Love*, 42 Ohio St. 61, under subd. VIII., supra; also *Chase v. Rutland*, 47 Vt. 393, under subd. XV., infra.

XII. Employees.

a. In general.

Under a statute requiring the appointment of disinterested persons, it has been held that the facts that one is secretary of the board of trustees of a reclamation district, is appointed and paid by them, and holds office at their pleasure, and that they own a majority of the land in the district, do not disqualify him from appointment by the board of supervisors to assess damages and benefits from reclamation works, where he owns no land in the district, and has no pecuniary interest that could be affected by the assessment, although he acts as secretary of the board and as commissioner at the same time. *Lower Kings River Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630. The court said it thought the commissioner was a disinterested person in the sense of the statute, and "that the most that can be properly said against his appointment is that, if his relation to the board of trustees of the district was known to the board of supervisors at the time he was appointed, the appointment was injudicious, because the appointee, under such circumstances, was liable to a suspicion that he might be improperly influenced by members of the board of trustees of the district."

The mere fact that one has been employed by the city and is still occasionally so employed does not render him incompetent as a commissioner to award compensation for land taken by the city under eminent domain, under a statute requiring the appointment of disinterested persons. *Re Lands*, 20 Misc. 520, 46 N. Y. Supp. 640.

And it has been held that one who was not in the continuous employment of parties claiming damages under eminent domain, but occasionally acted for them as a notary public, was not disqualified as an arbitrator to assess the damages. *North Shore R. Co. v. Ursuline Ladies of Quebec*, Cassels's Dig. 2d ed. 36, Can. Sup. Ct. Dig. Col. 136.

But it has been held that one is incompetent as a viewer of a road who is a paid employee of the petitioners therefor. *Re Road*, 3 Kulp, 474, cited in 25 Am. Dig. Century ed. Col. 1297.

See also *Terminal R. Co. v. Gerbereux*, 55 Misc. 1, 104 N. Y. Supp. 735; *Roches-*

ter, S. & E. R. Co. v. Tolan, 116 App. Div. 696, 101 N. Y. Supp. 433; New York, W. S. & B. R. Co. v. Townsend, 36 Hun, 630, and English cases, under subd. III., *supra*.

b. Employment as attorney in other proceedings.

In *Douglass v. Byrnes*, 63 Fed. 16, where the principal question was as to whether the objection had been waived, it appears to have been conceded that the act of a commissioner appointed to assess damages in condemnation proceedings, in accepting a retainer and acting as attorney in another case for one of the parties, before completion of the condemnation proceedings, would disqualify him, and require the court to set aside the commissioner's report.

But it has been held that a commissioner in eminent domain proceedings by a city was not disqualified by reason of the fact that he had appeared as counsel for other property owners in similar proceedings, where the cases in which he appeared as counsel and as commissioner were distinct, and the rulings in the proceedings in which he acted as commissioner could not affect those in which he was counsel. *Re Low*, 124 N. Y. Supp. 1050. The decision was affirmed in 142 App. Div. 533, 127 N. Y. Supp. 26, upon the ground that the fact that the commissioner, both before and after his appointment, represented various property owners in other eminent domain proceedings by the city, was not a sufficient reason for his removal, where it did not appear that any of the proceedings were still pending. It was said that if, as soon as he appeared in any of the various proceedings against the city, application had been made to compel him to make a choice between the positions of judge and advocate, there would have been strong ground in support thereof; but that the delay in making the application until the proceedings in which he appeared as counsel had terminated, and the greatest source of danger resulting therefrom has ceased, led the court to look upon the situation as not substantially different from that which would have arisen had his employment as advocate ceased before his appointment as commissioner.

A commissioner in eminent domain proceedings by a city is not disqualified by reason of the fact that the special counsel in the proceedings in behalf of the city was employed by him in a personal action, not then brought to trial, to recover a commission of \$50. *Re Simmons*, 124 N. Y. Supp. 738.

The fact that one is an attorney for a railroad company which has business relations with the company owning a majority of stock in another railroad company, seeking to acquire land by eminent domain, does not disqualify him as a commissioner in the proceedings. *Re New York, W. & B. R. Co.* 151 App. Div. 50, 135 N. Y. Supp. 234.

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Nor is one disqualified as an arbitrator of damages which a town corporation is compelled to pay for change of a street grade by reason of the fact that, prior to the arbitration proceedings, he acted as chamber counsel for the solicitor of the corporation, on matters affecting the corporation, where he has not so acted during the proceedings, and there were no business connections between him and the corporation, but the matters upon which he advised with its solicitor were merely incidental to business relations between them. *Re Christie*, 25 Can. S. C. 551.

XIII. Stockholders.

Stockholders of a railroad company are not competent jurors in proceedings by the company to take land under eminent domain. *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Rock Island & A. R. Co. v. Lynch*, 23 Ill. 645. In the latter case the court said that such commissioners were quasi jurors, and that it was no answer to say that their report need not be, like a verdict of a jury, unanimous; that if the interested party had not acted on the board, there might be propriety in holding the report of the majority sufficient, but that the award was properly set aside where it appeared that he participated in all the proceedings, and presumably influenced them.

But a railroad company cannot object to the assessment of damages for land taken by it, on the ground that commissioners to assess the damages were stockholders of the company, since their interest, if any, was in its favor. *Strang v. Beloit & M. R. Co.* 16 Wis. 635.

A juror in proceedings to condemn land for a railroad is not disqualified by reason of the fact that he owns stock in another railroad company which has long before acquired the necessary lands and is in operation. *People ex rel. Vandeusen v. First Judge*, 2 Hill, 398.

And the fact that one was an incorporator of, and formerly owned stock in, a corporation which was the predecessor in interest of the company seeking to exercise the right of eminent domain, does not disqualify him as a commissioner in the proceedings, where it appears that he is not, and has not been for many years, a stockholder in either company, or in any way interested therein. *Re Brooklyn Elev. R. Co.* 32 App. Div. 221, 52 N. Y. Supp. 997.

It has been held that where a railroad company seeks to take adjoining lands of two other railroad companies, the fact that a party is a stockholder in one of the latter companies does not disqualify him as a juror in proceedings to take the land of the other company, although the case in which he is interested is to be tried immediately after that in which he sits as juror. *Com. v. Boston & M. R. Co.* 3 Cush. 25. It was argued, apparently with considerable force, that since the two cases related to adjoining pieces of land, and the persons summoned as jurors were the same in both

cases, that the verdict fixing the value of the land in the first case would have an important influence upon the estimation of damages in the second, and that it was for the interest of the juror as a stockholder in the company owning the lands to be taken in the second case to have the lands in the first instance appraised at a high rate.

A stockholder of a railroad company who owns land crossed by a proposed highway is incompetent to act in proceedings to lay out the road, under statute providing for the appointment of disinterested persons. *Re Friend*, 53 Me. 387.

Upon the principle that any, even the smallest, degree of interest in the question pending is a decisive objection to a juror, it was held in *Page v. Contoocook Valley R. Co.* 21 N. H. 438, that while the interest of a commissioner in eminent domain proceedings for the construction of a railroad was probably trifling, and might not have influenced his judgment on the question of damages, yet that the award of the commissioners must be set aside, where it appeared that one of them was a stockholder in a railroad company which had an agreement with the company in question, whereby the former was to operate both roads, and the joint net income was to be divided between them in proportion to the cost of each; the juror, in order to receive larger dividends, thus being interested in keeping the cost of construction of the railroad in question as low as possible.

It has been held that an award would not be set aside because the umpire appointed as the third party to make the award was interested as a surveyor and stockholder in a railroad company which was (according to the argument) "materially interested" in the railroad seeking to acquire the lands in question, and which, connecting with it, formed a continuous line. *Re Elliott*, 2 DeG. & S. 17, 12 Jur. 445; *Re Hawley*, 2 DeG. & S. 33, 12 Jur. 389.

Under a statute providing that no one should act as commissioner in any case in which he should be interested, it was held in *Reg. v. Aberdare Canal Co.* 14 Q. B. 854, 19 L. J. Q. B. N. S. 251, 14 Jur. 735, that proceedings of commissioners authorizing the construction of a bridge over a canal owned by a corporation would be set aside where directors and stockholders of a railroad company participated in the proceedings, and the bridge was to be constructed for the benefit of the railroad company in transporting coal from a nearby colliery.

See also *New Boston's Petition*, 49 N. H. 328, and *Re Quillan*, 12 Ont. Pr. 294, under subd. VII., *supra*; also *Chesapeake & O. Canal Co. v. Binney*, 4 Cranch, C. C. 68, Fed. Cas. No. 2,645, under subd. IX., *supra*.

XIV. Contributors to railroad aid fund.

Under a statute requiring that jurors shall not be interested in the issue to be

tried, subscribing \$125 to a "citizens' fund," the object of which was to raise a portion of the money necessary for purchasing a right of way and terminals for a railroad company, disqualifies men from acting as jurors to assess damages for the taking of land by the company. *Louisiana & A. R. Co. v. Moseley*, 115 La. 758, 40 So. 37, 5 Ann. Cas. 920. While it appears that the parties were not pecuniarily interested, they were held disqualified on the ground of interest in the sense of bias or partiality. The court said: "We are of the opinion that the jury should be composed, so far as possible, of men not only without pecuniary interest in the object sought to be carried out, but also of men taking no specially active steps toward its accomplishment."

Parties who have given to a railroad company, to aid in its construction, notes "payable when the cars run," are disqualified as jurors in the condemnation proceedings. *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383. It was said that such parties were interested in the construction of the railroad, and the amount the company might have to pay for the right of way was a very material item; that the jurors, by reducing the damages, would be aiding the company by so much in the construction of its line.

But, although it was found unnecessary directly to decide the point, the court in *Detroit Western Transit & Junction R. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73, indicated that its holding in any event would have been, that one who makes a gift to a railroad aid fund, takes no stock in the company, is not disqualified on account of interest to serve as a juror in proceedings to condemn land for another railroad, which is to be leased to the one so aided.

XY. Relationship.

a. In general.

The fact that the wife of a commissioner in eminent domain proceedings by a railroad company is a cousin of a stockholder in the company is not such a disqualification that, in the absence of a showing of prejudice, the report of the commissioners will be set aside. *Albany & N. R. Co. v. Cramer*, 7 How. Pr. 164.

One is not disqualified to act as a juror in eminent domain proceedings to assess damages for taking property for railroad purposes merely because he is a brother of one of the counsel for the railroad company. It was said that "justices of this court could not well recuse themselves because their brothers or their sons happen to be of counsel, nor does a lawyer with a large practice have to migrate from his parish because his brother happens to be made judge." *Louisville R. & Nav. Co. v. Morere*, 116 La. 997, 41 So. 236.

The fact that two of the viewers are brothers-in-law will not disqualify them. *Crowley v. Gallatin County*, 14 Mont. 292,

36 Pac. 313. The court said that jurors sitting in the trial of a cause may be related, and yet that fact is not a disqualification if they are not related to either party to the controversy.

b. To landowners.

Upon the principle that there is no affinity between the blood relations of the husband and the blood relations of the wife, it was held in *North Arkansas & W. R. Co. v. Cole*, 71 Ark. 38, 70 S. W. 312, that a juror was not disqualified from acting in the assessment of damages for land taken under eminent domain by reason of the fact that the half sister of his wife married the son of the party whose land was taken. The court said it was clear there was no such relationship as would disqualify the juror as matter of law, though the court could, in the exercise of its discretion, have excused him upon that ground.

In *Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949, it was held that a juror, upon appeal in eminent domain proceedings, was not disqualified by reason of the fact that he was a cousin of the wife of one whose lands had been assessed for the improvement, where the latter had not petitioned for nor remonstrated against the road, and was not a party to the appeal.

The fact that five out of twenty freeholders who certify to the necessity and propriety of laying out a highway are of kin to the owners of the land across which it passes, does not vitiate the proceedings, where the statute only requires that twelve freeholders shall certify. *Carmel v. Judges*, 7 Wend. 264.

One is not disqualified as a viewer of a highway by reason of the fact that he is related to a party who is not a petitioner, but who owns land one half mile from the highway, and is interested in its alteration, and who appears before the viewers and urges the improvement. *Re Road*, 29 Pa. 18. The court said it did not see that the landowner had any such legal interest as would render him incompetent to be a viewer himself in a matter of this kind, in which all citizens are more or less interested; that it is impossible to be as strict about questions of challenge for cause in road cases as in regular jury trials.

The fact that one is related to the trustee of a church which holds the title to land through which the proposed highway passes does not disqualify him from acting in proceedings to determine its necessity, under a statute disqualifying those of kin to the owners of land, or those interested in the land through which a highway is to pass. *People ex rel. Flint v. Cline*, 23 Barb. 197. It was said that any interest, even a fiduciary one, in the party himself, might to some extent bias his mind and be sufficient to warrant his exclusion; but that it was different as to the relative,—that the statute required that he be an

owner; and that a trustee of a religious society was not literally an owner of land which was, in fact, owned by the society; and therefore the relative of the trustee was not of kin to the owner.

An appraiser whose sister-in-law, niece, and nephews own land along the line of a proposed drainage ditch is not a disinterested party to assess benefits and damages, under a statute providing that consanguinity or affinity within the sixth degree by the civil law, or within the degree of second cousin, both inclusive, shall disqualify a person required to be disinterested in acting upon any matter. *High v. Big Creek Ditching Asso.* 44 Ind. 356.

Under the above statute, it was held in *Bradley v. Frankfort*, 90 Ind. 417, that a commissioner who was the father-in-law of a party owning property which would be benefited by the opening of a street was disqualified to assess damages and benefits from its opening.

In *People ex rel. Flint v. Cline*, supra, it was held that one who had married the niece of an owner of land over which a proposed highway passed was incompetent to certify to its necessity, under a statute disqualifying those of kin to the owner of land across which the road was to pass.

The fact that one is a brother-in-law of one over whose land a highway is located disqualifies him as a commissioner in the proceedings. *Taylor v. Worcester County*, 105 Mass. 225, holding the proceedings void.

And in proceedings to establish a private way, it was held in *Lyon v. Hamor*, 73 Me. 56, that parties were disqualified to pass upon the question of its necessity and to assess damages who were related as son and nephew to the party for whose benefit the road was laid out.

But in *Re Ogden Street*, 63 Hun, 188, 17 N. Y. Supp. 744, it was held, under a statute requiring the appointment of disinterested persons, that a commissioner in proceedings to lay out a street was not disqualified by reason of the fact that he was a brother-in-law of a silent partner in a firm owning land affected, or likely to be affected, by the proceedings.

c. To petitioner or applicant.

A commissioner is not disqualified to act in proceedings for the establishment of a highway by reason merely of the fact that his son and brother signed the petition, where it does not appear that they have a private interest as landowners or otherwise but have only a public interest in the matter. *Wilbraham v. Hampden County*, 11 Pick. 322.

Although a juror is related to a petitioner for a highway, in that the latter's wife is the aunt of the juror's wife, the report of the jury will not be set aside where the intimacy is so slight as to satisfy the court that there is no cause for apprehension that improper influences would be brought to bear to bias the judgment of

the juror. *Re Sadsbury Road*, 9 Pa. Co. Ct. 521.

It has been held that interest of a commissioner in the establishment of a highway, by reason of the fact that he is a cousin of a petitioner, is too remote to disqualify him from acting in proceedings to determine whether the road should be established, under a statute requiring that commissioners shall be disinterested. *Chase v. Rutland*, 47 Vt. 393. The court said that the statute was intended to refer to those so situated that the establishment or refusal to establish a highway would not directly affect their pecuniary interests; that the difference between the interest of a petitioner and that of a taxpayer was one only of degree, the petitioners having no more interest in the proceedings than any taxpayer, except in the matter of costs; and it was difficult to see any good reason for holding that relationship to a petitioner would disqualify, and to a taxpayer would not; and it was evident that the legislature did not contemplate that relationship to a taxpayer in the town should be a disqualification.

In *Bogue v. DeLong*, 147 Mich. 63, 110 N. W. 119, it was held that the fact that the wife of a member of a township board was a sister of the deceased wife of one of the applicants and principal promoter of a highway, and had signed a former application for the opening of a highway, did not necessarily disqualify him from acting in the proceedings to determine the necessity of the road. It was said that these facts, at most, were only evidence of partiality or interest. But the decision seems to be based upon the fact that the return, which the court said must be taken as true, stated that the member was not interested in the establishment of the highway, and was without prejudice or partiality.

But the fact that parties are related to the principal petitioner for a highway, in that one of them is the brother and the other the father-in-law of the petitioner, disqualifies them to act as viewers to determine the necessity for the road and assess damages, under statute requiring the viewers to be disinterested persons,—especially where the petitioners must pay the costs and expenses if the petition is not granted. *Beck v. Biggars*, 66 Ark. 292, 50 S. W. 514.

And it has been held that the fact that one is related to a petitioner, in that he is the brother of the petitioner's mother, disqualifies him to act on a committee to locate the highway, under statute requiring that the members of the committee be disinterested. *Clifford's Appeal*, 59 Me. 262. The court said that the petitioners might be held responsible for costs, which liability constituted an interest; and that relationship to the interested party disqualified.

In *Groton v. Hurlburt*, 22 Conn. 178, it was held that the fact that a county commissioner was a brother-in-law of a petitioner did not disqualify him from

acting in the proceedings to lay out the highway.

But in *Phillips v. Tucker*, 3 Met. (Ky.) 69, it was held that one who was a brother-in-law of the plaintiffs in the motion for a highway was not a "fit" person, as required by statute, to be appointed a viewer; and that the report made by him and another was, on this account, properly set aside.

To the same effect is *Re Road*, 6 York Leg. Rec. 149, cited in 25 Am. Dig. Century ed. col. 1297, holding that the report of viewers should be set aside where one of their number was a brother-in-law of the petitioner.

In *People v. Wheeler*, 21 N. Y. 82, it was held that proceedings of highway commissioners in discontinuing a highway should not be set aside merely because one of the commissioners was a brother of the person upon whose application the proceedings had been instituted. It did not appear that the applicant had any pecuniary interest in the discontinuance of the road other than as a taxpayer, the statute empowering anyone to initiate the proceedings who was liable to be assessed for highway labor, and it was said that the public, and not the applicant, were substantially the parties to the proceedings.

See also *King's Lake Drainage & Levee Dist. v. Jamison*, 176 Mo. 557, 75 S. W. 679, under subd. VIII., *supra*.

XVI. Miscellaneous.

The fact that one is engaged in the business of manufacturing tile has been held not to disqualify him as a commissioner to view a proposed tile drainage ditch, and to report to the court for or against its construction, in the absence of a showing that he has some interest in the particular ditch under construction. *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

It has been held that the owner of a mortgage upon land liable to assessment for the construction of a drain is disqualified to act as commissioner in proceedings for its establishment, under a statute disqualifying one who is interested by reason of owning land liable to assessment for benefits, and making provision also in cases where the commissioner "may be otherwise disqualified to act." *Lickly v. Bishopp*, 150 Mich. 256, 114 N. W. 69.

While in general the question of waiver is not included in this note, attention is called to the case of *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383, holding that the objection that the jurors were interested could not, upon grounds of public policy, be removed by stipulations of the parties. It was said that the law looks beyond the effect upon the immediate parties to the action, and, while they might by stipulations waive any personal objections, could not waive the rights and interests of the public, and if the law permitted an interested person to act as judge or juror, no matter how impartially

and honestly he should act, yet his motives would be questioned, and the result would be to bring the administration of the law into disrepute.

In *Roanoke City v. Berkowitz*, 80 Va. 616, it being conceded by the city that the damages awarded by commissioners for land taken by it under eminent domain were not excessive, provided the defendant's view of the law were correct, it was held that the proceedings of commissioners would not be set aside, even admitting that one of them was disqualified on account of interest, since no substantial injury had been done.

R. E. H.

KANSAS SUPREME COURT.

KEMPER GRAIN COMPANY, Appt.,

v.

ALVIN HARBOUR, Doing Business as
Harbour Grain Company, et al.

(89 Kan. 824, 133 Pac. 565.)

Sale — wheat in transit — transfer of bill of lading.

In an action by the seller of a quantity of wheat to reclaim it against subvendees because of the failure of the buyer to pay for it, held, that a finding against the plaintiff is supported by evidence tending to show the following facts: The plaintiff acquired title to the wheat while in the hands of the railroad company by pay-

Headnote by MASON, J.

Note. — Right of purchaser of, or creditors levying on, goods sold for cash, but delivered without payment.

This note is supplemental to notes in 13 L.R.A. (N.S.) 697, and 29 L.R.A. (N.S.) 709.

A sale of goods for cash does not pass title, even as to a subsequent purchaser from the vendee purchasing in good faith for a valuable consideration, where the delivery of the goods was made with the understanding that a check tendered by the buyer to the seller represented the cash, since the delivery under such circumstances is conditional upon the check being honored. *Johnson v. Lankovetz*, 57 Or. 24, 29 L.R.A. (N.S.) 809, 102 Pac. 799, 110 Pac. 398.

Compare with *First Nat. Bank v. Griffin*, 31 Okla. 382, — L.R.A. (N.S.) —, 120 Pac. 595, holding that where goods are sold for cash and delivered, the seller taking the buyer's check for the price, which, on presentment within due time, is dishonored, the seller may either recover his goods in replevin, or the value thereof, from the buyer and all who have no greater equities.

But, although a sale is for cash to be paid upon delivery, if the articles are in the hands of a bailee, and the seller gives to the buyer a delivery order running to the buyer or order, a subsequent purchaser from the buyer relying upon the order will

be protected as against the original seller, although the order was given the buyer only to enable him to have the grain weighed before accepting it, it appearing, however, that it was the custom under such circumstances that the buyer pay a certain per cent of the purchase price at the time of the delivery of the order, which custom was not followed. *Baltimore & O. S. W. R. Co. v. Good*, 82 Ohio St. 278, 29 L.R.A. (N.S.) 713, 92 N. E. 435.

Although produce is shipped by the carload, and orders for delivery thereof to the purchaser with draft attached for the purchase price are sent to the bank, title will nevertheless pass enabling the purchaser to give a subsequent buyer from him a good title, where the bank delivers the orders without payment, and the agents of the seller deliver the possession of the property. *Cox v. Early*, — Tex. Civ. App. —, 143 S. W. 345.

Statement by MASON, J.:

The precise contents of the memoranda exchanged by the Kemper Grain Company and Alvin Harbour, doing business as Harbour Grain Company, referred to in the following opinion, are shown by these copies:

Harbour Grain Company, 209 Board of Trade, Wichita, Kansas.

Member of Wichita Board of Trade.

Codes: Robinson's Riverside.

No. 295. 12/13/1—.

Kemper Grain Co., City,—

Gentlemen:

This confirms purchase of you to-day by person (Johns) of one car $\frac{3}{60}$ hard wheat, at 95c per bu., basis Kansas City, subject to

be protected as against the original seller, although the order was given the buyer only to enable him to have the grain weighed before accepting it, it appearing, however, that it was the custom under such circumstances that the buyer pay a certain per cent of the purchase price at the time of the delivery of the order, which custom was not followed. *Baltimore & O. S. W. R. Co. v. Good*, 82 Ohio St. 278, 29 L.R.A. (N.S.) 713, 92 N. E. 435.

Although produce is shipped by the carload, and orders for delivery thereof to the purchaser with draft attached for the purchase price are sent to the bank, title will nevertheless pass enabling the purchaser to give a subsequent buyer from him a good title, where the bank delivers the orders without payment, and the agents of the seller deliver the possession of the property. *Cox v. Early*, — Tex. Civ. App. —, 143 S. W. 345.

And see *KEMPER GRAIN CO. v. HARBOUR*, holding delivery of a bill of lading sufficient to pass title as between the seller and a bona fide purchaser from the buyer, although the sale was for cash and the seller drew upon the buyer through a bank for the purchase price.

As to effect of delay in attempting to regain property, see note to *Frech v. Lewis*, 11 L.R.A. (N.S.) 948.

A. G. S.

sample inspection and our weights, shipment at once, *via* Santa Fé.

Car 23549 AT applies.

To be ordered to our elevator.

Harbour Grain Co.,

cw

J. Alvin Harbour.

Attach memorandum to your drafts showing your weights.

The Kemper Grain Co.

103-4 Board of Trade, Kansas City, Mo.;

323 Sedgwick Bldg., Wichita, Kans.;

Coffeyville, Kans.

This contract is subject in all respects to the rules and regulations of the Board of Trade of the issuing office.

Wichita, Kans. 12/13/10.

Harbour Grain Co., City:—

We confirm sale to you by sample of one car cap. bushels No. 2 hard 60-pound wheat, at 95 cents f. o. b., Kansas City basis, Wichita weights, Wichita grades, spot shipment. Bill cars: Car 23549 A. T. ordered to your elevator.

Accepted:

[Sign here].....

It is understood and agreed that this confirmation is a part of the contract, and that if the grain mentioned above is not shipped within the specified time, we reserve the right at our option to cancel, extend time, or buy in for sellers' account, and that this contract is not performed until destination, weights and grades mentioned above are obtained.

Cars to be loaded to capacity.

We urge you to take up with us immediately by wire any objections to this contract, failing to hear from you immediately we will consider the same fully accepted.

The Kemper Grain Co., by Johns.

The receipts for bills of lading, to which reference is made, were in the following form (the italicized portion being filled in, the remainder constituting a printed blank):

Received of *Kemper Grain Co.*

Original Bill of Lading covering shipment described as follows:

Shippers' Order. Notify *Kemper Grain Co.* Destination, *Wichita, Ks.*

Origin.	Date.	Car No. and Initial.	Contents	Weight.	Shipper.
<i>Lewis Ks.</i>	<i>12/7/10.</i>	<i>17518 A. T.</i>	<i>Wht.</i>	<i>55,000</i>	

Wichita, Kansas 12/13/10.

Time Ordered 2:00 P. M...

Set for unloading to *J. R. Ness, Agent,
Harbour Elevator.* *Santa Fé R. R.*

By *REJ—12 13 10.*

47 L.R.A.(N.S.)

Mr. Ross B. Gilluly, for appellant:

The documents which appellant attached to its draft, which went to protest on December 15, 1910, were, in contemplation of law, bills of lading, and carried title to the cars of wheat indicated therein.

Freeman v. Kraemer, 63 Minn. 245, 65 N. W. 455.

Where goods are shipped, and by the bill of lading or shipping receipt are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods.

35 Cyc. 332.

Disregarding documents attached to appellant's draft, and granting, for sake of argument, they have no merit as bills of lading, the "delivery" (so-called) to Harbour's track (so-called) was, at most, only conditional, and made in the contemplation that payment would be made before Harbour should take possession of the wheat.

People's State Bank v. Brown, 80 Kan. 520, 23 L.R.A.(N.S.) 824, 103 Pac. 102; Osborne v. Francis, 120 Am. St. Rep. 871, note; Frech v. Lewis, 218 Pa. 144, 12 L.R.A.(N.S.) 369, 67 Atl. 52; Hallowell v. Milne, 16 Kan. 65; Branson v. Heckler, 22 Kan. 617; Austill v. Hieronymus Bros. 124 Ala. 376, 27 So. 255; Allen v. Hartfield, 76 Ill. 358; Woolsey v. Axton, 192 Pa. 526, 43 Atl. 1029; Bloxam v. Sanders, 4 Barn. & C. 941, 7 Dowl. & R. 396, 28 Revised Rep. 519; Bergan v. Magnus, 98 Ga. 514, 25 S. E. 570; 35 Cyc. 328; Armour v. Pecker, 123 Mass. 143; Reed v. Upton, 10 Pick. 522, 20 Am. Dec. 545; Dannefelser v. Weigal, 27 Mo. 45; State use of Nelson Distilling Co. v. Green Tree Brewery Co. 32 Mo. App. 276; Farmers' & M. Nat. Bank v. Hazeltine, 78 N. Y. 104, 34 Am. Rep. 519; Kinsey v. Leggett, 71 N. Y. 387; Draper v. Jones, 11 Barb. 263; Edwards v. Glancy, 1 Ohio C. C. 453, 1 Ohio C. D. 253; Windle v. Moore, 1 Chester Co. Rep. 409; National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; Globe Mill. Co. v. Minneapolis Elevator Co. 44 Minn. 153, 46 N. W. 306; R. L. Moss & Co. v. Sell, 8 Ga. App. 588, 70 S. E. 18; Thomas v. First Nat. Bank, 66 Ill. App. 56; Benjamin, Sales, 6th ed. 255; Mechem, Sales, § 538; McManus v. Walters, 62 Kan. 128, 61 Pac. 686.

Harbour could convey no better title than he himself had.

Bills of lading are not negotiable.

6 Cyc. 424; Porter, Bills of Lading, § 438; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 560, 25 L. ed. 892; Wichita Sav. Bank v. Atchison, T. & S. F. R. Co. 20 Kan. 526; Hutchings v. Missouri, K. & T. R. Co. (Sealy v. Missouri, K. & T. R. Co.) 84

Kan. 479, 41 L.R.A.(N.S.) 500, 114 Pac. 1077.

Messrs. W. H. H. Platt, Thomas R. Marks, and Miller & Miller, for appellees Christopher et al.

Appellant so conducted its course of dealing with Harbour as to enable him to deal with the wheat as his own, and appellant is therefore estopped as against these appellees.

Third Nat. Bank v. Smith, 107 Mo. App. 181, 81 S. W. 215; Depew v. Robards, 17 Mo. 580; Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; Young v. Bradley, 68 Ill. 553; Wichita Sav. Bank v. Atchison, T. & S. F. R. Co. 20 Kan. 519; Missouri, K. & T. R. Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; Sawyer v. Symms, 39 Kan. 148, 17 Pac. 799; State v. Matthews, 44 Kan. 604, 10 L.R.A. 308, 25 Pac. 36; Daugherty v. Fowler, 44 Kan. 628, 10 L.R.A. 314, 25 Pac. 40.

The sale was on credit.

Benjamin, Sales, 259; Blackburn, Sales, 2d ed. 147, 149, 315; Third Nat. Bank v. Smith, 107 Mo. App. 181, 81 S. W. 215; Anstedt v. Sutter, 30 Ill. 164; Hall v. Richardson, 16 Md. 396, 77 Am. Dec. 303; Haskins v. Warren, 115 Mass. 514; People's State Bank v. Brown, 80 Kan. 520, 23 L.R.A.(N.S.) 824, 103 Pac. 102.

There was an actual delivery of the grain and the passing of title therein to Harbour.

Tiedeman, Sales, § 85, p. 207; Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858; National Bank v. Baltimore & O. R. Co. 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

Messrs. R. R. Vermillion, Earle W. Evans, and Joseph G. Carey, for appellee National Bank of Commerce:

Cash payment on delivery of the wheat was waived.

Fishback v. G. W. Van Dusen & Co. 33 Minn. 117, 22 N. W. 244; Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 N. W. 788; Parker v. Baxter, 86 N. Y. 593; People's State Bank v. Brown, 80 Kan. 522, 23 L.R.A.(N.S.) 824, 103 Pac. 102.

If the sale was a conditional one, and the property was delivered to Harbour without payment, then the bank, knowing nothing of the conditions, was an innocent purchaser, and is protected by the statute.

Van Duzor v. Allen, 90 Ill. 499; Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; Thompson v. Wedge, 50 Wis. 642, 7 N. W. 560; Van Leeuwen v. Fish, 28 Misc. 443, 59 N. Y. Supp. 183; Regier v. Craver, S. & A. & S. Plow Co. 54 Neb. 507, 74 N. W. 831; Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298; Hogan v. Detroit United R. Co. 154 Mich. 478, 118 47 L.R.A.(N.S.)

N. W. 140; Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Harp v. Patapsco Guano Co. 99 Ga. 752, 27 S. E. 181; Johnston v. Wood, 19 Wash. 441, 53 Pac. 707.

The appellant by its act placed Harbour in a position where he could deliver the grain to the railroad company and take therefrom bills of lading and secure money thereon from the National Bank of Commerce, and it is now estopped from claiming the property.

Hutchings v. Missouri, K. & T. R. Co. (Sealy v. Missouri, K. & T. R. Co.) 84 Kan. 479, 41 L.R.A.(N.S.) 500, 114 Pac. 1077; Wichita Sav. Bank v. Atchison, T. & S. F. R. Co. 20 Kan. 519; Third Nat. Bank v. Smith, 107 Mo. App. 178, 81 S. W. 215; Midland Nat. Bank v. Missouri P. R. Co. 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521; National Bank v. Baltimore & O. R. Co. 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134; Scheuermann v. Monarch Fruit Co. 123 La. 55, 48 So. 647.

Messrs. W. R. Smith, C. Angevine, Ball & Ryland, and McAnany & Alden also for appellees.

Mason, J., delivered the opinion of the court:

The Kemper Grain Company owned several cars of wheat upon the tracks of the Santa Fe Railway Company at Wichita. It made a bargain with Alvin Harbour, doing business as the Harbour Grain Company, for the sale to him of the wheat. Without having paid for it, Harbour obtained possession, or such color of possession as enabled him to reship it in his own name to his own order, and to procure bills of lading from the railway company. Upon the strength of these bills of lading he sold the wheat to different persons, receiving payment. The Kemper Grain Company, not having been paid, and claiming still to be the owner of the wheat, brought replevin for it while it was physically in the control of the railway company, making the various claimants parties. Upon a trial the court found generally against the plaintiff, and rendered judgment accordingly. The plaintiff appeals.

The transactions with reference to the several cars of wheat were not precisely the same, but the differences were not such as substantially to affect the questions of law involved. For convenience the facts will be stated regarding two cars of wheat claimed by B. C. Christopher & Company, and the discussion will be confined to the controversy with respect to them. These defendants maintain: First, that the deal between the Kemper Company and Harbour amounted to an actual sale of the wheat on

credit; that the title passed to Harbour; that he sold to B. C. Christopher & Company, who thereby became the owners; and that Harbour's failure to pay the Kemper Company cannot affect their rights. As a second proposition they contend that, even if there was not a completed sale and passing of title to Harbour from the Kemper Company, the Kemper Company, in the course of the negotiations for a sale, voluntarily gave Harbour possession of the wheat, intending thereby a complete and unrestricted delivery, not merely for some temporary purpose, as for examination of its quality; that even if a sale for cash were in contemplation, and even if the Kemper Company had the right as between itself and Harbour to reclaim the wheat on account of the nonpayment of the price, it cannot assert title against the Christophers, who in good faith bought and paid for it, believing and being justified in believing, that Harbour owned it.

The trial court made no special findings, and must be deemed to have resolved every conflict of evidence and every question of the credibility of a witness against the plaintiff, and to have made every permissible inference in favor of the defendants. Therefore the first question of law to be determined is this: Is there any evidence to support a finding that the Kemper Company sold the wheat to Harbour on credit? We are constrained to answer this in the affirmative. For simplicity in statement we shall at times speak of matters which there is some evidence to support, as though they were established facts. The plaintiff's manager at Wichita testified that he sold the wheat to Harbour, having no special arrangement as to payment different from that in the case of other cars sold to him; the sale being made under the rules of the Wichita board of trade, and the terms cash. Confirmations of the sale were exchanged, forms of which are given in the preliminary statement. The body of Harbour's confirmation as to one car (the others being substantially the same) read:

"This confirms purchase of you to-day by person (Johns) of one car $\frac{3}{4}$ hard wheat, at 95c per bu., basis Kansas City, subject to sample inspection and our weights, shipment at once, *via* Santa Fé.

"Car 23549 AT applies.

"To be ordered to our elevator."

The body of the corresponding confirmation by the Kemper Company read:

"We confirm sale to you by sample of one car cap. bushels No. 2 hard 60-pound wheat, at 95 cents f. o. b., Kansas City basis, Wichita weights, Wichita grades, spot shipment. Bill cars: Car 23549 A. T. ordered to your elevator."

47 L.R.A. (N.S.)

The precise character of the transaction is not definitely determined by the face of these writings. Such determination may be affected not only by evidence of the meaning of any technical terms used, but especially by the conduct of the parties in relation to delivery and by the provisions made for collecting payment. The actual manner in which business between the Kemper Company and Harbour was conducted becomes, therefore, of the greatest importance. The wheat was bought by the Kemper Company at a point on the Santa Fé Railway near Wichita. The original owner shipped it to his own order at Wichita, and drew upon the Kemper Company at Kansas City for his pay, attaching the bill of lading to his draft. The draft was paid, and the bill of lading was sent to the company's manager at Wichita. The company therefore had the two cars of wheat upon the track at Wichita, and had the bills of lading as evidence of its ownership. It could, of course, reship the wheat if it desired. Under the rules and practice of the railway company it had the privilege of having the cars delivered without further charge, by means of a belt line, to any one of a considerable number of local industries. But before the Santa Fé Railway would set out a car for unloading at any siding on the belt line, it required the surrender to it of the bill of lading. In exchange it would give the owner a receipt for the bill of lading, a form of which is shown in the preliminary statement. A copy or duplicate of this receipt would be given to the employees operating the belt line, who would place the car in conformity with the disposition there indicated.

In the present case the Kemper Company, having the two cars of wheat thus subject to its control, negotiated the sale to Harbour. It then delivered the bill of lading to the railway company and received a receipt containing the words: "Set for unloading to Harbour elevator." It attached this receipt to a draft upon Harbour for the price, and, in accordance with its custom, sent the draft for collection to a Kansas City bank. The draft was sent by the bank to its correspondent at Wichita, and on presentation Harbour failed to pay it. The forwarding of the draft to Kansas City and its return to Wichita had taken up, as usual about two days time. In the meanwhile the railway company had delivered the bill of lading and the duplicate receipt to the employees operating the belt line, and they had set out the cars on the siding at the Harbour elevator. Harbour negotiated a sale of the wheat to B. C. Christopher & Company, shipped it to his own order at Kansas City, drew upon Christopher & Company for the price, attaching

the bill of lading. The draft was paid, and while matters stood in this situation the Kemper Company brought its action.

The plaintiff contends that there was no intentional or valid delivery of the wheat to Harbour; that in the ordinary course of business the car would not have been set out to the Harbour elevator at once, but would have reached there about the time of the return of the draft from Kansas City; that Harbour had no right to exercise any control over the wheat until he had paid the price and obtained the receipt (for the bill of lading) which was attached to the draft; that with a fraudulent purpose he procured the cars to be placed on his siding at once, and wrongfully took possession of the wheat. These contentions involve a number of propositions which we must regard as questions of fact, to be determined by the trial court upon all the evidence.

Did the Kemper Company intend a delivery of the wheat to Harbour? While it had the bill of lading in its possession, it was absolutely secure. The fact that the railway company required the bill of lading to be delivered up before it would set out the car at the Harbour elevator, and that the Kemper Company acquiesced in this requirement, is some evidence that both parties regarded the direction placed upon the duplicate receipt, to set the cars for unloading at the Harbour elevator, as contemplating an actual delivery. The receipt cannot be said, as a matter of law, to be the equivalent of a bill of lading. The evidence does not conclusively establish that it was so regarded.

Did the Kemper Company intend to exact payment of the price as a condition of the passing of the title? It could have made the delivery unquestionably contingent upon payment, and chose not to exercise the power. It could have caused its draft to be presented to Harbour at once, but it voluntarily elected to collect it through Kansas City, thereby necessarily causing a delay of two days. We do not think it can be said, as a matter of law, that a literal cash on delivery payment was intended, or that the evidence conclusively establishes that intention. The trial court had a basis for finding, and must be deemed to have found, that the Kemper Company contemplated a delay of payment for two days, and was content to give credit for that time. This view is strengthened by the fact that for a period of substantially six months Harbour had succeeded in doing business upon the capital of the Kemper Company. He would buy wheat from the company, have delivery made at his elevator, and find a buyer, upon whom he would draw for the price with the bill of lading attached. He

would then cash the draft, and with the proceeds take up the Kemper draft, when it arrived at the end of its two days' trip. If the sale by the Kemper Company to Harbour was made upon credit, as the court must be deemed to have found upon what we regard as sufficient evidence, the Christopher firm acquired a good title to the wheat, and the debatable questions of law argued on behalf of the plaintiff do not require decision.

If it should be conceded that the Kemper Company, while intending an actual delivery of the wheat to Harbour, intended at the same time an immediate payment of the purchase price, or intended that the title should not pass without payment, the question whether it could, by reason of the non-payment, reclaim the property after it had passed into the hands of an innocent purchaser, is one upon which there is a sharp conflict of judicial opinion. In *People's State Bank v. Brown*, 80 Kan. 520, 23 L.R.A. (N.S.) 824, 103 Pac. 102, this court went very far in upholding the right of a seller who intended no extension of credit, to reclaim his property after a considerable interval, where it was held by an attaching creditor of the buyer. If the property had reached an innocent purchaser, a very different question would have been presented. The cases bearing on that question are collected in a note in 13 L.R.A. (N.S.) 697. A typical case supporting the right of the seller to retake his goods, even as against an innocent purchaser, is *National Bank v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560, where it was held that one who had sold goods for cash, taking a check from the buyer, was entitled, upon the dishonor of the check, to reclaim the goods even from an innocent subvendee for value. In the note referred to it is said: "While the Massachusetts court has gone as far, perhaps, as any of the courts in protecting the original vendor, yet that court will refuse to extend its protection to him where it appears that he makes an unconditional delivery of the property to the vendee. Thus, in *Goodwin v. Boston & L. R. Co.* 111 Mass. 487, the vendor of a large quantity of grain sold without any special agreement as to payment caused the delivery of the same to be made to the buyer by giving an order to him on a warehouse for the amount sold. It appears that it was the usage of the grain trade, under which this grain was sold, to consider a sale such as the one mentioned a cash sale, and to give to the buyer an order for delivery before payment was made, and to allow him not exceeding ten days before calling on him for payment. Before the expiration of the ten days, the buyer

had transferred the property to a third person under replevin of the original vendor. It was held that he had waived the right to insist upon payment as a condition precedent to the passing of title; the court saying: 'Upon such contracts the seller is not bound to deliver without payment of the price at the same time. But, if he does make an unqualified delivery, he waives his advantage, and the title passes, and his lien for the price is discharged.' 13 L.R.A. (N.S.) 697.

A valuable discussion of the question is found in a recent text-book; the author's conclusions, with the reasoning upon which they are based, being shown by these excerpts, the portions thought to be especially to the purpose being italicized: "Whether a sale is complete with a lien retained by the seller, or whether the property has not passed, and will not pass until the buyer pays the price, is a question that has some importance when merely the rights of the buyer and the seller are concerned. . . . The greatest importance of the question arises, however, when the rights of third persons are concerned. If the property does not pass till payment, a purchaser from the buyer gets no title. . . . The cases which present difficulty are where the seller has voluntarily parted with possession, and for a purpose other than the temporary one of examination or the like. *It is universally admitted in the decisions that delivery is at least evidence of a waiver, but it is also generally said that it is only evidence, and that the seller's intent not to waive the benefit of his condition may be shown.* An analysis of the situation upon principle makes it evident that the real question is, Does the seller assent to the transfer of the property? and in order to answer this question, the original bargain and what is subsequently done must both be considered. If the original bargain was for a cash sale, that must mean that the buyer was to have neither the title nor the use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment of the property, though not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if, after bargaining for a cash sale, the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. *Such a delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence.* . . . Sometimes after a bargain for a cash sale the buyer

gives in payment of the price a worthless check, and it has been held that such a false check is no payment; and that not only does no title pass to the fraudulent buyer, but that the seller may assert his title against an innocent purchaser from the buyer. It is submitted that such decisions are unsound. The reasoning upon which they rest is that a worthless check is no payment of the price, and the condition has not happened upon which the property was to pass. But the real question is, Did the seller assent to transfer the ownership in the goods? and it can hardly be doubted that he did. If a seller should say, 'You must not deal with these goods, though I have put them in your hands, until I collect the check,' that would show an intent not to transfer the property to the buyer. *But where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels inclined.* It is true that this assent to the transfer of the property to the buyer has been procured by fraud; therefore, the seller may reclaim the goods from the fraudulent buyer. But, as in other cases where the seller is induced to part with his property by fraud, the voidable title of the fraudulent buyer becomes an indefeasible title upon a bona fide purchaser from the fraudulent buyer. The matter may be thus summarized: If the goods are delivered without any permission, express or implied, to the buyer to deal with them as his own until the price is paid, the condition that payment shall be simultaneous with the transfer of title is not waived; but if the seller, on delivering the goods, does so without restriction, so that the buyer is violating the terms of no bargain if he uses the goods as his own, it is a conclusion of law that the transaction is not properly a cash sale. At most, it is what has been commonly called a conditional sale; and the natural inference is that the transaction is not even a conditional sale. *A delivery to the buyer with authority to use the goods immediately should be a conclusive evidence of transfer of the property, in the absence of pretty clear evidence showing an intention to reserve the title.*" Williston, Sales, § 346.

The conclusion of the trial court not only finds support in the evidence; it accords with the principle that when one of two persons, equally entitled to consideration so far as their purposes are concerned, must suffer from the delinquency of a third, the loss more properly falls upon him who, having readily at hand the means of protection, has failed to avail himself of them.

It is argued that some of the provisions of

the memoranda confirming the bargain between the Kemper Company and Harbour. regarding inspection and weights, require a finding that title did not pass. We think, however, these provisions are not conclusive, but merely matters to be taken into account in determining the real intentions of the parties. The contention is made that the defendants were not innocent purchasers from Harbour, but had knowledge of facts which, by imposing upon them a duty of inquiry, charged them at least with constructive notice of the plaintiff's rights. This question also was one fairly to be determined by the court under all the evidence.

As already stated, the issues between the plaintiff and the other defendants are controlled by the same considerations. Various phases of the evidence favorable to the plaintiff have not been touched upon, because the question before us is not whether the court might have found in its favor, but whether there was any evidence warranting a contrary finding.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

THEODORE ENNEST

v.

PERE MARQUETTE RAILROAD COMPANY, Plff. in Certiorari.

(— Mich. —, 142 N. W. 567.)

Receiver — for railroad — suit against — service on station agent.

The appointment of a receiver to operate and manage a railroad, with authority to defend suits against the road, does not prevent the service of papers necessary to institute such actions on station agents, in accordance with a statute permitting service of process upon any railroad company in the state upon any station agent along the line of such company, if the receiver continues the agents in office with directions to perform the duties theretofore performed by them.

(July 9, 1913.)

CERTIORARI to the Circuit Court for St. Clair County to review an order overruling a plea in abatement for lack of

Note. — Service of process, after appointment of receiver, upon person designated by statute to receive service for corporation.

It is assumed, for the purposes of this note, that the person served would have been the proper person upon whom to serve process directed against the corporation, if no receiver had been appointed. Therefore, 47 L.R.A.(N.S.)

proper service of process in a proceeding to recover damages for personal injuries for which the defendant railroad company was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Bills, Parker, Shields, & Brown, for plaintiff in certiorari:

When the property of a railroad company has passed into the hands of receivers, and its road is being operated by them under an order of the court, service of process on one of the employees of the receivers will give no jurisdiction over the company.

Cherry v. North & S. R. Co. 59 Ga. 446; Heath v. Missouri, K. & T. R. Co. 83 Mo. 617; Cleveland & M. R. Co. v. Orme, 1 Ohio C. C. 511, 1 Ohio C. D. 285; Collins v. Baltimore & O. R. Co. 7 Ohio N. P. 270, 8 Ohio S. & C. P. Dec. 445; Cain v. Seaboard Air-Line R. Co. 7 Ga. App. 462, 67 S. E. 127; Alderson, Receivers, 1905 ed. p. 522.

There are only two cases *contra*.

Faltiska v. New York, L. E. & W. R. Co. 12 Misc. 478, 33 N. Y. Supp. 679; Simpson v. East Tennessee, V. & G. R. Co. 89 Tenn. 304, 15 S. W. 735.

Process can be served on a corporation only by making service thereof on some one or more of its agents.

Lafayette Ins. Co. v. French, 18 How. 404, 408, 15 L. ed. 451, 453; Dinzy v. Illinois C. R. Co. 61 Fed. 49; 32 Cyc. 447; Robinson v. Harmon, 157 Mich. 272, 117 N. W. 664, 122 N. W. 106; High, Receivers, 4th ed. art. 1; Ocean S. S. Co. v. Wilder, 107 Ga. 220, 33 S. E. 179.

The receiver, and the corporation over which he is appointed, are two entirely distinct and separate legal entities.

Metz v. Buffalo, C. & P. R. Co. 58 N. Y. 61, 17 Am. Rep. 201; State v. Wabash R. Co. 115 Ind. 406, 1 L.R.A. 179, 17 N. E. 909; Godfrey v. Ohio & M. R. Co. 116 Ind. 30, 18 N. E. 61; Ocean S. S. Co. v. Wilder, 107 Ga. 220, 33 S. E. 179; Finance Co. v. Charleston, C. & C. R. Co. 46 Fed. 508; Northern P. R. Co. v. Hefin, 27 C. C. A. 460, 48 U. S. App. 562, 83 Fed. 93; Smith, Receiverships, p. 204; 23 Am. & Eng. Enc. Law, 1098; Decker v. Gardner, 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814; McDermott v. Crook, 20 App. D. C. 465; Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 L. ed. 319; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36

cases which, like Nickolson v. Wheeling, L. E. & P. Coal Co. 110 Fed. 105, turn upon the fact that the person served was not such an agent as was authorized to receive service at the hands of the corporation, are excluded.

As to service of process on servant or agent of lessee of railroad corporations, see note to Chicago, B. & Q. R. Co. v. Weber, 4 L.R.A.(N.S.) 272.

L. ed. 632, 12 Sup. Ct. Rep. 787; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; *Thomson v. McMorran Mill. Co.* 132 Mich. 591, 94 N. W. 188.

Messrs. Stevens, Graham, & Stevens for defendant in certiorari.

Stone, J., delivered the opinion of the court:

This case comes into this court on certiorari to review the order of the trial judge overruling defendant's plea in abatement to the declaration. On October 24, 1912, plaintiff filed a declaration against defendant in the circuit court for the county of St. Clair, on which was indorsed a rule to plead. A copy of this declaration, with notice of the rule to plead, was served on John J. Coryell, station and ticket agent at the Port Huron, Michigan, station, a station along the line of the defendant railroad, on November 1, 1912. The plaintiff seeks to recover damages for personal injuries alleged to have accrued to him on December 31, 1911, by reason of the negli-

gence of the defendant. The testimony taken on the trial of the issue formed on the plea in abatement shows that John J. Coryell had been, for about six years prior to April 5, 1912 (the date of the order creating the receivership hereinafter described), the station and ticket agent of defendant at the Port Huron station; that on that day he received notice from the receivers of their appointment, and afterwards acted under their control, and was so acting of November 1, 1912, as such station and ticket agent. That notice was as follows:

Detroit, Michigan, April 5, 1912.

12 o'clock noon.

All officers and agents of the Pere Marquette Railroad in the United States:—

By Virtue of an order made this day by the district court of the United States for the eastern district of Michigan, in the case of the American Brakeshoe & Foundry Company against the Pere Marquette Railroad Company, the undersigned have been appointed and have qualified as receivers of

Action against corporation—generally.

There is a difference of opinion on this question. In some jurisdictions it is held that the court obtains jurisdiction of the railroad company by service upon the agent notwithstanding the appointment of a receiver. *ENNEST v. PERE MARQUETTE R. Co.* sufficiently shows that such is the rule of *Faltiska v. New York, L. E. & W. R. Co.* 12 Misc. 478, 33 N. Y. Supp. 679, affirmed without opinion in 151 N. Y. 650, 46 N. E. 1146; and *Simpson v. East Tennessee, V. & G. R. Co.* 89 Tenn. 304, 15 S. W. 735. The *ENNEST CASE* was followed in *Barnhart v. Michigan C. R. Co.* — Mich. —, 142 N. W. 570.

Service of this kind has been held good as against the corporation, though the person served was regarded as the agent of the receiver. *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277; *Grady v. Richmond & D. R. Co.* 116 N. C. 952, 21 S. E. 304. In one case of this kind the court argued that when an insolvent corporation is put into the hands of a receiver, this only effects a change in the management of the property, and that while the receiver is substituted for those who theretofore had governed the corporation, the title is not changed; and that, inasmuch as the receiver is put in charge of and administers all the affairs of the corporation, service of process is properly made upon him through his agent. *State v. Port Royal & A. R. Co.* 84 Fed. 67, holding property of a railroad in the hands of a receiver bound by a judgment rendered in an action against the railroad company in which process was served on an agent of the receiver, who was not made a party.

Upon the other hand, it is held in some cases that such service is of no effect 47 L.R.A.(N.S.)

against the corporation, upon the ground that the person served, though exercising the functions of a railroad employee, was the agent of the receiver. As shown in *ENNEST v. PERE MARQUETTE R. Co.*, this is true of *Cherry v. North & S. R. Co.* 59 Ga. 446; *Cain v. Seaboard Air-Line R. Co.* 7 Ga. App. 462, 67 S. E. 127; and *Heath v. Missouri, K. & T. R. Co.* 83 Mo. 617.

So an Ohio court has held that service upon the ticket agent is not good as against the railroad company, at least where the ticket agent was one appointed by the receiver shortly after his appointment, to supersede the previous agent of the railroad company whom the receiver removed, under a statute drawing a distinction between servants of the railroad company and servants of the receiver by providing first that a summons against a corporation may be served upon the president, etc., and that, if such corporation is a railroad company, the summons may be served on any regular ticket agent, and providing in the statute relating to receivers that action may be brought against the receiver of a railroad in any county, and that service of summons may be had upon the receiver or upon any ticket agent who is in the employment of or acting for the receiver. *Cleveland & M. R. Co. v. Orme*, 1 Ohio C. C. 511, 1 Ohio C. D. 285.

And in *Collins v. Baltimore & O. R. Co.* 7 Ohio N. P. 270, 7 Ohio S. & C. P. Dec. 445, the court, regarding a ticket agent as the agent of the receiver, and not of the railroad company, held that service upon a ticket agent was ineffective as against the corporation, where the statute provided that the corporation could be served by delivering a copy of the process to any "regular ticket or freight agent thereof."

all the property and business of said Pere Marquette Railroad Company, of every kind and character and wherever situate, and have taken possession, and do hereby take possession, of all such property and business, and, pursuant to the authority of the said court, do hereby direct the continuance of said business in the names of the undersigned as receivers and until further orders, substantially as it has been conducted theretofore. Until further orders all agents and employees of the company connected with the business will perform the duties heretofore performed by them, and make reports and remittances as heretofore. The depositories of the company will be the depositories of the undersigned, and the existing tariffs and rules and regulations will remain in force until further notice.

Newman Erb,
Dudley Waters,
Frank Blair,
Receivers.

The plea in abatement (filed with the plea of the general issue under the rule)

—foreign receiver.

The appointment of a receiver by a state court entitles him to no right as of course to recognition in another jurisdiction, and therefore the validity of local service of process on the foreign corporation, in accordance with the statute authorizing service upon a resident agent, is not affected by the fact that a receiver had been appointed in the foreign state. *Pollock v. Carolina Interstate Bldg. & L. Asso.* 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. 977; *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 300.

Action against receiver—generally.

Where the action is instituted against the receivers as defendants, service upon a person who, in the absence of a receivership, is a proper person to receive service of process against the railroad company, is deemed a sufficient service as against the receivers. *Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; *Ganebin v. Phelan*, 5 Colo. 83; *Grady v. Richmond & D. R. Co.* 116 N. C. 952, 21 S. E. 304.

In *Ex parte Charles*, 106 Ala. 203, 18 So. 73, the court would seem to have decided only that a statute providing that when any railroad company should permit its railroad to be used or operated by any other person or corporation, service of process in an action against such person or corporation should be effected by serving the same on any depot agent, etc., did not apply where the possession and use of the railroad had been transferred to receivers, though the court prefaced its decision on this point by the summary statement that service

alleges that John J. Coryell, the person upon whom the service of declaration with rule to plead was made, on November 1, 1912, was not at the date of such service an agent or employee of the Pere Marquette Railroad Company, and that the service of said declarations and rule to plead on him was wholly inoperative to bind the defendant, or to give the court jurisdiction over it. On the trial of the issue it appeared that on April 5, 1912, the defendant, by the order of the district court of the United States for the eastern district of Michigan, southern division, was placed in charge of the above-named receivers. This order gave authority to the receivers, among other things, to take possession of all the railroads and other property of the defendant, "to run, manage, and operate the said railroads and property; . . . to maintain, preserve, and protect the said property and assets, and to keep the same in proper condition and repair, so that the same may be safely and advantageously operated and used; . . . to secure and develop the business of said railroad company; . . .

of process in this case was without authority, unless it could be drawn within the inference of such statute.

—federal receiver.

It was held by a Federal court that where Congress requires receivers to manage and operate the property according to the requirement of the laws of the state in which the property is situated, and authorizes receivers appointed by a Federal court to be sued without the leave of that court, a Federal court for a state in which is located a railroad for which receivers have been appointed in the state, who have removed to another state, will authorize process against the receivers to be served upon a station agent or clerk, where the state statute makes service upon such persons good service upon the company. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 40 Fed. 426.

So, it has been held by a few state courts that, in view of the Federal statute, service of process which would have been good as to the corporation in the absence of a receivership under the state statute is good as to the Federal receiver. *Peterson v. Baker*, 78 Kan. 337, 97 Pac. 373; *Proctor v. Missouri, K. & T. R. Co.* 42 Mo. App. 124 (distinguishing *Heath v. Missouri, K. & T. R. Co.* 83 Mo. 617, upon the ground that at the time that case was decided these provisions of the Federal statute were not in force); *Jacobs v. Blair*, 157 App. Div. 601, 142 N. Y. Supp. 897; *Farris v. Richmond & D. R. Co.* 115 N. C. 600, 20 S. E. 187; *Hill v. Baltimore & O. R. Co.* 7 Pa. Dist. R. 473.

L. A. W.

to employ and discharge and fix the compensation of all . . . officers, managers, superintendents, attorneys, agents, and employees, as, in their discretion, shall from time to time be needed in the performance of their duties as such receivers; . . . to keep the railroads and other property of said railroad company and its auxiliary companies employed and used in the manner in which they have heretofore been used and employed, so far as the said receivers, in their discretion, shall see it to be for the best interests of all parties concerned in the property and business of said railroad company; . . . to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property, and trust hereby vested in them; and likewise to defend all actions that may be instituted against them, and also to appear in and conduct the prosecution or defense, as the case may be, of any suits now pending or hereafter commenced in any court against the said railroad company, the prosecution or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the property and business placed in their charge. . . . That the said railroad company and its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under said company, and all other persons whosoever, be and hereby they are severally and collectively enjoined and restrained from interfering in any way whatever with the possession and management of any part of the property over which the said receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties or their operating the same."

The learned circuit judge, in stating his reasons for overruling the plea in abatement, in part said: "As will be seen from the above brief extracts from this order, the court which made it contemplated that the receivers should operate and manage the defendant railroad temporarily. This receivership has not dissolved the corporation known as the Pere Marquette Railroad Company, nor does the proceeding contemplate the dissolution or the winding up of the corporation. For the purpose of attaining certain ends, the railroads and other property of defendant have, by order of the court, been taken from the possession and management of the regular officials of defendant, and given over to certain officers of the United States district court, called receivers. By this order the receivers are directed to operate the railroads of defendant. In other words, instead of being under the management and control of the regular officials of the corporation, the Pere

Marquette Railroad was, on the 1st day of November, 1912, under the management of the receivers, but the Pere Marquette Railroad Company was still in existence. It was still a 'railroad company in this state.' It had a 'station agent' and 'ticket agent' at the Port Huron station, 'a station along the line . . . of the railroad of such company.' This station and ticket agent was John J. Coryell, the person served in this action on November 1, 1912. It is true that the record in this case shows that said agent, on notice from the receivers, attorned to them instead of his former superiors, the officials of the company. However, the Pere Marquette Railroad Company was still 'a railroad company in this state,' though its affairs were now under a different management, and Mr. Coryell, though now under the direction of the receivers, was still the station and ticket agent of 'a railroad company in this state,' within the meaning of the statute to which I shall now refer, and still is such agent. Act No. 260 of the Public Acts of 1899 provides as follows: 'That whenever in any suit or proceeding, either in law or equity, it shall become necessary to serve any process, notice, or writing upon any railroad company in this state, it shall be sufficient to serve the same upon any station agent or any ticket agent at any station or depot along the line, or at the end, of the railroad of such company.'"

That Mr. Coryell was the station and ticket agent at the station at Port Huron, of the railroad of the defendant, there can, we think, be no question.

Upon whom process shall be served in order to institute a suit against the artificial person known as a corporation is in this state a matter of statute; and, as here appears, we have a special statute governing service upon railroad companies. The question here raised seems to be a new one in this state, and we are at liberty to adopt the more reasonable rule. May it be said that in this case Mr. Coryell was, at the time of the service upon him, the proper person to receive service, notwithstanding his relation to the receivers? It is worthy of note that there was nothing in the order appointing the receivers, or in the notice served on the station or ticket agent, removing such agent from his former position. The language of the notice was significant: "Until further orders all agents and employees of the company connected with the business will perform the duties heretofore performed by them, and make reports and remittances as heretofore." Mr. Coryell might continue the agent of the company, for any purpose not inconsistent with his duty to the receivers. Such double

agency is not rare. By the order appointing them, the receivers were authorized and empowered to appear and defend any suits which might be commenced against the company, the defense of which would in their judgment be necessary for the proper protection of the property and business placed in their charge. Any suit against the company to recover damages might well be said to be a suit affecting the property which they had in charge, and service of process on the station or ticket agent at any station on the line of the road might be to the advantage of such receivers. There would be nothing incompatible in Coryell maintaining his relation to the corporation and to the receivers at the same time. It is very evident that there is nothing found in this record justifying us in holding that he has ever been discharged from his position by either the company or the court. Outside of this state this question has been passed upon by the following courts of last resort, and the courts have differed in their conclusions: In the state of New York, in the case of *Faltiska v. New York, L. E. & W. R. Co.* 12 Misc. 478, 33 N. Y. Supp. 679, affirmed in 151 N. Y. 650, 46 N. E. 1146, it was held that the appointment of a receiver of a railroad company does not affect the relation of a division superintendent as "managing agent" of the company, on whom the statute provides process against the company may be served, where he was never removed by the company, but retains his position after the appointment of the receiver. In Tennessee, in the case of *Simpson v. East Tennessee, V. & G. R. Co.* 89 Tenn. 304, 15 S. W. 735, it was held that suit against a railway corporation will not be abated upon its plea averring that the suit had been brought after the road had passed into the hands of a receiver, and that process had been served upon a station agent of the receiver, where it appears that such agent had been originally employed by the company, and continued in the same service under the receivership. The court said: "It will be remembered that this is no effort on the part of the receiver to abate suits by reason of a right to intervene and compel a discontinuance of actions, except in court where the receivership with litigation involving it is pending; but an effort by the company to deny its agent because its road had been placed in the hands of a receiver. In such case no reason appears to us why he does not still, in a proper sense, represent the company, which in another is represented by the receiver." See also *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277; *Grady v. Richmond & D. R. Co.* 116 N. C. 952, 21 S. E. 304.

Upon the other hand, defendant has called 47 L.R.A. (N.S.)

our attention to the following cases: *Cherry v. North & S. R. Co.* 59 Ga. 446; *Heath v. Missouri, K. & T. R. Co.* 83 Mo. 617. *Cherry v. North & S. R. Co.* has been followed by the Georgia court in *Cain v. Seaboard Air-Line R. Co.* 7 Ga. App. 461, 67 S. E. 127. Defendant claims that these last-cited cases hold that when the property of a railroad company has passed into the hands of receivers, and its road is being operated by them under an order of the court, service of process on one of the employees of the receivers will give no jurisdiction over the company. We think that the Georgia cases substantially so hold; but it is worthy of note that in *Cherry v. North & S. R. Co.* the court calls attention to the fact that the agent under the new arrangement was required to give, and did give, a bond to the state for the faithful performance of his duties, and that the agent had ceased to act for the company, and had become the agent of the state. In *Heath v. Missouri, K. & T. R. Co.* it appeared that the injury complained of resulted from the acts of the receiver, or his agents, within the scope of his official duty in operating the road, and that the defendant had nothing to do with it, and, by virtue of the receivership, was prohibited from operating the train which came in contact with the plaintiff's stock.

We are of opinion that the rule stated by the New York and Tennessee courts in cases above cited is the better and more reasonable rule, and that the circuit judge did not err in overruling the plea in abatement.

The order of the Circuit Court is therefore affirmed.

MINNESOTA SUPREME COURT.

MATILDA KOSKI, Resp't.,
v.

MARY PAKKALA, Admr., etc., of Axel
Pakkala, Deceased, et al., Appts.

(121 Minn. 450, 141 N. W. 793.)

Intoxicating Liquors — dealer's bond — scope.

1. The liquor dealer's bond executed under the provisions of § 1524, Rev. Laws 1905, and acts amendatory thereof, was intended by the legislature as security for

Headnotes by BROWN, Ch. J.

Note. — *Survival of cause of action on liquor dealer's bond after death of licensee.*

What little authority there is on this question sustains for the most part *KOSKI v. PAKKALA* in holding that where a right

an observance of and compliance with the liquor laws of the state, and for the benefit and protection of all persons injured or damaged in consequence of an unlawful sale of liquor by the licensee.

Same — who may sue.

2. Though the bond is executed to the state, injured persons may prosecute an action thereon in their own name for damages suffered by them for a violation thereof.

Action from — liquor bond.

3. The bond constitutes a contract between the licensee and his surety on the one hand, and the state and all persons injured in consequence of a violation thereof on the other; and though a breach thereof, by an unlawful sale of liquor by the licensee, necessarily constitutes a tort, the action for damages resulting from such sale is upon the contract, and not for the tort. The tort is but evidence of the breach of the contract.

Abatement — action on liquor bond — survival.

4. The cause of action for such breach of contract survives the death of the licensee, and the action may be prosecuted against his estate.

(May 23, 1913.)

APPEAL by defendants from an order of the District Court for St. Louis Coun-

of action on a liquor dealer's bond is given directly to persons injured in person, property, or means of support, such action is not an action in tort, but is an action upon the contract evidenced by the bond, and therefore does not abate by the death of the seller of the liquor. Such is the rule of *Garrigan v. Huntimer*, 20 S. D. 182, 105 N. W. 278 (action by widow under statute for "damages sustained by her," upon bond conditioned for payment of all damages sustained by any person either in person, property, or means of support); *American Surety Co. v. State*, 46 Ind. App. 130, 90 N. E. 99, 91 N. E. 624 (statutory action for injury or damage to means of support), reaffirming *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111, and commending the decision in the New York case of *Moriarty v. Bartlett*, 34 Hun, 272, and disapproving its reversal in a memorandum opinion in 99 N. Y. 651, 1 N. E. 794.

In the *Moriarty Case*, *supra*, although apparently not involving an action upon the bond, but an action under the civil damage act for injury to means of support, the general term held, in 34 Hun, 272, that the action given by the civil damage act would lie even though the liquor dealer's act was not a tort, and the act of the person intoxicated was not a tort; and that an action for injury to means of support was an action for injury to property, and not one for injury to the person. But the court of appeals seems to have assumed, rather than held, that this was wrong; and it reversed the general term without opinion, and upon the authority of *Hegerich v.*

ty overruling demurrers to a complaint filed to recover damages under the civil damage act for the death of plaintiff's intestate through a bullet fired by one intoxicated by liquor furnished by defendant *Pakkala's* intestate. Affirmed.

The facts are stated in the opinion.

Messrs. O. J. Larson, John Saari, and Spencer & Marshall, for appellants:

There is no statute authorizing the maintenance of such an action against a surety on a liquor license bond.

The state may alone maintain action.

St. James v. Hingtgen, 47 Minn. 521, 50 N. W. 700.

Prosecutions of the bond can be had only after conviction of the offense covered by the bond.

State v. Larson, 83 Minn. 124, 54 L.R.A. 487, 86 N. W. 3.

The right of action does not survive the death of *Pakkala*.

Green v. Thompson, 26 Minn. 500, 5 N. W. 376; *Bates v. Sylvester*, 205 Mo. 493, 11 L.R.A.(N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 Ann. Cas. 457.

Mr. R. J. Montague, for respondent:

The liquor bond is given to indemnify private parties as well as the state.

Keddie, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, which, however, had to do only with the survival of an action by the administrator for death caused by negligence. And it also appeared in the latter case that the New York statute in relation to survival of actions provided that, for wrongs done to the property or interests of another, an action might be brought against the wrongdoer, and after his death against his executors or administrators in the same manner and with like effect in all respects as actions founded upon contracts; but that the foregoing provision should not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. It would therefore seem that in the *Moriarty Case* the court of appeals inadvertently overlooked the fact that the action might be maintained against the administrator of the seller of the liquor, upon the ground that the action for injury to means of support was not an action for injury to the person, which, under the statute, did not survive, but was an action for injury to property, as held by the general term, which, under the statute, did survive.

From the cases decided, it appears that the test for determining whether an action survives in such circumstances is whether the action is deemed to be one on contract or in tort. Generally, as to the survival of an action, or a cause of action, for wrongful death, upon the decease of the wrongdoer, see the note to *Bates v. Sylvester*, 11 L.R.A.(N.S.) 1157.

L. A. W.

State v. Larson, 83 Minn. 124, 54 L.R.A. 487, 86 N. W. 3; *St. James v. Hingtgen*, 47 Minn. 521, 50 N. W. 700; *Thomas v. Hinkley*, 19 Neb. 324, 27 N. W. 231.

The cause of action did not abate by Pakkala's death.

Volans v. Owen, 74 N. Y. 526, 30 Am. Rep. 337; *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Gardner v. Day*, 95 Me. 558, 50 Atl. 892; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, 91 N. E. 624; *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111.

Brown, Ch. J., delivered the opinion of the court:

The complaint alleges, in substance, the following facts: Defendant's intestate, **Axel Pakkala**, was a licensed saloon keeper in the city of Virginia, this state. Preceding the issuance of his license, and in compliance with the requirements of the statutes in such cases provided, Pakkala, as principal, and defendant **Bankers' Surety Company**, a corporation, as surety, duly executed and caused to be filed in the office of the city clerk the saloon bond required by § 1524, Rev. Laws, 1905, as amended by chap. 246, p. 379, Laws 1905 (Rev. Laws Supp. 1909, § 1524—1), and it was accepted and approved by the proper city authorities. The license so issued covered the period from September 3, 1911, to September 3, 1912. During the night of December 23d, and until about 4 o'clock in the morning of December 24, 1911, Pakkala kept his saloon and place of business open, and therein sold intoxicating liquor to numerous persons there present, including one **Drexler**, to such an extent that said **Drexler** became badly intoxicated, and at about 4 o'clock in the morning of said December 24th, **Drexler**, in a "drunken, crazed condition, caused by the intoxicating liquor" furnished him by said Pakkala, drew a revolver from his pocket and commenced shooting the same indiscriminately about the saloon, and thus shot and killed one **Jonas Koski**, the husband of plaintiff. The complaint further alleges that **Drexler** was an intemperate person, and that the sale of the liquor to him by Pakkala, as already stated, was a violation of law, and a breach of the conditions of the saloon bond; that such violation of the law was the cause of **Drexler's** intoxication, the cause of the indiscriminate shooting of his revolver, and the direct and proximate cause of the death of plaintiff's husband. A copy of the saloon bond was attached to and made a part of the complaint. Subsequent to the death of plaintiff's said husband, Pakkala died, and defendant **Mary Pakkala** was duly commissioned administratrix 47 L.R.A. (N.S.)

of his estate. Plaintiff claims that, by the wrongful death of her husband, she has been injured in the means of her support, and she demands judgment against both defendants for the sum of \$2,000, the penalty of the saloon bond. Leave to sue upon the bond was obtained.

Defendants interposed separate general demurrers to the complaint, and joined in an appeal from an order overruling the same. We are of opinion, and so hold, that the complaint states a cause of action against both defendants, and that the demurrers were properly overruled.

The pertinent statutes in force at the time the license in question was granted are chap. 246, p. 379, Laws 1905, and chap. 175, p. 221, Laws 1911. The former provides for and requires the execution of a bond by the licensee, conditioned for the faithful observance of and compliance with all laws regulating the sale of intoxicating liquors, and further that "the surety or sureties on any such bond shall be liable for any damage or injury caused by or resulting from the violation of any of the conditions thereof in any and all cases where the principal upon such bond may be liable. The amount specified in such bond is declared to be a penalty, the amount recoverable to be measured by the actual damages." The act of 1911 provides: "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, shall have a right of action in his or her own name, against any person who shall, by illegally selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained. . . ."

1. The defendants contend that plaintiff's action sounds in tort, and since the tortfeasor, Pakkala, is dead, the cause of action died with him, and that the action cannot be maintained against his personal representative; and further that, since his estate is not liable, no liability exists against the surety, for the reason that, by the express language of the statute, the surety is liable for the violation of the bond only in cases where the licensee or principal is liable. We do not concur in either contention. The saloon bond is required for the purpose of indemnity to those who are injured in consequence of unlawful sales of liquors by the licensee. It constitutes a contract on the part of the licensee and surety that unlawful sales will not be made, and a violation thereof inures to the benefit of injured third persons. Though the act of the person who caused the death of plaintiff's intestate in the case at bar

was a tort, a crime, the act of Pakkala, the saloon keeper, in causing him, by the unlawful sale of liquor to him, to become intoxicated, thus bringing about a condition on his part which caused the commission of his wrongful act, was a violation of the bond, a breach of the contract; and herein is the basis and foundation of plaintiff's action. The action is not for the injury to her husband, which the unlawful sale brought about, but for an act, whether in itself a tort or not, amounting to a breach of the covenants of the bond, and which resulted in an injury to her, by depriving her of her means of support. Since, therefore, the wrongful act of Pakkala was a breach of the contract, and an injury to plaintiff distinct from the injury to her husband, a cause of action arising therefrom survived, and the action may be prosecuted against the representative of Pakkala's estate, precisely as for the breach of any other contract. *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Cullinan v. Burkard*, 93 App. Div. 31, 86 N. Y. Supp. 1003; *American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, 91 N. E. 624; *Garrigan v. Thompson*, 17 S. D. 132, 95 N. W. 294. The wrongful acts of Pakkala and Drexler do not constitute the foundation of the action, but serve only to prove and establish the breach of the covenants of the bond.

2. It is also claimed that no action upon a liquor dealer's bond can be maintained by a private party; that the bond, under express requirement of law, is executed to the state, and that the state alone may sue thereon. It is true that the bond is executed to the state, and that it contains no language, construing the bond without reference to statutory provisions on the subject, justifying the conclusion that the rights of individuals were intended to be protected thereby. But, construing the bond in connection with the provisions of the statutes above quoted, which enter into and form a part of the bond, the right of private action for injuries sustained in consequence of a breach of the bond seems clear. The right of private suit upon such bonds was expressly recognized in *State v. Larson*, 83 Minn. 124, 54 L.R.A. 487, 86 N. W. 3, though it was there held that the penalty of the bond could not be recovered by the state for a violation of the liquor statutes. The statutes in force when that decision was rendered were materially changed by chap. 246, p. 379, Laws 1905, and the rights of private persons for a violation of the bond more specifically stated and defined. Nor is it necessary, as a condition to the right of private suit on the bond, that the action be preceded by the conviction of the licensee. The remark found in the opinion in the 47 L.R.A. (N.S.)

Larson Case, supra, which seems to take the view that such conviction is essential to the right of recovery, was not necessary to a decision of that case, and was not intended as a definite declaration of the law on the subject. The provisions of the statute quoted to the effect that the surety on the bond "shall be liable for any damage or injury caused by or resulting from the violation of any of the conditions thereof, in any and all cases" where the principal would be liable, in connection with the provisions of the act of 1911, above referred to, make it clear that the legislature intended the bond to stand as indemnity for private persons, as well as for the benefit of the state. We so hold.

This covers all that is necessary to be said, and results in an affirmance of the order appealed from.

NEW YORK COURT OF APPEALS.

JOHN ZEISER, Resp't.,

v.

SARA OPPENHEIM COHN, Individually,
and as Exrx., etc., of Mark Cohn, Deceased, et al., Impleaded, etc., Appts.,

(207 N. Y. 407, 101 N. E. 184.)

Lien — vendors — enforcement by vendors' creditor.

1. A creditor of a vendor who conveys property on condition that the vendee shall satisfy the creditor's claim may enforce the vendor's implied lien for the satisfaction of the claim, although it was unliquidated at the time of the conveyance.

Same — personalty as part of transfer — effect.

2. That a substantial part of the property transferred by a debtor on consideration of the payment of his debt was personalty does not prevent the enforcement of a lien in behalf of the creditor, if the promise in his favor was concealed from him until the personalty was dissipated.

Equity — right to enforce lien — remedy at law.

3. The existence of the right of a creditor

Note. — Right of creditor of vendor to benefit of vendor's lien.

It is assumed in the present note that the vendor himself, on the facts of the case, would be entitled to a lien, and where for some reason this is not true, as in the case of *Long v. Burke*, 2 Bush, 90, where it is held that an agreement to pay the debts owing by the grantor was not such a statement of the part of the consideration which remained unpaid as required by statute, as would entitle the vendor or his creditors to a lien, the case is excluded.

The right of a vendor, to enforce a vendor's

to maintain an action at law upon a promise made by a stranger to his debtor to pay the debt does not deprive him of the equitable right to enforce the vendor's lien on property transferred in consideration of the promise.

Appeal — amended complaint — law of case.

4. An order unappealed from, compelling election as to which of two theories of a case plaintiff will adopt, and granting leave to amend and set forth more fully the theory chosen, becomes the law of the case upon the character of the complaint and the nature of the issues involved.

(Hiscock, Collin, and Gray, JJ., dissent.)

(February 25, 1913.)

lien against a subvendee is not considered, for, while such vendor may be considered a creditor of the subvendee's vendor, the question here is against whom may the lien be enforced. The question of subrogation to the vendor's lien by one who has paid the purchase money to the vendor is, of course, beyond the scope of the note.

The mere relation of creditor to a vendor does not give such creditor the right to enforce a vendor's lien against a vendee.

Thus, a creditor was held to have no right to enforce a vendor's lien against the property in the hands of the vendee, in *First Nat. Bank v. Salem Capital Flour Mills Co.* 39 Fed. 89.

But in *Edwards v. Edwards*, 24 Ohio St. 403, a judgment creditor of the vendor, in an action to subject the purchase money due the vendor to the payment of the judgment, was held entitled to enforce the vendor's lien. "In such action," says the court, "the vendor and vendee both being parties, it appears to us that the lien of the vendor should be enforced for the benefit of the judgment creditor to the same extent that it would be enforced if the action had been brought by the vendor himself against the vendee for the enforcement of the lien."

So, in *Ball v. Phenicie*, 94 Mich. 355, 83 N. W. 1114, an execution creditor of the vendor, upon a bill in aid of execution, was held entitled to enforce the vendor's lien under the principal of subrogation.

And where the vendee has assumed, as a part of the purchase price, payment of the creditor's debt, such creditor has a right to enforce the vendor's lien. The right to enforce, however, arises not from the relationship of creditor to the vendor, but from the fact that the vendee has assumed his debt.

In speaking of the right of one whose debts had thus been assumed, in *Carver v. Eads*, 65 Ala. 190, the court states that "the promise of the vendees, though not made directly to the complainant [the creditor], inured to his benefit, and on acceptance of it he could pursue, in his own name, any appropriate legal or equitable remedy for its enforcement. . . . The lien passed 47 L.R.A. (N.S.)

APPEAL by defendant's Cohn et al. from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming, a judgment of a Special Term for Albany County in plaintiff's favor in a suit to enforce a vendor's lien upon land sold on consideration of the payment of plaintiff's claim. Affirmed.

The facts are stated in the opinion.

Mr. Andrew J. Nellis, for appellants:

If any action can be maintained by respondent on Theresa Cohn's agreement with Jacob to pay the latter's debt to him, it is an action at law directly upon the promise, and not in equity, because of the consideration for the promise.

First Nat. Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 321; *Clark v. Howard*, 150

to the complainant as an incident to the agreement; or, rather, the agreement created a trust—a charge on the lands,—for the payment of the debt, which a court of equity will enforce for his benefit." In this case, where, upon an agreement between a debtor and his brother, a conveyance was made by the debtor to the wife of the brother upon an agreement by the brother to assume the debts of the grantor, it was held that a specific intention on the part of the brother to create a lien on the land in favor of the creditors was not necessary; that a lien is always created in the absence of satisfactory evidence that a reservation of a lien was not intended.

It was further held in *Carver v. Eads*, supra, not material whether the wife was or was not informed of and assented to the agreement, nor whether her husband had authority from her to bind her by the promise, since the amount of the purchase money was deducted in consequence of the promise, and there could be no repudiation of it without fraud upon the vendor.

A mortgage debtor of the vendor whose debt has been assumed by the vendee as part of the price of sale may exercise the vendor's privilege in enforcing his debt. *De L'Isle v. Moss*, 34 La. Ann. 164. The objection was made in this case that the vendor's privilege claimed was not on a debt created at the time of the sale and due to the vendor or to one of his authors, but that it was a debt which existed prior to the date of the purchase in favor of one who was not a vendor, and who was not a party to the act. In answer to this objection the court states that "both on principle and practically, it is a matter of indifference to the purchaser to whom the price be paid, whether to the vendor or to his creditors or to his beneficiaries. His obligation is to pay the price agreed upon to whoever can, on payment, give him acquittance and discharge. His assumption to pay it to a third person makes him personally liable to the creditor on his acceptance of the assumption."

In *Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99, an attorney who rendered serv-

N. Y. 232, 44 N. E. 695; *Pardee v. Treat*, 82 N. Y. 389; *Cook v. Berrott*, 50 N. Y. S. R. 163, 21 N. Y. Supp. 358.

Before equity can or will impress a lien upon the property in question in favor of respondent, he must allege and prove recovery at law against *Theresa Cohn* upon her promise, and execution returned in the county of her residence unsatisfied.

Trotter v. Lisman, 199 N. Y. 501, 92 N. E. 1052; *Fox v. Fitzpatrick*, 190 N. Y. 266, 82 N. E. 1103; *Beardaley Scythe Co. v. Foster*, 36 N. Y. 565; *Pritchard v. Pritchard*, 134 App. Div. 304, 118 N. Y. Supp. 882; *Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; *Potter v. Merchant's Bank*, 28 N. Y. 655, 86 Am. Dec. 273; *Thayer v. Manley*, 73 N. Y.

309; *Decker v. Mathews*, 12 N. Y. 319; *Walrod v. Ball*, 9 Barb. 276; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Towns v. Smith*, 115 Ind. 483, 16 N. E. 811; *Emmerich v. Hefferan*, 26 Jones & S. 217, 9 N. Y. Supp. 801.

Unless *Theresa Cohn* became respondent's primary debtor, and *Jacob Cohn* was only a surety for the payment of the debt, respondent had no cause of action against her or her successors in interest, either in equity or at law.

Pardee v. Treat, 82 N. Y. 389; *Palmer v. Sterling*, 41 Mich. 218, 2 N. W. 24; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 553.

It is impossible to imply a finding that *Theresa Cohn* and *Jacob* intended to benefit

ices for the vendor for which he was to receive a stated compensation, and to have a lien on the land to secure payment of the same, was held entitled to enforce a vendor's lien against the vendee, who agreed, as a part of the purchase price, to pay the amount due the attorney.

In *Ferguson's Succession*, 17 La. Ann. 255, where a purchaser of immovable property, as a part of the price thereof, agreed to pay two notes of the seller, the owner and holder of the notes was held to have the vendor's privilege existing in his favor for the payment of the amount of the notes by the administrator of the deceased purchaser.

In *Gillum v. Collier*, 53 Tex. 593, a creditor of the vendor, with whom the vendee contracted subsequently to the sale, giving him certain notes and a lien on the land to secure the same, was allowed to enforce the lien; and the lien is spoken of as a vendor's lien, but it is not clear that this is used in the ordinary sense of that term.

In *Waller v. Janney*, 102 Ala. 442, 14 So. 876, where a trustee for several *cestuis que trust* conveyed the property under an agreement with the vendee that such vendee should satisfy the claim held by one of the *cestuis que trust* upon the land, it was held that the *cestui que trust* in whose favor the agreement was made could enforce a vendor's lien on the land upon a failure to pay the agreed amount.

On the contrary, a statute providing that "one who sells real property" has a lien thereon for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer was held, in *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933, to confine the vendor's lien to the one who sells, and to exclude a creditor of the vendor to whom the vendee had agreed to pay a part of the purchase price.

In *Mays v. Sanders*, — Tex. Civ. App. —, 36 S. W. 108, attorneys who had performed services for the vendor in recovering purchase money notes, for which they were to have an interest in the notes, were held entitled to a vendor's lien on the land in 47 L.R.A. (N.S.)

the hands of the vendor, who had accepted a reconveyance of the same and canceled the notes.

Where vendee gives personal obligation direct to creditor.

Where the vendee has executed a promissory note to a creditor of the vendor, for a balance of the purchase price, such creditor may enforce the vendor's lien against the land in question. *Zwingle v. Wilkinson*, 94 Tenn. 246, 28 S. W. 1096.

So, where a note is given directly by the vendee to the creditor of the vendor, to be held by such creditor as collateral security to the note of the vendor, which he retains, such creditor may enforce a vendor's lien on the land sold. *Linn v. Bass*, 84 Ala. 281, 4 So. 867.

That a creditor of the vendor, to whom the vendee has executed notes for a part of the purchase money, has a lien on the land, is held also in *Glaze v. Watson*, 55 Tex. 563.

In *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57, 5 So. 164, where the vendee had given a promissory note for a balance of the purchase price, to a third person in satisfaction of a debt which such third person had incurred for the vendor by paying off certain purchase money notes which the vendor had given upon his purchase of the land, such third person was held to have a right to enforce the vendor's lien.

Cases, in general, involving the right of one who has furnished purchase money, to a vendor's lien, or the right of one to be subrogated to the lien, have been excluded. The above case, however, is based wholly upon the assumption of the vendor's debt.

In *Joiner v. Perkins*, 59 Tex. 300, a creditor of the vendor, to whom notes for the balance of the purchase money had been executed, was held entitled to enforce a vendor's lien, notwithstanding he had surrendered the first note given him and taken a renewal of the same. It does not appear, however, in this case, that much stress was laid upon the fact that a creditor of the vendor was seeking to enforce the lien.

In *Irvin v. Garner*, 50 Tex. 48, one who

respondent, unless it be assumed they intended respondent would establish and liquidate his claim in an action at law against Theresa.

Triest v. New York, 193 N. Y. 534, 86 N. E. 549; Rodgers v. Clement, 162 N. Y. 427, 76 Am. St. Rep. 342, 56 N. E. 901; Maroney v. Boyle, 141 N. Y. 469, 38 Am. St. Rep. 821, 36 N. E. 511; Camp v. Gifford, 67 Barb. 434.

The doctrine of Lawrence v. Fox, 20 N. Y. 268, should be limited to cases having the same essential facts.

Lorillard v. Clyde, 122 N. Y. 503, 10 L.R.A. 113, 25 N. E. 917; Wheat v. Rice, 97 N. Y. 302; Turk v. Ridge, 41 N. Y. 201; Seward v. Huntington, 94 N. Y. 104; New York Fastener Co. v. Wilatus, 65 App. Div.

467, 73 N. Y. Supp. 67; Feist v. Schiffer, 79 Hun, 275, 29 N. Y. Supp. 423; Wise v. Morgan, 13 Daly, 402, affirmed in 103 N. Y. 682; Knickerbocker L. Ins. Co. v. Nelson, 78 N. Y. 137; Martin v. Peet, 92 Hun, 138, 36 N. Y. Supp. 554; Garney v. Rogers, 47 N. Y. 241, 7 Am. Rep. 440; Rochester Dry Goods Co. v. Fahy, 111 App. Div. 748, 97 N. Y. Supp. 1013, affirmed in 188 N. Y. 629, 81 N. E. 1174; Shear v. Mallory, 13 Johns. 496; Pardee v. Treat, 82 N. Y. 389.

A vendor's lien never existed in the premises, either in favor of Jacob Cohn or the respondent.

Hare v. Van Deusen, 32 Barb. 96, 15 Am. & Eng. Enc. Law, 2d ed. 1125; Patterson v. Edwards, 29 Miss. 67.

Neither Jacob Cohn nor respondent ac-

had purchased from the vendor the note of the original vendee, and to whom, upon a subsequent sale by the vendee, the second vendee gave his note for the purchase money, was held entitled to enforce the vendor's lien on the land in question. The question is discussed in this case as one of waiver, it being held that such a transaction does not constitute a waiver of the vendor's lien.

One to whom a note had thus been given by a vendee has been held entitled to the lien, although the relation of creditor to the vendor does not appear.

Thus, where, under an agreement between vendor and vendee, the latter executes his note for the purchase money to a third person, the deed reciting the execution of the note, and declaring that the "party to the first part thus retain a lien on said property until said note is well and truly paid," a valid lien for the benefit of such third person exists. Mize v. Barnes, 78 Ky. 506.

It is not necessary that a third person for whose benefit a lien is retained in a deed be a party to the deed, but it is sufficient if the lien is retained for his benefit with his knowledge and consent. Ibid.

In Pinchain v. Collard, 13 Tex. 333, where a note was given by the vendee directly to a third person, the transaction is treated as an assignment of the debt by the vendor, and not as a case in which the payee of the note was a creditor of the vendor. A lien was held to exist in favor of the payee of the note in this case.

Assumption of mortgage debt.

It is frequently the case that a vendee of land assumes a debt secured by mortgage on only a part of the tract conveyed. The right of the mortgagee to enforce his mortgage is beyond the scope of the present note, but his right to enforce a vendor's lien on the part not covered by the mortgage, as well as his right to enforce a vendor's lien on the part covered in case of the invalidity of his mortgage, is discussed herein.

In West Plains Bank v. Edwards, 84 Mo. App. 462, where two tracts, one of which

was covered by a mortgage, were conveyed to a vendee under an agreement by him to assume the mortgage debt, the mortgage creditor was held to have a right to enforce a vendor's lien as to the tract not covered by his mortgage.

Where a vendee, as part of the purchase price of land, assumes a debt of his vendor secured by a mortgage on a part of the land, a vendor's lien arises in favor of the creditor on the entire tract. Louisiana Citizens' Bank v. Cuny, 38 La. Ann. 360.

A mortgagee whose mortgage covered only a part of the vendor's land was held, in Lee v. Newman, 55 Miss. 365, to have the right to enforce the vendor's lien, as to the part of his debt not realized on a sale of the premises covered by his mortgage, against the balance of land which was conveyed at the same time to one who assumed, as a part of the purchase price, the mortgage debt. The court, after stating that the vendor could assert his lien against the land, continues: "There can be no good reason for denying the same remedy to him for whose benefit the assumption was made. By reason of the assumption, the purchaser has obtained a diminution in the amount paid to the vendor, and has taken the land charged with an equity in favor of a third person."

In Binghamton Sav. Bank v. Binghamton Trust Co. 85 Hun, 75, 32 N. Y. Supp. 657, where, upon a conveyance of an undivided interest in the land the grantee assumed a mortgage debt of the grantor on another undivided interest in the property, the mortgagee was held entitled to a lien on the interest thus conveyed. Although the lien is not expressly referred to as a vendor's lien, it seems evident that it was so regarded.

So, in Scionneaux v. Waguespack, 32 La. Ann. 283, where a part of the land conveyed was subject to a mortgage given by the vendor to secure the payment of a debt owing by him, and the vendee assumed the debt as a part payment of the purchase price the mortgage creditor was held entitled to enforce the vendor's privilege on the entire tract, notwithstanding the mort-

quired a lien to secure the performance of any part of this contract, which was the consideration or price for the sale of both the personal property and the land without distinction.

Peters v. Tunell, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Warner v. Bliven*, 127 Mich. 665, 87 N. W. 49; *Clark v. Stilson*, 36 Mich. 482; *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367, 3 So. 4; *McCandlish v. Keen*, 13 Gratt. 615; *Welch v. Farmers' Loan & T. Co.* 91 C. C. A. 399, 165 Fed. 566; *Brawley v. Catron*, 8 Leigh, 522; *Camp v. Gifford*, 67 Barb. 440; *Brown v. Gilman*, 4 Wheat. 291, 4 L. ed. 573, 1 Mason, 191, Fed. Cas. No. 5,441; *Snyder v. Snyder*, 115 N. Y. Supp. 993; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587-596, 29 L. ed. 235-239, 5 Sup. Ct. Rep. 1081.

The vendor's lien does not exist in behalf of any uncertain, contingent, or unliquidated demand.

29 Am. & Eng. Enc. Law, 2d ed. 744; *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059; *Peters v. Tunell*, 43 Mich. 473, 19 Am. St.

Rep. 252, 45 N. W. 867; *Ross v. Clark*, 225 Ill. 326, 80 N. E. 275.

Messrs. Danforth E. Ainsworth and Charles B. Sullivan, with Mr. Fletcher W. Battershall, for respondent:

The vendor of real estate has a lien on the estate sold for the purchase money.

Hubbell v. Hendrickson, 175 N. Y. 175, 67 N. E. 302; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep. 821, 36 N. E. 511; *Fisk v. Potter*, 2 Keyes, 68.

Where, as part of the consideration for the transfer of real estate, the grantee agrees to pay the debt of the grantor to a third person, such third person has an equitable lien upon the real estate which he can enforce in equity against the grantee.

McWhorter v. Stewart, 39 App. Div. 212, 57 N. Y. Supp. 137; *Binghamton Sav. Bank v. Binghamton Trust Co.* 85 Hun, 75, 32 N. Y. Supp. 657; *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666, reversing 40 App. Div. 447, 58 N. Y. Supp. 115; *Clyde v. Simpson*, 4 Ohio St. 445; *Whetsel v. Roberts*, 31 Ohio St. 503; *Stehle*

gage subsequently ceased to have effect for want of reinscription.

In *Conte v. Cain*, 33 La. Ann. 966, it was held immaterial to a subsequent mortgagee whether a prior mortgage had been properly reinscribed or not, where the debt of such prior mortgagee had been assumed by a vendee of the land in question upon the purchase by him, as such assumption in the deed and the registering of the deed are notice of the encumbrance existing on the property to secure the payment of the note in question with the vendor's privilege.

In *Fontaine v. Nuse*, 38 Tex. Civ. App. 358, 85 S. W. 852, the owner of a homestead mortgaged the same to secure a sum of money due from him. This mortgage was void on account of the land being a homestead, but subsequently he sold the land, and the vendee agreed, as a part of the consideration, to discharge the debt owing to the mortgagee. The mortgagee was held entitled to enforce a lien on the land sold for his debt, although he was not able to enforce the void mortgage.

Broker's right to lien.

A vendor's lien has been asserted by real estate brokers to recover their commission earned in the sale of the lands.

A real estate broker who, by an agreement with the owner of land, is to receive a certain portion of the purchase price thereof upon effecting a sale, which part the vendee agrees to pay to him upon the closing of the transaction, may enforce a vendor's lien for this amount. *Zirkle v. Hendon*, — Ala. —, 60 So. 834.

So, in *Francis v. Wells*, 2 Colo. 660, a broker who was employed by a vendor to sell land, and who was to retain as his com- 47 L.R.A. (N.S.)

missions all over a stated price, was held to have a right to enforce a vendor's lien against a vendee who had promised to pay the amount.

It will be noticed that the debt promised to be paid by the vendee in these cases was not strictly a debt of the vendor; and in *Francis v. Wells*, supra, the court speaks of this fact, and states that the vendor was under no obligation to pay the sum promised by the vendee to the broker.

Consolidation of corporations.

This doctrine has been applied in the case of a consolidation of corporations in which the new corporation agreed to protect certain bonds of one of the consolidating companies, and it has been held that the bondholders have a lien on the property of the corporation which issued their bonds, to protect them under this arrangement. *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139; *Compton v. Wabash, St. L. & P. Co.* 45 Ohio, 592, 16 N. E. 110, 18 N. E. 380; *Tysen v. Wabash R. Co.* 11 Biss. 510, 15 Fed. 763. In the Alabama case, which was more in the nature of a sale than a consolidation, the lien is given apparently on the theory of the trust fund doctrine of corporate assets.

The case of *Tysen v. Wabash R. Co.* was subsequently reversed in 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081; and on the question of vendor's lien, the court there said that the doctrine of vendor's lien applies only to sales of real estate; that "the consolidation of the stock and property of several corporations into one was not a sale, and it did not affect real estate only, but included franchises and personal property."

W. A. E.

v. Stehle, 39 App. Div. 440, 57 N. Y. Supp. 201; 29 Am. & Eng. Enc. Law, 749; Halleck v. Smith, 3 Barb. 272.

A person having an equitable lien upon land for the unpaid purchase money may come into equity in the first instance to enforce such lien, without resorting to a suit at law to recover the amount.

Bach v. Kidansky, 106 App. Div. 502, 94 N. Y. Supp. 752; Bradley v. Bosley, 1 Barb. Ch. 152; Clark v. Howard, 150 N. Y. 238, 44 N. E. 695; Pardee v. Treat, 82 N. Y. 385.

Werner, J., delivered the opinion of the court:

This is a suit in equity to establish and enforce a vendor's lien upon land sold by Jacob Cohn to his mother, Theresa Cohn, under an agreement by which the grantee promised to pay the claims of certain creditors of the grantor, and among them the claim of the plaintiff. The land against which the plaintiff's lien has thus far been upheld by the courts has been sold under mortgage foreclosure, but, by stipulation, the surplus which arose upon the sale is held in its place. The complaint, in its original form, proceeded upon dual and inconsistent theories of relief, which gave rise to many troublesome questions of practice and dilatory motions that cannot now be considered in detail without losing sight of the main issue. Only a few of these incidental matters are of present interest, and these we shall touch upon most briefly; the rest have been resolved in plaintiff's favor and may be dismissed without further mention. As the case stands, stripped of all nonessential questions, the plaintiff is in court solely upon his claim of right to a vendor's lien. The facts pertinent to that claim can be very briefly stated.

In June, 1902, the defendant Jacob Cohn was indebted to the plaintiff in the sum of over \$5,000. On June 2d of that year Jacob executed two instruments of transfer, by which he conveyed to his mother, Theresa Cohn, deceased, all his real and personal property, which was of considerable value. Simultaneously with the execution by Jacob of those two instruments, Theresa executed another instrument reciting that in consideration of Jacob's transfer to her she exonerated him from certain indebtedness owing by him to her, and agreed to save him harmless from, and to pay, the debts owing by him to his creditors; and it also contained a list of these creditors with a statement of the amounts owing to some of them.

At the trial it was a disputed question whether the name of plaintiff was in the list of Jacob's creditors contained in this instrument. The paper then produced by 47 L.R.A. (N.S.)

the defendants did not contain his name, but the court upon sufficient evidence, found that the plaintiff's name was among the creditors set forth in the original instrument executed by Theresa. This finding has been unanimously affirmed by the appellate division, and upon this appeal we must, therefore assume that the name of the plaintiff was in the instrument, and that he was one of the persons for whose benefit the transfer to Theresa was made.

The evidence and the findings disclose that at or about the time of these transactions between Jacob and Theresa, the plaintiff had some hearsay information thereof, but that he never saw the contract signed by Theresa, and never had an opportunity to see it until after five years of litigation with Jacob. In the supplementary proceedings instituted upon the judgment which the plaintiff recovered against Jacob in that litigation, it finally transpired that this agreement was in the possession of Mark Cohn, a brother of Jacob, who then produced it, but without the name of the plaintiff as one of the creditors of Jacob whom Theresa had agreed to pay. This suit was then commenced. We have already referred to the difficulties which arose under the original complaint. At the first trial the complaint was dismissed upon the ground that the cause of action alleged, to set aside the transfer from Jacob to Theresa on the ground of fraud, had not been proved, and that the cause of action attempted to be proved to establish a vendor's lien had not been alleged. Upon appeal the appellate division reversed this decision and granted a new trial. Then the plaintiff moved at special term for leave to amend his complaint so as to make the action one solely to enforce a vendor's lien, and the amendment was allowed by the court upon condition that full costs be paid. The order permitting this amendment was affirmed by the appellate division, and no appeal was taken from that affirmance. As the case now stands, therefore, the suit is one to establish an equitable vendor's lien.

The first question to consider is whether a suit to enforce a vendor's lien will lie under the circumstances here disclosed. The material part of the instrument upon which the plaintiff relies provides that, in consideration of the conveyance by Jacob to Theresa, she promises and agrees "to save harmless the said party of the second part (Jacob) of and from the following debts and liabilities of the said party of the second part, and to pay the same as follows." This is supplemented by a list of creditors, which, we must assume, includes the name of the plaintiff. Thus the plaintiff's claim against Jacob entered into and

formed a part of the consideration for the promise made by Theresa to pay. It can hardly be doubted that a court of equity would have granted Jacob's prayer to have this property impressed with a lien for Theresa's failure to pay the consideration, and we do not perceive why the plaintiff is not entitled to the same relief. To the extent of his claim, he stands in the shoes of his debtor, who is the vendor, and to that extent he is for all practical purposes equitably subrogated to the rights of the vendor. *Pardee v. Treat*, 82 N. Y. 385, 387. The learned trial court has not found that there was an intention to create a lien; and such a finding was not necessary.

A vendor's lien may, of course, be reserved by express contract, but it is usually implied from circumstances. It is a pure invention of equity to protect those who have parted with real estate without security. In this state the equitable principle has been extended so far as to imply a lien in favor of a grantee, who has paid his purchase money without securing the property he bargained for, although until quite recently it was thought doubtful whether in this jurisdiction there is such a thing as a vendee's lien. *Elterman v. Hyman*, 192 N. Y. 113, 127 Am. St. Rep. 862, 84 N. E. 937, 15 Ann. Cas. 819.

We shall not attempt to discuss the theory upon which the vendor's lien is based, for that is a problem which no amount of learning or discussion seems to have been able thus far to solve. It may well be doubted whether any subject in our American law is involved in more hopeless dispute concerning its origin and the principles of its application. It is difficult to suggest any one principle upon which it securely rests, and impossible to assign any positive reason for its transplantation from the civil to the common law, except that it is a device admirably adapted to the equitable amelioration of inflexible legal rules. Although it has many apparent analogies in the law, it is yet strictly *sui generis*. Whatever its derivation may be, it is too firmly established in the jurisprudence of this state to need any justification in this day and generation. If there have been occasional indications of judicial reluctance to its enforcement, they seem to have sprung more from the difficulty of applying it to particular facts than from any sound reason against its use as a recognized agency of remedial justice. It is a remedy which must, of course, be applied with caution and discrimination, for in many cases the lien is the creature of secrecy and implication, and from its very nature calculated to work injustice to innocent third parties. No such danger exists in this case, 47 L.R.A.(N.S.)

for the answers of the defendants admit that the debts of Theresa have all been paid, and thus it is plain that the rights of no other creditors are involved. The case, in short, stripped of all extraneous considerations, presents the naked question whether the equitable remedy will lie in favor of a creditor in payment of whose debt a conveyance of property is made, where no intervening rights of other creditors are involved.

In *Hallock v. Smith*, 3 Barb. 267, the owner of real estate, being indebted to plaintiff, assigned his property to the defendant to pay certain debts due to the plaintiff. Among the assets transferred to the defendant was a note made to the assignor by one of the defendants for the purchase price of certain real property formerly owned by the assignor, who, as in this case, was plaintiff's debtor. In that action a lien was enforced in favor of plaintiff on the real estate the debtor had conveyed. It was there contended, as it is in the case at bar, that the lien can only be asserted by the vendor; but the court distinctly held that, as the purchase-money note was assigned to secure debts owing to the plaintiff by the vendor, he was entitled to enforce the lien. This case has remained the unchallenged law of this state for over half a century, and has been many times cited with approval in this court and in the courts below. The precise question has also arisen in other cases, and the lien has been sustained in favor of a third person whose debt was made a part of the consideration of the conveyance. *McWhorter v. Stewart*, 39 App. Div. 212, 57 N. Y. Supp. 137; *Binghamton Sav. Bank v. Binghamton Trust Co.* 85 Hun, 75, 32 N. Y. Supp. 657.

In *Bach v. Kidansky*, 186 N. Y. 368, 78 N. E. 1088, the vendors had conveyed real property subject to certain mortgages, one of which covered other lands. For the purpose of releasing these other lands from the mortgage, the vendors paid \$1,000 upon it, thus reducing to that extent the encumbrance on the property conveyed. The vendees refused to allow the vendor for this payment. This court sustained an action to establish a vendor's lien for the money thus paid on a debt owing to a third person. It may be said in passing that there seems to be no distinction in principle between that case and the one at bar. The only difference lies in the fact that there the vendor enforced the lien, and here the vendor's creditor invokes the remedy. In the *Bach* Case we found no difficulty in applying the equitable principles underlying the lien so as to prevent injustice; and in another case, quite similar in its facts to the one at bar (*Ahrens v. Jones*, 169 N. W. 555, 88 Am.

Theresa executed those instruments, and that therefore no lien was created. Some of the books contain expressions to the effect that no lien will lie except for a fixed, certain amount. It is difficult, if not impossible to ascertain upon what principle that idea is based. The vendor's lien is peculiarly a creation of equity devised to protect one party who has parted with land without being paid therefor. It is, said this court in *Fisk v. Potter*, 2 Keyes, 65, 68, "an anomaly in the law, and though it exists in certain cases, and perhaps we may say generally, as between vendor and vendee, its existence depends upon and is controlled by no well-settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established." There are cases, of course, in which it is impossible to measure the sum upon which the lien is to be predicated; or where the debt or obligation for which it is sought to be enforced is wholly contingent upon such uncertain events that practical considerations coerce the courts into refusing this equitable remedy. See *Pom. Eq. Jur.* § 1251, and cases cited. But the fundamental principle underlying the lien is that it would be unconscionable for the vendee to hold the land, and not pay for it. It is immaterial, then, so far as the principle itself is concerned, what the form of the obligation may be upon which it is sought to rest the lien.

In equity form gives way to substance, and the court will adapt its relief to the exigencies of the case. *Warvelle, Vendors*, 2d ed. § 690. The basis of the lien, said Judge Cooley in *Payne v. Avery*, 21 Mich. 524, 552, must be something which, "if not fixed in amount, is at least capable of being measured by some pecuniary standard." In the case at bar the plaintiff's debt arose out of certain transactions in the purchase and sale of stocks. Its amount was readily capable of ascertainment, for the only sense in which it was unliquidated when the instruments were signed by Jacob and Theresa was that it had not been judicially determined. The ascertainment of the amount was only an incident to the main relief (*Bradley v. Bosley*, 1 Barb. Ch. 125), and even that was not necessary, because the plaintiff's claim had been reduced to judgment in the action against Jacob, when the plaintiff finally learned all the facts upon which he brought this action.

It is also asserted that the plaintiff should not have a lien, because the transfer from Jacob to Theresa embraced both real and personal property. The implication of this statement is that there can be no vendor's

lien when a part, and especially a substantial part, of the property transferred, consists of personalty. That is a generalization which must be answered by the peculiar facts of this case. The plaintiff was prevented by the appellants, or those under whom they claim, from satisfying his debt out of the personal property transferred when it was still available to him. The agreement upon which he bases his claim was kept from him, and he did not know its contents. His claim was contested for five years, and, when Theresa's agreement for his benefit was finally brought to light, his name had been expunged therefrom. It is not strange that he was in doubt whether to attack the whole scheme as a fraud, or to affirm its validity and seek its benefit. That was, perhaps, the very doubt which the design of the plan was intended to create. In the period which elapsed before the plaintiff had acquired such information as enabled him to move in the matter, all the personal property and most of the realty was sold to pay the debts. The answers of the appellants allege that all of Theresa's debts have been paid. The only thing left is the surplus arising out of the sale on foreclosure of the last remaining piece of real estate conveyed by Jacob to Theresa. Why should the appellants now be heard to say that the plaintiff's claim could have been satisfied out of personal property of which he had no knowledge, and which was used by the appellants to pay other debts? If relief is now refused the plaintiff against this fund, he will be remediless, not through any fault of his own, but by the fraudulent acts of those through whom the appellants claim. Equity, therefore, in the exercise of its comprehensive jurisdiction over frauds, should mold its relief to meet the exigencies of the case, and fix a lien upon this fund in favor of the plaintiff. *Bradley v. Bosley*, supra; *Mills v. Bliss*, 55 N. Y. 139; *Lightfoot v. Davis*, 198 N. Y. 261, 273, 29 L.R.A. (N.S.) 119, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747.

One of the defenses interposed by the appellants was that the plaintiff had an adequate remedy at law, and therefore this action in equity could not be maintained. In support of this defense there are cited certain cases in which actions at law have been maintained on the transferee's promise to pay the debt of a third person. *First Nat. Bank v. Chalmers*, 144 N. Y. 432, 39 N. E. 331; *Clark v. Howard*, 160 N. Y. 232, 44 N. E. 695; *Pardee v. Treat*, 82 N. Y. 385. That such an action at law can be maintained on such a promise is amply supported by the authorities cited; but it does not follow that an equitable action in the nature of an action to establish a vendor's lien

may not be maintained. On the contrary, the remedies are concurrent, and not exclusive. "An action at law might be entirely ineffectual by reason of the insolvency of the defendant or his inability to render a pecuniary compensation; while, if the equitable relief can be had, the remedy is effectual by reason of the lien which is established." *Mills v. Bliss*, 55 N. Y. 139, 142. To the same effect, see also *Bradley v. Bosley*, 1 Barb. Ch. 125; *Dubois v. Hull*, 43 Barb. 26.

We have already referred to the form of the original complaint and to the complications in practice which arose from the plaintiff's apparently inconsistent claims for relief. Whatever ground that gave the defendants for asserting that the plaintiff had conclusively elected to pursue a remedy inconsistent with the one he now invokes has been eliminated by the course of the litigation. On the first trial the plaintiff claimed the suit was twofold in its nature; that, in one aspect its object was to set aside the transfers from Jacob to Theresa as in fraud of creditors, and in another view it was a suit to enforce the contract made between Jacob and Theresa for the benefit of Jacob's creditors. When the court compelled the plaintiff to elect upon which of these two theories he would stand, he chose the latter, and then his complaint was dismissed. He appealed from the judgment entered upon that decision, and succeeded in obtaining an order granting him a new trial. Before going to his second trial, however, he moved for leave to amend his complaint so as to set forth more fully the theory upon which he had elected to stand. An order was made granting such leave, and the defendants appealed to the appellate division, where there was an affirmance. The motion for leave to amend was granted upon condition that the plaintiff pay all the costs of the action to that time. These costs have presumably been paid by the plaintiff and accepted by the defendants. There has been no further review of that order, and it is therefore the law of this case upon the character of the complaint and the nature of the issues involved.

The voluminous briefs of counsel, covering hundreds of pages, present many arguments which we have not overlooked. We have simply endeavored to confine our discussion to the one central issue, with only such reference to related questions as the disposition of that issue, in the present status of the case, seems to require.

For the reasons given, we think the judgment should be affirmed, with costs.
47 L.R.A. (N.S.)

Cullen, Ch. J., and Willard Bartlett and Chase, JJ., concur.

Gray, J., dissenting:

The question which this appeal presents is whether the plaintiff is entitled to equitable relief in the nature of a vendor's lien upon certain real estate which had been conveyed by his debtor, Jacob Cohn, to another; in part consideration of which the grantee "agreed to pay and to save harmless the said Jacob Cohn of and from certain debts and liabilities in said agreement set forth." At the time of this conveyance, June 2, 1897, the plaintiff's claim is found to have been unliquidated and disputed; but it is also found that the agreement of the grantee of the property contained his name. A suit was commenced by the plaintiff against Jacob Cohn and resulted in a judgment in 1902, in the former's favor, and it is found that subsequent to the commencement of the suit he was informed concerning the agreement of Jacob Cohn's grantee. After obtaining judgment against Jacob Cohn, and being unable to enforce its payment by execution and proceedings thereupon, the plaintiff instituted this action in equity to have the judgment debt declared to be a lien upon the property conveyed by Jacob Cohn and held by the defendants, into whose hands it had come, either under the will of Theresa Cohn, Jacob Cohn's grantee, or through means transfers. The trial court, holding the plaintiff entitled to a vendor's lien upon the real estate transferred by Jacob Cohn in 1897, adjudged the debt to be a lien and charge upon certain surplus moneys, "proceeds of the foreclosure and sale of the premises described in the complaint." This judgment has been affirmed by the appellate division, and the question upon this appeal is whether the respondent was entitled to the equitable relief decreed. I think that he was not. By the promise of Jacob Cohn's grantee to pay his debt to the plaintiff, among other creditors named in her agreement, the promisor assumed and made that debt her own, and an action at law, adequate and complete, would lie against her for its recovery. *First Nat. Bank v. Chalmers*, 144 N. Y. 432, 39 N. E. 331. She then became primarily liable to the plaintiff, and Cohn stood, in relation to the agreement, as surety. The plaintiff has not shown that he had unsuccessfully resorted to an action at law against the grantee; nor does he aver any facts to show that he was excused from bringing such an action by the intervention of some cause

cognizable at law or in equity. The court found that he was informed of the agreement to pay him, and it must be assumed that the promisor was able to perform. Not having exhausted his plain legal remedy, I do not think that the plaintiff had a standing to ask the aid of a court of equity to apply the extraordinary remedy of a vendor's lien in his behalf. Plaintiff's claim against Jacob Cohn being unliquidated and disputed at the time of the latter's transfer of his property, no lien could well attach. Nor was it necessary that it should; for so far as it appears, he could have recovered payment from Cohn's transferee upon her agreement to pay. Not having adopted, nor sought to enforce, her agreement, I do not see how the plaintiff can well assert the right to a vendor's lien upon the property conveyed for the amount of his unpaid debt. A contract is essential to the existence of a vendor's lien for the unpaid purchase money, and the vendee's right to a lien, upon the default of the vendor, to the extent of any payment made, has only recently been recognized by this court. The contract between the parties is the essential basis of the lien, in either case, to protect vendor or vendee upon performance of their respective agreements. *Davis v. Rosenzweig Realty Operating Co.* 192 N. Y. 128, 20 L.R.A.(N.S.) 175, 127 Am. St. Rep. 890, 84 N. E. 943; *Elterman v. Hyman*, 192 N. Y. 113, 127 Am. St. Rep. 862, 84 N. E. 937, 15 Ann. Cas. 819. To extend the right, under the circumstances of this case, seems to me to be carrying the equitable doctrine too far. The doctrine of a vendor's lien is an anomaly in the law anyway. Plaintiff was not a party to any contract upon which he might predicate a claim for a lien, and he does not appear to have been remediless at law.

Perhaps to repeat somewhat, I say, upon what theory can the plaintiff claim to be entitled to a vendor's lien; that is, to stand in Jacob Cohn's shoes? Cohn's transfer of the property was absolute and perfectly good as to the plaintiff. The plaintiff's remedy was, then, against the transferee, whose agreement inured to his benefit; for it ran to him. Until shown to be unenforceable, how could the plaintiff claim to be without an adequate remedy at law?

I advise the reversal of the judgment and that a new trial be ordered; the costs to abide the event.

Hiscock and Collin, JJ., concur with Gray, J.
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NEW YORK COURT OF APPEALS.

DOUGLAS SYMMERS, Respt.,
v.

HOWARD CARROLL et al., Exrs., etc., of
John H. Starin, Deceased, Appts.

(207 N. Y. 632, 101 N. E. 698.)

Insurance — by carrier — duty to account to shipper.

1. The owner of a vessel which insures the cargo for account of whom it may concern, and collects the insurance on it, upon loss of the cargo by fire, for which he is not liable to the shippers, because of limitation of liability proceedings, must account to them for the money collected, and cannot retain the same for his own use.

Pleading — complaint — accounting for insurance proceeds.

2. The complaint in an action by owners of cargo against the carrier, to recover insurance taken out on account of whom it may concern, and collected by him, need not allege a contract or agreement that he should procure the insurance, or that they would pay the premium; nor is it necessary to allege that the proceeds of the policy were not absorbed by the carrier's individual loss.

(March 25, 1913.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part III., for New York County, in plaintiff's favor in an action brought to compel defendants to account for insurance which had been collected by their testator upon property which had been lost while in his possession as a common carrier. *Affirmed.*

Messrs. Avery F. Cushman and James D. Dewell, Jr., for appellants:

A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods.

Waring v. Indemnity F. Ins. Co. 45 N. Y. 606, 6 Am. Rep. 146; *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 420; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U.

Note. — Right of owner to benefit of insurance taken out by carrier.

A carrier having property in its custody or possession for which it is responsible, or upon which it has a lien for advances, expenses, or disbursements, has an insurable interest to the extent of the full face value of the property. 26 Cyc. 557.

And it may, in its own behalf, take insurance against its liability arising from negligence. 6 Cyc. 510.

S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

The carrier, having an insurable interest in the cargo, had a right to collect and keep the insurance moneys, and was liable only to those shippers who, by paying him, brought themselves under the policy.

Baxter v. Hartford F. Ins. Co. 11 Biss. 306, 12 Fed. 481; *Munich Assur. Co. v. Dodwell & Co.* 63 C. C. A. 155, 128 Fed. 410; *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219; 1 Phillips, Ins. §§ 285, 388; 2 Duer, *Marine Ins.* § 22, pp. 29, 30; *Pennefeather v. Baltimore Steam-Packet Co.* 58 Fed. 481.

The cause cannot be sustained in equity.

Black v. Vanderbilt, 70 App. Div. 16, 74 N. Y. Supp. 1095; *Doyle v. Delaney*, 112 App. Div. 856, 98 N. Y. Supp. 468; *Moore v. Coyne*, 113 App. Div. 52, 98 N. Y. Supp. 892; *Alexander v. Mason*, 125 Fed. 830.

The cases generally sustain the position taken in *SYMMERS v. CARROLL*, that a shipper is entitled to the benefit of insurance taken out by a carrier on account of whom it may concern, on goods in its custody.

In *Insurance Co. of N. A. v. Forcheimer*, 86 Ala. 541, 5 So. 370, it was held that owners of part of a cargo insured by agents of the carrier under a policy "on account of whom it may concern," without naming them, could recover thereon. The court said that the intention of the insurer to cover the general ownership of the property, and not the limited liability of the carrier on account of it, was strongly indicated by the fact that the contract of shipment provided against liability of the carrier for loss arising from any of a number of specified causes, among which were all of those embraced in the policy, except such as involved fault on the part of the carrier or its agents, and that the policy provided that the insurance should not inure to the benefit of any carrier, and that the agents of the carrier might agree to insure third persons, and effect such insurance by entries and notices to the insurer.

In *Robert Williams & Co. v. Auto Exp. Co.* 78 N. J. Eq. 165, 78 Atl. 670, a policy taken by an express company "on merchandise . . . in transit, . . . and for which they are liable as common carriers," was held to be for the benefit of the owners of the goods; and it was further held that the owners' rights arose out of the policies of insurance, and became effective for their protection as soon as the policies were effected, and therefore their rights were not affected by the fact that an assignment by the carrier of its rights to the shippers after loss was made within the prescribed period before the carrier became insolvent.

In *Pacific Mail S. S. Co. v. Great Western Ins. Co.* 65 Barb. 334, plaintiffs chartered a

Messrs. James Emerson Carpenter, and Henry E. Mattison, for respondent:

Starin collected the amount of the insurance as trustee for the owners of the cargo, and had no right to refuse to turn it over to them.

Hagan v. Scottish Union & Nat. Ins. Co. 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146; *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 420; *Munich Assur. Co. v. Dodwell & Co.* 63 C. C. A. 152, 128 Fed. 410.

Being under no liability in respect of such merchandise, his collection of the insurance thereon was "for account of whom it concerned," to wit, the owners.

Pennefeather v. Baltimore Steam-Packet Co. 58 Fed. 481; *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219; *Fire Ins. Asso. v. Merchants' & M. Transp. Co.*

vessel from the owners to carry a cargo of coal, and, in pursuance of an agreement to effect insurance to cover the freight and coal, the owners secured a policy insuring themselves "on account of whom it may concern," loss, if any, to be paid to plaintiffs; and in an action by plaintiffs on the policy, it was held that amounts due the insurers from the owners for other insurance could not be set off against plaintiffs' claim.

In *Pennefeather v. Baltimore Steam-Packet Co.* 58 Fed. 481, under a policy taken out by a carrier of goods to insure itself, "and also to insure each and all owners of such goods," it was held that, in case of loss and collection of the insurance by the carrier, the owners of goods destroyed could unite in a bill in equity to recover from the carrier their proportions of the loss sustained, but that the bill should show if any of such owners had effected and collected other insurance on the goods, there being a provision that, in case such other insurance was effected, the policy in question should cover only the excess loss over such other insurance.

In *Gross v. New York & T. S. S. Co.* 107 Fed. 516, it was held that a consignor of wool which, in consideration of a higher rate of freight, was to be insured by the carrier, which carried several policies covering its own risks as carrier, together with the risk on such goods as, by contract, it was required to insure, could recover for loss from the carrier; the fact that the insurer raised a legal question as to its liability on the particular goods of the consignor not absolving the carrier from the general duty to enforce the policies for the benefit of shippers.

In *Augusta Ins. & Bkg. Co. v. Abbott*, 12 Md. 348, it is held that if insurance obtained by the captain of a vessel, with a general clause "for whom it may concern," was taken for the purpose of enabling him

66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905; Home Ins. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 71 Minn. 296, 74 N. W. 140.

Cudderback, J., delivered the opinion of the court:

This action is brought by the plaintiff in his own behalf and in behalf of all others similarly situated. Prior to December 16, 1904, John H. Starin, the defendants' testator, was the owner of a steamboat used by him in carrying merchandise and passengers from the city of New York, in this state, to the city of New Haven, in the state of Connecticut. On the day mentioned the boat left New York, bound for New Haven, with a cargo of general merchandise, which included merchandise owned and shipped by the plaintiff's assignors, with the freight charges paid or agreed to be paid thereon. While the steamboat was on Long Island sound in the course of the voyage, it was burned to the water's edge, and the cargo was totally destroyed. By a decree of the United States district court, made under the Federal statutes, it has been adjudged that Starin was not liable for the loss or damage growing out of the

destruction by fire of the merchandise on the vessel.

Before the voyage on which the fire occurred, Starin had procured from the Home Insurance Company a policy of insurance on the cargo which reads in part as follows: "The Home Insurance Company, New York, by this policy of insurance, . . . does insure John H. Starin as freighter, forwarder, bailee, common carrier, or for account of whom it may concern, loss, if any, payable to him or order, to the amount of \$20,000, on goods, wares, and merchandise," against loss by fire while on board the vessel so destroyed.

After the fire Starin collected the amount of the insurance, \$20,000, but refused to pay over to the plaintiff's assignors any part thereof, though he had paid a portion of the moneys received to the owners of other parts of the cargo lost. The complaint also alleges that the plaintiff has no knowledge as to the exact value of the merchandise destroyed by the fire, nor as to the identity of the owners, but that such owners are very numerous, and the action is brought for their benefit, as well as for the benefit of the plaintiff. The demand for relief is that the defendants account for the insur-

to obtain freight, and was designed to cover any cargo of lumber which he might obtain for the vessel, the owner of a particular cargo could not maintain an action upon the policy; but whether it was so intended, or whether it was designed when obtained to cover that particular cargo, was a question for the jury. The court quoted from *Newson v. Douglass*, 7 Harr. & J. 451, 16 Am. Dec. 317, to the effect that no one can, by subsequent adoption, avail himself of such a policy,—a policy with the general clause for whom it may concern,—who was not at the time in contemplation of the party procuring the insurance, and for whose benefit it was not intended, notwithstanding any interest he may have in the thing insured. If, as declared by the court, the owner of a particular cargo could not avail himself of the policy, it is not apparent how the taking out of the policy by the owner of the vessel could have any effect to stimulate freights, except as there might be a misapprehension on that point by prospective shippers.

In *Aldrich v. Equitable Safety Ins. Co.* 1 Woodb. & M. 272, Fed. Cas. No. 155, a consignee who had advanced funds to purchase an entire cargo in which he was to be jointly interested with the owner of the vessel was held to be entitled to such amount as would pay the balance due him, out of insurance in the name of the owner of the vessel, "on account of whom it concerns," and nothing could be set off against the consignee on account of amounts due from the carrier to the insurance company, except the amount of the premium which had not been paid
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In *Wise v. St. Louis M. Ins. Co.* 23 Mo. 80, it was held that the owner of goods shipped by steamboat was not entitled to recover on a policy made to another "on all shipments of merchandise the property of the assured," there being no words in the policy equivalent to "for the owners" or "for whom it may concern."

In *Steele v. Franklin F. Ins. Co.* 17 Pa. 290, although the insurance in question was on goods stored in a warehouse, the court points out a distinction between the interest of a carrier and that of the owner of goods in insurance, as follows: "But it may be said that an insurance for the benefit of the carriers is an insurance for the owners. Not so. Their interests are distinct. A contract of insurance is essentially but an engagement to indemnify. The interest of a carrier, without advances, is certainly less than the interest of the owners, where he has a special contract which relieves him from his liability for loss by fire and other accidents. An insurance for the benefit of the carrier would be made upon a less premium, under such circumstances, than would be demanded for an insurance upon the interest of the owner. And where the carriers were not relieved from liability by a special contract, at the time of receiving the goods, and were known to be responsible men, an insurance for the benefit of the owner could be effected at a small premium, by reason of the right of the underwriters to a cession of the owner's remedy against the carriers."

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ance moneys collected by Starin, and pay over to the plaintiff and the other persons entitled to share therein their proportionate parts thereof.

To the complaint setting forth these facts, the defendants demurred, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court at special term, and an interlocutory judgment to that effect was entered, with leave to the defendants to amend on the usual terms. The appellate division affirmed the interlocutory judgment, and, in affirming the same, certified that a question of law had arisen in the case which in its opinion ought to be reviewed by the court of appeals. The question accordingly certified is: "Does the complaint state facts sufficient to constitute a cause of action?"

The argument of the defendants is that Starin had the right as common carrier to insure the cargo for his own benefit, and that he had the right to collect and retain the amount of the loss, irrespective of the question whether he was liable to the owners of the cargo for the damages which they had sustained. The plaintiff cites *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; *Baxter v. Hartford F. Ins. Co.* (C. C.) 11 Biss. 306, 12 Fed. 481, and *Munich Assur. Co. v. Dodwell & Co.* 63 C. C. A. 152, 128 Fed. 410.

These were all cases wherein the common carrier had been relieved by the shipper from liability for loss occasioned by fire. It was held that, although relieved from such responsibility, the carrier remained liable for his negligence, and therefore his right to collect the insurance moneys was not to be determined, after the loss, by inquiry whether he was in fact liable to the owners of the cargo. He could insure himself against his own negligence, and against the necessity of entering into any inquiry as to his negligence. Here the shippers did not release the carrier from liability for loss by fire, and the cases cited do not apply.

It is also the law that a common carrier can, if he so desires, insure the goods left in his charge, not only for his own benefit, but for the benefit of the owners as well. *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146; *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *Pennefeather v. Baltimore Steam-Packet Co.* (C. C.) 58 Fed. 481; *Home Ins. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 71 Minn. 296, 74 N. W. 140.

In *Waring v. Indemnity F. Ins. Co.* supra, the policy of insurance covered oil owned by the plaintiff, "or held in trust on

commission, or sold, but not removed, contained in bonded warehouse." It was held after loss that the plaintiff could recover for himself and for the benefit of a vendee for oil sold, but not removed from the warehouse. Judge Folger said: "It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred." p. 611.

In *Hagan v. Scottish Union & Nat. Ins. Co.* supra, the defendant insured the plaintiff Hagan "on account of whom it may concern," against loss by fire on a tug, her hull, etc. The plaintiff subsequently sold a one-half interest in the tug to Martin. After a loss it was held that the plaintiff could recover on the policy. The court said: "The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it was taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest, and in regard to whom the policy will be applied. We think this the common-sense interpretation of the language used, and that it is justified and required by the authorities.

When the carrier receives the proceeds of the policy of insurance for account of whom it may concern, he holds the money as trustee for those concerned.

No particular words are necessary to create a trust. Trust relations will be implied, when it appears that such was the intention of the parties, and when the nature of the transaction is such as to justify or require it. *Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169.

A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of the provision of the Code of Civil Procedure, § 449. It was so held in *Duncan v. China Mut. Ins. Co.* 129 N. Y. 237, 29 N. E. 76, which was an action on a policy of insurance issued by the defendant to the plaintiff on account of whom it may concern.

Starin in this case, having been relieved by the decree of the Federal courts from all liability to the owners of the cargo for their loss by fire, could not collect the amount of the loss on their property beyond the extent of his charges, except as

trustee. It is held in *Home Ins. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 71 Minn. 296, 74 N. W. 140, that though a carrier has no pecuniary interest in the goods in his possession, and is not liable for their loss by fire, he may insure them as "his own or held in trust by him," and in case of loss may recover in his own name, holding all in excess of his own claim in trust for the shipper.

If Starin held the insurance moneys as trustee, then the owners of the cargo here represented by the plaintiff had the right to call him to account, and it was his duty to state his account and prove the items of his loss. *Kliger v. Rosenfeld*, 120 App. Div. 396, 105 N. Y. Supp. 214. It was his further duty, after paying himself, to divide what remained of the insurance money among the owners of the cargo according to their respective rights and interest.

It is held in *Pennfeather v. Baltimore Steam-Packet Co. (C. C.)* 58 Fed. 481, that where a carrier secures insurance on goods belonging to numerous owners for their benefit as well as his own, and, the goods being destroyed, collects the entire amount of the insurance, equity has jurisdiction on the ground of avoiding a multiplicity of suits and the difficulty of making a proper apportionment, of a suit by some of the owners for the benefit of all who might join, to recover their proportional interests therein.

Within the doctrine of the cases cited it was not necessary to allege in the complaint, as the defendant contends, that there was any previous contract or arrangement between the carrier and the shippers that he should procure insurance on their account, or that they should pay any part of the insurance premium. It is sufficient if he intended to insure their interests in the cargo for their benefit, and such intention is established by the words in the policy "for account of whom it may concern." Furthermore, it was not necessary to allege that the carrier's loss did not absorb the whole amount of the insurance moneys, as the fact, whatever it may be, would be brought out on an accounting.

It does not appear from the complaint that any of the shippers had taken out insurance for their own benefit, or that the policy issued to the carrier contained any provisions that would be applicable if there was other insurance on the cargo. If there was other insurance obtained by any individual shipper, that might affect the amount of his recovery. These matters would also be a proper subject of inquiry on the accounting, with all other facts touching the rights of any of the parties to share in the insurance moneys.
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The question certified should be answered in the affirmative, and the order appealed from affirmed, with costs.

Cullen, Ch. J., and Gray, Werner, Collins, and Miller, JJ., concur. Hiscock, J., absent.

MINNESOTA SUPREME COURT.

ASSOCIATED SCHOOLS OF INDEPENDENT DISTRICT NO. 63 OF HECTOR, RENVILLE COUNTY, Respt.,

v.

SCHOOL DISTRICT NO. 83 OF RENVILLE COUNTY, Appt.

(122 Minn. 254, 142 N. W. 325.)

School — state control over district.

1. The state has the power to require of its municipal subdivisions the performance of duties of state concern, and to demand that they raise money and disburse the same for such purposes.

Same — duty of legislature.

2. The maintenance of public schools is a matter, not of local, but of state, concern. The state Constitution provides that "it shall be the duty of the legislature to establish a general and uniform system of public schools," and that "the legislature shall make such provisions, by taxation or otherwise, as . . . will secure a thorough and efficient system of public schools in each township in the state." These provisions were inserted, not as a grant of power, but as a mandate to the legislature, prescribing as a duty the exercise of an inherent power.

Same — payment of tuition to other district.

3. The legislature may require a school district of the state to furnish public school facilities, and it may provide that, if such district does not supply the required facilities, it shall pay tuition to another district furnishing such facilities to its pupils. A law of this state providing that one or more rural school districts may become associated with a high school for the purpose of affording education in agriculture, manual training, and home economics, including cooking and sewing, and further

Headnotes by HALLAM, J.

Note. — Power of legislature to prescribe subjects to be taught in public schools.

This note does not discuss the right to prescribe text-books for public schools, nor the constitutionality of religious exercises or instruction in such schools, those subjects being treated respectively in the notes to *Campana v. Calderhead*, 36 L.R.A. (N.S.) 277, and *Church v. Bullock*, 16 L.R.A. (N.S.) 860. And see note to *Kuhn ex rel. Sheehan v. Board of Education*, 45 L.R.A. (N.S.)

providing that such associated schools may charge nonresident pupils a tuition, which shall be a charge against the school district, in which such nonresident pupils reside, is within the legislative power.

Same — agriculture and domestic science.

4. The power of the legislature to impose a system of public school education upon local communities, is not limited to the common branches. If the legislature sees fit to require public education of boys in that which pertains to successful agriculture, and of girls in that which pertains to successful housekeeping, it has the power to do so.

Same — violation of Constitution.

5. Such legislation does not violate the constitutional requirement of equality of taxation, so long as the law operates alike

on all persons and property similarly situated. For similar reasons, it does not violate the requirement of a "uniform system of public schools."

Tax — for instruction in agriculture.

6. The funds to pay such an obligation may be raised by taxation. There is ample power in school districts to raise money for all necessary purposes.

Same — action to enforce.

7. An action may be maintained on such a demand. The fact that previous statutes relating to school districts provide only for actions on contracts, or for acts or omissions in the nature of tort, is not important. This act creates an obligation, and a right to its enforcement arises by necessary implication.

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972, as to power of school authorities to purchase text-books.

For cases as to right to exclude, suspend, or expel pupils from schools for failure to participate in certain prescribed studies, see note to Board of Education v. Purse, 41 L.R.A. 599, and School Board Dist. v. Thompson, 24 L.R.A. (N.S.) 221.

As to use of common school funds for normal school or teachers' training school, see note to School Dist. v. Bryan, 20 L.R.A. (N.S.) 1033.

Power to prescribe—in general.

The power and authority to prescribe subjects to be taught in the public schools reside primarily in the legislature. State ex rel. Clark v. Haworth, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; ASSOCIATED SCHOOLS v. SCHOOL DIST.; Roach v. St. Louis Public Schools, 77 Mo. 484, affirming on this point 7 Mo. App. 567.

Thus, in State ex rel. Clark v. Haworth, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946, it was said that essentially and intrinsically the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local, jurisdiction. In such matters, the state is a unit, and the legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities; but on the contrary it is a central power residing in the legislature of the state. Also, the Constitution of the state declares that it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvements, and to provide by law for a general and uniform system of common schools. Therefore, both by the Constitution and by the intrinsic nature of the duty and the power, the authority is exclusively legislative, and the matter over which it is to be exercised is solely of state concern. Moreover, it is impossible to conceive of the existence of a uniform system of common schools without power lodged

somewhere to make it uniform, and even in the absence of express constitutional provisions, that power must necessarily reside in the legislature. If it does reside there, then that body must have, as an incident of the principal power, the authority to prescribe the course of study and the system of instruction that shall be pursued and adopted, as well as the books which shall be used.

And in the Roach Case, supra, it was said that the power of prescribing what shall or shall not be taught in the public schools rests with the legislature, and not with the courts. The legislature may, from time to time, exercise this power and make such modifications and changes as, in its wisdom and discretion, seem fit and proper, subject only to the Constitution of the state.

As a matter of fact, however, this power to prescribe courses of study in the schools of the state is often delegated to local authorities, under general limitations and rules laid down by the legislature. And the power to delegate such authority seems not to be questioned. As was said in State ex rel. Clark v. Haworth, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946, it is for the lawmaking power to determine whether the authority shall be exercised by that power itself, or by a state board of education, or whether it shall be distributed to county, township, or city organizations throughout the state. And, as will appear below, this power of prescribing courses of study has in various cases been delegated to a state board of education, local boards of education, school directors, school commissioners, school committees of towns, school district meetings, and trustees.

Thus, it is said that the right to prescribe the general course of instruction in public schools must exist somewhere. If the legislature, acting within constitutional limits, should prescribe such a course, there is no power in the courts to interfere. And if the legislature sees fit to repose that authority in a local body, such as the superintending school committees of the several towns, such local bodies may rightly exer-

A PPEAL by defendant from a judgment of the District court for Renville County in plaintiff's favor in an action brought to recover a certain amount for tuition and instruction of pupils residing in defendant's district and attending plaintiff's school. Affirmed.

The facts are stated in the opinion.

Messrs. Rieke & Hamrum for appellant.

Messrs. O. A. Allen and J. M. Freeman, for respondent:

The right to create and establish different classes and grades of public schools and school districts necessarily involves the right to prescribe for each separate and distinct regulations specially adapted thereto, and not applicable to the others.

Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450.

The legislature has power to pass laws compelling some districts to pay tuition for their pupils in other districts.

Boggs v. School Twp. 128 Iowa, 15, 102 N. W. 796; Columbus v. Fountain Prairie,

cise it, and the course of studies prescribed by them is to be regarded as if established and prescribed by the act of the legislature. Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256.

However, when this power to prescribe studies has been delegated to a local body (such as school commissioners), it must be exercised by such local body subject to the dominant law of the state. Indianapolis v. State, 129 Ind. 14, 13 L.R.A. 147, 28 N. E. 61.

And where by statute, power is given a state board of education to prescribe the course of study for public schools, which course of study is to be carried out and enforced by local boards of directors, it is not the province of such directors to adopt a course of study according to their own notions of what such a course should be, and they have no authority to adopt a course inconsistent with the prescribed course, although they may deem it superior thereto. Wagner v. Royal, 36 Wash. 428, 78 Pac. 1094.

Subjects that may be prescribed—generally.

This power to prescribe courses of study, when delegated to local authorities, is broad, and its exercise within constitutional and statutory limits rests entirely within the discretion and good judgment of such local authorities. They are not limited to the so-called common branches.

Thus, it is said that neither in the policy of the state, in the Constitution, nor in the laws, are the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or in the grade of instruction that may be

134 Wis. 593, 115 N. W. 1111; Cooley, Const. Lim. p. 349.

The law in question is constitutional because it only imposes upon the district a duty which is not merely local, but which is to be rendered by the district to the state, that is, the duty of educating the young people within the district.

Dill. Mun. Corp. § 121.

School districts are quasi municipal corporations.

25 Am. & Eng. Enc. Law, 2d ed. 31; Harris v. School Dist. 28 N. H. 62; Cooley, Const. Lim. p. 342.

The legislature has power to exercise control over municipal property.

Gregg v. French, 67 Minn. 402, 69 N. W. 1102; School Dist. v. School Dist. 107 Minn. 442, 120 N. W. 898; Guilford v. Chenango County, 13 N. Y. 143; Carter v. Cambridge & B. Bridge, 104 Mass. 236; Com. v. Newburyport, 103 Mass. 129.

Hallam, J., delivered the opinion of the court:

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given, if their voters consent in regular form to bear the expenses and raise the taxes for that purpose. Stuart v. School Dist. 30 Mich. 69.

—agriculture and home economics.

The legislature, acting directly, may in its discretion provide for courses in agriculture and home economics in the public schools. ASSOCIATED SCHOOLS v. SCHOOL DIST.

—bookkeeping.

Under a statute empowering school directors to prescribe what branches of study shall be taught in the common schools, requiring teachers therein to be qualified to teach the common branches, and adding that nothing in such statute shall prevent the teaching in the common schools of other and higher branches than those enumerated, school directors may provide for the teaching of higher branches, such as bookkeeping, to those who are willing to receive instruction therein. Rulison v. Post, 79 Ill. 567. This case, however, turned upon the question whether the directors could compel pupils against the will of their parents to study such higher branches, and that question is beyond the scope of this note.

—debates and compositions.

The authorities of a public school (teachers in this case) have power to require, as a part of the regular school work, the participation by pupils in debates or the preparation of compositions upon assigned subjects. Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S. E. 920.

Laws Supp. 1909, §§ 1342—15 to 1342—25), as amended by chapter 82, Laws of 1911, provides that any high school, graded school, or consolidated rural school, having satisfactory rooms and equipment, and having shown itself fitted by location and otherwise to give training in agriculture, may, upon application to the state high school board of this state, be designated to maintain an agricultural and industrial department, to consist of courses in agriculture, manual training, and home economics, including cooking and sewing.

The act further provides that one or more school districts maintaining rural schools may become associated with any such high school, and in such case the high school shall be known as the central school. Section 3 provides that such associated school may charge nonresident pupils attending and receiving instruction in such department, tuition, to be fixed by the board, not exceeding \$2.50 per month for each such pupil, and that said tuition so fixed shall be a legal charge against the school district in which said nonresident

pupil resides, and shall be paid by such school district out of the funds of such district.

The complaint alleges: That, pursuant to these acts, certain common school districts of Renville county became associated with Independent School District No. 63, of Hector, under the name "Associated Schools of Independent School District No. 63 of Hector, Renville County, Minnesota," for the purpose of maintaining an agricultural and industrial department. That said Independent School District No. 63 is a duly formed and organized high school, and is the central school of plaintiff, and was, prior to the association of said schools, designated by the proper authorities of the state to maintain an agricultural and industrial department. That plaintiff had fixed a charge of \$2.50 a month for tuition and instruction furnished in said departments to nonresident pupils. That during the school year, from September 11th to June 12th, plaintiff furnished instruction in said departments to eight pupils resident within defendant's district,

—kindergarten.

Under a statute empowering the board of education to determine the course of study in the public schools of a city, requiring instruction in certain studies, and providing that other studies may be authorized by the board, such board may adopt the kindergarten system as a special study, and provide for instruction therein. *Sinnot v. Colombet*, 107 Cal. 187, 28 L.R.A. 694, 40 Pac. 329.

—languages.

Where the charge, control, and conduct of the schools of a city are fully committed to the care and direction of the board of education, that board may prescribe such studies as it deems expedient for the training of the pupils, including languages, arts, and sciences. *Roach v. St. Louis Public Schools*, 77 Mo. 484, affirming on this point 7 Mo. App. 566.

And under a constitutional provision that a school system shall be maintained whereby pupils may receive "a good common school education," and under a statute providing that every public school shall be for the instruction in the common branches, "and in such other branches" as the directors may prescribe, such local authorities may provide for the teaching of German or any other modern language, where the medium of instruction is the English language, especially where the teaching of modern languages has long been acquiesced in in such district; and provision for such teaching does not constitute a misappropriation of school funds subject to injunction. *Powell v. Board of Education*, 97 Ill. 375, 37 Am. Rep. 123. 47 L.R.A. (N.S.)

And under a similar statutory provision, the board of education of a city may prescribe the teaching of higher branches, including Latin and modern languages, in the common schools. The board is subject only to the provisions of law, and should exercise their best judgment, always keeping in view the highest good of the schools. *Board of Education v. Welch*, 51 Kan. 792, 33 Pac. 654

—music.

Under a statute directing the instruction in public schools of the common branches, naming them, and such other branches of learning as the advancement of pupils may require, and as the trustees may from time to time direct, such trustees are clothed with discretionary power to prescribe the course of instruction in the different grades of their schools, and they may require that each high school pupil shall at stated intervals employ a certain period of time in the study and practice of music. *State ex rel. Andrew v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, 8 N. E. 708.

Also, the trustees of ungraded township schools may prescribe the teaching of music in such schools. *W. P. Myers Pub. Co. v. White River School Twp.* 28 Ind. App. 91, 62 N. E. 66.

And under a statute empowering each school district at its annual meeting to determine what branches, other than the common branches, shall be taught in the schools of the district, a school district has power to prescribe the teaching of music in its schools as a branch of education. *Bellmeyer v. Independent Dist.* 44 Iowa, 564

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and this action is brought to recover the sum of \$2.50 a month for the time of attendance of each of said pupils.

Defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendant appealed.

It is contended that to tax defendant district for tuition of pupils residing therein and attending plaintiff's school creates unequal taxation; that it constitutes the taking or appropriation of the money of the district without compensation, and without due process of law, and without a hearing to defendant, and for a purpose it may not desire. These contentions cannot be sustained. They are based on too narrow a view of the power of the legislature over its municipal subdivisions and over matters of education.

1. It has never been doubted that the state has the power to require of its municipal subdivisions the performance of duties of state concern, and to demand that they raise money by taxation and disburse the same for such purposes. These municipal subdivisions are mere auxiliaries of the state, created by the state as a means of exercising its political power in an orderly manner. Being thus subordinate agencies of the state, they are subject to the control and direction of the legislature in matters of internal government, and the legislature may require such public duties and functions to be performed by them as fall within the general scope and objects of municipal organization. *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Mobile County v. Kimball*, 102 U. S. 691, 703, 26 L. ed. 238, 241; *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249; *Talbot County v. Queen Anne County*, 50 Md. 245; *Marengo County v. Coleman*, 55 Ala. 605, 607.

2. The maintenance of public schools is a matter, not of local, but of state, concern. When the Constitution of Minnesota was adopted, its framers inserted these two provisions:

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools." Section 1, article 8.

"The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the state." Section 3, article 8.

The object of these provisions is "to insure a regular method throughout the state," 47 L.R.A.(N.S.)

whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." *Board of Education v. Moore*, 17 Minn. 412, 416, Gil. 391, 394. These provisions were not a grant of power to the legislature, for all the powers there mentioned would have existed without such grant. They were inserted as a mandate to the legislature, prescribing as a duty the exercise of this inherent power.

3. This statute is within the legislative power. This state has always imposed upon each community the burden of providing for the elementary education of its children. It has required school districts to maintain common schools for at least five months in the year (*Revised Laws 1905*, § 1337), and to provide by taxation sufficient revenue therefor (*Revised Laws 1905*, § 1324). The power of the legislature to make such requirement has never been doubted. It is equally within the power of the legislature to provide that, if a district does not see fit to furnish school facilities of its own, it shall pay some other district for the furnishing of such facilities.

4. If this were a question of common school education, this proposition would probably not be questioned. But the power of the legislature to impose a system of public school education upon local communities is not limited to common branches alone. It is the judgment of the legislature that this state should now require public education in something more than the common branches; that it should provide for the public education of boys in that which pertains to successful agriculture, and of girls in that which pertains to successful housekeeping. The question whether the population and wealth of the state are such as to warrant such measures is a legislative, and not a judicial, question, a question of legislative policy, and not of legislative power.

5. There is nothing in the statute in question that violates the constitutional requirement of equality of taxation. The law operates alike on all persons and property similarly situated. This is all that is required. *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. Nor does it violate the constitutional requirement of a "uniform system of public schools." In *Curryer v. Merrill*, 25 Minn. 1, 6, 33 Am. Rep. 450, the court said: "The rule of uniformity contemplated by this constitutional provision, which the legislature is required to observe, has reference to the system which it may provide, and not to the district organizations that may be established under it. These may differ in respect to size, grade, corporate powers,

and franchises, as may seem to the legislature best under different circumstances and conditions; but the principle of uniformity is not violated, if the system which is adopted is made to have a general and uniform application to the entire state, so that the same grade or class of public schools may be enjoyed by all localities similarly situated, and having the requisite conditions for that particular class or grade."

The view we have taken of this case is amply sustained by authority.

In *Boggs v. School Twp.* 128 Iowa, 15, 102 N. W. 796, an act of the legislature of Iowa provided for the establishment and maintenance of county high schools. It was held that a provision requiring a school corporation to pay for the tuition of its pupils for attending such a high school without its consent is constitutional. The court said: "That the legislature has the power to provide for a system of public schools, . . . and that it may provide for the maintenance of such schools by taxation, is as well settled by authority. It has the same power to provide for the establishment and maintenance of a county high school that it has to provide for schools of a lower grade, and it may unquestionably designate the means and manner of raising the revenue necessary for its maintenance."

In *Columbus v. Fountain Prairie*, 134 Wis. 593, 115 N. W. 111, the statutes of Wisconsin authorized persons of school age who may reside in any town or incorporated village not within a free high school district, to attend a free high school, and provided for the payment and collection of tuition from the city, town, or village from which such persons are admitted. It was held that this statute was a valid exercise of legislative power.

In *Fiske v. Huntington*, 179 Mass. 571, 61 N. E. 260, an act of the legislature of Massachusetts provided that any town of less than 500 families, in which a public high school or a school of corresponding grade is not maintained, shall pay for the tuition of any properly qualified child who resides in said town and who attends a high school of another town or city. It was held that this statute was constitutional, and that plaintiff was entitled to recover from the town in which he resided for the tuition of his child at the high school of another town, although defendant refused to approve of the attendance.

In *Ricker Classical Institute v. Mapleton*, 101 Me. 553, 64 Atl. 948, a statute of Maine provided that any youth who resides within a town which does not support and maintain a free high school giving at least

a four-year course may, when prepared to pursue such four-year course, attend any high school having such course, and in such case the tuition, not to exceed \$30 annually, shall be paid by the town in which he resides. It was held that a school receiving such pupils might maintain an action under this statute against the town in which such pupils reside, although the statute failed to specify the remedy which should be employed to compel performance by the town of its statutory duty.

In *New Hampton Inst. v. Northwood School Dist.* 74 N. H. 413, 68 Atl. 538, there was involved an act providing that any town not maintaining a high school shall pay for the tuition of any child who, with parents or guardian, resides in said town, and who attends a high school or academy in the same or another town or city in this state. The liability of districts to respond under that statute was affirmed.

We find no authority to the contrary. *High School Dist. v. Lancaster County*, 60 Neb. 147, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380, cited by counsel for appellant, is not in point. The statute there considered provided that nonresident pupils might attend high schools free of charge, and that an arbitrary sum of 75 cents per week for each pupil should be paid out of the general fund of the county for such tuition, which sum might in any case fall below or exceed the cost of education. It was held that the act violated the constitutional requirement of uniformity of taxation, but the decision was based on the ground that the tuition was to be paid by the whole county in which such pupils resided, and that the want of uniformity between the taxpayers of the county who resided within and those who resided without the high school district arose from the fact that the tuition charge was not based upon the expense of education.

6. It is urged that there is no statute under which the defendant is authorized to levy taxes to pay tuition of pupils in the schools of other districts. It is true there was no such provision in statutes previous to the one under consideration. This act in itself creates the obligation to pay, and confers by necessary implication both the power and the duty to raise money for that purpose. The power is ample in the school district to raise money by taxation for all necessary purposes. Revised Laws 1905, § 1324, provides in terms that the school board shall submit at the annual school meeting an estimate of the expenses of the district for the coming year for a school, "and for such other specified purposes as the board may deem proper."

7. It is urged that this action cannot

be maintained, because there is no provision in the statutes for an action upon any such demand; that Revised Laws 1909, § 1458, the only express provision on the subject, provides for actions only upon a contract, or for acts or omissions in the nature of tort. But it is clear that the act of 1911 creates an obligation on the part of defendant. The creation of the obligation carries with it by necessary implication the right to its enforcement. There is ample provision for payment of a judgment when lawfully obtained. Revised Laws 1905, § 1459.

Our conclusion is that the complaint states a cause of action and that the order overruling the demurrer should be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

FRED H. THOMPSON, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(120 C. C. A. 575, 202 Fed. 401.)

Indictment — second for same offense — same grand jury.

1. A grand jury may bring in a second indictment against the same person on the same state of facts, upon the first one proving defective, under a statute providing that if a demurrer is sustained to an indictment it is a bar to another prosecution for the same offense unless the court, being of opinion that the objection to which the demurrer is allowed may be avoided in a new indictment, directs the case to be submitted to the same or another grand jury. Same — former one pending — effect.

2. An indictment cannot be quashed because a former one for the same offense is pending.

Note. — Pardon or commutation of sentence as affecting competency of witness convicted of crime.

As to pardon or commutation as affecting proof of conviction to impeach credibility of witness, see note to Rittenberg v. Smith, post, 215.

The general rule is that the competency of a witness who has been convicted on a charge of having committed an infamous or felonious crime is restored by a full and complete pardon. *Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1078, 12 Sup. Ct. Rep. 292; *Logan v. United States*, 144 U. S. 303, 36 L. ed. 443, 12 Sup. Ct. Rep. 617; *United States v. Hughes*, 175 Fed. 238; *United States v. Jones*, *Brunner*, Col. Cas. 462, Fed. Cas. No. 15,493; *United States v. Rutherford*, 2 Cranch, C. C. 528, Fed. Cas. No. 16,210; *Yarborough v. State*, 41 Ala. 405; *Werner v. State*, 44 Ark. 122; *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148; *Singleton v. State*, 38 Fla. 297, 34 L.R.A. 251, 56 Am. St. Rep. 177, 21 So. 21; *Klein* 47 L.R.A. (N.S.)

Same — receiving money stolen from mail — sufficiency.

3. Failure of an indictment for receiving money stolen from the mails to charge the intent with which the money was received, or from whom it was concealed, or the name of the owner, is not fatal under a statute providing for a punishment of any person who shall receive or conceal any bank note, etc., knowing it to have been stolen from the mail.

Appeal — failure to bring up evidence erroneously admitted — effect.

4. No error will be presumed in the admission of evidence not contained in the bill of exceptions.

Evidence — self-serving declarations — admissibility.

5. In a prosecution for receiving money stolen from the mail, evidence is not admissible that, after arrest, accused informed his attorney that he did not know that the money was stolen.

Pardon — identification of bearer.

6. The identification of a person named in a pardon is sufficient if one bearing the name of the person so named testifies that he received and accepted it.

Same — of offender rather than offense — effect.

7. Pardonng the offender, and not the offense for which the pardon is granted, does not destroy its effect.

Witness — convict — pardon — effect.

8. A full pardon of a convict restores his capacity as a witness.

Appeal — pardon — presumption as to effect.

9. In the absence of anything in the record to the contrary, an appellate court will presume that a pardon introduced to qualify a person as a witness who had been convicted of offenses in the court in which he was to testify, which contained the date of conviction and named the court, was shown

v. *Dinkgrave*, 4 La. Ann. 540 (especially where the disability is not annexed to the conviction by express statutory provision); *State v. Benoit*, 16 La. Ann. 273; *State v. Baptiste*, 26 La. Ann. 134; *Perkins v. Stevens*, 24 Pick. 277; *State v. Kelleher*, 224 Mo. 145, 123 S. W. 551, 19 Ann. Cas. 1270; *State v. Foley*, 15 Nev. 67, 37 Am. Rep. 458; *State v. Blaisdell*, 33 N. H. 388; *Territory v. Chavez*, 8 N. M. 528, 45 Pac. 1107; *People v. Pease*, 3 Johns. Cas. 333; *Com. use of Lawson v. Ohio & P. R. Co.* 1 Grant, Cas. 329; *Howser v. Com.* 51 Pa. 332; *Diehl v. Rodgers*, 169 Pa. 316, 47 Am. St. Rep. 908, 32 Atl. 424; *Jones v. Harris*, 1 Strobh. L. 160; *State v. Dodson*, 16 S. C. 453; *Carr v. State*, 19 Tex. App. 635, 53 Am. Rep. 395; *Thornton v. State*, 20 Tex. App. 519; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330, on subsequent appeal 20 Tex. App. 632; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Missouri, K. & T. R. Co. v. Howell*, — Tex. Civ. App. —, 30 S. W. 98; *Miller v.*

to relate to the particular offenses for which he was convicted, or that the court took judicial notice of that fact.

Instructions — invading province of jury — assuming that witness was accomplice.

10. It is not error to assume in an instruction that a particular witness was an accomplice, if he was so designated in the request of the complaining party.

Appeal — instruction — failure to add qualifying words — first objection.

11. Failure to add qualifying words to an instruction involving a number of propositions cannot be questioned for the first time on appeal.

(February 3, 1913.)

State. — Tex. Crim. Rep. —, 50 S. W. 704; Taylor v. State, 41 Tex. Crim. Rep. 148, 51 S. W. 1106; Petty v. State, — Tex. Crim. Rep. —, 65 S. W. 917, 12 Am. Crim. Rep. 146; Gulf, C. & S. F. R. Co. v. Gibson, 42 Tex. Civ. App. 306, 93 S. W. 469; Wormley v. State, — Tex. Crim. Rep. —, 143 S. W. 615; Flowers v. State, — Tex. Crim. Rep. —, 147 S. W. 1162; Perry v. State, — Tex. Crim. Rep. —, 155 S. W. 263. In this connection it was said in Singleton v. State, 38 Fla. 297, 34 L.R.A. 251, 56 Am. St. Rep. 177, 21 So. 21, that "the pardon of an offense not only blots out the crime committed, but removes all disability resulting from the conviction."

And in United States v. Hughes, 175 Fed. 238, where the Constitution vested pardoning power in the legislature and the governor, and the legislature passed an act providing that service of a sentence for a felony not punishable by death, or a misdemeanor punishable by imprisonment at labor, shall have the like effects and consequences as a pardon by the governor, it was held that service of a sentence for murder in the second degree operated as a legislative pardon which restored the competency of the person so pardoned to testify as a witness. (As to legislative power to grant pardon or amnesty, see note to Singleton v. State, 34 L.R.A. 251.)

And it has been held that it is not an essential to restoration of competency that the pardon expressly state that the rights of citizenship or other rights forfeited by the conviction are thereby restored. Yarborough v. State, 41 Ala. 405.

But a limited pardon does not restore the competency of a witness convicted of a felony. State v. Timmons, 2 Harr. (Del.) 529 (pardon remitted "the fine, imprisonment, and corporal punishment"); Perkins v. Stevens, 24 Pick. 277 (remission of "the residue of the punishment he [the convict] was sentenced to endure"); State v. Kirschner, 23 Mo. App. 349 (governor released, discharged, and set free the prisoner and granted to him "all the rights, privileges, and immunities which by law attach and result from the operation of these presents"). In this connection it was said in Perkins v. Stevens, supra, that "partial 47 L.R.A.(N.S.)

ERROR to the District Court of the United States for the Southern Division of the Southern District of California to review a judgment convicting defendant of having unlawfully received and concealed, and assisted another in concealing, money stolen from the United States mails. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

Messrs. Fred H. Thompson, *in propria persona*, and Paul W. Schenck, for plaintiff in error:

The qualifications of a grand jury in the Federal court must be same as in the state court.

remission cannot be extended beyond the limitations fixed to it. It is only a full pardon of the offense which can wipe away the infamy of the conviction, and restore the convict to his civil rights. If a remission of part would restore competency, what part would have that effect? Would the remission of a few days' solitary imprisonment restore a convict sentenced to the state prison for life? We think the view taken by a former distinguished law officer of this commonwealth, whose long experience in the administration of criminal law gave to his opinions the weight of authorities, are correct and sound. He says. 'There is but one mode now in use, of restoring the competency of a witness, and that is by pardon under the great seal of the state;' 'which, when fully exercised, is an effectual mode of restoring the competency of a witness. It must be fully exercised to produce this effect; for if the punishment only be pardoned or remitted, it will not restore the competency, and does not remove the blemish of character. There must be a full and free pardon of the offense before these can be restored and removed.'

Nor does a conditional pardon restore the competency of a convicted felon. Carr v. State, 19 Tex. App. 635, 53 Am. Rep. 395 (holding that a pardon which by its terms was subject to revocation in case of a future violation of the law by the convict was conditional and did not restore the competency of the pardoned convict); Dudley v. State, 24 Tex. App. 163, 5 S. W. 649 (condition not set out in report of case); McGee v. State, 29 Tex. App. 596, 16 S. W. 422 (condition same as in Carr v. State, supra). In Carr v. State, supra, a strong dissent was entered, the ground taken being that the effect of a pardon with a condition subsequent was the same as that of a full pardon until it was vitiated by the happening of the condition. And see Taylor v. State, 41 Tex. Crim. Rep. 148, 51 S. W. 1106, wherein it was held that a pardon conditioned like that in the Carr Case restored the competency to testify where granted after the full sentence had been served, the ground taken being that in such case the condition was void and the pardon absolute.

But in Hoffman v. Coster, 2 Whart. 453,

United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16,429; United States v. Clark, 46 Fed. 633; United States v. Eagan, 30 Fed. 609; United States v. Benson, 31 Fed. 896; Southern P. Co. v. Rauh, 1 C. C. A. 416, 7 U. S. App. 84, 49 Fed. 698; Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; Kie v. United States, 27 Fed. 351; United States v. Reid, 12 How. 361, 13 L. ed. 1023.

A grand jury or a petit jury, disqualified from acting in the state court, would necessarily be disqualified upon the same grounds from acting in the Federal court.

People v. Hanstead, 135 Cal. 149, 87 Pac. 763; State v. Osborne, 61 Iowa, 330, 16

N. W. 201; State v. Gillick, 7 Iowa, 287; People v. Bright, 157 Cal. 663, 109 Pac. 33; People v. Landis, 139 Cal. 426, 73 Pac. 153.

A juror who has an opinion concerning the case is *prima facie* disqualified.

People v. Miller, 125 Cal. 46, 57 Pac. 770; People v. Wells, 100 Cal. 227, 34 Pac. 718.

The indictment is fatally defective.

Miller v. United States, 66 C. C. A. 399, 133 Fed. 337; United States v. Van Wert, 195 Fed. 974; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; United States v. Cruikshank, 92 U. S. 543, 23 L. ed. 588; United States v. Hess, 124 U. S. 488, 31 L. ed. 518, 8 Sup. Ct. Rep. 571; Foster v. United States, 101 C. C. A.

the remission of the remainder of a sentence, a part having been served, and liberating the convicted person upon payment of costs, was held to remove the incompetency as a witness which attached to the conviction. The court, however, seems to have regarded the grant as in effect a full pardon, it being said that, as it is by the sentence that the disability attaches, the remission thereof would remove the disability, it not being necessary to remit the crime or offense.

So in Jones v. Harris, 1 Strobb. L. 160, a remission of the remainder of a term of imprisonment for a felony in terms that the prisoner "be forthwith released from prison" was held to be a pardon which annulled the sentence and restored the competency of the convict to testify as a witness.

And in People v. Pease, 3 Johns. Cas. 333, it was held that competency to testify was restored to a convicted felon by a pardon, although the pardon contained a proviso that it was not to be construed as relieving from the disabilities arising from the conviction and sentence, but only from the imprisonment; it being said that the proviso was repugnant to the pardon itself, and ought therefore to be rejected.

And it has been held that mere irregularities and omissions of form in a pardon do not destroy its efficacy to restore the competency of a witness, especially where the grant was the deliberate act of the governor, and there was no allegation of fraud or false pretense. Hester v. Com. 85 Pa. 139.

Nor is the restoration to competency to testify avoided by a mistake in stating the offense for which the party had been convicted, where the evidence shows that the pardon was for the offense actually committed. Petty v. State, — Tex. Crim. Rep. —, 65 S. W. 917, 12 Am. Crim. Rep. 146.

So it has been held that a full pardon will restore the competency of a convicted felon although the date of conviction was incorrectly stated therein, if it is shown that it relates to the crime for which the conviction was had. Com. use of Lawson v. Ohio & P. R. Co. 1 Grant, Cas. 329; Hunnicutt 47 L.R.A. (N.S.)

v. State, 18 Tex. App. 498, 51 Am. Rep. 330, on subsequent appeal 20 Tex. App. 632; Martin v. State, 21 Tex. App. 1, 17 S. W. 430.

And the fact that the pardon was granted after the convict had suffered the entire punishment imposed upon him does not render a full pardon any the less effective to restore his competency as a witness. State v. Baptiste, 26 La. Ann. 134; State v. Blaisdell, 33 N. H. 388; State v. Dodson, 16 S. C. 453; Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330; Missouri, K. & T. R. Co. v. Howell, — Tex. Civ. App. —, 30 S. W. 98. In this connection the court in State v. Baptiste, *supra*, said: "We think it matters not whether the pardon came before or after his term of confinement had expired. Imprisonment and hard labor are not the only punishments, which the law inflicts upon those who violate its commands. Besides these are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effects would only be a halfway relief. The doctrine, now well recognized upon this subject, we believe, is that a pardon gives to the person in whose favor it is granted a new character and makes of him a new man. When extended to him in prison, it relieves him and removes his disabilities; when given to him after his term of imprisonment has expired, it removes all that is left of the consequences of conviction,—his disabilities."

And it has been held that a full pardon restores the competency to testify of a convicted felon as to facts which came to his knowledge while he was a convict; that is, after his conviction and before his pardon: it being said that the admission of the evidence of the pardoned convict does not infringe the rule as to *ex post facto* laws. Thornton v. State, 20 Tex. App. 519. And a full pardon of the governor of a state, although granted after the serving of the term of imprisonment, was held in Logan v.

485, 178 Fed. 165; *United States v. Louisville & N. R. Co.* 165 Fed. 936; *United States v. Montgomery*, 3 Sawy, 544, Fed. Cas. No. 15,800; *Batchelor v. United States*, 156 U. S. 429, 39 L. ed. 479, 15 Sup. Ct. Rep. 446; *Ball v. United States*, 140 U. S. 136, 35 L. ed. 384, 11 Sup. Ct. Rep. 761; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *State v. Wheeler*, 3 Vt. 344, 23 Am. Dec. 212; *State v. Darrah*, *Houst. Crim. Rep.* (Del.) 112; *Bannon v. United States*, 156 U. S. 467, 39 L. ed. 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; *Pickering v. United States*, 2 Okla. Crim. Rep. 197, 101 Pac. 123; *United States v. Staats*, 8 How. 41, 12 L. ed. 979; *Dimmick v. United States*, 70 C. C. A. 141, 135 Fed. 265; *State v. Moxley*, 41 Mont. 402, 110

Pac. 83; *Com. v. Finn*, 108 Mass. 468; *Hodges v. State*, 22 Tex. App. 415, 3 S. W. 739; *State v. Perkins*, 45 Tex. 10; *Wells v. State*, 90 Miss. 516, 43 So. 610; *McLain, Crim. Law*, § 718; *State v. Pollock*, 105 Mo. App. 273, 79 S. W. 980; *Miller v. People*, 13 Colo. 166, 21 Pac. 1025; *State v. McAloon*, 40 Me. 133; *Com. v. Maguire*, 108 Mass. 469; *Com. v. Billings*, 167 Mass. 283, 45 N. E. 910; *Sault v. People*, 3 Colo. App. 502, 34 Pac. 263; *Bishop, New Crim. Proc.* 982, 17 Enc. Pl. & Pr. 894; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *People v. Rice*, 73 Cal. 220, 14 Pac. 851; *Com. v. Campbell*, 103 Mass. 436; *State v. Fink*, 186 Mo. 50, 84 S. W. 824; *Dalton v. United States*, 83 C. C. A. 317, 154 Fed. 462; *Evans v. United States*, 153 U. S. 584, 38

United States, 144 U. S. 303, 36 L. ed. 443, 12 Sup. Ct. Rep. 617, to take away all disqualifications as a witness, and restore his competency to testify to any facts within his knowledge, although such knowledge was acquired before his disqualification was removed by the pardon. And a similar conclusion was reached as against the objection that the pardon could not relate back so as to render the convict competent to testify to matters intervening between the time of his conviction and sentence and the pardon, in *Missouri, K. & T. R. Co. v. Howell*, — *Tex. Civ. App.* —, 30 S. W. 98.

And in *Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292, it was held that a full and unconditional pardon by the President, of one who had been convicted of larceny, and had served his sentence, restored the competency of the felon, although the pardon was granted upon the request of the district attorney, and for the express purpose of restoring the competency of the person pardoned as a witness. And see *United States v. Jones*, *Brunner, Col. Cas.* 462, *Fed. Cas. No.* 15,493; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; and *Flowers v. State*, — *Tex. Crim. Rep.* —, 147 S. W. 1162, wherein pardons granted for the express purpose of restoring competency were held to have that effect. And in *Miller v. State*, — *Tex. Crim. Rep.* —, 50 S. W. 704, the court went so far as to hold that a criminal case was properly postponed from one afternoon to the following morning in order that a pardon could be procured by a prospective witness who, at the time of the postponement, was incompetent to testify because of having been convicted of a felony.

And it has been held no objection to a pardon that it was granted to avoid a former decision to the effect that a conditional pardon did not restore the convict to competency as a witness. *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430. In this case it was said that the courts have no concern with the reasons which actuated the executive to grant the pardon; that the constitutional power of the governor to

grant pardons is beyond the control or even the legitimate criticism of the judiciary; and that whatever may have been the reasons for granting the pardon, the courts cannot decline to give it effect if it be valid upon its face.

But a pardon of one distinct offense does not make the pardoned person a competent witness where he has also been convicted of another and distinct felony. *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Miller v. State*, 46 Tex. Crim. Rep. 59, 79 S. W. 567, 3 Ann. Cas. 645. So it was held in *Hutchins's Case*, 4 N. Y. City Hall Rec. 119, where the proposed witness had been convicted in the month of June of three distinct larcenies, that a pardon reciting a conviction of grand larceny in the month of June and the imposing of a sentence for five years did not restore competency to the convict to testify, although the several terms of imprisonment amounted in the aggregate to five years, it being said that a pardon should recite truly and with reasonable certainty the conviction to which it was intended that it should apply, and that it could not justly be inferred that the pardon in question was intended to apply to the whole or either of the three specific convictions.

And a proclamation releasing a convicted felon before the expiration of his term, because of good behavior, and restoring him to "all rights of citizenship possessed by him before his conviction," has been held not to be such a pardon as would restore competency as a witness, the ground being that the executive act neither purported to remove the guilt nor wipe away the infamy, but merely restored rights of citizenship to one yet a convicted felon. *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148; *Blanc v. Rodgers*, 49 Cal. 15.

And it has been held that a pardon does not restore competency where it is expressly provided by statute that the crime (in this case larceny) shall be deemed infamous, and that a conviction shall forever thereafter render the one convicted incapable of giving testimony. *Foreman v. Baldwin*, 24 Ill. 298, wherein it was said that a pardon

L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Evans v. United States*, 153 U. S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *Chitty, Crim. Law*, 170; *Willis v. People*, 2 Ill. 401; *Shaw v. United States*, 91 C. C. A. 208, 165 Fed. 174; *United States v. Pearce*, 2 McLean, 14, Fed. Cas. No. 160, 20; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819; *Com. v. Filburn*, 119 Mass. 297.

Testimony of the witness Orator W. Smith was incompetent for the reason that the purported pardons were inoperative and void, and did not restore him to his competency.

3 Co. Inst. 238; 2 Hawk. P. C. 37, 534, 535; *Cases of Pardons*, 6 Coke. 13; *Dominick v. Bowdoin*, 44 Ga. 357; *State v. Leak*, 5 Ind. 359; *Stetler's Case*, 1 Phila. 302, Fed. Cas. No. 13,380; *State v. McIntire*, 46 N. C. (1 Jones, L.) 1, 59 Am. Dec. 566; *Wharton, Crim. Law*, 5th ed. 405; *State v. Foley*, 15 Neb. 64, 37 Am. Rep. 458; *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148; *United States v. Swift*, 186 Fed. 1007; *Perkins v. Stevens*, 24 Pick. 277; *McGee v. State*, 29 Tex. App. 596, 16 S. W. 422; *Gaskins v. State*, — Tex. Crim. Rep.

—, 38 S. W. 470; *Carr v. State*, 19 Tex. App. 635, 63 Am. Rep. 395.

Evidence of intent, not having been sufficiently pleaded, cannot be submitted to the jury.

People v. Garnett, 129 Cal. 364, 61 Pac. 1114; *Beasley v. State*, 39 Tex. Crim. Rep. 688, 47 S. W. 991.

The foreman of the grand jury and the other members thereof, having such bias and prejudice prior to the time any witnesses were called and examined upon whose testimony the indictment was found, were not competent to return a bill against defendant.

Chitty, Crim. Law, 307; 2 Hawk. P. C. chap. 25, §§ 18, 28, 33; *Bacon, Abr. Juries*, 4 Swabey & T. 748; *Reg. v. Knatchbull*, 1 Salk. 150.

The incompetency of one member of a grand jury vitiates an indictment, and a motion to quash on such ground prior to plea is timely and proper.

State v. Rowland, 36 La. Ann. 193; *State v. Jones*, 8 Rob. (La.) 616; *Barney v. State*, 12 Smedes & M. 72; *State v. Duncan*, 7 Yerg. 271; *Com. v. Smith*, 10 Bush. 476; *United States v. Hammond*, 2 Woods, 197,

restores the competency where the disability is a consequence of the judgment, but not where the disability is annexed by the express words of the statute.

And under the Tennessee statute declaring persons convicted of certain offenses infamous and incompetent as witnesses unless restored to full citizenship, as provided by law (by petition to the circuit court in Tennessee), it has been held that an executive pardon does not restore the competency of the person pardoned. *Evans v. State*, 7 Baxt. 12, wherein the crime was petit larceny. In reaching this conclusion the court adhered to the rule of distinction adopted in *Foreman v. Baldwin*, supra, stating the reason therefor as follows: "The distinction seems to be this: that that part of the statute which declares persons convicted of certain offenses infamous and incompetent as witnesses, notwithstanding it is part of the punishment, is also a rule of evidence, and this rule of evidence remains unchanged by the executive pardon. We find no conflict of authority upon this question in the elementary writers. . . . The purport of the authority we have referred to is, that this is not interfering with the constitutional power of the governor to grant pardons. That the governor may pardon the offense, and this relieves the party of the punishment. Still, the legislature may, independent of this, upon grounds of policy, decree such persons incompetent witnesses. Although it is in one sense a punishment, it is a question in which others are interested."

So, where the statute provides that a person convicted of perjury "shall not thereafter be received as a witness . . . un- 47 L.R.A. (N.S.)

til the judgment against him be reversed," it has been held that a governor's pardon of the crime of perjury does not restore the competency of the convict, even though the pardon expressly attempted to restore him to all of his civil rights, and the exclusive power of pardon was vested in the governor. *Houghtaling v. Kelderhouse*, 1 Park. Crim. Rep. 241; *Holridge v. Gillespie*, 2 Johns. Ch. 30.

And see *Klein v. Dinkgrave*, 4 La. Ann. 540, where the court infers that the holding in Louisiana would be the same as that in the cases immediately preceding.

And the English rule is that the King's pardon would restore the competency to testify as a witness of a felon convicted upon an information at common law, but that where the conviction was upon a statute disqualifying the witness, such a pardon would not restore the right to testify to the pardoned person, the distinction being made that in case of the statute, it was part of the judgment to be disqualified, and that therefore the disqualification could be removed only by a reversal, while at common law the disability was consequential only, which would allow its removal by pardon of the consequences. To this effect are the following cases: *Rex v. Greepe*, 2 Salk. 513; *Rex v. Crosby*, 2 Salk. 689 (conviction on information for libel,—held restored to competency by pardon); *Rex v. Ford*, 2 Salk. 691 (convicted of barratry,—held restored to competency by pardon); *Anonymous*, 3 Salk. 155 (convicted of perjury under statute disqualifying as witness,—held not restored to competency by pardon); *Dover v. Maestaer*, 5 Esp. 92 (convicted of perjury under common-law indictment,—held re-

Fed. Cas. No. 15,294; *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1.

The district attorney, being of a different opinion than the court, could not seek and get another indictment by the same (or another) grand jury without any direction from the court.

Ex parte Williams, 116 Cal. 512, 48 Pac. 499; *Ex parte Hayter*, 16 Cal. App. 214, 116 Pac. 370; *People v. Hanstead*, 135 Cal. 149, 67 Pac. 763.

Messrs. A. I. McCormick, Edward A. Regan, and Harry R. Archbold, for the United States:

The word "qualifications" in § 800, Revised Statutes, refers only to those legal qualifications which are necessary in order to render the grand juror competent to sit in any case; and not to objections which go only to the favor in some particular case, such as bias, prejudice, and the like.

United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16,716; *United States v. White*, 5 Cranch. C. C. 457, Fed. Cas. No. 16,679; *United States v. Belvin*, 46 Fed. 381; *United States v. Benson*, 31 Fed. 896.

The fact that the grand juror has in-

formed or expressed an opinion as to the guilt or innocence of the accused is no ground for a motion to quash the indictment, or for a plea in abatement.

20 Cyc. 1300; *United States v. Clune*, 62 Fed. 798; *People v. Hanstead*, 135 Cal. 149, 67 Pac. 763; *People v. Northey*, 77 Cal. 618; 19 Pac. 865, 20 Pac. 129, 8 Am. Crim. Rep. 338; *State v. Peterson*, 61 Minn. 73, 28 L.R.A. 324, 63 N. W. 171, 10 Am. Crim. Rep. 422.

The pendency of two indictments against the same defendant, for the same offense, is no ground for quashing either one.

Joyce, Indictments, § 106, p. 123; *Bishop, New Crim. Proc.* § 770; *Com. v. Drew*, 3 Cush. 279; *Smith v. Com.* 104 Pa. 339; *State v. Lambert*, 9 Nev. 321; *O'Meara v. State*, 17 Ohio St. 515; *Miasza v. State*, 36 Miss. 613; *Com. v. Berry*, 5 Gray, 93; *People ex rel. Barron v. Monroe Oyer & Lerminer*, 20 Wend. 108; *Dutton v. State*, 5 Ind. 533; *Com. v. Murphy*, 11 Cush. 472.

In objecting to the competency of a witness on the ground of a prior conviction creating a disqualification, it is incumbent upon the party objecting to establish this disqualification by the introduction of the

stored to competency by pardon); *Reading's Trial*, 7 How. St. Tr. 259 (conviction of treason and pardoned by King,—held competent to testify); *Fernley's Trial*, 11 How. St. Tr. 382 (convicted of outlawry and pardoned,—testimony admitted); *Crosby's Trial*, 12 How. St. Tr. 1291 (pilloried for libel,—pardon held to restore competency). In some of the early English cases, however, it was intimated that the King's pardon alone was not sufficient to restore a felon's competency, but that if he was burned in the hand, that acted as a statutory pardon which restored his competency to testify. See *Palmer's Trial*, 7 How. St. Tr. 1067; *Rookwood's Trial*, 13 How. St. Tr. 139, and *Warwick's Trial*, 13 How. St. Tr. 939.

But in Pennsylvania it has been held (*Diehl v. Rogers*, 169 Pa. 316, 47 Am. St. Rep. 908, 32 Atl. 424) that a full pardon restores the competency of a witness convicted of perjury notwithstanding the provisions of the act of March 31, 1860, to the effect that one convicted of perjury "shall be forever disqualified from being a witness in any matter in controversy," and the provisions of the act of May 23, 1887, that a person convicted of perjury shall not be a competent witness although his sentence may have been fully complied with, § 181 of the act of 1860 providing that the endurance of the punishment shall have the effect of a pardon, the ground being that since both the disqualification of the felon as a witness and the fine and imprisonment are consequences of the conviction, the remission of one is no more a violation of the statute than the remission of the other, and therefore that a full pardon renders the 47 L.R.A.(N.S.)

convicted person a competent witness. In reaching this conclusion, the court criticizes those cases in which a distinction is drawn between conviction on an indictment at common law and on an indictment under a statute which declares that no person shall be received as a witness after conviction thereunder, saying that "all penal consequences of crime, whether by common law or by statute, are equally results of the transgression of the law, and even the common-law consequences are historically presumed to be of statutory origin. There is no basis in sound reason for including one and excluding the other from the power to pardon."

The case of *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, which is cited in *THOMPSON v. UNITED STATES*, is not in point with this note as it did not involve the effect of a pardon upon the credibility of a witness, but Justice Field, in delivering the majority opinion, discussed the general effect of a full presidential pardon in the following language, which is of interest here: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." G. J. C.

record of conviction. This is the only way of establishing this fact.

United States v. Sims, 161 Fed. 1008; Greenleaf, Ev. § 375; 1 Wigmore, Ev. § 521; United States v. Neverson, 1 Mackey, 152; Harless v. United States, 34 C. C. A. 400, 92 Fed. 353; Hopt v. Utah, 110 U. S. 574, 587, 28 L. ed. 262, 267, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

The first conviction and sentence recited did not disqualify the person sentenced. It was a misdemeanor, and not *crimen falsi*.

United States v. Lancaster, 2 McLean, 431, Fed. Cas. No. 15, 556; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; United States v. Sims, 161 Fed. 1008.

A pardon should be construed most strictly against the state, and in favor of the person pardoned.

Redd v. State, 65 Ark. 475, 47 S. W. 119; Osborn v. United States, 91 U. S. 474, 478, 23 L. ed. 388, 389.

If it is possible to show that the pardon was intended to cover, and does cover, the offense of which defendant was convicted, the pardon, if in other respects valid, is sufficient.

Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563.

Gilbert, Circuit Judge, delivered the opinion of the court:

The plaintiff in error, an attorney at law, practising at Los Angeles, California, defended Orlando F. Altorre in a case in which Altorre was indicted for stealing \$15,000 in currency from the mails of the United States. Altorre was employed in the registry division of the postoffice at Los Angeles. In June, 1909, he stole from the mail two packages of currency which had come into his possession as registry clerk, one containing \$10,000 and the other \$5,000. Altorre was convicted on the indictment for stealing from the mails, also on an indictment for perjury, and was sentenced to serve a term of two years in Leavenworth and pay a fine of \$1. In July, 1910, the plaintiff in error was indicted by the Federal grand jury at Los Angeles, indictment No. 268, charging him with having unlawfully received and concealed, and assisted Altorre in concealing, the money above referred to. Shortly afterwards, in order to avoid objections which had been made to the indictment, a second indictment, No. 295, was returned against the plaintiff in error and his wife, and on that indictment he was convicted.

Error is assigned to the refusal of the trial court to quash indictment No. 295. The motion is based on two grounds, the first of which is that prior to finding and 47 L.R.A. (N.S.)

returning the same the grand jury had found and presented indictment No. 268 against the plaintiff in error and Etta M. Thompson, his wife, accusing them and each of them with the identical offense embraced in indictment No. 295, and that the defendants in indictment No. 268 had been arraigned and had entered their pleas, and the trial had been set for a day certain.

The contention is that under the law of California, which it is said became the rule of practice for the Federal courts in that state, a grand jury which has once indicted a defendant is disqualified to bring in a second indictment against him, charging him with the same offense. Assuming, for the purpose of this discussion, that § 800 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 623), which provides that jurors to serve in Federal courts "shall have the same qualifications . . . as jurors of the highest court of law" in the state where they are to serve, is applicable to the case, we turn to the statutes and decisions of California for light upon the question whether the grand jury was disqualified to bring in the second indictment. Counsel for plaintiff in error cite three decisions; *People v. Hanstead*, 135 Cal. 149, 67 Pac. 763; *People v. Bright*, 157 Cal. 663, 109 Pac. 33; *People v. Landis*, 139 Cal. 426, 73 Pac. 153. The two cases last named are not in point, but *People v. Hanstead* holds distinctly in accordance with the contention of the plaintiff in error. That was a decision by a department of the supreme court, and it runs directly counter to a former decision of that court in banc, reported in *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129, 8 Am. Crim. Rep. 338. The opinion in the *Hanstead* Case takes no note of the *Northey* Case, and the court would seem to have overlooked the decision in that case. The practice in the state of California, therefore, cannot be said to be settled in favor of the proposition for which the plaintiff in error contends. It is to be observed that all of the decisions of the supreme court of California above cited were rendered prior to the change in § 1008 of the Penal Code, which was made in 1905 (Stat. 1905, p. 773). That section, prior to the amendment, provided that, if a demurrer were sustained to an indictment, it was a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection to which the demurrer was allowed might be avoided in a new indictment, "directs the case to be submitted to another grand jury." The section as amended substitutes for the last clause the following: "Directs the case to be submitted to the same or another grand jury,"

—thereby declaring the law of the state to be that a grand jury which had once found an indictment against a defendant was not disqualified to find a second indictment against him upon the same facts,—a wise provision of law, and we may well wonder why it should ever have been held otherwise, as no substantial reason is apparent why a grand jury, after having once found an indictment which is discovered to be defective in form, may not, upon the information which it has acquired, and with the same conviction, based upon that information, that the defendant should be brought to trial, present a second indictment for the same offense.

The second ground of the motion to quash, which was that there were pending two indictments against the defendant for the same offense, is not sustainable. It is not supported by any citation of authority, probably for the reason that none could be found. In *O'Meara v. State*, 17 Ohio St. 516, the court, referring to a similar contention, said: "We know of no such law. The last indictment is as valid as the first. Two indictments for the same offense are often pending at the same time. The state can only proceed upon one of them, but may elect upon which it will proceed."

The same was held in *Smith v. Com.* 104 Pa. 339; *Com. v. Drew*, 3 Cush. 279; *Dutton v. State*, 5 Ind. 533; and *State v. Lambert*, 9 Nev. 321.

It is contended that the court erred in overruling the demurrer to the indictment, that the indictment is faulty, in that it fails to charge the intent with which the money was received, or from whom it was concealed, or the name of the owner thereof. The defendant was indicted under § 5470 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3693), which provides that "any person who shall buy, receive, or conceal, or aid in buying, receiving, or concealing . . . any bank note, bank post bill, bill of exchange, . . . knowing any such article or thing to have been stolen or embezzled from the mail or out of any postoffice . . . shall be punishable," etc.

The indictment charges that the defendant did wilfully, knowingly, unlawfully, and feloniously receive from Altorre the bank notes which were therein described, and states the value thereof, and charges that they had been knowingly, unlawfully, and feloniously stolen and taken and carried away from the mails of the United States in a postoffice of the United States at Los Angeles, by the said Altorre, and that the defendants at the time and place of receiving and concealing, and aiding in concealing, said articles, knew the same to

have been unlawfully and feloniously stolen, taken, and carried away from the mails of the United States. These allegations clearly import that the concealment by the defendants was criminal, and done with an unlawful intent, and they cover all the elements of the crime which is described in § 5470. The purpose of the statutes (§§ 5467-5470, U. S. Comp. Stat. 1901, pp. 3691-3693) is to protect the mails against plundering, pilfering, or other interference or meddling with their contents.

In prosecuting offenders for violation of §§ 5467, 5469, and 5470, it is not necessary to allege in the indictment or to prove on the trial all the essential ingredients of the crime of larceny. *United States v. Falkenhainer* (C. C.) 21 Fed. 624; *United States v. Jolly* (D. C.) 37 Fed. 108; *United States v. Atkinson* (D. C.) 34 Fed. 316; *United States v. Trosper* (D. C.) 127 Fed. 476; *Bowers v. United States*, 78 C. C. A. 193, 148 Fed. 379.

It is assigned as error that upon the examination of Maude J. Matthews, a witness for the government as to certain alleged automobile transactions occurring after the commission of the acts charged in the indictment, the court overruled the objections of plaintiff in error to the following question: "Will you state what happened at the time they came in to negotiate with you?" The bill of exceptions informs us that, after the objections were overruled, the witness was allowed to testify "in support of the charges set forth in said indictment, and particularly with reference to said alleged automobile transactions occurring after the commission of the alleged offense." None of the evidence is contained in the bill of exceptions, and we have no means of knowing that any testimony so given was injurious to the plaintiff in error or beneficial to the cause of the government. In the absence of such a showing, no error will be presumed. These remarks are applicable also to the error assigned to the admission of testimony of Frank S. Hutton. Also to the assignment that the court erred in permitting Jackson F. Durlin, deputy marshal, to identify "plaintiff's exhibit 14, consisting of the top of a jar," and to the denial of the motion to strike out the testimony of the witness with reference to finding the same, on the ground that it occurred more than a year after the matter charged in the indictment. We have no means of knowing how the evidence could possibly have tended to incriminate or prejudice the plaintiff in error.

It is assigned as error that the court excluded testimony proposed to be adduced by

Gesner Williams, to show that the plaintiff in error, after his arrest, consulted the witness, who was an attorney, and sought his advice as to what to do under the circumstances, and informed him that he, the plaintiff in error, did not know that the money was stolen, and inquired whether or not he could bring a suit and bring in the bank which claimed to own the money, the insurance company, Altorre, and all other parties interested in it, to determine to whom the money belonged, and that the witness advised him that he could not do so, that he would be betraying the secrets of his client. This testimony was clearly incompetent. To prove the statements made to Williams would be to show only the self-serving declarations of the plaintiff in error, made after he had been arrested and charged with the crime of which he was subsequently convicted.

Altorre was called as a witness for the government. His testimony was objected to on the ground that he had been convicted of perjury and sentenced therefor. The witness produced a pardon which he testified he had received and accepted. It was dated March 21, 1911, was signed by the President, and it pardoned Altorre of the crime of perjury and also of the crime of embezzling the money which the plaintiff in error was charged with concealing. He produced also a pardon of date September 28, 1911, pardoning him of the offense of feloniously stealing, taking, and carrying away certain articles of value from a mail bag of the United States, in violation of § 5467. The objection was made to the first pardon that it was not full and complete, and to the second pardon that it was incompetent, irrelevant, and immaterial, and that no proper foundation had been made for its introduction. The bill of exceptions then recites that the objections to the introduction of the pardons were overruled, to which exception was taken, and thereupon the witness was allowed to testify "in support of the charges set forth in said indictment." The contention is that it does not appear that the witness was the same person as the person named in the pardons, that the pardons did not pardon any offense, but pardoned the offender, and that the pardons failed to set forth the indictment and conviction for the offense committed against the United States.

There is no merit in any of these objections. The witness, bearing the name of the person named in the pardons, testified that he had received the pardons and accepted them. That was sufficient to identify him.

The pardons were full and complete, and 47 L.R.A. (N.S.)

their effect in law was to remove penalties and disabilities, and restore the witness to his full rights. Said the court in *Ex parte Garland*, 4 Wall. 333, 380, 18 L. ed. 366, 369: "It makes him, as it were, a new man, and gives him a new credit and capacity."

As to the objection that no proper foundation was laid for the introduction of the pardons, it is sufficient to say that the record is silent in that respect, and it will be presumed that it was shown, or that the court took judicial notice, that the pardons related to the particular judgments under which Altorre had been convicted in that court of violation of § 5467 and of perjury, for each pardon contained the date of the conviction and sentence, and named the court in which the judgment was rendered.

Error is assigned to certain instructions of the court to the jury. The bill of exceptions contains none of the evidence, nor does it purport to contain the whole of the instructions. For these reasons we might properly decline to enter into a consideration of these assignments. But, assuming that the whole of the instructions are before us, we find no substantial merit in any of the objections that are raised thereto.

For example, error is assigned to the following: "The court has been requested to instruct you on the law with reference to accomplices, especially as affecting the testimony of Mrs. Anna White and Orlando F. Altorre, and you are accordingly instructed that accomplices are competent witnesses," etc.

The objection made to this is that the court characterized the witnesses as accomplices, whereas the question whether they were such was to be determined by the jury. It is clear, however, from the opening sentences of the instruction, that it was given in compliance with the request of the plaintiff in error, and that the witnesses were designated accomplices in the request; for it appears in a requested instruction which the court refused to give that the plaintiff in error requested the following: "If the testimony of Mrs. Anna White is to be believed at all, she was what is known in the law as an accomplice," etc.

Again, after quoting a lengthy sentence from the instructions, the plaintiff in error asserts that there should have been a few words added by way of qualification. If he thought that those words were a necessary qualification of the instructions, he should have directed the attention of the court to their omission. As it was, all that the bill of exceptions shows is that the defendant took an exception, and the exception was allowed to the whole of an in-

struction which involved a number of propositions, in none of which, in our judgment, was there any error.

It is unnecessary to go into further detail, or to enter into a further discussion of the numerous assignments of error to the refusal of the court to grant requested instructions. We find no error in any of them.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOSEPH RITTENBERG

v.

IRWIN L. SMITH.

(214 Mass. 343, 101 N. E. 989.)

Witness — conviction of concealment of property — effect on credibility.

1. Conviction for fraudulently concealing property from a trustee in bankruptcy may be given in evidence to affect the credibility of a witness, under a statute providing that conviction for crime may be shown to affect credibility.

Same — effect of commutation of sentence.

2. Commutation of a sentence for crime does not prevent the introduction of the conviction in evidence, to affect the credibility of the convict as a witness.

(May 19, 1913.)

Note. — Pardon or commutation as affecting proof of conviction to impeach credibility of witness.

As to competency of convict witness as affected by pardon or commutation of sentence, see note to *Thompson v. United States*, ante, 206.

While it is the general rule that the fact that a witness has been convicted of crime may be brought out as bearing on his credibility, where the crime amounts to a felony, or is infamous in its nature and involves moral turpitude (see 40 Cyc. 2607), it is only with the effect upon the rule of a pardon or commutation that the present note is concerned.

Upon the question thus presented, the true rule seems to be that the conviction may be shown in evidence although a full pardon has been granted; that the question of credibility is for the jury; but that the facts connected with the issuing of the pardon should also be shown.

Thus, it has been held that after pardon of one convicted of an infamous crime, the fact of conviction may still be urged as affecting the pardoned person's credibility. *Werner v. State*, 44 Ark. 122; *Wormley v. State*, — Tex. Crim. Rep. —, 143 S. W. 615; *Perry v. State*, — Tex. Crim. Rep. —, 155 S. W. 263. And in such case it has been held that the fact of conviction may be con-

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover back a deposit on account of a stable trade, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. Irish & George for defendant.

Mr. Elisha Greenwood, for plaintiff:

Plaintiff was induced to enter into the contract by fraudulent representation of the defendant. *Bliss v. Thompson*, 4 Mass. 488; *Dana v. Kemble*, 17 Pick. 545.

At common law, one convicted of felony in our state courts was an incompetent witness, but in 1822, however, in *Com. v. Green*, 17 Mass. 517, it was held that such a conviction, except by a court of Massachusetts, did not render a witness incompetent in our courts.

Logan v. United States, 144 U. S. 303, 36 L. ed. 443, 12 Sup. Ct. Rep. 617; *Sims v. Sims*, 75 N. Y. 466; *Langdon v. Evans*, 3 Mackey, 1; *Utley v. Merrick*, 11 Met. 304; 30 Am. & Eng. Enc. Law, 1085; *Hoffman v. Coster*, 2 Whart. 453.

The refusal to rule that, "if the plaintiff had reasonably available means for ascertaining the truth" as to the misrepresentations, "he could not impeach the transaction," was correct.

David v. Park, 103 Mass. 501; *Bowen v. Carter*, 124 Mass. 426; *Lewis v. Jewell*, 151

considered by the jury in determining the credit to be given the testimony of the person pardoned. *United States v. Jones*, *Brunner*, Col. Cas. 462, Fed. Cas. No. 15,493; *Werner v. State*, supra; *Douglass v. State*, — Tex. Crim. Rep. —, 33 S. W. 228.

So, in *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527, it was held that, although a pardon restores a person's competency, his conviction may still be shown in evidence; that the question of credibility was not taken from the jury by the pardon; and that it was not error for the court to refuse to prevent the attorney from arguing that the witness, notwithstanding the pardon, was entitled to no credit on account of his former conviction.

And in *Wallamet R. T. Co. v. Oregon S. N. Co. Fed. Cas. No. 17,106*, in holding that a pardon does not fully restore the credit of a person convicted of an infamous crime, the court said: "It is admitted that the fact of his conviction affects his credibility, but it is claimed that his subsequent pardon by the President—February 27, 1869—restores it. No authority has been cited for this novel proposition; and it is wholly contrary to the nature and reason of the matter. If the pardon established his innocence with the same degree of certainty that the conviction did his guilt, then it would follow that his credibility was thereby restored. But nothing short of this can give

Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52; *Holst v. Stewart*, 161 Mass. 516, 42 Am. St. Rep. 442, 37 N. E. 755; *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Savage v. Stevens*, 126 Mass. 207; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Veasey v. Doton*, 3 Allen, 380; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Deming v. Darling*, 148 Mass. 504, 2 L.R.A. 743, 20 N. E. 107; *Nowlan v. Cain*, 3 Allen, 261.

The refusal to rule that the plaintiff "waived the misrepresentations," if he knew of them before March 1, "and was willing to carry out the contract," was correct.

Weeks v. Currier, 172 Mass. 53, 51 N. E. 416; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Wilkinson v. Blount Mfg. Co.* 169 Mass. 375, 47 N. E. 1020; *Lincoln v. Gay*, 164 Mass. 537, 49 Am. St. Rep. 480, 42 N. E. 95; *Plumer v. Lord*, 9 Allen, 455, 85 Am. Dec. 773.

it such effect. But, as a matter of fact, a pardon by the President is no proof of the innocence of the party receiving it, although it may have been granted upon the belief or impression that the party was not or might not be guilty. It is, or certainly was at the date of this pardon, an *ex parte* proceeding, taken upon the *ex parte* statements, representations, and solicitations of sympathizing friends and interested and uninformed parties, and cannot be said to prove anything except its own existence and the fact that the party was entitled to have, or had the influence requisite to procure, the application of the executive clemency to his case. A pardon does not profess to be a reversal of the judgment of conviction, but only a relief from the punishment imposed by it. In every other respect the judgment stands as if no pardon had been granted."

And in *Curtis v. Cochran*, 50 N. H. 242, it was again held that evidence of the conviction of an infamous crime may be admitted upon the question of the convict's credit as a witness, under a statute providing that the record of such a conviction may be used, and this notwithstanding a pardon may have been granted. In this connection it was said: "The conviction is an impeachment and condemnation of his general character for truth. A pardon is not presumed to be granted on the ground of innocence or total reformation. . . . It removes the disability, but does not change the common-law principle that the conviction of an infamous offense is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government." And following *Curtis v. Cochran*, *supra*, it 47 L.R.A. (N.S.)

Morton, J., delivered the opinion of the court:

The plaintiff was a witness, and for the purpose of affecting his credibility the defendant offered a record of the United States circuit court showing the plaintiff's conviction for fraudulently and knowingly concealing from one Percy A. Atherton, trustee in bankruptcy, certain personal property belonging to one Jacob Kerreh, and his sentence to a term of fifteen months in the jail at East Cambridge. The plaintiff objected and offered a certificate duly made showing that after the plaintiff had served a part of his sentence the same was commuted by the President to expire at once, and that he was released. The defendant objected to the certificate that it was not a pardon. But the court admitted it, and excluded the record of conviction. The defendant excepted. We think that the record should have been admitted.

By Rev. Laws, chap. 175, § 21, it is provided that "the conviction of a witness of

was held in *Territory v. Chavez*, 8 N. M. 528, 45 Pac. 1107, that a pardon, although restoring a convict's competency, does not restore his credit.

And in *Gulf, C. & S. F. R. Co. v. Gibson*, 42 Tex. Civ. App. 306, 93 S. W. 469, it was held that the fact that a witness had been convicted of a felony could be shown in impeachment of his credibility, notwithstanding his competency to testify had been restored by pardon.

And in *Dudley v. State*, 24 Tex. App. 163, 5 S. W. 649, it was held that the conviction of a witness on a felony charge could properly be shown in evidence as affecting the credibility of such witness, although a conditional pardon had been granted.

In *Sisson v. Yost*, 58 Hun, 609, 35 N. Y. S. R. 136, 12 N. Y. Supp. 373, where the credibility of a witness was attacked by showing a conviction of a felony, it was held that evidence of the promptitude with which the pardon was granted, the reason why it was granted, and the time when the convict was discharged, was admissible as necessarily bearing upon the question of the credibility to be given the witness.

But in *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, reversing on this point 110 Ill. App. 250, under a statute making one convicted of crime competent to testify, with the qualification that the conviction might be shown for the purpose of affecting his credibility, in holding that evidence of a pardon was inadmissible, the court said: "Under the statute, the guilt or innocence of the defendant of the crime for which he had been convicted, his punishment, his term of service, etc., are wholly immaterial and incompetent. That he may have been pardoned proves nothing as to his credibility, and to permit evidence of that fact would simply be to introduce into the case a collateral issue." G. J. C.

a crime may be shown to affect his credibility." The first provision touching this matter is found in the Revised Statutes, chap. 94, § 56: "No person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof in this state; but the conviction of any person, in any court without the state, of a crime which, if he has [had] been convicted thereof within this state, would render him an incompetent witness here, may be given in evidence to affect his credibility." This related to crimes proof of the conviction of which would render a witness incompetent at common law, and it was expressly provided that proof of the conviction of a witness of such a crime in another state should be admissible here to affect his credibility. See *Com. v. Knapp*, 9 Pick. 496, 511, 20 Am. Dec. 491. The next statute was Stat. 1851, chap. 233, § 97. The concluding sentence of this section is as follows: "And the conviction of any crime may be shown, to affect the credibility of any person testifying." This sentence and the section in which it is found were re-enacted *in totidem verbis* in Stat. 1852, chap. 312, § 60. With slight changes in phraseology, and with changes in the order and connection in which it occurs, the sentence which we have quoted above from Stat. 1851, chap. 233, has appeared in successive re-enactments. Gen. Stat. chap. 131, § 13; Stat. 1870, chap. 393, § 3; Pub. Stat. chap. 169, § 19. The change from "any crime" in Gen. Stat. chap. 131, § 13, and Stat. 1870, chap. 393, § 3, and in previous statutes, to "a crime," in Pub. Stat. chap. 169, § 19, has no significance. It is plain, we think, that a conviction of any crime, whether a felony or a misdemeanor, may be given in evidence to affect the credibility of a witness. That was in effect so held in *Com. v. Hall*, 4 Allen, 305, and was expressly decided in *Com. v. Ford*, 146 Mass. 131, 15 N. E. 153, and *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586. There is nothing limiting the conviction which may be shown to one obtained in the courts of this state. In *Com. v. Knapp*, supra, a conviction obtained in Maine was permitted to be introduced in evidence. And in *Gertz v. Fitchburg R. Co.* 137 Mass. 77, 50 Am. Rep. 285, it was assumed, on due consideration, that a conviction obtained in the United States district court for a felony punishable with imprisonment stood on the same footing as a conviction obtained in another state, and was admissible. We do not conceive that the fact that it was a felony rather than a misdemeanor made, or on principle should make, any difference.

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In the present case, the offense was one involving falsehood and fraud, and as such was calculated to show moral turpitude and a disregard for truth and honesty on the part of the person committing it. *Com. v. Green*, 17 Mass. 515, 539-549, was decided in 1822, before the enactment of Rev. Stat. chap. 94, § 56, and the question was whether a conviction of an infamous crime in another state rendered a witness incompetent. The question whether such conviction was admissible to impeach his credibility was left open with an intimation that it was. p. 541. The commutation of the sentence did not do away with the conviction. Only a full pardon could do that. *Perkins v. Stevens*, 24 Pick. 277. The effect of the commutation was simply to remit a portion of the sentence. The conviction remained undisturbed by the commutation, and was admissible to affect the credibility of the witness. This exception must be sustained. Stat. 1913, chap. 81, was not enacted till after this case had been tried, and is not therefore applicable.

There is nothing in either of the other exceptions. There was evidence tending to show that the defendant refused to carry out and perform the agreement, and that the plaintiff was ready and able and offered to perform his part of the contract. The question of waiver by the plaintiff of the alleged misrepresentation by the defendant in regard to the rent was rightly left to the jury. So, also, was the question whether there was any misrepresentation, and whether and to what extent, if any, the plaintiff relied upon it. The circumstances under which the trade was entered into were such that it could not be ruled as matter of law that the plaintiff was not justified in relying upon the representations made by the defendant. The jury could not have been properly directed to return a verdict for the defendant as requested. We cannot say that the evidence concerning the characterization of the defendant's appearance and manner was improperly admitted.

Exceptions sustained.

KANSAS SUPREME COURT.

STATE OF KANSAS, Appt.,

v.

ROBERT E. GILLMORE.

(88 Kan. 835, 129 Pac. 1123.)

Husband and wife — desertion — payments — constitutionality.

1. Chapter 163, Laws 1911, relating to

Headnotes by WEST, J.

desertion and nonsupport of wife by husband, or of children by either parent, is not unconstitutional by reason of the provisions of § 4, relating to orders for periodical payments, nor because of the requirement of § 7, relating to wages of one confined at hard labor, nor because the punishment is unusual.

Same — duty of husband.

2. The chief object of the act is to compel the husband, when able, to support his family; and wherever he deserts his wife, leaving her in destitute or necessitous circumstances, it is his duty to provide for her there, unless some reason be shown why she should follow him elsewhere.

Same — nonresident — witness — liability.

3. The offense is committed either by deserting and leaving her in destitute or necessitous circumstances, or by neglect or

refusal to provide for her whenever, after such desertion, she becomes destitute or necessitous. And a husband who deserted his wife in such circumstances, and left the state before the act took effect, and after it became operative voluntarily returned to be a witness in a civil action between other parties, and while here neglected or refused to provide for her, she then being in destitute and necessitous circumstances, thereby rendered himself liable to prosecution.

Criminal law — plea to jurisdiction — defense.

4. In a criminal case, a plea to the jurisdiction which goes only to matters of defense may properly be denied.

Same — duty to prove or verify.

5. A plea to the jurisdiction is not receivable unless proved or positively verified.

(February 8, 1913.)

Note. — Offense of desertion or failure to provide for wife or family as affected by residence of parties.

This discussion is confined to criminal prosecutions. As to absence of accused from territorial jurisdictions at time of offense, as affecting jurisdiction of offense generally, see note to *Tutt v. Greenville*, 33 L.R.A.(N.S.) 331.

General principles.

The locality of an offense is the place where the act or acts constituting the same are committed, but it is sometimes difficult to apply this rule to particular crimes, or to determine the locality of a crime where several persons participate at different places. 12 Cyc. 208. The test for the proper action-venue has generally been, not whether the direct effect of the action would be *in rem* or *in personam*, but whether the occurrence giving rise to the action could have happened only in one place, or might have happened anywhere. If it might have happened anywhere, the action could be recognized as transitory, and its venue might be laid in any county; if in one place only, the action remains local, and its venue must be laid where the occurrence happened. 40 Cyc. 19.

Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, venue must be laid as in the county of the offense, and it must be proved as laid. An offense is committed in that county in which the acts constituting the same are done. *State v. Dangler*, 74 Ohio St. 49, 77 N. E. 271.

Although a defendant may be tried only in the county where the offense is committed, the personal presence of the offender is not always an indispensable element in fixing local jurisdiction of the criminal offense; a crime is, in legal contemplation, committed in the place where

the doer's act takes effect, whether he is himself in such place or not. *Johnson v. People*, 66 Ill. App. 103; *State v. Dvoracek*, 140 Iowa, 266, 118 N. W. 399.

Such an offense as desertion is negative, the omission of a duty, and therefore venue depends on the question where the omission to perform that duty occurs; and where the husband abandons his family and they become destitute, he owes the duty of support at the place of their residence and nowhere else; accordingly, the breach of duty occurs there and the venue should be laid there. *State v. Dvoracek*, supra.

General rule.

The general rule is in accordance with the decision in the *GILLMORE CASE*, and may be stated briefly as follows: Where a man deserts or abandons his wife or minor child, and where he himself subsequently removes to another jurisdiction, or where he sends the wife or child to another jurisdiction, he is properly indicted and tried for the offense in the jurisdiction where the wife or child becomes dependent, regardless of his nonresidence, for that is the place where the duty of support should be discharged, and consequently the place where the offense of failure to support is committed. This rule may, however, be affected by statute, and also by the application of the theory that the object of statutes prescribing punishment for such offenses is not only to prevent the wife or child from becoming a public burden, but also to punish the wrong as such, and to deter husbands from abandoning their families.

Application of rule as between different counties—where the husband or father removes to another county.

Thus, in *State v. Dvoracek*, supra, under a statute providing that the local jurisdiction of the court is of offenses committed within the county, but that where an offense is committed partly in one county and partly in another, or where the acts constituting the offense occur in two coun-

A PPEAL by the State from an order of the District Court for Stafford County discharging accused, who had been arrested under a charge of neglecting and refusing to support and maintain his wife. Reversed.

The facts are stated in the opinion.

Messrs. John S. Dawson, Attorney General, Ray H. Beals, and Paul R. Nagle, for the State:

There was an abandonment.

Spencer v. State, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969; Burton v. Com. 109 Va. 800, 63 S. E. 464; State v. Stout, 139 Iowa, 557, 117 N. W. 958; Com. v. Simmons, 165 Mass. 356, 43 N. E. 110; Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805; State v. Witham, 70 Wis. 473, 35 N. W. 934; State v. Dvor-

acek, 140 Iowa, 266, 118 N. W. 400; State v. Sanner, 81 Ohio St. 393, 26 L.R.A. (N.S.) 1093, 90 N. E. 1007; Burton v. United States, 202 U. S. 344-387, 50 L. ed. 1057-1073, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362.

The nonresidence of defendant is immaterial.

1 Bishop, Crim. Law, § 110; Jones v. Layne, 144 N. C. 600, 11 L.R.A. (N.S.) 361, 57 S. E. 372; Spencer v. State, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969; Burton v. Com. 109 Va. 800, 63 S. E. 464; State v. Witham, 70 Wis. 473, 35 N. W. 934; State v. McCullough, 1 Penn. (Del.) 274, 40 Atl. 237; State v. Dvoracek, 140 Iowa, 266, 118 N. W. 399; State v. Sanner, 81 Ohio St. 393, 26 L.R.A. (N.S.) 1093, 90 N. E. 1007; Bur-

ties, jurisdiction is in either county, it was held that where the husband had deserted his family without cause, and had come to another county within the state, the venue and trial were rightly in the county where the duty of providing for the family should be discharged, i. e., in the county where the wife and children resided.

Similarly, in *Re Price*, 168 Mich. 527, 134 N. W. 721, Ann. Cas. 1913 C, 594, under a statute providing that "any person who deserts and abandons" shall be guilty of the offense, it was held that the venue is properly laid in the county of the wife's legal residence, for there the offense of failure to support is committed, although the husband is a resident of another county at the time of his arrest, and never was a resident of the county where the wife resides.

And a father residing in one county is properly indicted for nonsupport of his minor children in another county which is that of their residence. The place where the injury is done is the place where the crime is committed. If one personally out of the county puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence be elsewhere. By parity of reasoning, one is answerable for his neglect in the place where others suffer in consequence. *State v. Peabody*, 25 R. I. 544, 56 Atl. 1028.

And so, where a husband and father abandons his family in one state, and goes to another, and his child later becomes dependent, he is indictable in the state where the abandonment occurred and in the county where the child first became dependent. *Ware v. State*, 7 Ga. App. 797, 68 S. E. 443. In this case the chief question at issue was as to whether the venue should be laid in the county where the actual abandonment occurred, or in the county to which the wife and child later removed, and where the child first became dependent.

Likewise, under a statute (Ohio) prescribing punishment for neglect to provide for a minor child, and providing that the offense shall be held to have been committed 47 L.R.A. (N.S.)

in any county of the state in which such child may be at the time the complaint is made, the venue is in the county where the child is when the complaint is made, or when the indictment is returned. *Ex parte Lewis*, 34 Nev. 28, 115 Pac. 729.

But in *State v. Dangler*, 74 Ohio St. 49, 77 N. E. 271, it was held that one who violates a statutory duty to support his parent commits the offense in the county where he then resides, and cannot be prosecuted therefor in another county which may be the county where the dependent parent resides.

But while the court of one county may not have jurisdiction to try a defendant accused of nonsupport of minor children, when it appears that he is a resident of another county, that is a matter of defense to the prosecution, and must be considered by the tribunal upon the trial, and is not a ground for discharging the defendant on habeas corpus. *Burns v. Tarbox*, 76 Ohio St. 520, 81 N. E. 761; *Re Poage*, 87 Ohio St. 72, 100 N. E. 125.

Also, under an act providing for the punishment of a husband or father who deserts his wife or children, "being within the limits of this commonwealth," upon warrant of arrest issued by any magistrate of the commonwealth, the jurisdiction of the offense is not confined to the court of the county where the defendant has his residence, but extends to any county of the state. *Demott v. Com.* 64 Pa. 302; *Keller v. Com.* 71 Pa. 413; *Com. v. Tragle*, 4 Pa. Super. Ct. 159; *Com. v. Wall*, 4 Pa. Dist. R. 326; *Barnes v. Com.* 2 Pennyp. 506.

And if a husband deserts his family and goes into any other county of the state, he may be arrested in any part of the state and be brought back for trial, and since the desertion continues he may be brought to trial in the county to which he may have removed after such desertion. *Com. v. Douglass*, 2 Lanc. L. Rev. 179, cited in 26 Am. Dig. Century ed. col. 2876.

—where he sends his family to another county.

Under a statute making the gist of the

ton v. United States, 202 U. S. 344, 388, 50 L. ed. 1057, 1074, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; State v. Bailey, 57 Neb. 204, 77 N. W. 654; State v. Stout, 139 Iowa, 557, 117 N. W. 959.

Messrs. F. L. Martin and Van M. Martin, for appellee:

The law under consideration is unconstitutional.

People v. Smythe, 56 Tex. Crim. Rep. 375, 23 L.R.A.(N.S.) 854, 133 Am. St. Rep. 976, 120 S. W. 200; Waller v. State, — Tex. Crim. Rep. —, 120 S. W. 207; Re Wheeler, 34 Kan. 98, 8 Pac. 276, 6 Am. Crim. Rep. 70; Atchison, T. & S. F. R. Co. v. State, 22 Kan. 1; Harrod v. Latham Mercantile & Commercial Co. 77 Kan. 466, 95 Pac. 11.

offense the voluntary and wilful abandonment of the child, and leaving it dependent and destitute, where a husband voluntarily and wilfully separates from his wife in one county and sends her by his agent to another county, and his children become dependent and destitute in the latter county, he is indictable in that county, since it is by his act that they are removed thither (Bennefield v. State, 80 Ga. 107, 4 S. E. 869); also under a statute making the offense complete when there is an abandonment and the child is left dependent (Cleveland v. State, 7 Ga. App. 622, 67 S. E. 696).

And in Johnson v. People, 66 Ill. App. 103, where the defendant was charged with abandoning his wife and minor children, and neglecting and refusing to maintain and provide for them, it appeared that the actual abandonment occurred in another state, and subsequently both the husband and the family returned to Illinois, but took up their residence in different counties; the wife later visited her husband, and he sent her back to her home county promising to come over and provide for them, but failed. It was held that the venue was properly laid and the trial had in the county where the wife and children were sent, and where they became dependent, although the husband had not been in that county for several years.

And where a husband and wife residing in a certain city voluntarily separate, he consenting that she shall go to another city (and county) to reside, and that their minor children shall go with her, and where he agrees to pay her a certain sum weekly for the children's support, upon his refusal to pay the agreed amount he abandons them at the place of their residence, and since it is to the interest of that municipality that it shall not be compelled to assume the obligations of the father, its courts have jurisdiction to determine his guilt or innocence. People ex rel. Armstrong v. Quigley, 75 Misc. 151, 134 N. Y. Supp. 953.

However, in State v. Baurens, 117 La. 136, 41 So. 442, it was held that a man may be tried in the parish where he resides for the offense of failure to support his wife, 47 L.R.A.(N.S.)

Defendant came to Kansas as a witness in a civil case.

He cannot violate this law of Kansas while his residence is in Texas.

He cannot be convicted for acts committed before the passage of the statute.

People v. Price, 250 Ill. 112, 95 N. E. 68; Com. v. Bailey, 1 Legal Gaz. Rep. 87; State v. Hoon, 78 Neb. 618, 111 N. W. 462; State v. Stout, 139 Iowa, 557, 117 N. W. 958; People v. Flewellyn, 111 N. Y. Supp. 621; Virtue v. People, 122 Ill. App. 223.

The state must prove criminal intent.

State v. Brinkman, 40 Mo. App. 284; People ex rel. Vitam v. Vitan, 8 N. Y. Crim. Rep. 30, 10 N. Y. Supp. 909; People v. Pettit, 74 N. Y. 320, 3 Am. Crim. Rep. 56.

although the wife has been compelled, because of his cruelty, to find shelter with her child at the residence of her father in another parish.

And in Cuthbertson v. State, 72 Neb. 727, 101 N. W. 1031, it was said that it is quite immaterial where the first act of separation occurs, if such act is followed by a wilful refusal to support the wife at the place previously provided by the husband and considered by them both as their home; the county in which the home is fixed the venue of the offense. Accordingly, although the separation actually occurred in one county, where the husband at that time provided for the maintenance of the wife until she should return to their place of residence in another county, and where his refusal to support her occurred after her return to that other county, the crime, if any, occurred in the latter county, and the defendant is rightly convicted there.

Application of rule as between different states.

In STATE v. GILLMORE, under a statute providing that "any husband who shall without just cause desert or neglect to provide for his family" shall be guilty of the offense, it was held that the fact that the defendant was a resident of another state at the time the act making desertion a criminal offense took effect, and during the times named in the warrant of arrest, is no defense to a charge of desertion and failure to support the wife in the state where she became dependent. In this case it appeared that the defendant had come voluntarily into the state where he had previously abandoned his wife, and had voluntarily remained there some days and had failed to provide for her support or maintenance.

So, under a statute providing that if any husband, being within the limits of the state, shall separate himself from his wife without reasonable cause, or shall neglect to maintain her, it shall be lawful for any justice of the peace of that state, upon information, to issue a warrant for his ar-

West, J., delivered the opinion of the court:

Section 1 of chapter 163 of Laws of 1911 provides: "That any husband who shall, without just cause, desert or neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, . . . shall be guilty of a crime, and, on conviction thereof, shall be punished by imprisonment in the reformatory or penitentiary, at hard labor, not exceeding two years."

On May 11, 1912, a complaint was sworn to before a justice of the peace of Stafford county, charging: "That on the ——— day of April, 1911, and from then continuously to the filing of this complaint, at the county of Stafford, state of Kansas, the said

defendant, Robert E. Gillmore, being then and there the husband of one Rosamond Gillmore, did then and there unlawfully, wilfully, feloniously, and without just cause, desert and neglect and refuse to provide for the support and maintenance of his said wife, she (the said Rosamond Gillmore) being then and there in destitute and necessitous circumstances." The defendant was arrested, and filed a motion to quash, which was overruled; and, after a preliminary hearing, the defendant was bound over to the district court for trial. On the 13th day of May, an information was filed containing substantially the same charge as indicated, in response to which the defendant filed a paper unnamed, setting out that he denied the jurisdiction of

rest and bind him over for trial, it is not material that the marriage and desertion should have taken place in that state; it is sufficient that the husband is in that state, and that, without reasonable cause, he neglects to maintain his wife, although she is in another state and the desertion may have occurred there. *State v. McCullough*, 1 Penn. (Del.) 274, 40 Atl. 237.

And under a charter providing that every person in the city who actually abandons his wife or children without adequate support, or leaves them in danger of becoming a burden upon the public, may be required to pay a sum sufficient for their support, where a husband and wife are residing in the city separate from each other, and he refuses to support her, by reason whereof she is in danger of becoming a burden upon the public, he may be proceeded against in such city, and it is immaterial that the abandonment actually occurred in a foreign country. *People ex rel. Public Charities Comrs. v. Wexler*, 152 App. Div. 67, 136 N. Y. Supp. 679.

And in *State v. Sanner*, 81 Ohio St. 393, 26 L.R.A. (N.S.) 1093, 90 N. E. 1007, under a statute providing that the father of a child under sixteen years of age, or the husband of any pregnant woman living in this state, who shall neglect or refuse to provide for them, shall, upon conviction, be deemed guilty, and adding that the offense shall be held to have been committed in any county of the state in which such child or woman may be at the time the complaint is made, it was held that the words "living in this state" are meant to qualify the person to whom the duty is owing, and not the word "father" or "husband;" and, accordingly, the fact that he was a nonresident of the state during the time laid in the indictment is no defense.

Also, in *Re Poage*, 87 Ohio St. 72, 100 N. E. 125, it was said that, under the statute then in force in that state, a parent might be guilty of the crime of failing to provide for his minor children, although residing in another state during the time laid in the indictment, and that the venue of the crime is properly laid in the county 47 L.R.A. (N.S.)

where the child resides when the complaint is made.

"Notwithstanding that a parent may never have been a resident of this state, and that he has always been a citizen of another state, yet the circumstances might be such as to make him amenable to our laws. It is unnecessary to imagine such a state of affairs as would authorize the prosecution of a citizen of another state for failure to provide for minor children living and being in this state. It is sufficient to say that it must at least appear either that he has brought or compelled them to come into this state and then abandoned them, or that, having been brought into this state by others, even against his will, they were then abandoned and permitted to become homeless and unprovided for. Clearly, in such case, it would be the duty of the father to assert his legal right to their care and custody, and provide them with a home, food, shelter, and clothing, and his failure to do so would be an offense against our laws. This legislation is for the benefit of the child. It is passed for the purpose of enforcing the natural duties of parents to their children. This duty is owing to the child wherever the parent entitled to its control and custody places it, or wherever, in disregard of his parental duty and obligation, he permits it to remain unprovided for. So that citizens of another state cannot permit their children to become objects of charity in this state, and defend against a prosecution under our laws to compel parents to provide for their minor children, by the plea that they are not citizens of this state; but where such child is brought into this state against the will and consent of the parent, and is provided with a suitable home, food, shelter, and clothing by those responsible for bringing it into the state, or by others procured by them to furnish the same, it is then no concern of our state, and no offense against our laws." *Ibid*.

However, before the section of the Ohio statute was added with reference to holding the offense to have been committed in any county in which the child or woman

the court over his person, and over the subject-matter of the action, and that he entered his special appearance for the sole purpose of this plea; that he was arrested on the 11th day of May; that he left the state of Kansas in 1908, and had been a resident of Texas continuously for the past three years, and had not been in Kansas since 1909, until he came on May 6, 1912, to act as a witness in a case between his wife and other parties; that he intended to return to Texas, where he resided, and, when about to take the train on the

10th of May, he was arrested on a warrant issued by Justice Mace, from which arrest he was discharged on May 11th; that, when attempting to take the train on the date last mentioned, he was again arrested on a warrant of Justice Swartz, before whom he entered his special appearance and moved to quash, which motion was overruled; that the justice proceeded with the preliminary examination, and although there was no testimony showing, or tending to show, that the defendant had ever been in Kansas from April 1, 1911, until

might be, it was held, without opinion, that a defendant was not guilty of the offense where he resided in another state during the time laid in the indictment. *State v. Ewers*, 76 Ohio St. 563, 81 N. E. 1196.

And see *Re Fowles*, post, 227, which is distinguished from the *GILLMORE CASE* upon the ground that there the petitioner did not come into the state voluntarily in the sense in which *Gillmore* came, but only in a strict legal sense; he did not voluntarily remain there at all, but was prevented from a speedy return upon his discharge by another arrest on the same charge, and was then involuntarily in jail.

And under the Georgia Code, in order to convict of child abandonment, it must appear that the acts constituting such abandonment occurred in the state; if the abandonment occurs in another state, although the children subsequently come into the state of Georgia and are dependent and destitute there, the offense is not complete even though the father has knowledge of their condition, unless he has received them or recognized them in some way as his family after they have come into the state. *Jemerson v. State*, 80 Ga. 111, 5 S. E. 131.

Also, under a statute providing punishment for the abandonment of a wife, it has been said that the offense must have been committed in the state, since the intention of such statute is to punish offenses committed there, and not offenses committed elsewhere; accordingly, where a husband and wife separate in one state and she follows him to another state and takes up her residence there, not in order to place herself under his protection or to secure maintenance or support, but simply to coerce him into a division of his money, the husband is not guilty under the statute of the second state. *State v. Weber*, 48 Mo. App. 500.

And under a statute prescribing the punishment for neglect to support wife or child, and expressly providing that the complaint may be made to the court of the district in which husband and wife, or either of them, is living, a man may properly be prosecuted for the offense in the commonwealth of his residence, although the child was born in a foreign land and is still residing there. *Com. v. Acker*, 197 Mass. 91, 125 Am. St. Rep. 328, 83 N. E. 312.

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In *Com. v. Acker*, supra, it was said that "while one of the objects of the statute is doubtless to prevent wives and children from becoming a charge upon the public for their support, this is not its chief object. The higher and more important purpose of the legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation. There is nothing either in the words or the object of the statute that should limit its application to cases where the neglected person happens to be in this commonwealth at the time of the neglect, or at the time of the prosecution for it. A person domiciled in this commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the commonwealth by his father, or has been left by him in another state or country, if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here within our jurisdiction. While residing here, he ought to make provision for the support of his wife and minor children, whether they are here or elsewhere. If he fails to do this, his neglect of duty occurs here, without reference to a place where the proper performance of his duty would confer benefits."

Application of rule where the wife removes to another jurisdiction without the husband's consent—as between different counties.

Where the wife, after her abandonment, removes to another jurisdiction voluntarily and without the husband's consent, the general rule as stated above will usually not apply, especially in simple abandonment cases, for in such cases it is generally held that the offense is complete where the abandonment takes place, and the wife cannot, by taking up her residence elsewhere, confer jurisdiction upon another court to punish the husband for that offense.

Thus, in *Bayne v. People*, 14 Hun, 181, it was held that, under an act providing

and including May 6, 1912, and although it was shown to the justice that the defendant was a resident of Texas, and had been during the times named in the warrant, and no evidence showing that he had been in Kansas subsequent to March 29, 1911, when the act under which he was arrested took effect, he was nevertheless bound over; that he came to Stafford county as a witness in the cause mentioned, and for no other purpose, and was endeavoring to return at the earliest possible moment at the close of the case in which he came to testify; that he

believed he was illegally restrained of his liberty by the sheriff of Stafford county, and that the laws of Kansas can have no extraterritorial effect, and that he could not be guilty of violating the act in question, and that he believed, if it were the intention of the legislature to apply the provisions of such act to nonresidents who were living apart from their wives prior to its passage, that such act is unconstitutional and *ex post facto*, and defendant believed he was exempt from arrest, because he had come merely to be a witness. This was

for the punishment of persons who abandon their families in a certain county, a husband who resides in another county cannot be prosecuted in the first county, for abandoning his wife, simply because she removes to that county. After being abandoned in one county, she may not, by taking up her residence in another county, confer jurisdiction upon the court in the latter to punish the husband for that offense. The offense is complete when the abandonment takes place, and it is only one offense, whether the separation be long or short. And to the same effect is *People ex rel. Drake v. Bergen*, 36 Hun, 241.

And where the wife leaves the husband in one state and removes to another, he following later, but residing in another county, he cannot be prosecuted for abandonment in the county of her residence. The fact that the wife lives in that county at the time of the issuing of the warrant against the defendant, and at the time of his refusal to support her upon demand, does not confer jurisdiction upon the court of that county. A wife who has been abandoned by her husband in one county or state may not, by taking up her residence elsewhere, confer jurisdiction upon a court there to punish him for that offense. *People ex rel. Vitan v. Vitan*, 20 Abb. N. C. 298, 10 N. Y. Supp. 909.

And in *State ex rel. Delevan v. Justus*, 85 Minn. 114, 88 N. W. 415, where it appeared that the husband left his wife, but remained a resident of the same county and provided for her there, and she later removed to another county without his consent, whereupon he ceased to contribute to her support, and refused further to support her and the child, it was held that, if any crime was committed, it was committed in the county of his residence, and that the court of the county where she went had no jurisdiction.

In that case it was said: "It is however, claimed by the state that the relator by his conduct drove his wife to the county of Ramsey, and that it was his duty to support her there, and, having failed to do so in that county, the crime was committed there. The conclusion does not follow from the premises, conceding them to be true; for it was in the county of Hennepin, where he resided and actually was at the time, that he wilfully omitted and re-

fused to support his wife. If the contention of the state be correct, then the wife may, by taking up her residence in any county in the state she may elect, make the crime ambulatory, and render the husband guilty of felony therein, although he may never have been within such county. That she cannot so do is too obvious to justify any discussion of the proposition, for this case does not fall within the limited class of cases in which a party may become liable to punishment in a particular jurisdiction while his personal presence is elsewhere,—for example, circulating a libel in a county in which he is not personally present."

But a husband who enters into a separation agreement with his wife providing for the payment to her of a stipulated sum weekly for support, and who, after she has removed to another county, refuses longer to pay the stipulated sum, may, in proceedings in the other county, be declared a disorderly person for failure to support his wife. *People v. Meyer*, 12 Misc. 613, 33 N. Y. Supp. 1123.

—as between different states.

And where the abandonment occurs in one state, the defendant is not indictable in another state to which the wife may remove in order to live with her father; such an offense is one against the laws of the state where the abandonment occurs, and not against the laws of the other. *State v. Shuey*, 101 Mo. App. 438, 74 S. W. 369.

Under the New York statute providing for proceedings against parents who leave their children chargeable to the public, a warrant of seizure cannot issue against the property of the husband, who has abandoned his wife and child, in another state, and who is not a resident of New York state, and not within its jurisdiction, and has had no notice of the proceedings. *People ex rel. Public Charities Comrs. v. Clairmont*, 58 Misc. 517, 111 N. Y. Supp. 613.

And in *Philadelphia v. Bailey*, 8 Phila. 485, it was held that under a statute providing that a wife's domicile shall be deemed to be that of her husband, where the husband's domicile is in another state, he cannot be prosecuted for desertion in Pennsylvania, since the court there has no jurisdiction.

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sworn to on belief only. To this paper the state demurred; and after argument the court not only overruled the demurrer, but discharged the defendant; and the state, reserving the question for review, appeals and assigns error in the ruling of the trial court.

The defendant contends that the act is unconstitutional because § 4 provides that before trial, with the consent of defendant, or at the trial on entry of a plea of guilty, or after conviction, instead of sending the defendant to the penitentiary or reformatory, or in addition thereto, the court, in its discretion, may make an order, subject to change from time to time, directing the payment of a certain sum periodically, for a term not exceeding two years, to the wife, guardian, curator, or custodian of the minor child or children, or to an organization or individual approved by the court as trustee, and shall have power to release the defendant from custody on probation for a period so fixed, upon his giving a recognizance with or without surety in such sum as the court or judge may order and approve. Also that it is unconstitutional because § 7 authorizes the warden or official in charge of the penitentiary or reformatory, to pay over to the wife, or to someone for the minor children, at the end of each week for their support, a sum equal to such amount as may be allowed by law to such convict for each day's hard labor performed by him. It is also contended that, as the statutes of Kansas can have no extraterritorial effect, and as it is the wife's duty to reside at the husband's domicile, which was here shown to be in Texas, he could not default in her support until demand was made at that place; that, if he owed a duty to support his wife, it was a duty to support her in Texas, and not in Kansas. The provision requiring the warden to pay a sum equal to the daily wage of the convict can hardly render the act unconstitutional, as there is no law in existence by which the convict receives wages for his labor.

The fact that the court is authorized, instead of putting the sentence into execution at once, to parole and recognize the defendant on condition that he provide periodical support for his wife, does not render the act void for diversion of a fine from the direction required by § 6, art. 6, of the Constitution, which requires the proceeds of fines for the breach of any penal laws, to be applied exclusively to the support of common schools. The payment required under this sort of order is the payment of a sum found by the court to be reasonable for the support of a wife, by virtue of which payment the defendant

escapes the penalty of the law, and it can by no process of reasoning be rightfully considered a fine.

As to the paper filed by the defendant, we think it should be considered as an attempted plea to the jurisdiction of the court. It appears to have been so treated by both parties and by the trial court; and we know of no other designation which could with propriety be applied to it.

The general rule is not only that a plea to the jurisdiction must be certain, but that, if it contain matters of defense merely, it may with propriety be overruled. "Where an indictment is taken before a court that has no cognizance of the offense, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. . . . Such pleas are not common; the easier and simpler course being writ of error or arrest of judgment. The want of jurisdiction may also be taken advantage of under the general issue." Wharton, *Crim. Pl. & Pr.* 9th ed. § 422.

"By this plea, the defendant totally denies the authority of the court to try him. . . . But it seems that the the defendant cannot plead to an indictment before justices, that the offense was committed at some place beyond their jurisdiction, for this would amount to no more than the general issue." 2 Bishop, *New Crim. Proc.* 3d ed. § 736.

"This plea is seldom used, as the objection may be taken in other ways. This plea will be proper when the court before which the indictment is preferred has no cognizance of the particular crime, either because of the nature of the crime or because it was not committed within the territorial jurisdiction of the court; or when the court has no jurisdiction of the defendant's person. Objection to the jurisdiction may generally be taken advantage of under the plea of not guilty, or the general issue, and need not be specially pleaded; or it may be successfully raised by motion in arrest of judgment, or on appeal or writ of error, or by demurrer, when the want of jurisdiction appears on the face of the indictment or in the caption. A plea to the jurisdiction is therefore seldom resorted to. The plea, being dilatory, must be certain to every intent. The highest degree of certainty is required." Clark, *Crim. Proc.* § 130.

While the question of jurisdiction may be raised at any time (*Rice v. State*, 3 Kan. 141, ¶ 5 Syl. 161), still "it is proper for the district court to overrule a plea to the jurisdiction of the court, which substantially raises the question of the guilt or innocence of the accused." *Salina v.*

Cooper, 45 Kan. 12, 25 Pac. 233, Syl. ¶ 2; State v. Bailey, 57 Neb. 204, 77 N. W. 654.

Section 162 of the Criminal Code (Gen. Stat. 1909, § 6738) provides that "no plea in abatement or other dilatory plea to an indictment or information shall be received by any court unless the party offering such plea shall prove the truth thereof by affidavit or some other evidence." The oath of the defendant that he merely believed the contents of the paper filed to be true did not amount to an affidavit. State v. Gleason, 32 Kan. 245, 4 Pac. 363, 5 Am. Crim. Rep. 172. The demurrer challenged the sufficiency of the plea. Whatever of substance the paper contained was, if anything, matter of defense; and the demurrer was erroneously overruled.

Assuming, however, that the paper should have been considered as a properly drawn and verified plea to the jurisdiction, it was insufficient, although this sort of pleading and practice is novel in our criminal law. The statute is disjunctive, and the crime is committed either by desertion and leaving the wife destitute, or by neglect or refusal to provide for her support and maintenance when in destitute or necessitous circumstances. In State v. Dvoracek, 140 Iowa, 266, 118 N. W. 399, it was held that the venue may be laid in the county where the duty to support should be discharged. It was also said in the opinion, concerning an act quite similar in terms: "Analyzing this, it becomes apparent that any one of three acts, stated disjunctively, may subject a person to the penalty denounced. The act of abandoning his children had been consummated prior to the taking effect of the act; and this doubtless accounts for the omission to charge him therewith." p. 268.

In State v. Witham, 70 Wis. 473, 35 N. W. 934, the statute made it a misdemeanor to abandon the wife, leaving her in a destitute condition, or, being of sufficient ability, to refuse or neglect to provide for her; and it was held that such abandonment, before the act took effect, but continued down to the time of the trial, subjected the defendant to the penalty. It was said: "By the act of abandonment, leaving his wife in a destitute condition, the husband incurs the penalty. He also incurs the penalty when, being of sufficient ability, he refuses or neglects to provide for her support. In the present case, while the abandonment occurred before the law took effect, still the wilful refusal to provide for his wife continued to the time of trial. This rendered the defendant liable, under the statute, for the penalty incurred or imposed for such neglect." p. 475.

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The wife was alleged to be in destitute circumstances in Stafford county, and the defendant was charged with there deserting and there neglecting and refusing to provide for her support and maintenance. The fact that, when the act was passed, he was in Texas, could be no defense. That he had come voluntarily into Stafford county to appear as a witness in a case between other parties was no bar to his arrest for a violation of the criminal laws of Kansas. His plea that he believed that his domicile had been in Texas since 1908, or even such fact, if it were a fact, of itself, furnished no reason why his wife should be left or permitted to remain in Kansas in destitute circumstances. Had it been shown that she had wrongfully refused to follow him to his domicile in Texas, and thus in law abandoned or deserted him, this might be a defense.

In Com. v. Bailey, 1 Legal Gaz. Rep. 87, both parties had their domicile in Delaware, and the desertion was in Massachusetts, for which the husband was arrested in Pennsylvania, where it was held that the court had no jurisdiction. But in State v. McCullough, 1 Penn. (Del.) 274, 40 Atl. 237, it was ruled that it was sufficient that the husband be in the state, and that he neglect without cause to support his wife, regardless of where he abandoned her. People v. Pettit, 74 N. Y. 320, 3 Am. Crim. Rep. 56, was a case wherein it was shown that, when the parties were living apart, the husband gave a recognizance for her support. He then offered to take her to his father's house, where they had formerly lived, and to support her there, but not elsewhere. She refused to go, for the reason that she would not live in the house with his parents, and that it was unfit because of his father's drunkenness and abusiveness. It was held that the husband was not guilty of failing to support her, on the theory that he had a right to choose the domicile. A violation of the statute, as it was worded, made the delinquent a disorderly person, and the court found no evidence of disorder in the offer to support the wife at the domicile chosen by the husband. People ex rel. Vitan v. Vitan (Gen. Sess.) 20 Abb. N. C. 298, 10 N. Y. Supp. 909 is cited. There the parties were domiciled in Pennsylvania, where the wife left her husband and went to reside in New York. He afterwards came to live in another county in New York. While calling on her, he refused to live with or support her. The court held that this did not render him subject to punishment as a disorderly person,

on the ground that he had abandoned his wife in the county where he was living, and that, knowing, after she had left him without legal cause, that he was residing in another county, she should have made her demand there. Had he first abandoned her without cause and left her destitute, a different question would have arisen.

It was held in *Burton v. Com.* 109 Va. 800, 63 S. E. 464, that, under a statute making it a misdemeanor to desert or wilfully neglect to provide, the violation may be charged as having occurred at the time of desertion or at any time during its continuance. The court said: "In order to establish the offense . . . it must be made to appear that, without just cause, he deserted or wilfully neglected to provide for the support of his wife or minor children, leaving them in destitute or necessitous circumstances. They may be in destitute circumstances at the time the desertion takes place, or they may become destitute as a consequence of the desertion on the part of the husband and his wilful neglect to provide for their support. The object of the statute was to compel the husband, if he were able to do so, to support his wife and children. It is a continuing duty, and the breach of it may be stated as having occurred either at the moment of the desertion, or at any time during the continuance of the wilful neglect to make provision for his wife or minor children, whom he has left, at the moment of desertion, or who have since been rendered destitute or in necessitous circumstances." p. 804.

State v. Sanner, 81 Ohio St. 393, 26 L.R.A. (N.S.) 1093, 90 N. E. 1007, involved a statute making it an offense to neglect or refuse to provide, when able, for the wife or children living within the state, and it was held that a parent might be guilty, although residing in another state, as the venue is in the county where the child is when the complaint is made. The supreme court of Wisconsin decided in *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969, that a husband having the means was punishable for failure to support his wife, who became destitute to his knowledge, although they were living separate by consent. The theory of a continuing offense is fully recognized in *State v. Stout*, 139 Iowa, 557. 117 N. W. 958.

The defendant's statement that he verily believed it was not the intention of the legislature to apply the provisions of the act to "nonresidents who were living apart from their wives prior to the passage of said act" indicates the notion that mere

living apart from a wife relieves the husband from the duty to support, which is neither good law nor good morals. In his brief, his counsel ask: "When he came into Kansas for a temporary and lawful purpose, was he violating the law and committing a crime by failing and refusing to support his wife while here? If, during the few days he was in Kansas, he had supported his wife, would he be innocent of the crime charged?" As to the first question, we reply that, according to the information, he was violating the law, and there was nothing shown in his plea to the contrary. As to the second query, we feel confident that, had he provided for his wife's support during the few days he was here, he would at least be in much better relation to the law than he now is. It is insisted that, before he can be in default, the wife must demand of him in Texas that he provide for her. This presupposes that the circumstances were and are such as to make it her duty to follow him to the other state; and, as already suggested, he alleged nothing showing such duty on her part. Counsel say: "He may admit that he deserted his wife in Kansas in 1908, the law not then being in effect. He cannot be tried for desertion under this law, even if he deserted her in Texas in 1909." But he can be tried for failure to support her in the place where he deserted her, unless he can show some legal excuse, which he has not done thus far.

It is suggested that the act is void because the punishment provided is unusual. Hard labor in the penitentiary or reformatory not exceeding two years, with the incidental provision for the enforcement of orders for support, which, if obeyed, work a stay of execution, is certainly not more unusual than the Wisconsin penalty of six months in jail on bread and water. Of that Justice Winslow said in the *Spencer Case*, 132 Wis. 509. "We are of opinion, however, that the clause in question may well be justified as providing an appropriate punishment for an aggravated case of abandonment or failure to support." p. 520. The penalty is severe; but evidently the legislature believed that this very feature would act as a deterrent to faithless husbands and pitiless fathers who might be tempted to leave wife and child without support or care. Its severity need trouble no one who possesses sufficient manhood and decency to entitle him to remain outside prison walls.

The ruling of the trial court is reversed, with directions to proceed in accordance herewith.

KANSAS SUPREME COURT.

RE A. T. FOWLES.

(89 Kan. 430, 131 Pac. 598.)

States — jurisdiction — nonresidents.

1. One state will not seek to censor or control the conduct of citizens and residents of other states, unless such conduct results in an infraction of its own laws.

Parent and child —nonresident — desertion.

2. A citizen and resident of another state, who, without lawful excuse, knowingly permits his child under sixteen years of age to be and remain here in destitute or necessitous circumstances without providing for the support and maintenance of such child, thereby violates the desertion act (chapter 163, Laws of 1911), and may be punished therefor.

Same — trial in state — retention after discharge.

3. When, upon such charge, the father is arrested in another state and, waiving requisition, comes in the custody of an officer, the courts of this state have jurisdiction to try him upon such charge, although he has never before been within this state. But when, after having thus come, he is discharged by writ of habeas corpus by the probate court of the county where the charge was laid, and before having an opportunity to return, is rearrested on the same charge, the state has no right to retain and try him for failure to support such child after he (the father) was thus brought here, without showing that after so coming he, without lawful excuse, knowingly failed or refused to furnish such support and maintenance.

Same — conditions of guilt.

4. To render a father liable to punishment for such failure before being thus brought here, it must be shown that he knew, or ought to have known, the location and condition of his child, or that he had by act of omission or commission permitted him to be and remain here in destitute or necessitous circumstances without providing for his support and maintenance.

Same — omission in state —liability.

5. A sovereign state will not be less fair in its treatment of parties than it requires its citizens to be, and, having brought here a citizen and resident of another state upon criminal process to answer for an offense alleged to have been committed while in the state of his residence, it will not upon his discharge, and before he has an opportunity to return, forcibly retain him to answer for an act of omission since he was

thus brought here, unless such omission was knowing and wilful on his part.

(Porter, J., dissents.)

(April 12, 1913.)

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed for neglecting or refusing to provide for the support and maintenance of his son. Writ denied.

The facts are stated in the opinion.

Mr. R. E. Melvin, for petitioner:

Nonresidence of petitioner is a bar to his prosecution.

State v. Ewers, 76 Ohio St. 563, 81 N. E. 1196; Ohio v. Sanner, 81 Ohio St. 393, 26 L.R.A.(N.S.) 1093, 90 N. E. 1007; Beattie v. State, 73 Ark. 428, 84 S. W. 477; Tutt v. Greenville, 33 L.R.A.(N.S.) 332, note; Jemmerson v. State, 80 Ga. 111, 5 S. E. 131.

Messrs. John S. Dawson, Attorney General, S. N. Hawkes, Assistant Attorney General, and J. S. Amick, for respondent:

Nonresidence is no defense to a criminal prosecution.

Lindsey v. State, 38 Ohio St. 507; Adams v. People, 1 N. Y. 173; People v. Adams, 3 Denio, 190, 45 Am. Dec. 468; Minor, Conf. L. 499; State v. Sanner, 81 Ohio St. 393, 26 L.R.A.(N.S.) 1093, 90 N. E. 1007.

The nonsupport or desertion takes place where the children are, and not where the defendant resides, and therefore this crime was committed in Douglas county, Kansas, and should be punished there.

29 Cyc. 1678; State v. Peabody, 25 R. I. 544, 56 Atl. 1028; Bennefield v. State, 80 Ga. 107, 4 S. E. 869.

A person coming into the state voluntarily upon a warrant issued by an officer of another state is held to surrender his person to the jurisdiction of said court.

State v. Garrett, 57 Kan. 132, 45 Pac. 93; 21 Cyc. 304.

West, J., delivered the opinion of the court:

This is an application for a writ of habeas corpus submitted upon an agreed statement of facts.

The petitioner for more than eighteen years, excepting a brief sojourn in Missouri, has been a citizen and resident of Dallas, Texas. With him at that place his wife and their two children lived intermittently from about 1895 to about 1905 or 1906, when she left Texas with their two children and brought them to Lawrence, Kansas. It is stipulated that no blame is attached to the husband or wife for the separation. One

Headnotes by WEST, J.

Note.—See note to State v. Gillmore, ante, 217, for a discussion of the effect of residence of parties upon the offense of desertion or failure to provide for wife or family.

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of the children is a boy now about fourteen years old, healthy, and able-bodied, and it is inferable that he has remained at Lawrence since coming there in 1905 or 1906, but with whom it is not shown. On a date not given a complaint was filed before a justice of the peace of Douglas county, charging the petitioner with neglecting or refusing to provide for the support and maintenance of this son. A warrant was issued and the petitioner was arrested at Dallas, Texas, and brought to Lawrence; the issuance of requisition papers having been waived, and on February 24, 1913, he was discharged from custody by writ of habeas corpus issued by the probate court. Almost immediately, and before he had an opportunity to leave, he was again arrested on the same charge upon information filed by the county attorney. February 28th his plea in abatement was sustained, whereupon he demanded to be released, but instead was again arrested on a justice's warrant on the same charge originally made, and placed in jail. The petitioner asserts his right to be discharged from custody upon the theory that he has committed no crime against the state of Kansas, in which he never set foot until brought here in custody, as already stated. The state insists that failure to support a destitute child in Kansas is a crime against our laws, and that the petitioner, having come into the custody of an officer without a requisition, is here voluntarily and subject to the jurisdiction of our courts.

The statement of facts, the substance of which has already been stated, is more remarkable for what it omits than for what it contains. From statements made upon the argument and in the briefs, however, we shall assume that about six or seven years ago the wife brought the boy to Lawrence, Kansas; that when the complaint was filed he was in necessitous or destitute circumstances; and that the father was not at that time providing for his support and maintenance. We cannot assume, as it is not charged, that the father abandoned the boy at any time; that he sent him to Kansas; or that he had knowledge of his destitute circumstances. Whether during the years since leaving Texas he has lived with the mother or with relatives, or during what portion of that time he has been provided for and by whom, we are not advised.

The statute provides: "That any husband who shall, without just cause, desert or neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any parent who shall, without lawful excuse, desert or neglect or refuse to provide for the support and maintenance of his or her child

or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and, on conviction thereof, shall be punished by imprisonment in the reformatory or penitentiary, at hard labor, not exceeding two years." (§ 1, chap. 163, Laws of 1911.)

The general rule is that the laws of a state have no extraterritorial force, and that its crimes act is for the punishment of those within its own borders. Section 10 of the Bill of Rights provides that in all transactions the accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." No argument is needed to show that if the authorities in one state should undertake to censor and punish the conduct in their state of citizens of another state, the domestic tranquillity and general welfare mentioned in the preamble of the Federal Constitution would be seriously disturbed. However, mere physical presence, citizenship, or residence within the state is not always essential in order to render one amenable to its laws and subject to its prosecution. The legislature has provided (Gen. Stat. 1909, § 6595) that "every person being without the state, committing or consummating an offense by an agent, or means within the state, is liable to be punished by the laws thereof in the same manner as if he were present and had commenced and consummated the offense within the state." Crim. Code, § 21.

In the case of Carr, 28 Kan. 1, it was said: "We fully recognize that the power of the state to punish criminals extends to all persons who, being without the state, commit or consummate violations of the penal statutes within our state, 'by an agent or means within the state.' Such persons, although out of the state, are, in contemplation of law, within the state." p. 5.

"The legislature of one state cannot make laws by which people outside the state must govern their actions, except as they may have occasion to resort to the remedies which the state provides, or to deal with property situated within the state. . . . But if the consequences of an unlawful act committed outside the state have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such state." Cooley, Const. Lim. 6th ed. 149.

In Rex v. Garrett, 17 Jur. 1060, Lord Campbell, Ch. J., said: "I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the court, for if a man employ a conscious or unconscious agent to commit an offense in this country, he is amenable to the laws of Eng-

land, although at the time the offense was committed he was living beyond the jurisdiction." p. 1062.

In *Barkhamsted v. Parsons*, 3 Conn. 1, a prosecution was had under a statute providing a forfeiture for the bringing of paupers into the state and leaving them there. It was argued that evidence had been improperly received to show the conduct of the defendant in another state, the only ground of his amenability to the criminal laws being that he owed allegiance, and he could owe no allegiance unless within their protection, and he could not be within their protection unless either a citizen or personally within their jurisdiction. The court said it was conceded that the defendant did not personally bring the paupers, but that he sent them under the care of his son. The court further said: "The principle of common law, *Qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases; and he who does an act in this state, by his agent, is considered as if he had done it in his own proper person." p. 8.

In *State v. Peabody*, 25 R. I. 544, 56 Atl. 1028, a complaint alleging nonsupport of minor children in Washington county by a defendant in Kent county was held good for the reason that one is answerable for his neglect to the place where others suffer in consequence. It has been held that one can be prosecuted for procuring a drug in another state, and sending it by mail to a woman within the state for the purpose of procuring an abortion. *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, 859, 9 Am. Crim. Rep. 28. The court said: "Assuming however, for the purposes of this discussion only, that there was no evidence of any act done in pursuance of an intention to effect an abortion, except such acts as were done by the defendant in the city of Washington, then if the acts there done were intended to take effect in this state, and did there actually take effect, we still think the court in this state had jurisdiction of the offense charged." p. 237. This quotation is supported by numerous authorities cited in the opinion, which rests on the assumption that the defendant voluntarily came into and submitted himself to the jurisdiction of the trial court. The doctrine was announced that it is the duty of a state to protect the lives and persons of its citizens and others temporarily resident therein, against unlawful violation or injury whether committed by citizens or others, jurisdiction of the subject-matter and of the person being different questions. Forgery in another state of titles to lands in the state of Texas was held to be an offense against the laws of the latter state, under a statute providing that

persons out of the state may commit, and be liable to indictment and conviction for, offenses which do not in their commission necessarily require personal presence in the state. *Hanks v. State*, 13 Tex. App. 289. A resident of Missouri who turned cattle out of his inclosure knowing that they would go across the line into Arkansas was held not guilty of violating an act of the latter state prohibiting stock running at large. *Beattie v. State*, 73 Ark. 428, 84 S. W. 477. A nonresident of a city was held liable to prosecution by its police court, for permitting his cow to be at large within the city contrary to a municipal ordinance, although the owner was not within the city at the time. *Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890, 33 L.R.A.(N.S.) 331. A note to this decision collates a large number of authorities touching the subject under consideration. In the opinion it was said: "It is the act or thing that is done within the city limits in violation of the ordinance that subjects the doer to the penalty. Where the doer in fact is at the time is a matter of no consequence. Possibly in some cases it might be difficult to get jurisdiction of the person of the offender, so that he might be punished; but this fact would not affect his guilt or his liability to punishment if he could be brought to trial. . . . When appellant permitted his cow to wander at large within the city limits, he as certainly committed an act in violation of its law as if he had himself driven his cow within the limits and turned her at large. There could be no difference between the legal effect and consequence of appellant's act in standing just outside the city limits, and driving his cow into the city, to run at large and in leading her into the city, and then turning her loose." p. 538.

In *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, it was decided that the Federal court at the place where the agreement was made for compensation to perform services forbidden by statute had jurisdiction to try the offense, even if the agreement was negotiated or accepted at another place; its final acceptance and ratification being within the district. *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407, was cited, which ruled that the Illinois district court had jurisdiction to try one for violating the lottery statute who had sent to persons within that district lottery circulars by mail deposited at New York.

In *State v. Gillmore*, 88 Kan. 835, ante, 217, 129 Pac. 1123, it was said that the statute in question may be violated either by deserting and leaving in destitute or necessitous circumstances, or by neglect or re-

fusal to provide after such desertion when such destitute or necessitous circumstances arise.

In *Bennefield v. State*, 80 Ga. 107, 4 S. E. 869, 870, it was held that the gist of the offense of abandoning a child is the voluntary and wilful abandonment of it, leaving it dependent and destitute. There the husband voluntarily and wilfully separated from his wife in one county and sent her and their child by an agent to another county, where they became dependent and destitute, and the father was held indictable in the latter county for abandonment, because it was by his act that they were removed from one county to the other. The court said: "It was the same as if he had stood upon the county line between Heard and Carroll, and had pushed his child across the line into Carroll, and then left it dependent and destitute." p. 110.

In *State v. Dvoracek*, 140 Iowa, 286, 118 N. W. 399, it was ruled that the venue in a prosecution for failure to provide for a wife or children is in the county where the duty of providing for them should be discharged. The court said: "The penalty is denounced, not on the commission of any affirmative act, but on the omission of the plainest duty. Necessarily, then, the venue depends on where the omission to perform the duty occurred. . . . He owed no such duty elsewhere, and, because of the situation of his wife and children, must have omitted the duty in Story county, or not at all. Somewhat akin in principle is the line of cases deciding that the venue in embezzlement cases may be laid in the county in which it was the duty of the accused to account. . . . The presence of the offender within the county where a crime is committed is not always essential, but some portion of the act or omission to act must have taken effect therein." p. 270.

In *State v. Sanner*, 81 Ohio St. 393, 26 L.R.A.(N.S.) 1093, 90 N. E. 1007, under an act providing that the offense shall be held to have been committed in any county of the state in which the destitute child or children may be at the time the complaint is made, it was determined that a parent may be guilty of the crime of failing to provide for his minor children although a resident of another state during the time laid in the indictment; that the venue is in the county where the child is when the complaint is made. Before the provision as to venue already quoted was added by amendment, it had been decided that one could not be thus prosecuted who resided in another state during the time laid in the indictment. *State v. Ewers*, 76 Ohio St. 563, 81 N. E. 1196. The latest decision we have found is *Re Poage* by the supreme court of Ohio, 87 47 L.R.A.(N.S.)

Ohio St. 72, 100 N. E. 125. A citizen and elector of Kentucky was indicted in Lawrence county, Ohio, for failure to provide for his minor children therein. On application for habeas corpus he averred that he was married in Kentucky, established a home for himself and family there, where he had ever since resided and where the child was born; that without any just cause and without his knowledge or consent, and against his wishes, his wife abandoned their home and took the child with her into Ohio, where she had remained ever since, and refused to return or permit the child to return, although the father had at all times maintained the home in Kentucky for her and her child, and had been ready and willing at all times to provide for them their food, shelter, and clothing. It was held that, it appearing that the child received support from the mother or someone else at her request, the mere failure and neglect of the father, after considering his legal right to the custody and control of the child, did not bring him within the operation of the statute. It was said that a parent may be guilty of failing to provide, although a resident of another state, and that the venue may be properly laid where the child is domiciled when the complaint is made, but that it by no means follows that the legislature may control domestic relations of citizens of another state who have never resided in the complaining state, or compel the performance of parental duties and obligations arising under the laws of the state of their residence, where the defendant is not responsible either by acts of omission or commission for the child being temporarily in the complaining state. The court then said: "It is sufficient to say that it must at least appear that he has brought or compelled them to come into this state and then abandoned them, or that, having been brought into this state by others, even against his will, they were then abandoned and permitted to become homeless and unprovided for. Clearly in such case it would be the duty of the father to assert his legal right to their care and custody, and provide them with a home, food, shelter, and clothing, and his failure to do so would be an offense against our laws. This legislation is for the benefit of the child. It is passed for the purpose of enforcing the natural duties of parents to their children. This duty is owing to the child wherever the parent entitled to its control and custody places it, or wherever, in disregard of his parental duty and obligation, he permits it to remain unprovided for. So that citizens of another state cannot permit their children to become objects of charity in this state, and defend against a prosecution un-

der our laws to compel parents to provide for their minor children, by the plea that they are not citizens of this state; but where such child is brought into this state against the will and consent of the parent, and is provided with a suitable home, food, shelter, and clothing by those responsible for bringing it into the state, or by others procured by them to furnish the same, it is then no concern of our state, and no offense against our laws." 87 Ohio St. 85.

The officer who arrested the petitioner was clothed only with the authority of a warrant issued by a justice of the peace of this state; but, as the person sought came across the line without demanding a requisition, he must be held in law to have come into the state voluntarily to the extent and in the sense that the court had jurisdiction to try him for a crime already committed here by him. *State v. Garrett*, 57 Kan. 132, 45 Pac. 93; *State v. McNaspy*, 58 Kan. 691, 38 L.R.A. 756, 50 Pac. 895. However, he came to Lawrence in custody, and not of his own motion or volition. In the *Gillmore Case*, 88 Kan. 842, ante, 217, 129 Pac. 1125, it was said: "That he had come voluntarily into stafford county to appear as a witness in a case between other parties was no bar to his arrest for a violation of the criminal laws of Kansas. His plea that he believed that his domicile had been in Texas since 1908, or even such fact, if it were a fact, of itself, furnished no reason why his wife should be left or permitted to remain in Kansas in destitute circumstances. Had it been shown that she had wrongfully refused to follow him to his domicile in Texas, and thus in law abandoned or deserted him, this might be a defense." p. 842. The decision in the case just quoted from is based upon the proposition that, having come voluntarily into the county where he had previously abandoned his wife, and having voluntarily remained there some days, and having failed to provide for her support or maintenance, she being in destitute and necessitous circumstances, he was liable to prosecution. Here the petitioner did not come into the state voluntarily in the sense in which *Gillmore* came, and only in a strict legal sense; he did not voluntarily remain here at all, and was prevented from a speedy return upon his discharge by the probate court by another arrest on the same charge, and is now involuntarily in jail.

A sovereign state cannot afford to be less fair and decent in its treatment of parties than it would require its citizens to be, and it would be taking an unfair advantage of the applicant to assume or imagine that the state is really attempting to prosecute him for knowingly and voluntarily permitting his son to be in Douglas county in destitute 47 L.R.A. (N.S.)

circumstances and failing to provide for him since being brought here by the officer. The only fair and straightforward way to treat the situation is to regard it as a prosecution for a failure to support before the petitioner came into the state. The county attorney advises us that the complaint under which the restraint is now attempted to be justified charges that the defendant on or about the 1st day of December, 1912, wilfully and feloniously and without lawful excuse, refused to provide for the support and maintenance of the boy, and has ever since refused so to provide, "and that said William D. Fowles is in destitute and necessitous circumstances." In all fairness two observations should be made. We cannot assume under the statement of facts on which this case is presented, that the petitioner while in Texas knew that the son was destitute in Douglas county, Kansas, and therefore cannot assume that he wilfully failed to provide for his support. Again, a charge that in February, 1913, the son "is in destitute circumstances," is hardly tantamount to an allegation that he was thus destitute or necessitous before the father was brought here in custody of the sheriff.

We think the question of jurisdiction to prosecute the defendant for failure to support his son before the arrest depends upon what he really had to do with the boy's presence in Douglas county, what means were in fact provided for his support, and what knowledge the father had, or should have had, of his condition, and whether or not he was, in the language of the statute, "without lawful excuse." If, as a matter of fact, the father, unmindful of his duty and obligations, permitted the mother to remove the child to this state under such circumstances that he was obligated for his support, and with knowledge or reasonable means of knowledge that his child was destitute and likely to become a public burden upon Douglas county, then we think without question his conduct was as reprehensible and as punishable as it would have been had he brought the child here and abandoned him on purpose. On the contrary, the mere fact that without fault of the parents as to their separation, the child was brought here something like seven years ago by his mother, and presumably has remained here since, and as the stipulation shows has become a healthy able-bodied boy at least fourteen years of age, and was, at some time after the father had been brought here in custody of an officer, actually in destitute circumstances, would not of themselves constitute a crime or vest the court with jurisdiction to try him.

What the real facts of the case are we do not know, and, as the petitioner has not

shown affirmatively that he is entitled to a discharge, the writ is denied.

Porter, J., dissenting:

On the agreed statement of facts I think the petitioner should be discharged.

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

T. E. B. SILER

v.

N. B. PERKINS et al., Appts.

(126 Tenn. 380, 149 S. W. 1060.)

Agent — undisclosed principal — liability for services.

1. One who negotiates with a broker to sell the stock of a corporation of which he

Note. — Personal liability of one known to be an agent for an undisclosed principal.

I. Scope, 232.

II. General rule, 232.

III. The question of notice, 235.

IV. English cases, 236.

V. Miscellaneous, 238.

1. Scope.

Notwithstanding the great number of cases where it is laid down as a rule that an agent is personally liable on his contracts where his agency is not disclosed, there are comparatively few cases which distinctly pass upon the question of liability of one known to be an agent for an unknown principal.

This note presupposes that there is an actual principal, and that it is known by the other contracting party, that the person with whom he contracts is an agent for somebody. In general, cases where the question of the disclosure of the name of the principal is not separated distinctly from the question whether the fact of any agency is disclosed are not included, as not of value on the subject of the note.

Cases relating to the effect of statutes providing as to the result where business is carried on with the addition of the word "agent," or in one's own name, are excluded. See Hoge v. Turner, 96 Va. 624, 32 S. E. 291, and cases therein cited; also Morris v. Clifton Forge Grocery Co. 46 W. Va. 197, 32 S. E. 997.

For personal liability of one who signs a contract by adding words indicating representative capacity to his signature, see the note to Gavazza v. Plummer, 42 L.R.A. (N.S.) 1.

For right to join agent and undisclosed principal as defendants in the same action, see the note to Gay v. Uren, 26 L.R.A. (N.S.) 742.

As to whether commencing action or tak-

ing judgment against either the undisclosed principal or his agent operates as a bar to a subsequent action against the other, see the note to Murphy v. Hutchinson, 21 L.R.A. (N.S.) 786.

Same — bond to release attachment — effect.

2. One who negotiates with a broker for the sale of stock of a corporation of which he owns a part, who is sued as agent and trustee for the stockholders for the broker's commissions, and gives his individual bond to release collaterals for purchase money which has been impounded to secure payment to the broker, cannot defeat liability for the commissions, on the ground that he was merely an agent for undisclosed principals.

Broker — right to commissions — failure to consummate trade.

3. A broker who has brought to his principal one ready, able, and willing to take the property on the terms offered is not

ing judgment against either the undisclosed principal or his agent operates as a bar to a subsequent action against the other, see the note to Murphy v. Hutchinson, 21 L.R.A. (N.S.) 786.

For character of contract as affecting rights of undisclosed principal to sue thereon, see the notes to Shields v. Coyne, 29 L.R.A. (N.S.) 472, and Davidson v. Hurty, 39 L.R.A. (N.S.) 324.

For cases upon the question whether the statute of frauds relating to sales of real property may be set aside by a memorandum which discloses that one of the parties acted for an undisclosed principal, see the note to Mertz v. Hubbard, 8 L.R.A. (N.S.) 733.

For form of execution of deed by attorney in fact or agent, see the note to Tiger v. Button Land Co. 41 L.R.A. (N.S.) 805.

For personal liability to other contracting party, of one who, without authority, assumes to contract as agent for another, see the note to Haupt v. Vint, 34 L.R.A. (N.S.) 518.

II. General rule.

An agent known to the other contracting party to be contracting for an unknown principal is personally liable to such other contracting party on the contract. Ye Seng Co. v. Corbitt, 7 Sawy. 368, 9 Fed. 423; Horan v. Hughes, 129 Fed. 248, affirmed in 64 C. C. A. 581, 129 Fed. 1005; Sere v. Faures, 15 La. Ann. 189; Lull v. Anamosa Nat. Bank, 110 Iowa, 537, 81 N. W. 784; Pugh v. Moore, 44 La. Ann. 209, 10 So. 710; Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602; Merriam v. Wolcott, 3 Allen, 258, 80 Am. Dec. 69; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Knapp v. Simon, 96 N. Y. 284; Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022; McClure v. Central Trust Co. 165 N. Y. 108, 53 L.R.A. 153, 58 N. E. 777; Morrison v. Currie, 4 Duer. 79; Whitman v. Johnson, 10 Misc. 725, 31 N. Y. Supp.

deprived of his right to commissions because, after being informed that there was nothing more he could do, he was not present when the deal was consummated, and some changes were made in the details of the trade during the final negotiations.

Same — right to commissions from purchaser — effect.

4. A broker is not deprived of his right to commissions for selling property, because he is authorized by his principal to secure a sum for himself from the purchaser, which he does not do.

(October 5, 1912.)

APPEAL by defendants from a decree of the Chancery Court for Knox County in complainant's favor in an action brought to recover compensation for services rendered in effecting a sale of corporate stock. **Affirmed.**

The facts are stated in the opinion.

805; Bassett v. Perkins, 65 Misc. 103, 119 N. Y. Supp. 354; Soutter v. Stoeckle, 6 Ohio Dec. Reprint, 1054; Wheeler v. Miller, 2 Handy (Ohio) 149; **SILER v. PERKINS.**

The rule is also recognized in the following cases: Murphy v. Helmrich, 66 Cal. 69, 4 Pac. 958; Scaling v. Knollin, 94 Ill. App. 443; Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; De Remer v. Brown, 165 N. Y. 410, 59 N. E. 129; Cockran v. Rice, 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913 B, 570; see also Macdonald v. Bond, 195 Ill. 122, 62 N. E. 881.

In view of Pugh v. Moore, 44 La. Ann. 209, 10 So. 710, supra, the hesitation or doubt in Nott v. Papet, 15 La. 306, may be disregarded; and any lack of clearness in Drake v. Pope, 78 Ark. 327, 95 S. W. 774, seems immaterial in view of the Arkansas cases of Cooley v. Ksair and State v. Neely, noticed *infra*.

The soundness of this rule would seem to admit of no question. The agent can give no legal reason why he should not disclose the name of his principal, and he ought not to be heard to deny a claim against him as principal, unless he can say, "You knew very well I was acting for A."

Judicial explanations.

In Winsor v. Griggs, 5 Cush. 210, the court said, in holding that one who signed a submission to arbitration, adding "agent" to his name, was personally liable thereon, where it did not appear that the name of his principal was known to the other party: "On this question, the rule of law is well laid down by Judge Story in his Commentaries on the Law of Agency, §§ 266, 267. 'A person,' he says, 'contracting as agent, will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency. And the same principle will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not disclosed; 47 L.R.A. (N.S.)

Messrs. Lindsay, Young, & Donaldson for appellants.

Messrs. Shields, Cates, & Mountcastle for appellee.

Buchanan, J., delivered the opinion of the court:

The complainant, Siler, a duly licensed real estate agent, sought by his bill a money decree against N. B. Perkins and A. Gatliff, as individuals and as trustees of the stockholders of the Westbourn Coal Company, a Tennessee corporation. His bill was double in scope,—in one aspect, based on express contract; in the other, upon contract implied and the *quantum meruit*. His purpose in either phase of the bill was to recover compensation for his services rendered, as a real estate agent, in effecting the sale of all the capital stock of the corporation above named which amounted to 650 shares of the par value of \$100 per share;

for until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent, and trusting to an unknown principal, who may be insolvent, or incapable of binding himself.' This is a very reasonable rule of law, and it is supported by the authorities. 2 Kent Com. 630, 631, and the cases there cited. 'If a person,' says Chancellor Kent, 'would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract.'

In Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51, where it was a disputed question of fact whether the defendant had stated that he was acting as agent, the court said: "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable." Quoted in whole or in part in De Remer v. Brown, 165 N. Y. 410, 59 N. E. 129; Good v. Rumsey, 50 App. Div. 280, 63 N. Y. Supp. 981; Powers v. McLean, 14 App. Div. 92, 43 N. Y. Supp. 477; and Mahoney v. Kent, 7 Misc. 726, 28 N. Y. Supp. 19.

In Danforth v. Timmerman, 65 S. C. 259, 43 S. E. 78, the court said: "If it should appear that defendant purchased and received the goods as agent for another, and the goods were charged to defendant as agent, defendant may, nevertheless, be personally liable, if, at the time of the purchase of the goods, his principal was not disclosed or known to plaintiff. or if defendant had no authority to bind his principal in the transaction, or if, notwithstanding the agency, he voluntarily incurred a personal responsibility to pay for the goods received by him."

the purchase price at which the same passed from vendor to vendee in the transaction being the sum of \$225,000, a large portion of which was cash, with notes given to secure the deferred payments, secured by deposit of the shares as collateral.

The defendants being nonresidents, injunction and attachment writs issued, and the capital stock and indebtedness on the deferred payments, sufficient in amount to satisfy the demands of the bill, were by these means impounded, which resulted in the giving of a bond by defendants to discharge the writs, and to satisfy such decree as might be rendered. Defendants answered, denying any indebtedness to complainant, but admitting that they had made the sale of stock alleged in the bill.

"If an agent would bind only his principal, it is his duty to disclose him." *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516. If the agent would escape personal responsibility he should bind the principal, and not himself. *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721. That the buyer supposes the seller is selling on commission makes no difference. *Wheeler v. Reed*, 36 Ill. 81.

While it is not intended to include cases decided upon the ground that the contract in form binds the agent irrespective of other considerations, it may be said that where, by the contract, it appears that the defendants have interposed their own credit, it is immaterial that it is indicated by facts in the case that the other party knew that they were probably acting for third persons named. *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420; see also *Scott v. Messick*, 4 T. B. Mon. 535.

It may be stated that the fact that the usual business of the person who is acting for an undisclosed principal is to act for others is no notice to the other contracting party that he is not acting as a principal,—whether his business be that of auctioneer (see *infra*), commission Merchant (*Waring v. Mason*, 18 Wend. 425), bill broker (*Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644), or otherwise.

Illustrations.

Where defendants contracted as the agents of a ship, not disclosing her owner, they were held liable upon the contract. *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423.

So, one signing a memorandum that there was a certain amount due the plaintiffs by a certain schooner "and owners," for supplies, etc., was held personally bound. *Sydney v. Hurd*, 8 Tex. 98.

So the maker of a charter party was held personally liable where he signed his individual name thereto, and most of the covenants were stated to be made by him as agent for the (unnamed) owners of the 47 L.R.A. (N.S.)

Only three depositions were taken on behalf of complainant. One of these was that of complainant, covering each of the phases of the bill. The other depositions taken by him were of two real estate agents of Knoxville, each of which depositions was addressed to the *quantum meruit* feature of the bill. On behalf of defendants, the deposition of each of them was taken; but neither of them was read on the hearing, nor does either of them appear in the record before us. The fact that they were taken, and not read, appears in the final decree.

By this decree a recovery and execution thereon was awarded complainant against defendants, and the sureties on their bond aforesaid for the sum of \$3,000 principal,

although it was further stated that, for the performance of all the covenants, the parties bound themselves to each other respectively, and that the "vessel, her tackle, and apparel are hereby bound for the due performance of her owners, and agent or agents" to the charterer. *Meyer v. Barker*, 6 Binn. 228.

In *Cooley v. Ksir*, — Ark. —, 43 L.R.A. (N.S.) 527, 151 S. W. 254, it was held that an attorney was not relieved from liability for use and occupation, where, in taking possession of a leasehold of a debtor to assist in collection of the claims, he informed the landlord that he was acting for creditors, not stating who they were.

But it was held in *American Alkali Co. v. Kurtz*, 70 C. C. A. 532, 138 Fed. 392, affirming 134 Fed. 663, that there was no individual liability upon a broker who, acting for the owner of stock, delivered the stock to the company with a verbal request that it be transferred to the transfer clerk of the company, where an assessment was made upon the stock while it was in the name of such transfer clerk, who had no real interest in it.

One who sells liquor to a minor who informs him that he wants it for a school-teacher, not naming him, is guilty of selling liquor to a minor, as in such case the sale is to the agent, who does not disclose the name of his principal. *State v. Neely*, 60 Ark. 66, 27 L.R.A. 503, 46 Am. St. Rep. 148, 28 S. W. 800.

In *Lichten v. Verner*, 8 Pa. Dist. R. 218, it was held that a broker on the stock exchange, who does not disclose the name of his principal, is liable on the contract; but it seems that here there was no evidence that the broker was not acting for himself.

In *Lewis v. Weidenfeld*, 114 Mich. 581, 72 N. W. 604, where it does not appear whether the directors of a corporation knew the particular parties for which the defendant claimed to be acting, but it seems that they did know that he was acting for others as well as himself, it was held that he was personally liable upon his contract made in his name as an individual; but the court gave as one reason for the decision that there was no evidence that the stockholders

and interest thereon from January 20, 1909, making an aggregate sum of \$3,450, together with the costs of the cause. From this decree, defendants appealed, and have assigned errors in this court. These are five as numbered in the brief; but they raise, in fact, only three questions.

First. It is said the proof shows that, as to part of the stock sold, defendants Perkins and Gatliff were not owners, but agents merely, and of what proportion of the stock they were owners does not appear, but that complainant knew that they were acting as agents only in respect of part of the stock; and to sustain this insistence, they quote one of complainant's answers to this effect: "I have always understood that Dr. Gatliff and Mr. Perkins and a man

in Ohio were the principal and largest owners of the stock." And upon this evidence is based the argument that defendants Perkins and Gatliff were acting as agents for a disclosed principal, and that their contract to pay complainant a commission for the sale of the stock did not bind the agents personally. The first answer to this contention is that the record does not show that defendants Perkins and Gatliff ever disclosed to complainant who their principals were in respect to that portion of the stock of which they were not themselves the owners; nor does it appear that they ever disclosed to him how much of the stock they owned individually, but it does clearly appear that the defendants were assuming, in the making of the con-

knew that he was acting as agent, although the directors may have known it.

—ignoring request for name of principal.

A fortiori, an agent who ignores a request to give the name of his principal will be liable upon the contract. Thus, an attorney was held personally liable where he bid off land at a sheriff's sale, and instructed the seller to charge the land to himself, attorney, and declined to disclose the name of his principal, although he was told that if he did not disclose it, he would be held personally liable. *Long v. McKissick*, 50 S. C. 218, 27 S. E. 636.

In *Lincoln v. Levi Cotton Mills Co.* 63 C. C. A. 333, 128 Fed. 865, where the plaintiff understood that the defendants were acting for another, and on a controversy arising they ignored the request for the name of their principal, they were held personally liable on the contract.

Auctioneers.

An auctioneer who does not disclose the name of his principal at the time of the sale is personally responsible. *Hanson v. Roberdeau, Peake*, N. P. 120; *Franklin v. Lamond*, 11 Jur. 780, 4 C. B. 637, 16 L. J. C. P. N. S. 221; *Seemuller v. Fuchs*, 64 Md. 217, 54 Am. Rep. 766, 1 Atl. 120; *Meyer v. Redmond*, 205 N. Y. 478, 41 L.R.A. (N.S.) 675, 98 N. E. 906; *Davie v. Lynch*, 1 Tex. App. Civ. Cas. (White & W.) 381.

He is deemed in such case to be the vendor. *Schell v. Stephens*, 50 Mo. 375; *Thomas v. Kerr*, 3 Bush, 619, 96 Am. Dec. 262 (*obiter*).

In *Mills v. Hunt*, 20 Wend. 431, affirming 17 Wend. 333, where the defendants as auctioneers made a sale, and made out a bill to the purchaser in their own names, the court, in holding them personally responsible, said: "At this day the law must be considered as settled that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer or broker, who is 47 L.R.A. (N.S.)

usually employed in selling property as the agent for others."

Where auctioneers sent out notices of sale, giving the name of the principal and holding the sale at his store, and a purchaser had received (it seems) one of the notices, it was held that it was a question for the jury whether the auctioneers had contracted to deliver. (It seems that there was some evidence that the bill was made out in the auctioneers' name.) *Elison v. Wulff*, 26 Ill. App. 616.

An auctioneer selling for account of whom it may concern is personally responsible. *Meyer v. Redmond*, 141 App. Div. 123, 125 N. Y. Supp. 1052.

But it is not necessary for an auctioneer to name his principal, to escape from personal liability, where the principal is present and is pointed out. *Mercer v. Leihy*, 139 Mich. 447, 102 N. W. 972.

In *Wood v. Baxter*, 49 L. T. N. S. 47, where an auctioneer sold a standing crop under bill of sale against a tenant, but did not disclose the principal, it was held that he contracted to give the purchaser authority to go on the farm to get the crop, but did not warrant the title, and so was not liable, if the landlord declined to permit the straw to be taken away unless an equivalent in manure was brought back,—as such was the custom of the country.

III. The question of notice.

To relieve the agent of liability, it is sufficient that the other contracting party has actual knowledge of the identity of the principal; it is immaterial how such knowledge was acquired. *Chase v. Debolt*, 7 Ill. 371; *Forrest v. McCarthy*, 30 Misc. 125, 61 N. Y. Supp. 853; *Johnson v. Cate*, 77 Vt. 218, 59 Atl. 830.

"It is quite immaterial whether the agent disclose his character or his principal, himself, if it be actually known at the time to the other party. In such case the agent will not be bound, unless he enter into such a contract as will bind him at all events." *Chase v. Debolt*, 7 Ill. 371.

tract sued on, to be acting for the holders of shares of the entire capital stock in the corporation, and that they did sell and deliver, pursuant to negotiations conducted by complainant under the contract sued on, all of that capital stock. It is clear that complainant, under the terms of his contract with them was made to understand that they and each of them personally were bound to him for the commissions which it was agreed that he should receive; that being the principal sum of the chancellor's decree.

The second answer to the first assignment of errors is that, while it is true as a general rule that in law "an agent who, acting within the scope of his authority, enters into contractual relations for a dis-

closed principal, does not bind himself, in the absence of an express agreement to do so," yet it is also true that whether such an agent does by such a transaction bind himself depends on the intention of the agent and the person dealing with him, and this intention must be gathered from the facts and circumstances of each particular case. And it is the disclosed intention that governs, and not some hidden intention of the agent; and so the agent may become personally liable, although this be contrary to his actual intention, if he has in fact bound himself according to the terms of the contract. And an agent who makes a contract in his own name, without disclosing the identity of his principal, renders himself personally liable, even though the

Constructive notice.

For English cases, see *infra*, IV.

The courts will not be astute to find that there has been constructive notice of the principal's identity.

It has been held that there was no constructive notice of the identity of the principal so as to relieve the agent where,

—it was stated that wheat purchased was for the "Blissville Distillery," which was not a corporation, nor were its proprietors known to the seller. *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51;

—the plaintiff, on inquiring who owned the buildings on which the defendant had hired him to work, was answered, "The Bradford estate." *Nelson v. Andrews*, 19 Misc. 623, 44 N. Y. Supp. 384;

—the plaintiff, similarly hired, was informed by the defendant that he was not the owner of the buildings, but was acting as attorney for him. *Nichols v. Weil*, 30 Misc. 441, 62 N. Y. Supp. 477;

—the defendant hired the plaintiff by a letter signed by him as trustee, and the plaintiff did not know who was the *cestui que trust*. *Whalen v. Ruegamer*, 123 App. Div. 585, 108 N. Y. Supp. 38.

In *Philips v. Hine*, 61 App. Div. 428, 70 N. Y. Supp. 593, it was held that the fact that the plaintiff, while engaged upon other work, had been paid by checks of the alleged principal, was not necessarily notice to him that he was employed by the same party, where he was given no notice of the fact, and there was no doubt that he was engaged by, and furnished the work and materials at the request of, the defendant.

Similarly, in *Kneeland v. Coatsworth*, 29 N. Y. S. R. 844, 9 N. Y. Supp. 416, it was held that the fact that previous work on the same structure had been paid for with checks of the owner did not necessarily show knowledge of the ownership, and the plaintiffs were held entitled to recover from the person who ordered the work. They "were not bound to institute any investigation to make sure who they were working for;" but in this case there was some reason to suppose that the defendant had some personal interest in the structure.

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On the other hand, it was held that an agent who made a contract in, terms for the benefit of the "several railroad companies between" two points was exonerated from personal liability, although he did not give the names of the corporations, as it was easy for the other party to ascertain them. *Lyon v. Williams*, 5 Gray, 557.

In *Johnson v. Armstrong*, 83 Tex. 325, 29 Am. St. Rep. 648, 18 S. W. 594, it was held that there was no personal liability upon the president of a college who employed the plaintiffs as architects to prepare plans for the college building, where they knew something about the college, but did not know whether it was incorporated or not, as there was sufficient to put them on inquiry, which would have disclosed the fact that the college was a corporation.

But the majority of the cases are hardly to be reconciled with *Waddell v. Mordecai*, 3 Hill, L. 22, where it was held that one who contracted "for the owners" of a brig was not personally liable, as he had pointed out with sufficient clearness the owners, provided he was not asked a more specific designation and refused it.

While it is not as explicit as might be desired, reference may here be made to the statement in *Book v. Jones*, — Tex. Civ. App. —, 98 S. W. 891, where it was said: "If it should be conceded that appellee was put upon notice of the fact of appellant's agency, the latter would not be relieved."

The duty is upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it, and if he fails so to do, and deals with persons unaware of his agency, he must answer personally for the liabilities he contracts."

IV. English cases.

The rule seems to be admitted in England in terms, but denied in practice, where a contract expressly for an unnamed principal is held to exonerate the agent.

The English cases are thus explained in 1 *Laws of England* (Halsbury), p. 219: "Every person who, in making a contract, discloses the existence, but not the name,

person with whom he deals knows that he is acting as agent, unless it affirmatively appears that it was the mutual intention of the parties to the contract that the agent should not be bound. 31 Cyc. pp. 1552-1555, inclusive, and 2 Page, Contr. § 975.

"When a purchase is made by an agent, in the name and on the credit of the agent, for a principal not disclosed to the seller, the latter may, upon discovering the principal, treat the sale as a contract with the principal, and hold him responsible for the price. The seller may have his action for the price, at his election, against the agent, or the principal; and this, though the seller at the time supposed the agent to make the purchase for himself, as principal. In such case the contract, though apparently

and in form with the agent as principal, is in fact for the benefit of the principal, and in the performance of the agency, and is the contract of the principal. The law regards the reality rather than the form." *Davis v. McKinney*, 6 Coldw. 17.

But, as a matter of course, when a third person contracts with an agent with knowledge of that fact, and also with knowledge of the principal for whom the contract is made, then the contract, if it be within the scope of the powers of the agent, is in law the contract of the principal, and on such a contract the agent is not bound, unless, in making the contract, the third party gave credit expressly and exclusively to the agent, and it was clearly the intention of the agent to become liable in person. *Bailey*

of the principal on whose behalf he is acting, is personally liable on the contract to the other contracting party, unless a contrary intention appears. In the case of a verbal contract this is a question of fact. But if the contract is in writing, the question depends upon the construction placed by the court upon the terms of such contract."

This explanation does not seem to justify the cases. Perhaps they might be supported on the theory that a contract expressly for an unnamed principal is constructive notice of the identity of such principal. But this would be a highly unsatisfactory extension of the doctrine of constructive notice.

In *Dale v. Humfrey*, El. Bl. & El. 1004, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854, where the contract read sold "to our principal," it was held admissible to show a trade custom that, if the broker did not give up the name of his principal, he was personally responsible, as not contradicting but explaining the contract,—but it seems by no means clear that the court considered the custom necessary to cast the liability on the agent.

The same was held in *Fleet v. Murton*, L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97, but here the court laid it down positively that if it had not been for the custom the brokers would not have been responsible, as it appeared on the face of the contract that they were dealing for some other person than themselves.

So, also, in *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 42 L. J. C. P. N. S. 260, 29 L. T. N. S. 103, 22 Week. Rep. 18, where the defendants chartered a ship, describing themselves and signing as "agents to merchants," and it was shown that there was a custom that if the name of the principal was not given up in a reasonable time, the agents should be responsible, they were so held responsible because of the custom, the court considering that if it had not been for the custom, they would not have been responsible.

Following these opinions it was held in *Southwell v. Bowditch*, L. R. 1 C. P. Div. 374, 45 L. J. C. P. N. S. 630, 35 L. T. N. 47 L.R.A. (N.S.)

S. 196, 24 Week. Rep. 838, that, in the absence of proof of a similar custom, the broker was not liable where his contract stated that he had sold "by your order and for your account to my principal." This was in reversal of the trial court (reported in L. R. 1 C. P. Div. 100), where judgment for the plaintiff had been given on the ground that the broker had signed the contract in his own name and was therefore liable upon it. *Jessel, M. R.*, considered that in *Dale v. Humfrey*, supra, the opinions of the majority judges were to the same effect, but this is at least doubtful, as has been heretofore stated.

The court proceeded still farther in *Pike v. Ongley*, L. R. 18 Q. B. Div. 708, 56 L. J. Q. B. N. S. 373, 35 Week. Rep. 534, where it was held that evidence of such a custom was inadmissible as contradicting the contract of a broker who sold personal property "for and on account of owner," not naming him. And *Jessel, M. R.*, stated that if any remarks of his in *Hutchinson v. Tatham*, supra, were in conflict with the present decision, they must be considered as withdrawn.

But the form of the contract may make the agent liable. Thus, in *Magee v. Atkinson*, 2 Mees. & W. 440, 6 L. J. Exch. N. S. 115, it was held that one contracting in his own name could not afterward say that he was contracting merely as a broker, and evidence that it was the local custom for brokers to send in brokers' notes without disclosing the principals' names was rejected.

In *Hutcheson v. Eaton*, L. R. 13 Q. B. Div. 861, 51 L. T. N. S. 846, where the contract on its face was that of the defendants, who added to their signature the word "brokers," the plaintiffs understanding that there was some principal, the court, in holding the defendants liable, seemed to be of the opinion that if the defendants had added to their signature the words "as brokers," the result would have been otherwise.

In *Bacmeister v. Fenton*, Cab. & El. 121, where the defendant omitted his principal's name from the contract at the plaintiff's request, it was held that the defendant was personally liable when such was the trade

v. Galbreath Bros. 100 Tenn. 602, 47 S. W. 84.

Under these legal principles, we think it clear that when these defendants, without disclosing to complainant the names of the holders of the stock, assumed to represent the holders of all the stock, only giving to complainant the knowledge that one man in Ohio and themselves were the principal owners of the stock, it cannot be said that these defendants disclosed the names of their principals to complainant; and when, under these facts, they, for themselves and their associate stockholders, accepted the benefits of the services of complainant in finding for them a purchaser for the entire capital stock under a contract express, or one arising by implication of law out of the dealings between them and complainant, they cannot defeat his recovery of just compensation for making the sale or finding the purchaser who took all the stock at a price agreeable to all the stockholders, by invoking the defense that complainant's contract for compensation was not with them, but with their principles. Who were their principals? The record gives no answer. Their answer to complainant's bill does not disclose, and, if their depositions did disclose this fact, they were not read on the trial. So that, so far as the record shows, neither in their negotiations with complainant nor in the conduct of the cause, have they disclosed whom they acted for when they contracted for and accepted the benefits of complainant's services. Moreover, they were sued, in this case, not only as individuals, but also as agents and trustees of all of the shareholders of the corporation, and the fruits of the sale which had been brought about by complainant's labors, to wit:

A part of the purchase money indebted-

custom on any omission of the principal's name.

It may be noted that where the brokers' bought and sold note provided that on any dispute the decision of the selling brokers should be final and binding on both sellers and buyers, it was held that evidence of a custom of the trade that when a broker does not disclose his principal, he is personally responsible, was properly rejected, as the brokers would in such case be judges in their own cause. *Barrow v. Dyster*, L. R. 13 Q. B. Div. 635, 51 L. T. N. S. 573, 33 Week. Rep. 199.

V. Miscellaneous.

It was held in *Tew v. Wolfsohn*, 174 N. Y. 272, 66 N. E. 954, that a complaint against husband and wife for breach of contract was not demurrable as improperly writing several causes of action, where it stated that the husband, as his wife's agent, carried on her business, "although the said

ness secured by a deposit of the stock as collateral was impounded by the injunction and attachment writs, and to discharge these writs the defendants Perkins and Gatliff executed an individual bond to pay any recovery which complainant might obtain in this cause, and by means of this bond they freed from the grasp of complainant the fruits of his labors, which they had held as agents and trustees for all the stockholders. Therefore they will not be heard to say that they are not personally liable for the decree in this case. The final decree, following the theory of the assumption by appellants of any liability which might be disclosed under the bill of complaint, ran against Perkins and Gatliff as individuals, and against their individual sureties on the bond aforesaid. The same theory of the individual liability of defendants is followed in the execution by them of the appeal bond, by which they bring the decree of the chancellor to this court for review. That decree in general terms adjudges complainant to be entitled to the relief sought, whether upon the express contract or the implied contract averred in the bill. It does not show, nor did it show, whether, in the opinion of the chancellor, they were held liable individually as agents dealing for an undisclosed principal, or as agents and trustees, who, having all of the capital stock of the corporation within their possession and control, with full power to act in the premises, had contracted for and obtained the services of the complainant to effectuate a sale thereof. After the execution of the bond discharging the injunction and attachment, it was not essential that the decree should be more specific. What we have said disposes of the first question.

It is next said that "the chancellor erred

[husband] pretends to be conducting said agency on his own behalf and without disclosing his said wife as principal," it being further alleged that the husband, acting as agent for his "undisclosed" principal, his wife, made the contract with the plaintiff. The court considered that the words first quoted were redundant and might be stricken out, and that the word "undisclosed" might be treated as mere *descriptio personæ*.

But in *Pope v. Harter*, 60 S. C. 54, 44 S. E. 407, it was held that where a complaint alleged that one of the defendants, as agent for the other defendant, purchased certain goods, and at the time did not disclose the name of his principal, the agent might properly demur to the complaint, as it set up no liability on the part of the agent.

It may be noted that in *Seaber v. Hawkes*, 9 L. J. C. P. 217, the case as reported is indistinct as to whether it was the fact of agency or the name of principal which was under discussion.

B. B. B.

in holding and decreeing that the complainant carried out his contract, so as to entitle him to recover his alleged commission." The record clearly discloses without dispute that complainant, under a contract so to do, did procure a purchaser who was acceptable to his principals, and who was ready, able, and willing to buy on the terms to which the principals had agreed, and that the sale was actually closed, and the principals had in their possession the fruits thereof, before this suit was brought. The record does show that, after the agent had brought the parties together, some changes were made in the details of the trade, and that the agent was not present at the actual consummation of the trade and delivery of the property. But this all occurred after he had asked one of the defendants if there was anything further he (complainant) could do in the premises, and had been assured to the contrary. It is clear that the sale was the result of the labors of this agent in bringing the parties together, and that his labors were by no means inconsiderable, but entirely capable and efficient. *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241; *Cheatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076; *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572; *Parker v. Walker*, 86 Tenn. 567, 8 S. W. 391.

It is next said that complainant accepted from the parties to whom the sale was made an employment to act for them in the same matter, and therefore that his contract with defendants and right to recover under it ceased.

"In general, an agent may, with their full knowledge and consent, represent both parties to a contract, and his contracts, under these circumstances, bind each within the scope of his authority. But where an agent, without the full knowledge and consent of his principal, represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of the principal. . . . The payment of a secret commission, bribe, or gratuity to the agent by the third party as an inducement for entering into contractual relations on behalf of his principal, or an agreement to pay such commission, . . . entitles the principal to avoid the contract." 31 Cyc. pp. 1572, 1573. And on the same subject see *Moinett v. Days*, 1 Baxt. 431; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Perkins v. McGavock*, 3 Hayw. 265; *Hadley v. Latimer*, 3 Yerg. 537; *Coffee v. Ruffin*, 4 Coldw. 487; *Raht v. Union Consol. Min. Co.* 5 Lea, 1.

There is no doubt about the general rule of law urged in support of this assignment, nor question of the soundness of the authorities to which we are referred. But the 47 L.R.A.(N.S.)

facts of record do not support the facts stated in the assignment. So this case does not fall within the rule invoked. A careful reading of the record satisfies us that there was no secret, collusive or fraudulent dealings or employment between complainant and the purchasers.

The sum and substance of the whole business was that, in shaping up the proposition to be submitted to the proposed purchasers, and lest they might be deterred from buying by the fear that the price was loaded with a heavy commission for the complainant as agent, it was agreed that defendants, or one of them, should write complainant a letter stating, in substance, that he might add to the price demanded by defendants the sum of \$1,000. This letter it was intended that complainant should show to the purchasers, and this letter was written by one of these defendants, and was by complainant shown to the purchasers, who made no objection to the arrangement, but never paid the \$1,000 to complainant. If there was collusion or fraud in this, it was leveled at the proposed purchasers, and defendants were *particeps criminis*. No harm ever came of it to defendants. The defendants, after taking advantage of the scheme to delude the purchasers as to the amount of commission carried in the purchase price, now seek to use it to defeat their obligations to complainant. It is also said under this assignment that complainant did not secure as much money for the property as the original price fixed by defendants, and from this fact it is argued that he was working in the interest of the purchasers. The conclusion by no means follows, and, beside, is wholly overthrown by complainant's proof. It is also said the purchasers at one time offered to pay complainant's expenses from Atlanta to Williamsburg, Kentucky, on condition that he would convey a proposition to defendants at a much lower figure for the property than the purchasers were willing to give. Complainant testifies that such an offer was made, and that he carried it to defendants, but advised them not to accept it, and told them that the purchasers would pay the higher sum at which the property was finally sold. He also testified that he had never received or demanded of the purchasers payment of the expenses of the trip. If the complainant was ever in any respect disloyal to the interests of defendants, the fact fails to appear in this record.

From what has been said, it follows that the decree of the Chancellor must be affirmed, with costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM A. SWEET

v.

POST PUBLISHING COMPANY.

(215 Mass. 450, 102 N. E. 660.)

Libel — newspaper — effect of care and good faith.

1. A newspaper cannot escape liability for libel for publishing sensationally and with descriptive particulars, that a certain person was one of those who it states was indicted for crime, if such person was not in fact the one indicted, because of the fact that it was honestly mistaken after a bona fide attempt in the exercise of reasonable care and diligence to get the facts for publication, on account of the similarity in the names of the two persons.

Pleading — libel — damages.

2. Allegations in a complaint for libel of loss of business and injury to feelings

Note. — Libel and slander: mistake as to identity of person libeled or slandered.

As to libel by publication of photograph as that of another person, see note to *Wandt v. Hearst's Chicago American*, 6 L.R.A.(N.S.) 919.

The publication of one's photograph in connection with scandalous matter concerning another is discussed in the note to *Hillman v. Star Pub. Co.* 35 L.R.A.(N.S.) 595.

It is generally held that a mistake in identity, although honestly made, is no defense to an action for libel; that it is admissible, however, in mitigation of damages. *Jones v. Murray*, 187 Mo. 25, 66 S. W. 981 (charging person with murder under the mistaken belief that he had committed the crime).

So, where a newspaper designated the wrong house as being disorderly by making a mistake in the number, it was held no defense to an action for libel. *McLean v. New York Press Co.* 64 Hun, 639, 46 N. Y. S. R. 706, 19 N. Y. Supp. 262.

So, the fact that a newspaper article libelous *per se* was made to apply to a person by mistake in initials was held in *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392, not to justify or excuse the publication. The court said: "The 'correction' or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action. . . . In this case it was clearly established that the publication was not made by reason of any ill-will against the plaintiff, or with any intention to injure or defame him. That being so, the plaintiff was not entitled to exemplary or punitive damages, and the court did not err in so telling the jury." In this case the initials of J. N. Taylor were erroneously printed J. W., J. N. Taylor being the one arrested for conspiracy, and not J. W. Taylor, as stated.

Where a newspaper, without knowledge

and reputation will support a recovery of damages for mental suffering and distress and illness suffered in consequence of the libel, for loss of reputation in plaintiff's profession, and loss and withdrawal of business.

(September 11, 1913.)

EXCEPTIONS by defendant to rulings of Superior Court for Norfolk County made during the trial of an action brought to recover damages for the alleged publication of a libel which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Elder, Whitman, & Barnum and James T. Pugh for defendant.

Mr. Charles R. Elder, for plaintiff:

Defendant's liability was not a question of good faith nor due care.

Monaghan v. Globe Newspaper Co. 190 Mass. 394, 77 N. E. 476; *Robinson v. Van*

or inquiry on the subject, published an article received from its correspondent to the effect that a certain person was the defendant in a breach of promise suit, when, in fact, the suit was against another person of the same name, the court, in *Morey v. Morning Journal Asso.* 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 181, affirming 28 N. Y. Week. Dig. 514, 1 N. Y. Supp. 475, said: "It received the libelous article from its correspondent, who was not its agent in the sense that his act was its act, and his information its information; and it could receive no advantage from the fact that he was imposed on, or innocently mistaken."

In *Finnegan v. Detroit Free Press Co.* 78 Mich. 659, 44 N. W. 585, where a newspaper company by mistake used the name John Finnegan instead of John Finnucan, and falsely published that the former had stolen a coat, the court, reversing a judgment for plaintiff (Sherwood, Ch. J., and Campbell, J., dissenting), held erroneous a refusal to instruct that "if you find that at, and for a length of time prior to, the publication of the article sued upon, the plaintiff was universally or generally known as 'John D. Finnegan,' and not as merely 'John Finnegan,' and that such initial 'D.' had been adopted by him expressly to distinguish him from persons known as John Finnegan, then this article sued upon will not be presumed to have had reference to the plaintiff, and as there is no evidence in the case that he is the person referred to in the said article, your verdict in that case must be for the defendant."

In *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504, where a newspaper publication stated that one Michael Davis had been arrested for larceny, and gave as his address the address of plaintiff, an innocent person by the same name, the court, in reversing a judgment for defendant, held that it was not conclusively shown by the facts stated that the publication was made for justifiable ends, and that the article

Auken, 190 Mass. 161, 76 N. E. 601; Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Brow v. Hathaway, 13 Allen, 239; Curtis v. Mussey, 6 Gray, 261; Com. v. Pratt, 208 Mass. 553, 95 N. E. 105; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; Peterson v. Morgan, 116 Mass. 350; Watson v. Moore, 2 Cush. 133; Clement v. Lewis, 3 Brod. & B. 297, 7 J. B. Moore, 200, 10 Price, 181, 22 Revised Rep. 533; E. Hulton & Co. v. Jones [1910] A. C. 20, 79 L. J. K. B. N. S. 198, 101 L. T. N. S. 831, 26 Times L. R. 128, 54 Sol. Jo. 116, 47 Scot. L. R. 591, 16 Ann. Cas. 166.

The plaintiff might recover any damage

was made to point to plaintiff through a mistake; that it was therefore error to charge the jury that there was no evidence from which improper motives on defendant's part could be inferred.

A newspaper company was held liable in *Hulbert v. New Nonpareil Co.* 111 Iowa, 490, 82 N. W. 928, for actual damages sustained through the publication of a libelous article where, by mistake, the name and address of an innocent person were given as those of complainant in a seduction case. The court held the following instruction proper: "There is no dispute in the case but that the article in question was published by the defendant, and that, in so far as it referred to the plaintiff, it was untrue. The defendant claims that the article was privileged; that is, that it had a right to publish the same, whether true or false, by reason of its being the report of a judicial proceeding. There was, however, nothing in the legal proceedings, or in the information furnished by the justice, that identified the plaintiff as being the prosecuting witness in the so-called *Shaffer Case*. When, therefore, the defendant did so identify her in the article in question, it did so at its peril, and the statements with reference to the plaintiff having turned out to be false, the plea of privilege cannot avail the defendant." In speaking of the retraction of the article, the court said that it was the duty of the defendant to correct the error. That the correction was made was admitted in evidence on the question of damages, and for that purpose it was immaterial whether or not the plaintiff was satisfied with the correction. The court further said that, "while the jury was fully warranted in finding specially as it did that plaintiff was not entitled to exemplary damages, yet that was a proper question to be submitted to them. It is not for the court to say whether further inquiry as to the identity of the person complaining against *Shaffer* should have been made or not. It was for the jury to say whether greater care should have been exercised, and whether there was such a want of care as showed malice."

In *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129, while the liability of a newspaper proprietor for compensatory damages for 47 L.R.A. (N.S.)

suffered on account of his reputation, his business, so far as it was the natural result of the publication, and mental suffering.

Treadwell v. Whittier, 80 Cal. 579, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Shaw v. Southern P. R. Co.* 157 Cal. 240, 107 Pac. 100; *Harvey v. French*, 1 Cromp. & M. 11, 2 Tyrw. 585, 2 Moore & S. 591, 1 L. J. Exch. N. S. 231; *Goslin v. Corry*, 7 Mann. & G. 342, 8 Scott, N. R. 21; *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427; *Ratcliffe v. Evans* [1892] 2 Q. B. 524, 61 L. J. Q. B. N. S. 535, 66 L. T. N. S. 794, 40 Week. Rep. 578, 56 J. P. 837; *Bishop v. Journal Newspaper Co.* 168 Mass.

libel was not denied, where a reporter, in condensing an article taken from another newspaper late at night, and under a press of work, by mistake used the name John W. Turner instead of John H. Thomas, and falsely published that the former had committed wrongful acts and criminal offenses, the court, reversing a judgment for plaintiff and granting a new trial because of an erroneous instruction that the defendant was legally bound to publish a retraction, said that, while it was defendant's right to publish retraction, and to have proof of that publication presented to the jury for their consideration in mitigation of damages, even after the commencement of the action, defendant was not legally bound to do so.

In *Clark v. North American Co.* 203 Pa. 346, 53 Atl. 237, where a libelous newspaper article referred to one John Clark, but, in describing him, gave the occupation, official position, locality, etc., of one James Clark, the plaintiff, the court, in holding that the article established legal malice if it referred to plaintiff, or if it was so written that it would be reasonably taken to refer to him, said that "what the article meant or intended was only one of the grounds on which defendant's liability might rest. The manner in which it was expressed might so point to plaintiff as equally well to constitute a libel upon him without any actual intention to refer to him at all."

So, it is libel to publish that one who had been arrested for murder, and another bearing a different name, who is innocent, and who had not been arrested, are one and the same person. *Soper v. Associated Press*, 115 App. Div. 815, 101 N. Y. Supp. 342, affirmed without opinion in 188 N. Y. 550, 80 N. E. 1120. To the same effect is *Soper v. Butler*, 115 App. Div. 818, 101 N. Y. Supp. 345 (Nash, J., dissenting).

So in *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. Supp. 567, affirmed without opinion in 152 N. Y. 621, 46 N. E. 1150, where a libelous article gave the name of Edward E. Palmer as being degraded and arrested, and the description or reference in the libel identified one Thomas, an innocent person, it was held that the latter could recover damages. The court said that, to recover

327, 47 N. E. 119; *Finger v. Pollack*, 188 Mass. 208, 74 N. E. 317; *Marble v. Chapin*, 132 Mass. 225; *Parker v. Republican Co.* 181 Mass. 392, 63 N. E. 931; *Hubbard v. Allyn*, 200 Mass. 167, 86 N. E. 356; *Odgers, Libel & Slander*, pp. 383, 388.

Morton, J., delivered the opinion of the court:

This is an action of tort to recover damages for the publication of an alleged libel upon the plaintiff, an attorney at law, in the "Boston Post" of August 13, 1907, a newspaper published by the defendant. The article complained of purported to give the names of six persons who had been in-

dicted by the Suffolk county grand jury for conspiracy to defraud persons unknown, and circumstances connected with their arrest. Amongst the names given as those of the persons indicted and arrested was that of the plaintiff. There was also a paragraph in the same article giving particulars as to the age, residence, and profession of "Mr. Sweet," which was descriptive of the plaintiff in the particulars mentioned. The article was printed in what may be fairly described as a highly sensational manner. The declaration was in three counts. The first count was in the statutory form. The second and third counts averred that the plaintiff was an

damages for libel, it is not necessary that the person libeled be named; it is sufficient if the description or reference contained in the article identifies him.

In *Butler v. New Leader Co.* 104 Va. 1, 51 S. E. 213, plaintiff, who, under the name Annie Oakley, had achieved wide fame as a crack shot while a member of Buffalo Bill's Wild West Show brought an action for libel based upon a publication of one described as Annie Oakley, a famous beauty and crack shot of the world. The court sustained an instruction that, if the jury believed that the article did not refer to the plaintiff, but to a person who was sometimes known as Annie Oakley, and used that title in order to attract the notice of the public, and was not in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to the plaintiff, they must find for the defendant. The court further said that the jury were plainly right in applying the facts to the instruction, and in finding that the defendant company did not refer to the plaintiff, but to a woman known as Any O'Klay, who had also achieved considerable reputation as a crack shot. It appears that there were some statements in the article, including the description of the subject thereof, that would indicate to persons knowing both women that it was not the plaintiff, but the other woman, who had had the experience related in the article. The court observed that there was no purpose in the publication in question to refer to the plaintiff; that it was at most a case of mistaken identity, made not recklessly, but after reasonable inquiry, and the trouble arose from a most unusual complication of facts and circumstances with reference to the name, occupation, and career of two individuals.

When this same plaintiff founded an action for libel upon an article almost identical with that referred to in *Butler v. New Leader Co.* supra, the court, in awarding plaintiff compensatory damages, held in *Butler v. Every Evening Printing Co.* 140 Fed. 934, that where, in an action for injury to reputation and feelings sustained through a newspaper publication false and libelous *per se*, the plaintiff waives all

claim to punitive damages, it is the effect which the libel is calculated to have upon the minds of its readers, and not any actual intent on the part of the defendant to defame the plaintiff that is material in the consideration of damages for the injury.

And on a later appeal of this same case, 75 C. C. A. 657, 144 Fed. 916, the court, in affirming a judgment for plaintiff, said that there did not seem to be room for doubt as to the identical female intended in the libel itself, but that, conceding an antecedent and innocent mistake as to identity, it could not legally excuse the perpetrator of the libel caused by that mistake, or relieve him from responsibility for the injury to the plaintiff resulting therefrom; that, while the impression made on the ordinary reader by the alleged libel might or might not be conclusive or pertinent in determining the issue joined on the innuendo, as to who was meant to be referred to therein, it was the indispensable ground for determining the question of injury to the reputation of the plaintiff when once the identity was established. The court said: "And so, as to the supposititious case put by counsel for plaintiff in error, of a newspaper stating that one John Smith, a blacksmith, of a certain vicinage, was arrested and committed on a charge of larceny, and there were five John Smiths, blacksmiths, of the same vicinage. Would each or any of them, the query is put, have a right to damages in a libel suit against the newspaper, on the ground that ordinary readers would have the impression that the particular John Smith, the plaintiff, was the one referred to? The question must be answered: Not on that ground alone. The plaintiff must establish to the satisfaction of the jury the truth of the innuendo, that by the John Smith so arrested was meant the plaintiff. The case supposed well illustrates the distinction between proving the innuendo that applies the libel to the plaintiff and the finding by the jury, essential to the recovery of damages, of the impression that would be made upon the mind of the ordinary readers of the libel, and that while the impression had by an ordinary reader might be relevant as to who was meant to be referred to in the libel, it is not conclusive."

attorney at law, and that the alleged libel had greatly injured him in his reputation, and had caused him great loss and damage in his profession. The answer admitted publication, but denied any malice, and set up in substance that the article was published with reasonable care, on a privileged occasion, about another person whose name was similar to that of the plaintiff, but that, in spite of such care, a mistake occurred, and that on discovering the mistake the defendant promptly published a retraction.

There was a verdict for the plaintiff and the case is here on exceptions by the defendant to a matter of evidence, and to the refusal of the presiding judge to give cer-

tain rulings asked for, and to certain instructions that were given.

It was stated at the trial by the plaintiff's attorney that no claim of express malice was made.

The principal contention of the defendant is that the occasion was one of privilege or qualified privilege, and that it is not liable for the consequences of a mistake honestly made in a bona fide attempt, in the exercise of reasonable care and diligence, to get at the facts for publication.

The investigation and report by the grand jury constituted a judicial proceeding, and, in the absence of express malice, a fair and correct report of it by the defendant in the newspaper published by it was privileged. *Cowley v. Pulsifer*, 137

The publication of the same article in another newspaper was also the foundation of an action in *Butler v. Barret*, 130 Fed. 944, in which it was held that the depositions of witnesses with respect to the origin of the article were not admissible, either for the purpose of showing that there was a foundation in fact for the article, since, though there may have been a foundation in fact for the statements contained in the article, so far as they concerned the person who was arrested, there was none as to the plaintiff, to whom the article was made to apply not only by its use of her stage name, but by allusions to incidents in her professional career,—or to show that the article had reference to another person than the plaintiff, the question whether the article referred to the plaintiff being for the jury to determine by the allusions contained in the article itself and their application to her.

Where the libel in substance charged one Kate Losee, a woman of thirty-five years, whom the police recognized as Kittie Carr, a notorious character, with having robbed a sleeping passenger, a complaint in an action for libel was, in *Corr v. Sun Printing & Pub. Asso.* 177 N. Y. 131, 69 N. E. 288, held demurrable upon its face as failing to state facts sufficient to constitute a cause of action, where plaintiff alleged that her name was Kate Corr (not Carr), that she was a public school teacher, twenty-six years of age, of good character and reputation, and alleged nothing to show that the libel described or referred to her, the plaintiff.

It is held in *Hanson v. Globe Newspaper Co.* 159 Mass. 293, 20 L.R.A. 856, 34 N. E. 462, that one whose name is used by mistake in publishing an article intended to refer to another person of the same surname and description, as to whom the facts stated are true, has no right of action for libel, although the article would be libelous if it were intended to refer to him. In this case the language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the H. P. Hanson was used

by mistake. "For the purposes of this case," said the court, "it may be assumed in favor of the plaintiff that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well-known person, it would be held to have been published concerning that person, although the defendant should show that through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that, through ignorance or mistake, he said something either by way of designating the person, or making assertions about him, different from that which he intended to say, but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances attending the publication as may easily be known by those of the public who wish to discover it." In *SWEET v. POST PUB. CO.* it was in effect conceded at the trial that the plaintiff was the person meant, although the naming of him was due to a mistake, and the presiding judge so stated in his charge without any objection being made thereto.

It has also been held that an honest mistake in identity will not excuse a false or slanderous charge. Thus, a proprietor of a grocery store was held liable in *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165, for slander and false imprisonment, where the manager ran after a customer, mistakenly accused her of taking meat without paying for it, and forcibly conducted her back to the store, the court stating that the fact that he had made a mistake in the party only tended to mitigate damages.

Where defendant slandered plaintiff by charging him with arson under the mistaken belief that he was another person, defendant was, in *Greer v. White*, 90 Ark.

Mass. 392, 50 Am. Rep. 318. Kimball v. Post Pub. Co. 199 Mass. 248, 19 L.R.A. (N.S.) 862, 127 Am. St. Rep. 492, 85 N. E. 103. The privilege attaching to such report rests, however, upon a somewhat different ground from that on which privileged communications between private persons rest. In them the person making the communication has an interest to protect or a duty to perform, or his relation to the party to whom the communication is made is of a confidential nature, and the law holds that in such cases, if what is said or written is communicated in good faith, in the belief that it is true, and with no malevolent motive, and for the purpose of protecting or promoting his interest, or in

the performance of a duty incumbent upon him, social or legal or moral, and is justified or required by the nature of the relations existing between him and the person to whom the communication is made, and does not go beyond what is fairly warranted by the occasion, the communication is privileged. But no duty rests upon the publishers of a newspaper to report judicial proceedings, and their interest in such matters is only that which all the rest of the community has. It is for the interest of everyone that crime should be detected and punished, and everyone has the highest interest in whatever pertains to the proper administration of justice. It is upon these grounds that reports of judicial proceedings

117, 118 S. W. 258, 17 Ann. Cas. 270, held liable only for compensatory damages, defendant's conduct in speaking to or about plaintiff as he did, honestly believing that he was the right person, amounting to no more than gross negligence.

Where the manager of a park, a popular place of resort, refused to admit one Neuskey, stating as his reason, upon being pressed therefor, that such person was "Burns, a bank robber, a thief, and the biggest burglar in the country," the court in *Neuskey v. Mundt*, 4 Legal Gaz. 230, nonsuited plaintiff for the following reasons: 1st. Because the publication of the words were privileged, in view of the defendant's position, and before a recovery could be had, the plaintiff should prove express malice on the part of the defendant. 2d. That the plaintiff was not charged with being the bank robber, etc., but with being Burns, who was; and if he was not Burns, the language did not injure him. The court said: "If he was not Burns, it was not pretended, and it cannot be intended, that the defendant meant that Neuskey, the plaintiff, was a burglar or robber. This mistaken identity doubtless gave the plaintiff great annoyance for the time being, but annoyance without injury is not actionable."

This note is limited to cases of mistaken identity, and no attempt has been made to treat exhaustively such cases as the following, in which the name of an imaginary or fictitious personage turns out to be that of a real person:

In *Jones v. E. Hulton & Co.* [1909] 2 K. B. 444, 78 L. J. K. B. N. S. 937, 101 L. T. N. S. 330, 25 Times L. R. 597, a newspaper company was held guilty of libel and liable in damages for the publication of a defamatory article concerning "Artemus Jones," although it was conceded that the author of the article and editor of the paper honestly believed that the name used was fictitious, and not likely to be possessed by anyone. It appeared, that plaintiff, however, who bore the name of Artemus Jones, had without the knowledge of the author and editor, been a contributor to the paper for six years and was well known by many of its readers. And al- 47 L.R.A. (N.S.)

though plaintiff was not a churchwarden, and did not live at Peckham, as the article stated, and there was nothing in the article except the name to connect the Artemus Jones therein mentioned with the plaintiff, several witnesses testified that they thought the article referred to plaintiff. The court held that the question was not whether the defendant intended the defamatory matter to refer to plaintiff but whether it was understood by reasonable people who knew plaintiff to refer to him. *Fletcher Moulton, L. J.*, dissented, taking the view that a defendant was not guilty of libel unless he intended the defamatory words to refer to plaintiff.

The above case was affirmed in [1910] A. C. 20, 79 L. J. K. B. N. S. 198, 101 L. T. N. S. 831, 26 Times L. R. 128, 54 Sol. Jo. 116, 47 Scot. L. R. 591, 16 Ann. Cas. 166, the court holding that it was no defense to an action for libel that defendant did not intend to defame plaintiff, when reasonable people would think the language defamatory of plaintiff. While the statement of facts preceding the opinion includes the statement that the evidence that the author of the article and the editor of the paper did not know of the existence of the plaintiff was accepted as true by plaintiff's counsel, Lord Loreburn, L. C., observed that the jury were entitled to think, in the absence of proof satisfactory to them, that some ingredient of recklessness, or more than recklessness, entered into the writing and the publication of the article, especially as Mr. Jones, the plaintiff, had been employed on this very paper, and his name was well known in the paper, as well as in the district in which the paper circulated; that the jury were entitled to say this kind of article is to be condemned. Unless the decision in this case is to be limited by the facts tending to charge defendant with negligence in publishing the article, it is an extreme application of the law of libel. If generally adopted, authors and publishers of fiction must at all hazards avoid the use of names that happen to be borne by real persons, or at least must make it clear upon the face of the writing that it purports to be fiction, and not fact.

J. D. C.

fairly and correctly made are privileged. *Ibid.*: *Kimber v. Press Asso.* [1893] 1 Q. B. 65, 62 L. J. Q. B. N. S. 152, 4 Reports, 95, 67 L. T. N. S. 515, 41 Week. Rep. 17, 57 J. P. 247. In order to be privileged, such reports must be not only fair and impartial, but they also must be accurate. The same principle which requires that they should be fair and impartial requires that they should be accurate, at least in regard to all material matters. *Kimber v. Press Asso.* supra. A distorted report cannot, in the nature of things, from the basis for a correct judgment. In a sense it may make no difference to the public so far as the course of judicial proceedings is concerned, whether it is John Smith or John Jones who is arrested. But the administration of justice would be a farce, or worse than a farce, if the guilty escaped and the innocent were punished, or if the rights of parties were determined in a manner in which, according to plain principles of justice, they should not be. It is of the highest consequence therefore, in order to enable the public to judge rightly, that a report of judicial proceedings should be not only fair and impartial, but should be accurate also. The importance of a full and correct statement in regard to legal matters is well illustrated in actions for malicious prosecution where the defense relied on is that, in procuring the arrest, the defendant acted upon the advice of counsel. See *Black v. Buckingham*, 74 Mass. 102, 54 N. E. 494. If the report had to be accurate, then the defendant is not protected by the alleged privilege. For, admittedly, the plaintiff was not the person indicted. Nor can the defendant avail itself of the doctrine laid down in *Hanson v. Globe Newspaper Co.* 159 Mass. 293, 20 L.R.A. 856, 34 N. E. 462, that, in order to render a defendant liable, the libel must have been published of and concerning the plaintiff, and it is not to be deemed to have been so published if through mistake another person than the one intended is named. It was in effect conceded at the trial that the plaintiff was the person meant, although the naming of him was due to a mistake, and the presiding judge so stated in his charge without any objection being made thereto.

The defendant contends, however, that it is not liable, and is entitled to avail itself of the privilege extended to fair, impartial and accurate reports of judicial proceedings, if it exercised reasonable care and diligence in endeavoring to ascertain what the facts were before it published the report, and the mistake occurred in spite of such care and diligence and was an honest mistake. It would seem that that defense was disposed of, so far at least as 47 L.R.A. (N.S.)

this commonwealth is concerned, by the case of *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, where it was held that the privilege did not extend to statements made with reasonable cause to believe them to be true. As was said in that case: "A person publishes libelous matter at his peril." A newspaper, as a purveyor of news and information of interest to the public, stands no differently in respect to liability from any other medium of communication. As was said by Coleridge, J., in *Davison v. Duncan*, 7 El. & Bl. 229: "There is no difference in law whether the publication is by the proprietor of a newspaper or by someone else. There is no legal duty on either to publish what is injurious to another; and if any person does so, he must defend himself on some legal ground." Stat. 1901, chap. 322, providing that, in actions for libel or slander, the defendant may show acts of the plaintiff creating reasonable suspicion of the truth of the matters charged, manifestly has no application to this case. No doubt, when a person acts in the performance of a duty, or in regard to a matter where his interest is involved, he may justify by showing that he had reasonable and probable cause to believe what he published, and that he acted bona fide and in the belief that what he published was true. In such a case he will be protected by the privilege which attaches to what he publishes from the consequences of an honest mistake. It is on that ground that the case of *Douglass v. Daisley*, 114 Fed. 628, 57 L.R.A. 475, 52 C. C. A. 324, rests, as we understand it. In the present case, however great the interest of the public in the doings of the grand jury might have been, there was, as already observed, no duty, legal or social or moral, resting upon the defendant to publish a report of them, and it had no such legal interest to be protected or promoted as to justify it in the publication of what otherwise would be libel. It does not follow that, because the public had an interest in knowing what the grand jury did, that it was the defendant's duty to inform them. In *O'Connell v. Boston Herald Co.* (C. C.) 129 Fed. 839, also relied on by the defendant, the question was whether, in a report of judicial proceedings published in a newspaper, the reporter, for the purpose of showing that the report was accurate, could introduce the opinion of this court that was rendered in *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788, from which the statement, or one of the statements that were objected to, was taken. It would seem clear that the opinion was admissible, as the court held that it was.

See *Hood v. Hood*, 110 Mass. 463; also *Mangena v. Wright* [1909] 2 K. B. 958, 977, 78 L. J. K. B. N. S. 879, 100 L. T. N. S. 960, 25 Times L. R. 534, 53 Sol. Jo. 485. In *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513, also relied on by the defendant, and followed in *Couroy v. Pittsburgh Times*, 139 Pa. 334, 11 L.R.A. 725, 23 Am. St. Rep. 188, 21 Atl. 154, and *Ferber v. Gazette & B. Pub. Asso.* 212 Pa. 367, 61 Atl. 939, there was a vigorous dissenting opinion by the chief justice and two associate justices, which commends itself to us as expressing the correct view. There is no doubt that, when required to do so, private interests must yield to the public advantage. And if we go back over a long term of years, especially in England (see *Allbutt v. General Council of Medical Education & Registration* [1889] L. R. 23 Q. B. Div. 400, 58 L. J. Q. B. N. S. 606, 61 L. T. N. S. 585, 37 Week. Rep. 771, 54 J. P. 36; *Wason v. Walter* [1868] L. R. 4 Q. B. 73, 8 Best & S. 671, 38 L. J. Q. B. N. S. 34, 19 L. T. N. S. 409, 17 Week. Rep. 169), an increasing disposition is manifested to enlarge the protection afforded by privilege, by broadening the field as to matters that may be properly published for the public information. A liberal rule in regard to such publications has long prevailed in this commonwealth. See *Barrows v. Bell*, 7 Gray, 301, 313, 66 Am. Dec. 479. But the right of the private citizen to be secure in his reputation always must remain one of the most sacred of rights. We discover no error in the manner in which the presiding judge dealt with the matter of privilege and liability in his charge, or in the way in which he dealt with the requests for rulings so far as they related to or bore upon that matter.

It follows from what has been said that the evidence which was offered of the examination of the city directory by the night city editor, "as bearing upon the care which we took in and about the publication of this article," was rightly excluded. Whether it would have been admissible on the question of damages, it is not necessary to consider. The purpose for which it was offered was limited to that expressed above, and the ruling was based on its competency for that purpose.

We do not discover any error in the manner in which the presiding judge dealt with the question of damages. The second court alleged that the plaintiff was an attorney and counselor at law engaged in the practice of his profession in Hyde Park and in the city of Boston, and particularly in the counties of Suffolk, Norfolk, and Middlesex, and that, by reason of the publication of said article he had suffered great

pecuniary damages and loss of business, and had been greatly injured in his feelings and in his reputation in his profession. The third court alleged that the plaintiff was an attorney and counselor at law engaged in the practice of his profession in the city of Boston, Hyde Park, and other places in this commonwealth, and that the publication of said libel and the matters and things contained in said article had caused him great loss in his professional business, greatly injured his feelings and his reputation in his profession, had deprived him of professional business, had caused the withdrawal of professional business from him, and had put him to great trouble and expense to refute said charges. Neither count was demurred to.

Under these counts the plaintiff was entitled to recover for mental suffering and distress, and for illness suffered by him in consequence of the libel, for loss of reputation in his profession, and for loss and withdrawal of business. It is immaterial, it seems to us, whether the damages which the plaintiff was entitled to recover be called general or special. So far as there was any evidence tending to show particular instances of damage, it was brought out by the defendant itself without objection on cross examination of the plaintiff. The case is fully covered we think on this branch of it by *Parker v. Republican Co.* 181 Mass. 392, 63 N. E. 931, and *Morasse v. Brochu*, 161 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

Exceptions overruled.

NORTH DAKOTA SUPREME COURT.

A. E. McADAMS, Appt.,
v.

GRAND FORKS MERCANTILE COMPANY, Resp't.

(24 N. D. 645, 140 N. W. 725.)

Pleading — character of action.

1. Complaint examined, and held not to state a cause of action against the defend-

Headnotes by BRUCE, J.

Note. — Extent of liability of indorser or assignor of bill or note transferred after maturity at a discount.

The general question as to the rights of a holder of negotiable paper transferred after maturity, as against an indorser, is discussed in a note to *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 46 L.R.A. 753.

As to the extent of recovery by a pledgee on negotiable paper which the pledgee

ant as an indorser of a note, but as a vendor and warrantor of a chattel merely.

Bills and notes — indorsement — sale at discount after maturity — effect.

2. A executed a note to B. B indorsed the same without recourse to C, a bank, to gain credit thereon. He afterwards paid C the amount due on said note, and, on it being redelivered to him, scratched out the words, "Pay to C without recourse," but left his signature thereon. Prior to such time A, the maker of the note, had failed, and a settlement had been made with his creditors by which they had agreed that A's property should be turned over to a trustee for their benefit, and that he should be released. B was one of such creditors, and accepted a final dividend of 42 cents on the dollar. He, however, retained the note. Later B sold the note, with others having a face value of \$20,000, to D for \$51, taking at the same time a collateral agreement by which he expressly exempted himself from all liability, both as an indorser

and as a guarantor of the solvency of the paper. The note, however, still had his name indorsed thereon, though it is not shown whether either he or D was aware of the fact. D then sold the note, with others having a face value of \$5,000 to E, and E sold the said lot, with others of a face value of \$1,600, to F for \$50; both of the latter transfers being by delivery only. At the time of the last transfer E told F that the notes were not worth anything; and F did not know that B's name was on the back of the particular note in question, nor, on the other hand, did he know that any dividend had been paid thereon, though he did know that the maker's assets had been turned over to a trustee for the benefit of his creditors. He also testified that the letters P. and L. were on said note when purchased by him, and that he was aware of their commercial meaning. It was also proved that both D and F realized, from their purchases as a whole, more than they had paid therefor.

could not collect, see *Yellowstone Nat. Bank v. Gagnon*, 44 L.R.A. 243, and note.

The liability of an indorser who, after receiving reindorsement, transfers the note for value without canceling his indorsement, is discussed in a note to *Moore v. First Nat. Bank*, 10 L.R.A. (N.S.) 260.

And as to the effect of the amount of discount to put a purchaser of negotiable paper on inquiry, in order to secure rights of a bona fide holder, see the note to *Mee v. Carlson*, 29 L.R.A. (N.S.) 378.

Practically all of the cases involving the extent of liability of an indorser or assignor of a bill or note transferred after maturity at a discount sustain *McADAMS v. GRAND FORKS MERCANTILE CO.* in holding that only the amount paid, not the face of the note, is recoverable.

Thus, in *Coye v. Palmer*, 16 Cal. 158, where a certificate of deposit was indorsed after due, it was held that an indorsee could recover from the indorser only the amount paid therefor, the court saying that it had been unable to find any authority for a different doctrine.

So, in *Bethune v. McCrary*, 8 Ga. 114, it is held that an assignee of a past-due note, having notice that his assignor did not pay full value therefor, can recover from a prior indorser no more than was paid for it by his assignor.

In *French v. Turner*, 15 Ind. 59, it is held that one who assigned a mortgage and several notes secured thereby, part of which were past due, by a writing which was insufficient to charge him as an indorser, is liable at most for the amount received, as for money paid upon a consideration that had failed.

And in *Collger v. Francis*, 2 Baxt. 422, which was a proceeding to determine as between creditors the right to the proceeds of a note assigned by an insolvent after due, it was held that the facts that the assignee was trading with a man in embarrassed circumstances, for a note that was overdue, 47 L.R.A. (N.S.)

and that its real value could by proper inquiry have been approximately determined, while not showing that the transaction was fraudulent, were sufficient to render it inequitable that he should hold more of the proceeds of the note than he paid for it, with interest.

The assignor of a note which has been paid is liable to the assignee for the consideration received. *Campbell & Bro. v. Ayres*, 9 Iowa, 108.

And so the indorser of a note which had been paid in part is not liable to the indorsee for more than he represented to be due on the note, and is not liable for costs of a suit wrongfully brought against the maker, or of one in which he submitted to a nonsuit. *Buckner v. Curry*, 1 Bibb, 477.

The assignee of a non-negotiable note can recover from his assignor only the amount paid for it, with interest. *Whisler v. Bragg*, 31 Mo. 124.

He may also recover the costs of a suit against the maker. And the face of the note is prima facie evidence that that was the price paid. *Foust v. Gregg*, 68 Ind. 399.

In *McVeigh v. Allen*, 29 Gratt. 588, where the plaintiff purchased the note in suit at a judicial sale of the effects of a bank, the court upheld the refusal of a requested instruction that if the plaintiff acquired the note after dishonor, it having been accommodation paper in its origin, he could recover of his immediate indorser only the amount actually paid by him to such indorser. Although no reason is assigned for the ruling, it was probably because the requested instruction was inapplicable, as the action was against the maker and accommodation indorser, and not against the immediate indorser or assignor (the bank), and the bank was apparently a bona fide holder in good faith, before maturity, whose rights against prior indorsers would pass to the plaintiff, notwithstanding that he was a purchaser after maturity.

R. L. S.

Held, that F was not a purchaser in due course of negotiable paper.

Same — demand — when due.

3. A note payable on demand is due within a reasonable time after its date.

Same — overdue.

4. A note which is payable on demand, and is purchased over a year after its date, will be considered to have been overdue when so purchased.

Same — liability of indorser of overdue paper.

5. In the case of an indorsement or transfer of a negotiable instrument after its dishonor or maturity, and where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee, in an action against the indorser, can recover only the consideration he has actually paid.

Same — statutory warranty — extent.

6. The warranty of the seller, under § 5428, Rev. Codes 1905, which provides that "one who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all parties thereto, and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause," is not a warranty of an indorser, but a warranty to the vendee merely, which does not run with the paper.

(March 15, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Grand Forks county in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note which had been indorsed by defendant. Affirmed.

Statement by Bruce, J.:

On January 14, 1904, W. Crawford & Son executed and delivered to the defendant, Grand Forks Mercantile Company, their promissory note for \$600, payable on demand; said note being given in part payment of an open account for goods sold and delivered. On January 21, 1904 the note was indorsed by the defendant: "Demand, notice of nonpayment and protest waived. [Signed] Grand Forks Mercantile Co., by W. A. Curry"—and delivered to the First National Bank of Grand Forks, which bank thereupon gave to the defendant credit upon its books for the amount of said note. Afterwards, and on the 5th day of February, 1904, by a written agreement made with a large number of creditors, including the defendant Mercantile Company, the said W. Crawford & Son

conveyed to one E. A. Young all of their partnership assets in trust for the benefit of such creditors, with power of sale in such trustee; said trust agreement containing the provision that, "if there shall not be sufficient assets to pay the just debts of the respective creditors, then the parties of the first part, William Crawford and William H. Crawford, shall be forever dismissed, discharged, and freed from further liability on their respective accounts." In said agreement each of said creditors also expressly agreed to "forego all suits, actions, or proceedings of any kind whatever for the collection or enforcing of our several demands, and to accept payment thereof as in the annexed trust deed provided." On October 14, 1904, the defendant Mercantile Company paid to the First National Bank the principle and interest of said note, and the same was then and there redelivered to it. Thereafter, and on November 1, 1904, the trustee paid to such Mercantile Company 42 per cent of its claim; such claim having been theretofore duly filed with the trustee. No other and further payment thereon was ever made by such partnership or trustee. Thereafter, and on the 2d day of March, 1905, the said Mercantile Company sold the note in question, together with others, amounting in all to a face value of \$20,000, to one S. S. Titus for \$51. Before such transfer, however, it had erased from said note the words, "Demand, notice of nonpayment and protest waived," but, on the other hand, such agreement of sale was in writing, dated contemporaneously with the delivery of the note, and contained the provision that "the consideration of the above bills receivable and securities thereto attached is to be the sum of \$51. Which is paid with the understanding that the seller does not guarantee the solvency of any note or security in the said list, and is not to be held as an indorser on any of the said notes or securities." Thereafter, and on March 6, 1905, the said S. S. Titus sold the said note, with others whose face value in all aggregated \$5,000, to one John Valley for the sum of \$50; all of said notes being at such time, upon their faces, apparently overdue. After the purchase of said note, and on the same date, the said Valley met the plaintiff, A. E. McAdam, tossed several of the notes so purchased, and aggregating a face value of between sixteen and seventeen hundred dollars, and including the note in suit, on a desk in front of the plaintiff, and asked the plaintiff what the bunch of notes so tossed down in front of him was worth. The plaintiff answered that they were not "worth a damn." The said Valley then said: "You surely can get

something out of them." Plaintiff then said: "Are they your notes?" Vallyley replied: They are; what will you give me for them?" Plaintiff answered \$50. The offer was then and there accepted, and the said plaintiff, McAdam, thereupon paid the said Vallyley the sum of \$50, and all of said notes were delivered to the plaintiff. At the time of the purchase of said notes the plaintiff did not know that the note described in the plaintiff's complaint and herein sued upon bore the indorsement of the defendant. Before such purchase, however, he knew that the assets of said Crawford & Son, the makers of said note, had been turned over to the trustee for the benefit of their creditors; that the plaintiff purchased the said notes, including the note in suit, for the purpose of speculating on the chance of their collection from the makers thereof. All of the notes so purchased appeared, upon their faces, to be overdue, although the plaintiff had no knowledge of the payment of any amount of the note sued upon, but believed that in the settlement of the trusteeship a substantial dividend would be realized. Plaintiff realized, out of the other notes purchased by him from said Vallyley, more than the sum paid for all of said notes; and at the time of the purchase of said note he saw, upon the face and margin thereof, the letters and characters "P. & L.," and knew that said letters and characters meant, in mercantile usage, "profit and loss." Immediately on the purchase of said notes plaintiff instituted inquiries, which revealed the facts set forth in the trustee agreement aforesaid, and on March 31, 1905, one of the makers, W. H. Crawford, wrote to him informing him of such trust deed, and that he and his partner had turned over all of their property under such deed, and that said trust agreement had been signed by the Mercantile Company. On March 8, 1905, the trustee also wrote him, evidently in response to a letter, that a dividend of 42 per cent had been paid to the Mercantile Company, and that this closed the transaction, in so far as the trustee was concerned. After the receipt of this last letter plaintiff demanded payment of said note from the makers, W. H. Crawford & Son, and payment thereof was refused. Immediately thereafter payment was demanded from and refused by the defendant. There is no evidence, however, showing or tending to show that the said note was ever presented for payment, or that notice of the dishonor of said note by the makers was ever given to the defendant. The complaint, after omitting the formal parts, was as follows: "That on the 16th day of January, 1904, said W. Crawford & Son, by W. H. 47 L.R.A. (N.S.)

Crawford made, executed and delivered their certain promissory note in writing, wherein and whereby, for value received, they promised and agreed to pay to the Grand Forks Mercantile Company, on demand, at the office of said company at Grand Forks, North Dakota, the sum of \$800, with interest thereon from date at the rate of 10 per cent per annum until paid; that thereafter the said defendants sold and delivered, for a valuable consideration, the above-described promissory note to the plaintiff herein; that by such sale and delivery the said defendant warranted and agreed with this plaintiff that the aforesaid note was genuine and forceful and binding upon all parties thereto, and that he had no knowledge of any fact which would tend to prove it (the said note) worthless; that prior to the sale and delivery of said note, as aforesaid, the same had been satisfied, all of which was unknown to the plaintiff at the time of the purchase of said note, as aforesaid; that the said note was by the plaintiff duly presented for payment, and payment then and there demanded; that the same was not paid, for the reason that the same had been satisfied, as hereinbefore stated; of all of which due notice was given to the defendant." The trial court rendered a judgment dismissing the plaintiff's cause of action, and against the plaintiff for costs and disbursements. An appeal is taken from this judgment.

Messrs. George A. Bangs and George R. Robbins, for appellant:

The obligation of an indorser after maturity of the note is no different from that of an indorser before maturity, except as to the time the instrument becomes due.

7 Cyc. 826; 1 Dan. Neg. Inst. § 724a; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenborst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Scott v. First Nat. Bank, 71 Ind. 445; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; French v. Jarvis, 29 Conn. 347.

The subsequent indorsement of a note overdue is equivalent to drawing a new bill, payable at sight, or within a reasonable time.

1 Dan. Neg. Inst. § 669; 7 Cyc. 822, 826, 973, 1071; 2 Randolph, Com. Paper, § 671; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Coleman v. Dunlap, 18 S. C. 595; Swartz v. Redfield, 13 Kan. 550; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106; Broun v. Hull, 33 Gratt. 29; Brown v. Davies, 3 T. R. 80; Light v. Kingsbury, 50 Mo. 331; Maddox v. Duncan, 143 Mo. 613,

41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688.

The note remained negotiable after its payment as to all parties who knowingly negotiated it.

2 Dan. Neg. Inst. § 1242; 2 Randolph, Com. Paper, § 683, p. 1090; Callow v. Lawrence, 3 Maule & S. 95, 15 Revised Rep. 423; Mabry v. Matheny, 10 Smedes & M. 323, 40 Am. Dec. 753; Guild v. Eager, 17 Mass. 615; Havens v. Huntington, 1 Cow. 387.

The reissue of a note with an uncanceled prior indorsement, where the indorser knows the note has been paid, or that the maker is dead, or that the instrument has been dishonored, makes the indorser liable to all subsequent parties as the maker or drawer of a new note.

7 Cyc. 826; 2 Dan. Neg. Inst. §§ 1238, 1242; 3 Randolph, Com. Paper, § 1434; Coleman v. Dunlop, 18 S. C. 595; Mabry v. Matheny, 10 Smedes & M. 323, 48 Am. Dec. 753; Picklar v. Harlan, 75 Mo. 678; Scott v. Bank, 71 Ind. 445; St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287; Montgomery & E. R. Co. v. Trebles, 44 Ala. 255; Ward v. Allen, 2 Met. 53, 35 Am. Dec. 387; Brook v. Vannest, 58 N. J. L. 162; 33 Atl. 382; Guild v. Eager, 17 Mass. 615; Moore v. First Nat. Bank, 38 Colo. 336, 10 L.R.A.(N.S.) 260, 120 Am. St. Rep. 120, 88 Pac. 385, 12 Ann. Cas. 268.

No presentment, or demand for payment, or notice of dishonor, is necessary.

2 Dan. Neg. Inst. § 1113; 7 Cyc. 962, 1072; Coleman v. Dunlop, 18 S. C. 591; Picklar v. Harlan, 75 Mo. 678; Williams v. Mathews, 3 Cow. 252; St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287; Montgomery & E. R. Co. v. Trebles, 44 Ala. 255; Copp v. M'Dugall, 9 Mass. 1; Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; Davis v. Francisco, 11 Mo. 572, 49 Am. Dec. 98; Burrill v. Smith, 7 Pick. 291.

The indorser who sells a negotiable instrument which has no validity impliedly warrants, (1) that he has title to the note, (2) that the note and the signatures thereon are genuine, (3) that there is a valid and subsisting obligation, (4) that it has not been paid, (5) and that he knows of no defenses thereto.

An indorser without recourse so warrants.

7 Cyc. 830 et seq. 2 Randolph, Com. Paper, §§ 720, 757; 1 Dan. Neg. Inst. §§ 670 et seq.; Ogden, Neg. Inst. pp. 92, 93, 108; Joyce, Defences to Com. Paper, § 348; Sutherland, Damages, p. 1546; Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; Mays v. Callison, 6 Leigh, 230; 47 L.R.A.(N.S.)

Carroll v. Nodine, 41 Or. 415, 93 Am. St. Rep. 743, 69 Pac. 51; Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382; Broadbudd Institute v. Siera, 68 W. Va. 125, 69 S. E. 468, Ann. Cas. 1912 A, 120; Palmer v. Courtney, 32 Neb. 781, 49 N. W. 754; Delaware Bank v. Jarvis, 20 N. Y. 227; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Drennan v. Bunn, 124 Ill. 175, 7 Am. St. Rep. 365, 16 N. E. 100; Daskam v. Ullman, 74 Wis. 474, 43 N. W. 321; Ware v. McCormack, 96 Ky. 139, 28 S. W. 157, 959; Myer v. Richards, 103 U. S. 385, 411, 41 L. ed. 199, 209, 16 Sup. Ct. Rep. 1148; Thrall v. Newell, 19 Vt. 203, 47 Am. Dec. 682; Seeley v. Reed, 28 Fed. 167; Earnest v. Barrett, 6 Ind. App. 371, 33 N. E. 635; Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158.

Messrs. Bangs, Cooley, & Hamilton, for respondent:

The mere indorsement of these promissory notes created no liability against the defendant.

A. B. Farguhar Co. v. Higham, 16 N. D. 106, 112 N. W. 557; Beebe v. Brooks, 12 Cal. 309; Beer v. Clifton, 98 Cal. 323, 20 L.R.A. 580, 35 Am. St. Rep. 172, 33 Pac. 204; Graul v. Strutzel, 53 Iowa, 712, 36 Am. Rep. 250, 6 N. W. 119; German American Bank v. Atwater, 165 N. Y. 36, 58 N. E. 763; Colt v. Barnard, 18 Pick. 260, 29 Am. Dec. 584; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75.

The demand made on defendant for the payment of the note did not obviate the necessity of notice.

Merchants' Nat. Bank v. Bentel, 15 Cal. App. 170, 113 Pac. 708.

The contract of an indorser after maturity is in no way different from that of an indorser before maturity.

Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Beer v. Clifton, 98 Cal. 323, 20 L.R.A. 580, 35 Am. St. Rep. 172, 33 Pac. 204; Beebe v. Brooks, 12 Cal. 309; Scott v. First Nat. Bank, 71 Ind. 445; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106.

An action for a breach of warranty upon the sale of personal property can be maintained by the vendee against his immediate vendor only, as there is no privity of contract between the last vendee and a remote vendor.

Bordwell v. Collie, 45 N. Y. 494; Nelson v. Armour Packing Co. 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; Smith v. Williams, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; Thisler v. Keith, 7 Kan. App. 363, 52 Pac. 619; Asher Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 56 L.R.A. 672,

58 S. W. 438; Prater v. Campbell, 110 Ky. 23, 60 S. W. 918; Pemberton v. Dean, 88 Minn. 60, 60 L.R.A. 311, 97 Am. St. Rep. 503, 92 N. W. 478; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382.

The amount of the consideration paid may be considered with other facts, in determining bad faith.

Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903; Proctor v. Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Williams v. Huntington, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336; Watkins v. Goessler, 65 Minn. 118, 67 N. W. 796; Smith v. Jansen, 12 Neb. 125, 41 Am. Rep. 761, 10 N. W. 537; Oppenheimer v. Farmers' & M. Bank, 97 Tenn. 19, 33 L.R.A. 767, 56 Am. St. Rep. 778, 36 S. W. 705.

If the plaintiff were a bona fide purchaser, he could recover no more than the amount paid.

Oppenheimer v. Farmers' & M. Bank, 97 Tenn. 19, 33 L.R.A. 767, 56 Am. St. Rep. 778, 36 S. W. 705; Coye v. Palmer, 16 Cal. 158; Dunn v. National Bank, 15 S. D. 454, 90 N. W. 1045; Harrington v. Butte & B. Min. Co. 19 Mont. 411, 48 Pac. 758; Dresser v. Missouri & O. R. & Constr. Co. 93 U. S. 92, 23 L. ed. 815; 1 Dan. Neg. Inst. § 758.

Bruce, J., delivered the opinion of the court:

An examination of the complaint will hardly show that the defendant is sought to be held to the liability of an indorser. He is certainly not sought to be held as a maker of a new note. As we construe the complaint, the liability as a vendor or warrantor is alone relied upon. Even if a proper foundation is laid for proof of the liability of an indorser, we are quite satisfied that there is no reason for reversing the judgment of the trial court. Even if we concede that presentment for payment was dispensed with, on which we do not express an opinion, we are perfectly satisfied that no right to a recovery was proved by the plaintiff. All that the plaintiff himself paid for the notes in question was \$50; while all that the original purchaser, Titus paid was \$51. The evidence is conclusive and undisputed that Titus recovered, out of the notes that he purchased, to say nothing of the \$50 received from Valley, more than he paid for all of the notes; and it is also undisputed that the plaintiff recovered from the balance of the notes purchased by him from Valley more than he himself paid for all of the notes so purchased.

The law seems to be well established that in the case of an indorsement or transfer

of a negotiable instrument after its dishonor or maturity, where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee, in an action against the indorser, can recover only the consideration he has actually paid. The face of the note sued upon was \$600. The amount paid for all of the notes by Titus was \$51, and by the plaintiff \$50. Under the authorities plaintiff's right of recovery, therefore, would be limited in any event to \$50. Even this right of recovery he has not proved, as it is conclusively shown that he bought the notes in bulk,—that is to say, notes of the face value of from \$1,100 to \$1,700, including the note in question, and that he has already realized on such bulk purchase more than the \$50 that was paid. See Coye v. Palmer, 16 Cal. 159; Cook v. Cockrill, 1 Stew. (Ala.) 475, 18 Am. Dec. 67; Brown v. Mott, 7 Johns. 361; Braman v. Hess, 13 Johns. 52; Munn v. Commission Co. 15 Johns. 44, 8 Am. Dec. 219; Youse v. M'Creary, 2 Blackf. 243; Arents v. Com. 18 Gratt. 750; Davis v. Miller, 14 Gratt. 1.

There is no question that the note under consideration was past due, both when purchased by Valley and when purchased by the plaintiff. It was a demand note dated January 16, 1904. It was purchased by the plaintiff on March 6, 1905. It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such reasonable time can be extended beyond a year. Rev. Stat. 1905, § 6355; Morey v. Wakefield, 41 Vt. 24, 98 Am. Dec. 562; Camp v. Scott, 14 Vt. 387; Vinton v. King, 4 Allen, 562; Thompson v. Hale, 6 Pick. 259; Paine v. Central Vermont R. Co. (C. C.) 14 Fed. 269; Bull v. First Nat. Bank (C. C.) 14 Fed. 612; Losee v. Dunkin, 7 Johns. 70, 5 Am. Dec. 245; Herrick v. Wolverton, 41 N. Y. 581, 1 Am. Rep. 461; La Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426; Carlton v. Bailey, 27 N. H. 230; American Bank v. Jenness, 2 Met. 288. There can therefore be no liability as an indorser under §§ 6366 and 6367 of the Civil Code of 1905.

Nor can any liability be founded upon the theory that there was a new indorsement and a new issue of the note. In the first place, there is no foundation laid for any such claim or liability in the pleadings. In the second place, there is no proof whatever that there was any such new indorsement or reissue. The note in question was not physically indorsed after maturity. It was at the most only sold to the original purchaser, Titus, in the condition it was in when it was among the profit and loss

papers of the defendant. The total inadequacy of the consideration and the collateral agreement absolutely negative any presumption of a reissue or reindorsement. Such being the case, it was not a note which had been indorsed after maturity and then sold, but one which had been indorsed before maturity and sold as a chattel in such condition. It is quite clear from the authorities that in such a case the plaintiff would have no further or greater rights than would the original purchaser, Titus. *Huddleston v. Kempner*, 3 Tex. Civ. App. 252, 22 S. W. 871; *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733; *Kernohan v. Durham*, 48 Ohio St. 1, 12 L.R.A. 41, 26 N. E. 982; *Simons v. Morris*, 53 Mich. 155, 18 N. W. 625; *Malfield Grocery Co. v. Price*, 43 Tex. Civ. App. 391, 95 S. W. 31; *Brown v. Smedley*, 136 Mich. 65, 98 N. W. 856; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942. It is also clear that this is a case where the clause of § 6367, Rev. Codes 1905, that, "when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee," would apply. There is no liability, in short, under § 6367, for the simple reason that the transfer to Titus, in spite of the alleged indorsement, was a transfer by delivery only; that is to say, a sale of a chattel, rather than an indorsement.

Nor can there be any liability under § 5428, which provides that "one who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act thereby warrants . . . that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause." This section of the statute is not a section which relates or pertains to indorsers of, or, necessarily, to commercial paper at all. It is a section which relates to vendors of chattels and to the liability of such. Its warranty, therefore, is not the warranty of an indorser, but the warranty of a vendor, and is a warranty that is personal to the vendee.

Even as far as the vendee is concerned, the inadequacy of the consideration and the collateral agreement positively negative any liability on the part of the vendor. Even if there was any liability, as we have before stated, it was personal to the vendee, Titus. The suit before us is not a suit between Titus and the Mercantile Company, but between the assignee or indorsee of an assignee or indorsee of the said Titus, and the company. Such being the case, and since there is no allegation of any prior assignment by Titus of his cause of action, 47 L.R.A.(N.S.)

if any he had, there can be no liability to the plaintiff in this suit. *Bordwell v. Collie*, 45 N. Y. 494; *Nelson v. Armour Packing Co.* 76 Ark. 353, 90 N. W. 288, 6 Ann. Cas. 237; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; *Thisler v. Keith*, 7 Kan. App. 363, 52 Pac. 619; *Asher Lumber Co. v. Cornett*, 22 Ky. L. Rep. 569, 56 L.R.A. 672, 58 S. W. 428; *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Pemberton v. Dean*, 88 Minn. 60, 60 L.R.A. 331, 97 Am. St. Rep. 503, 92 N. W. 478; *Watson v. Cheshire*, 18 Iowa, 202, 87 Am. Dec. 382.

The judgment of the District Court is affirmed.

OREGON SUPREME COURT. (Division No. 1.)

MUTUAL LIFE INSURANCE COMPANY OF NEW JERSEY.

v.

EVELYN M. CUMMINGS, Appt.

SOPHIA J. CUMMINGS, Resp't., et al.

(— Or. —, 133 Pac. 1169.)

Evidence — ownership of insurance policy — calling beneficiary wife.

1. Intention that the beneficiary in a life insurance policy shall be a woman with whom insured is living is shown by evidence that he had it made in her name as his wife, if he had held her out as his wife for several years, and was estranged from the woman to whom he was legally married.

Insurance — adopted name of beneficiary.

2. An insurance policy may be made in favor of one by an adopted name.

Same — in favor of paramour — enforceability.

3. A life insurance policy taken out by a man in favor of his paramour, with whom he is illegally living as his wife, may be collected by her.

(McBride, Ch. J., dissents.)

(July 22, 1913.)

Note. — Insurance on life in favor of paramour.

No discussion is here entered into as to the presumption of the legality of a formal marriage, or the burden of proving the legality of such a marriage. Nor does this note discuss the question whether the statement of relationship between insured and beneficiary is to be deemed a warranty, or only a representation.

Where there was a formal ceremony and beneficiary acted in good faith.

It seems to be well settled that a woman who is formally married to a man believing

APPEAL by defendant Evelyn M. Cummings from a judgment of the Circuit Court for Multnomah County in favor of respondent Sophia J. Cummings, in an interpleader proceeding to determine the ownership of the proceeds of a policy of life insurance on the life of Harry A. Cummings, deceased. Reversed.

Statement by Ramsey, J.:

This is a suit in equity in the nature of a bill of interpleader brought by the Mutual Benefit Life Insurance Company of Newark, New Jersey, against Evelyn M. Cummings and Sophia J. Cummings, to require them to interplead concerning the right to receive the amount of a policy of life insurance on the life of Harry A. Cummings, deceased.

in good faith that the marriage is legal, and who lives with him as his wife, and is recognized as such by friends and acquaintances, may be designated as beneficiary as his wife in his insurance policy, and, if so designated, is entitled to the fund upon his death, although in fact the formal marriage was for some reason illegal. (Grand Lodge, K. P. v. Barnard, 9 Ga. App. 71, 70 S. E. 678 (insured married before, but the former wife had been absent and unheard from so long as to warrant him in believing her dead); *Senge v. Senge*, 106 Ill. App. 140 (beneficiary believed herself divorced from former husband, and was unaware of insured's former marriage); *Wojanski v. Wojanski*, 136 Ill. App. 614 (beneficiary believed in good faith that the insured was divorced from his former wife); *Supreme Lodge, A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816 (beneficiary mistakenly believed the insured to be a widower); *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122 (beneficiary mistakenly believed insured to have been divorced from his wife); *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573 (insured not divorced from his lawful wife); *Story v. Williamsburgh Masonic Mut. Ben. Asso.* 95 N. Y. 474 (insured having a lawful wife living); *Starr v. Knights of Maccabees*, 27 Ohio C. C. 475, 6 Ohio C. C. N. S. 473 (beneficiary marrying insured without knowledge of his previous marriage); *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646 (insured having a lawful wife whom he had abandoned); *De Grote v. De Grote*, 175 Pa. 50, 34 Atl. 312 (although the marriage may have been void because of the previous marriage of insured to another woman); *Duckabury v. Supreme Lodge, S. H.* 4 Lack. Leg. News, 172 (although insured may have had a lawful wife living at time of second marriage); *James v. Supreme Council, R. A.* 130 Fed. 1014 (beneficiary knowing that former wife of insured had died, and ignorant of the fact that he had still another wife living); *Crosby v. Ball*, 4 Ont. L. Rep. 496, 1 Ont. Week. Rep. 545 (beneficiary believing wife of insured dead when in fact she was not).
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On the 5th day of May, 1911, said insurance company issued a policy of life insurance on the life of Harry A. Cummings in the sum of \$2,000, which policy was issued in consideration of the payment by said deceased of an annual premium of \$54.34, or a semi-annual premium of \$27.14. Said deceased paid to said company the first semiannual premium of \$27.14 at the time said policy was issued. Said Harry A. Cummings died on the 23d day of August, 1911. Said policy had earned \$2.08, making the amount due on the policy \$2,002.08. There was due as a semiannual premium on said policy the sum of \$27.14, which leaves due, as a balance, the sum of \$1,974.36. Said policy by its terms made said sum of \$2,000 payable, on the death of the insured,

And it is immaterial that she was thus designated six years before her marriage to the insured took place, where there is no evidence that they were then living in a state of concubinage. *Grand Lodge, K. P. v. Barnard*, 9 Ga. App. 71, 70 S. E. 678.

In *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122, it was said that the beneficiary in such cases has an insurable interest in the life of the insured; in *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573, it was said that it was immaterial whether she has an insurable interest in his life or not.

Under such circumstances, the beneficiary has at least a moral right to look to the insured for support. *Supreme Lodge, A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816.

A policy designating a woman as beneficiary under such circumstances is not a wagering contract. *Scott v. Scott*, supra.

And such a designated beneficiary is entitled to the fund, although the by-laws of the fraternal order may contemplate payment of death benefits to the member's lawful widow. *Story v. Williamsburgh Masonic Mut. Ben. Asso.* 95 N. Y. 474.

Such a designated beneficiary is entitled to the fund as against the previous lawful wife of insured, who had been abandoned by him for nearly twenty years (*Starr v. Knights of Maccabees*, 27 Ohio C. C. 475, 6 Ohio C. C. N. S. 473); or as against the heirs of the insured by his lawful wife, whom he had abandoned before marrying the beneficiary, they being named as beneficiaries after the designated wife (*Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646).

Especially is such designated beneficiary entitled to the fund where, at the time of her designation, the member is unlimited in his choice, and where, upon her discovery of his previous marriage, he obtains a divorce from his former wife and remarries the beneficiary, and they continue to live together until his death; and, although at the time of his death the laws of the association may limit the choice of beneficiary to members of the family, blood relatives, or dependents, the heirs of the member cannot recover the fund as against

to "Evelyn M. Cummings, his wife." The defendant Evelyn M. Cummings claimed that she was entitled to the said sum of \$2,000 as the beneficiary of said policy, and made proof of her claim. Said Sophia J. Cummings claimed that she was entitled to said \$2,000 as the beneficiary of said policy as the wife of Harry A. Cummings, deceased, and made proof of her claim. Each of said parties claimed the whole of said \$2,000, and demanded payment thereof. Said company filed its complaint, alleging the necessary facts, and asking that said defendants be required to appear and set forth their several titles and claims to the proceeds of said policy, and asked the court to require them to adjust and settle their respective demands between themselves.

The plaintiff insurance company deposited in the court below the proceeds of said policy, to be paid to the person entitled thereto.

Each of the defendants filed an answer to the plaintiff's complaint, claiming to be entitled to said money. The defendant Evelyn M. Cummings in her answer alleges that for about two years before the death of Harry A. Cummings, and until his death, she lived with him as his wife, and that he represented to the public and his friends that she was his wife, and that she was known to the public as his wife, etc. The defendant Sophia J. Cummings was shown by the evidence to be the wife of the deceased, but she resided in California, and she and the deceased had not lived together,

such designated beneficiary. *De Grote v. De Grote*, 175 Pa. 50, 34 Atl. 312.

In such cases the designation of the beneficiary as "wife" is only *descriptio personæ*. *James v. Supreme Council*, R. A. 130 Fed. 1014.

The relation between man and woman may be bigamous, illicit, and immoral so far as he is concerned, and yet be right and proper as regards the wife. And while, under the criminal law, she might thereafter, upon discovery that she was not the true and lawful wife of the man and yet continuing to live with him, be guilty of living in adultery or in an illicit relationship, yet, in the construction of the rules of beneficial orders, the law of life insurance upon this subject is more tolerant of such conditions than the criminal law. *Starr v. Knights of Maccabees*, *supra*.

So, upon the death of the wife who was named as beneficiary in a certificate of membership in a fraternal order, the husband may, in order to provide a home for himself, exchange the certificate for another naming as beneficiary a woman as his fiancée, although she is then married and is living apart from her husband with the expectation of obtaining a divorce from him, where she and insured agree in good faith thereupon to intermarry. And where that arrangement is carried out and she faithfully performs her part of the contract till his death, she may recover upon the certificate as against the heirs of the insured. *Johnson v. Van Epps*, 14 Ill. App. 201, affirmed in 110 Ill. 551.

And a woman who formerly marries a man without any knowledge that he already has a lawful wife living, and continues to cohabit with him as his wife after the death of the former one, and is recognized by him and by the public as his wife, becomes his lawful wife upon the death of that other, and may claim the fund upon his death when she is named as beneficiary as wife in the certificate taken out after the first wife's death. *Busch v. Supreme Tent*, K. O. T. M. 81 Mo. App. 562.

Likewise, a woman who formally marries

a man in ignorance of the fact that he is already married, upon his promise to substitute her as beneficiary in his railroad relief certificate, is entitled to the fund upon his death as against his mother, who was originally named as beneficiary, although the promised substitution is not made. *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

And where husband and wife separate, and subsequently he marries another woman without getting a divorce from the former, and lives with the second for nineteen years, whereupon he takes out an insurance policy payable to his "widow," the first wife, who has also remarried, is estopped from showing the illegality of the second marriage, especially where she, with knowledge of it, acquiesced therein for the whole nineteen years; accordingly, the second wife is entitled to the fund. *Woodson v. Colored Grand Lodge*, K. H. 97 Miss. 210, 52 So. 457.

But it has been held that where a married man deserts his wife and family, and without obtaining a divorce marries another woman, and later becomes a member of a fraternal order with the right of certain benefits upon his death accruing to his widow, the first and legal wife becomes entitled to those benefits to the exclusion of the second so-called wife. *Bolton v. Bolton*, 73 Me. 299; *Sullivan v. Grand Lodge*, K. P. 97 Miss. 218, 52 So. 360.

Likewise, under a fraternal order insurance policy, whereby the proceeds are to go to the widow or other heirs of the member, it has been held that the legal wife of the member, though separated from him and living with another man, without divorce from the member, is entitled to the proceeds as against one who may later go through the form of marriage with such member and live with him as wife. *Tutt v. Jackson*, 87 Miss. 207, 39 So. 420.

And in *Schnook v. Independent Order*, S. B. 21 Jones & S. 181, it was said that, although the rules of a fraternal order may contemplate that the beneficiary shall be the lawful wife of the member, yet it is

at any time, for about three years prior to his death.

The court below rendered a decree that the defendant Evelyn M. Cummings was not entitled to the proceeds of said policy on deposit, and that the defendant Sophia J. Cummings was entitled to said money, etc. The defendant Evelyn M. Cummings appealed.

Messrs. Emmons & Emmons & Reid, for appellant:

A party has a right to insure his own life and designate any person whom he pleases as his beneficiary.

Dolan v. Supreme Council, C. M. B. A. 152 Mich. 266, 16 L.R.A.(N.S.) 555, 116 N. W. 383, 15 Ann. Cas. 233; Reed v. Provident

Sav. Life Assur. Soc. 190 N. Y. 111, 82 N. E. 734; Locher v. Kuechenmeister, 120 Mo. App. 701, 98 S. W. 92; Brett v. Warnick, 44 Or. 519, 102 Am. St. Rep. 639, 75 Pac. 1061; Hess v. Sengenfelder, 127 Ky. 348, 14 L.R.A.(N.S.) 1172, 128 Am. St. Rep. 343, 105 S. W. 476; Union Fraternal League v. Walton, 109 Ga. 1, 46 L.R.A. 424, 77 Am. St. Rep. 357, 34 S. E. 317; Langdon v. Union Mut. L. Ins. Co. 14 Fed. 272; 25 Cyc. 708.

A creditor has an insurable interest in the life of his debtor.

Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; Downey v. Hoffer, 110 Pa. 109, 20 Atl. 655; 25 Cyc. 706; Curtiss v. Aetna L. Ins. Co. 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; Manhattan L. Ins. Co. v. Hennessy,

legally possible for a member to designate as beneficiary a woman as his wife even though they are not legally married, and even though he may have a lawful wife living; but in order to give such designated beneficiary the right to the fund, it must be clearly established not only that the designation was made, but also that it became a part of the contract. So, where it appeared that a man had a lawful wife living, evidence that he joined a lodge as a single man, and thereafter formally married another woman and lived with her, and had her name reported to the proper officer of the order as his beneficiary, was held not sufficient to establish the fact that she had been accepted by the order as beneficiary, and that such acceptance had become part of the contract, to the exclusion of the lawful wife; the by-laws which constituted the contract in this case recited that the widow or heirs should receive the fund.

In the last case it was said that courts will not assist in encouraging concubinage, and no right of a lawful wife or child will be permitted to be taken away except upon clear proof. The doctrine of cases awarding funds in fraternal orders to beneficiaries designated as wives when they are not legally such, and where there are lawful wives living, should not be extended beyond situations substantially the same.

And where beneficiaries are limited to the family, blood relations, and dependents, a woman who marries a man who has not been divorced from his former wife the statutory period, so that the second marriage is void, is not in any sense his wife, or eligible to be beneficiary under the by-law limitation, and cannot recover the fund, although she did not know at the time she married the insured that there was any legal prohibition against such marriage. Severa v. Beranak, 138 Wis. 144, 119 N. W. 814.

Also, where the applicant for membership in a railroad relief department expressly stipulates that his marriage (not distinguishing between present and subsequent marriages) shall *ipso facto* have the effect 47 L.R.A.(N.S.)

of substituting the wife in the place of the beneficiary named, and where he has abandoned his lawful wife and later has married another woman and has named the latter as beneficiary, and where the rules of the company provide that in case of a married man the beneficiary must be his wife, the lawful widow is entitled to the fund; although the designated beneficiary had no knowledge of the former marriage, and although she was mentioned by name as beneficiary and wife, she is not the beneficiary required by the company, and the latter would not have assented to her designation had it known of the former marriage. The purpose of the contract was not simply insurance for the member but, as to the company, its purpose was protection from litigation at the instance of persons entitled to recover in case of death or injury, containing as it did a stipulation of release of all claims for death or injury. To hold otherwise would frustrate the purpose of this company by requiring it to pay the mistress and at the same time leaving it liable to the lawful widow. Baltimore & O. R. Co. v. Veltri, 37 Pa. Super. Ct. 399.

Where there is no formal ceremony but the beneficiary believes she is lawfully married to insured.

It seems generally that, in order to entitle one designated as beneficiary as wife of insured to receive the fund, no formal ceremony of marriage is necessary, provided they live together in good faith as husband and wife.

Thus, a woman living with a man as his wife and recognized as such by him, and all his friends, although no ceremony of marriage has been performed, has an insurable interest in his life, and when named as beneficiary in his insurance policy, she may maintain an action thereon. Watson v. Centennial Mut. Life Asso. 21 Fed. 698.

And a woman who is living with insured as his wife, and who is recognized as such by their friends and acquaintances, although in fact not formally married to him,

39 C. C. A. 625, 99 Fed. 64; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191; *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083; *Morrell v. Trenton Mut. Life & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92; *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

There is no reason of public policy why one who procures insurance on his own life should not make the benefit payable to another without regard to whether the latter has an insurable interest.

25 Cyc. 708; *Hill v. United L. Ins. Asso.* 154 Pa. 29, 35 Am. St. Rep. 807, 25 Atl. 771; *Milner v. Bowman*, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094.

if specifically named in his policy as beneficiary as his wife, is entitled to the fund as against his former lawful wife, whom he has abandoned. *Prudential Ins. Co. v. Morris*, — N. J. Eq. —, 70 Atl. 924; *Durian v. Central Verein*, 7 Daly, 168; *MUTUAL L. INS. CO. v. CUMMINGS*.

So, where a policy in a beneficial association is payable to one as wife of insured, and they have entered into a contract of marriage, but no ceremony has been performed, where they acted in good faith and continuously lived together as husband and wife, and were so treated for eighteen years, until his death, and where both believed that she was legally divorced from her former husband, who still lived, although that may not have been the fact, she is entitled to the fund rather than the mother of insured, who had treated them as husband and wife with full knowledge of the facts during the whole eighteen years. The beneficiary in such a case is not his mistress, nor was this a wagering contract contrary to public policy. *Supreme Tent, K. M. v. McAllister*, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770.

And a woman may insure her life for the benefit of a man as her reputed husband, even though she is not lawfully married to him. *Ruoff v. John Hancock Mut. L. Ins. Co.* 86 App. Div. 447, 83 N. Y. Supp. 758.

Also, where a member of a fraternal order organized for the benefit of widows and orphans designates another woman than his lawful wife as beneficiary, calling her his wife, but she living with him in fact as his mistress, and where upon his death the order innocently pays the fund over to her, the lawful widow cannot recover the amount from such association, when she has not served proper notice on the officer thereof, that she is the lawful widow. *Supplee v. Knights of Birmingham*, 18 W. N. C. 280.

And where a man and woman live together as husband and wife for ten years, though not actually married, and though in fact she is his concubine, where she cares for him and attends to his wants, there be-

Where a beneficiary named in a policy had lived with the insured for years as his wife, she has an insurable interest, though there had been no legal marriage ceremony.

3 Am. & Eng. Enc. Law, 2d ed. 942; *Watson v. Centennial Mut. Life Asso.* 21 Fed. 698; *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040; *May, Ins. §§ 102a, 107b; Bliss, Ins. § 26.*

The words "his wife" after the name of Evelyn M. Cummings in said policy are merely descriptive of the person, and do not in any way invalidate the designation of Evelyn M. Cummings as the beneficiary therein.

Durian v. Central Verein, 7 Daly, 168;

ing no impediment to a real marriage between them, and where she is named as beneficiary in his policy and pays the premiums herself, there is no gift on his part to her, and she is entitled to the proceeds to the exclusion of his collateral heirs. *Johnson's Succession*, 115 La. 20, 38 So. 880.

However, under a statute prohibiting those living together in open concubinage from making a donation of movables to each other of more than one tenth of the whole of their estate, one who thus lives with an insured, though named in the policy as beneficiary of the whole fund, where there is no contractual relation between them and no obligation on his part toward her, where she does not take care of him, and where he has no estate, cannot recover more than one tenth of the policy; the remainder must go to his heirs. *New York L. Ins. Co. v. Neal*, 114 La. 652, 38 So. 485.

But where, by the laws of the fraternal order, death benefits are payable to the widow of the member if she has lived with him in lawful union, and where the member had lawfully married one woman and lived with her several years and then deserted her, and later cohabited with another woman who believed him to be divorced from the former, when in fact he was not, the fund belongs to the former woman, the only one answering the requirements of the laws of the order. *Grand Lodge, O. H. S. v. Elsner*, 26 Mo. App. 108.

And where by statute payment of death benefits in a fraternal order may be made only to the widow or persons dependent upon the member for food, lodging, clothing, or education, and to none other, a woman named in the member's certificate as beneficiary as his wife, even though she has lived with him as such for ten years, is not entitled to the fund, when such member has another legal wife living from whom he is not divorced; such designated beneficiary is not his wife nor dependent upon him in the sense of the statute. *Meinhardt v. Meinhardt*, 117 Md. 426, 83 Atl. 715.

Story v. Williamsburgh Masonic Mut. Ben. Asso. 95 N. Y. 474; Standard Life & Acci. Ins. Co. v. Martin, 133 Ind. 381, 33 N. E. 105; 3 Am. & Eng. Enc. Law, 2d ed. 942, 943; Overbeck v. Overbeck, 155 Pa. 5, 25 Atl. 646; DeGrote v. DeGrote, 175 Pa. 50, 34 Atl. 312; Bogart v. Thompson, 24 Misc. 581, 53 N. Y. Supp. 622; Lampkin v. Travelers' Ins. Co. 11 Colo. App. 249, 52 Pac. 1040; 25 Cyc. 889.

Messrs. Arthur P. Tiff and Hamilton Johnstone, for respondent:

The intention of the assured was to make the policy payable to his wife.

The pleadings do not claim that plaintiff was a creditor; although a good case may appear in the evidence, relief cannot be granted, but the bill will stand dismissed,

But it was said in the last case that, in the absence of statute, there is no legal reason why insurance cannot be taken out in a mutual or co-operative insurance company for the benefit of a woman who lives with the insured as his wife, although he may have another legal wife living, from whom he is not divorced.

Where there has been no cohabitation between insured and beneficiary.

Where the laws of the order make no provision by which persons in the class of beneficiaries enumerated as eligible can take the fund, when the beneficiary named in the certificate is ineligible, those not named have no interest in the certificate, and cannot be heard to question the right of the order to pay, or the right of the beneficiary named to receive, the fund simply because she may have been ineligible. So, a woman named as beneficiary as fiancée of the member may recover the fund as against his heirs, although at the time she was so named she was a married woman and had simply promised to marry the member as soon as she had procured a divorce from her husband. Taylor v. Hair, 112 Fed. 913.

And a woman who becomes engaged to a man who has abandoned his lawful wife, knowing that he lived with her but believing that he was never married to her, and who is designated in his certificate as beneficiary as his wife, is entitled to the fund, although he may die before they are actually married. Bogart v. Thompson, 24 Misc. 581, 53 N. Y. Supp. 622.

And where the policy in a beneficial order was payable to one as the fiancée of insured, who was already married, but had separated from his wife, the beneficiary being ignorant of this fact, it was held that she might recover the fund without showing an insurable interest as against the lawful wife and children, the term "fiancée" being treated as only descriptive. Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

But under the laws of an order providing for two general classes of beneficiaries, 47 L.R.A. (N.S.)

if the case made by the evidence offered is substantially variant from that alleged in the pleadings.

22 Enc. Pl. & Pr. 530; Blagen v. Smith, 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292; Blackburn v. Lewis, 45 Or. 426, 77 Pac. 746; Thayer v. Buchanan, 46 Or. 109, 79 Pac. 343; Booth v. Thompson, 49 Mich. 73, 13 N. W. 363; 21 Enc. Pl. & Pr. 664, 665; United States Nat. Bank v. First Trust & Sav. Bank, 60 Or. 266, 119 Pac. 345; Boothe v. Farmers' Nat. Bank, 47 Or. 299, 83 Pac. 785; Troy Laundry Co. v. Henry, 23 Or. 237, 31 Pac. 484; Knahtla v. Oregon Short Line & U. N. R. Co. 21 Or. 142, 27 Pac. 91.

Living with deceased, however long or in whatever manner, would not make appellant the wife of deceased.

and further providing that if any designation of a beneficiary from the second class shall fail for illegality, the benefit shall be paid to the persons mentioned in the first class, where a member who has a lawful wife (one of those named in the first class) designates another as beneficiary as his "affianced wife" (one of those named in the second class), the designation is illegal and void, and the funds should go to the lawful widow. Mendelson v. Gausman, 157 App. Div. 370, 142 N. Y. Supp. 293, affirming 78 Misc. 457, 139 N. Y. Supp. 947.

In that case it was said that where a beneficiary is described as wife, notwithstanding the member has another lawful wife living, and lives with him and becomes dependent upon him within the spirit of the contract, such beneficiary has an insurable interest, and may rightfully claim the fund, but that that doctrine is not to be extended to cases where such beneficiary does not live with him or become dependent upon him.

Where there is no ceremony of marriage and cohabitation is maintained with knowledge of its illegality.

The cases falling under this heading are cases of open, voluntary concubinage, the rule in these cases being that the paramour, though specifically designated as beneficiary, cannot recover upon the policy.

Thus, under a statute authorizing the incorporation of fraternal orders for the relief of families, widows, orphans, or other dependents of deceased members, one who knowingly occupies the relation of concubine or mistress to a member, he having a lawful wife living, does not belong to either of the classes mentioned, and cannot take the fund even though designated as beneficiary. Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543 (designated as "wife"); Grand Lodge, A. O. U. W. v. Riobling, 81 Mo. App. 545 (designated as "dependent housekeeper").

And a woman who is the lawful, undivorced wife of one man, but is living without even a ceremonial marriage with

L. O. L. 7017, 7019 (as amended by act of 1911, chap. 214), 7020; Holmes v. Holmes, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638; Peck v. Peck, 155 Mass. 479, 30 N. E. 74; McBean v. McBean, 37 Or. 205, 61 Pac. 418; Currey v. Butcher, 37 Or. 387, 61 Pac. 631; Compton v. Benham, 44 Ind. App. 51, 85 N. E. 367; Judson v. Judson, 147 Mich. 518, 111 N. W. 78; Re Baldwin, 162 Cal. 471, 123 Pac. 275; Furth v. Furth, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912 D, 595.

To hold that appellant was intended to be designed by assured as his wife would be to admit a false warranty on the part of the assured, and would have been sufficient to enable the insurance company to avoid payment on the policy.

another who designates her as beneficiary as his wife in his insurance policy, cannot recover the fund, since she is falsely thus designated, and is not in any of the classes named as proper beneficiaries, viz., family, heirs, relatives by blood, marriage or legal adoption, affianced husband or affianced wife, or persons dependent upon the member. The fund in such a case must go to the legal heirs. Mikesell v. Mikesell, 40 Pa. Super. Ct. 392.

So, under the laws of an order providing that the benefits shall be payable only to the husband, child, or dependent of the member, the son of a member first designated as beneficiary is entitled to the fund as against one designated in a substitute certificate as husband of the member, who had lived with her as such, but who was never married to her, she having a lawful husband living. Kult v. Nelson, 24 Misc. 20, 53 N. Y. Supp. 95.

"Likewise, one designated as beneficiary as "friend" of the member, but actually his concubine, is not within the class called "family" or "dependent," and cannot recover the fund as against a lawful widow. The designation is without effect, the bounty apparently intended as a recompense for services odious in law and abhorrent to society. Di Messiah v. Gern, 10 Misc. 30, 30 N. Y. Supp. 824.

And where the rules of the order limit beneficiaries to members of the family, blood relations, or dependents, a woman who contracts with a man who already has a lawful wife living, to live with him and care for him, and carries out her agreement by living with him as his concubine, upon his promise to insure his life in her favor, cannot recover upon the certificate delivered to her by him in pursuance of such an agreement. Especially is this the proper rule, where she, being a negress, is prohibited by statute from consummating a marriage contract with the insured, who was white; and it is immaterial that she did not know when their illicit relations began that he had a lawful wife living. In such a case the beneficiary does not fall within the designated classes of eligible per-
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Gaines v. Fidelity & C. Co. 93 App. Div. 524, 87 N. Y. Supp. 821, 111 App. Div. 386, 97 N. Y. Supp. 836; Continental Casualty Co. v. Lindsay, 111 Va. 389, 69 S. E. 345; Van Cleave v. Union Casualty & S. Co. 82 Mo. App. 668; Equitable Life Assur. Soc. v. Paterson, 41 Ga. 366, 5 Am. Rep. 535.

No rights attach to the relationship of concubinage sustained by a woman with a man known by her to be married to another.

Equitable Life Assur. Soc. v. Paterson, 41 Ga. 366, 5 Am. Rep. 535; Grand Lodge, A. O. U. W. v. Riebling, 81 Mo. App. 545; West v. Grand Lodge, A. O. U. W. 14 Tex. Civ. App. 471, 37 S. W. 966; Re Maher, 204 Ill. 25, 68 N. E. 160.

A misnomer of a true wife's name in an insurance policy will not defeat the inten-

sions; there was not even a promise of marriage, she was not seduced, but was a party to a contract made in defiance of public morals and in violation of the laws of the state. West v. Grand Lodge, A. O. U. W. 14 Tex. Civ. App. 471, 37 S. W. 966.

But it has been held that where an employee of a railroad company may designate the beneficiary of the relief fund, subject only to the approval of a certain official of the company, who may refuse to approve unless good and sufficient reasons are presented to him why such person should be designated as beneficiary, a woman so designated as beneficiary as wife of the employee, and approved by the official, is entitled to the fund, although in fact she may not have been his wife, but the wife of another man. At least, she is so entitled as against all strangers to the contract of insurance. No advantage can be taken of such false representation by any except the company itself, and accordingly the parents of the employee cannot recover as against the designated beneficiary. Wolfstern v. Pennsylvania R. Voluntary Relief Dept. 76 N. J. Eq. 78, 74 Atl. 533.

Where there is a formal ceremony of marriage, but the paramour knows that it is in fact illegal.

In some cases, however, the paramour, when named as beneficiary in an insurance policy, has been held entitled to the fund, although at the time of her formal marriage to insured she knew of some legal impediment to such marriage, this doctrine resting upon the ground that, by marrying insured and living with him as his wife, such person, notwithstanding the illegality of the marriage, has an insurable interest in his life, or is actually dependent upon him, and that her designation as beneficiary as wife is only *descriptio personae*, and not a warranty and not material to the risk.

Thus, in Lampkin v. Travelers' Ins. Co. 11 Colo. App. 249, 52 Pac. 1040, an action to recover on the policy by the beneficiary called wife in the application, where the defense was that she was not the wife, but that there a legal wife living, and where

tion of assured to provide for his wife and family.

Hogan v. Wallace, 166 Ill. 328, 46 N. E. 1136, reversing 63 Ill. App. 385.

Ramsey, J., delivered the opinion of the court:

The question for decision is whether the defendant Evelyn M. Cummings or the defendant Sophia J. Cummings is entitled to the proceeds of said policy of insurance on deposit in the court below.

The evidence shows that Sophia J. Cummings was the wife of said Harry A. Cummings, and that Evelyn M. Cummings was not his wife. It appears that Harry A. Cummings and his wife, Sophia J., separated about three years before his death in

the state of Washington, and that his wife never resided in Oregon until after his death, and that she resided in California at the time of his decease, and that she had no correspondence with the deceased during said separation.

The defendant Evelyn M. lived with the deceased about two years as his wife, and he represented to his friends and to the public that she was his wife, and she claimed to be his wife. She bore the name of Evelyn M. Cummings, in Portland, but there had been no marriage ceremony. The deceased had not been divorced from his wife, and could not legally enter into a marriage contract. Evelyn M. testified that she and the deceased had entered into an agreement to be married. Such agreement, how-

it appeared that a marriage had been contracted and that they had cohabited, she was allowed to recover, really upon the ground that the evidence did not prove that the insured had another lawful wife living; but the court went on to say that the statement in the application, "write policy payable to L., whose relationship to me is that of wife," was not in any view a warranty, but only descriptive of the person to whom the fund should be paid in case of death of the insured; and further that the beneficiary in such a case had an insurable interest in his life.

And where such statement is not to be deemed a warranty, but only a representation, and not material to the contract of insurance, the fact that the beneficiary is called the wife of the insured, whereas in fact they both knew when formally married that he had another lawful wife living, does not invalidate the insurance policy, and she may recover upon the same. Vivar v. Supreme Lodge, K. P. 52 N. J. L. 455, 20 Atl. 36.

And where such a statement is not deemed a warranty, a woman may be named as beneficiary as wife, and may be entitled to the fund, although at the time of the formal marriage each party has another lawful spouse living; where she lives with the member, she is dependent upon him, and as such may take the fund. Richards v. King, 57 Misc. 177, 107 N. Y. Supp. 720.

Also, a policy of life insurance effected by the husband on his own life in his wife's name, and for her benefit, is not necessarily void merely because the marriage, as between themselves, is void on account of the fact that the wife already has a lawful husband living; it is not a gaming policy, for she has an interest and a deep one in his life; nor is the policy void as offering an inducement to crime, for when the insured is the actor in taking out the policy, the amount of temptation held out to others to take his life may as a general rule be left to his discretion. Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535.

But in the last case cited, the court 47 L.R.A. (N.S.)

adds that under a Code provision making the wilful concealment of any fact which enhances the risk a cause for avoiding the policy, if the husband knew that the marriage was illegal and concealed that fact from the company, the policy would be void.

But a woman who lives with the insured as his concubine, mistress, or paramour, knowing at the time that he has a lawful wife living, even though they go through the form of a marriage ceremony, does not thereby become his wife so as to be properly named as his beneficiary as such in a fraternal order certificate; and although they continue to cohabit as man and wife after the lawful wife dies, such mistress is not entitled to the insurance money. Miller v. Prella, 122 Ill. App. 380.

Where description of beneficiary is deemed a warranty.

As noted in the beginning, this note does not attempt to discuss the question generally whether the description of the relationship between insured and beneficiary is to be deemed a warranty or merely a representation. In the cases cited under this subdivision, as a matter of fact, that description was deemed a warranty, and the result is largely affected thereby.

Where a statement of the relationship between insured and beneficiary is by agreement of parties a warranty, or where it is so interpreted by the courts, the description of a beneficiary as husband or wife of the insured, when in fact the relationship cannot be legally such, vitiates the policy, and the beneficiary cannot recover thereunder. Smith v. Baltimore & O. R. Co. 81 Md. 412, 32 Atl. 181 (woman named as beneficiary as wife of the insured when he had another lawful wife living); Makel v. John Hancock Mut. L. Ins. Co. 95 App. Div. 241, 88 N. Y. Supp. 757 (no contract of marriage, civil or ceremonial, but parties simply living together as husband and wife); Gaines v. Fidelity & C. Co. 93 App. Div. 524, 87 N. Y. Supp. 821, s. c. on another appeal, 111 App. Div. 386, 97 N. Y. Supp. 836 (beneficiary named as wife, not

ever was void, but evidence of it was relevant to show the relation between her and the insured. She testified, also, that during the time that she lived with the deceased as his wife she advanced to him money, amounting in the aggregate to \$6,000, and jewelry of the value of \$2,000, and that she did this to assist him in business. She claims that he never repaid her this money. She testified, also, that he introduced her to his friends as his wife, and this is corroborated by the evidence of other witnesses. She does not claim that they were married, and, of course, she was not his wife, and it was a gross deception for him to represent to his friends and the public that she was his wife. There is no doubt that Sophia J. was his wife, and that he had a daughter by her.

The policy of insurance provided that the \$2,000 named therein should be paid to Evelyn M. Cummings, "his wife." The evidence shows that, shortly after he obtained this policy, he delivered it to Evelyn M. and told her that it was a present to her, and that it remained in her possession. Sophia J. had no knowledge of this policy until after his death. In the application for the policy it

is stated that the beneficiary thereof should be "Evelyn M. Cummings," wife of the insured.

In her testimony, Sophia J. testified that she had never seen the original policy, and that she doubted whether anyone but Evelyn M. had seen it. It is clearly shown, and not disputed, that the deceased lived with Evelyn M. two years as his wife; that he called her his wife; that he introduced her to his friends and acquaintances as his wife; that his friends and acquaintances believed her to be his wife; that the application for the policy referred to her as his wife, and stated that she should be the beneficiary of the policy; that the policy named her as the beneficiary; and that, after he obtained the policy, he delivered it to her and told her that the policy was a present to her, and that she retained possession of the policy, and that Sophia J. never had the policy or heard of it until after the death of the insured. These facts prove to a moral certainty that Evelyn M. was intended by the insured to be the beneficiary and to have the whole interest in the policy. This conclusion is strengthened by the fact that he had been for years estranged from Sophia

being such, but having another lawful husband living, and she herself living in open, notorious adultery with insured, without even an agreement on their part to assume marital relations); *Van Cleave v. Union Casualty & S. Co.* 82 Mo. App. 668 (circumstances similar to the last case cited).

Also, in a suit upon an insurance policy taken out by one as wife upon her husband's life, and providing that if any of her declarations at the time of its issuance were in any respect untrue the policy should be void, the claimant must prove that, at the date of the policy, she was the lawful wife of the insured, and that he did not then have a former lawful wife living. *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 166, note, Fed. Cas. No. 6,587.

Whether paramour is a "dependent."

A woman who is formally married to the insured, and who lives with him in good faith, though in fact the marriage is illegal, is "dependent" upon the insured for her support within the meaning of that term as used in describing classes of persons eligible to be named as beneficiaries. *Senge v. Senge*, 106 Ill. App. 140; *Wojanski v. Wojanski*, 136 Ill. App. 614; *Supreme Lodge, A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122; *Starr v. Knights of Maccabees*, 27 Ohio C. C. 475, 6 Ohio C. C. N. S. 473; *James v. Supreme Council, R. A.* 130 Fed. 1014; *Crosby v. Ball*, 4 Ont. L. Rep. 496, 1 Ont. Week. Rep. 545.

And it has been said that a woman who is formally married to insured, notwithstanding

standing she knows at the time that the marriage is illegal, is "dependent" upon him, and may thus recover the fund. *Richards v. King*, 57 Misc. 177, 107 N. Y. Supp. 720. But this has been denied. *Miller v. Prella*, 122 Ill. App. 380.

But generally a woman who knowingly occupies the position of a concubine cannot recover as a "dependent." *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Grand Lodge, A. O. U. W. v. Riebling*, 81 Mo. App. 545; *Mikesell v. Mikesell*, 40 Pa. Super. Ct. 392; *Kult v. Nelson*, 24 Misc. 20, 53 N. Y. Supp. 95; *Di Messiah v. Gern*, 10 Misc. 30, 30 N. Y. Supp. 824; *West v. Grand Lodge, A. O. U. W.* 14 Tex. Civ. App. 471, 37 S. W. 966.

The term "dependent" means one who is sustained by the member, or who relies upon him for support or maintenance. *Crosby v. Ball*, 4 Ont. L. Rep. 496, 1 Ont. Week. Rep. 545.

The word "dependent" as used to designate those who may be beneficiaries in fraternal order certificates should not be restricted to those whom the member may be legally or even morally bound to support, but it should be restricted to those whom it is not unlawful for him to support. And while a member may in fact support a mistress, and she may actually depend upon him for support, yet such relationship is unlawful, its object and consideration are abhorrent to morals and laws, and it is subversive to society at large. The law could not have been for the protection of such a person, nor does it reasonably aim to bestow a reward upon such conduct. *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543.

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J., his wife, and that this estrangement was so intense that no letters had passed between them since the separation, a period of several years.

The policy is a contract, and should be so construed as to effectuate the intention of the parties to it. In 25 Cyc. p. 741, the rule for the construction of policies is thus stated: "The language of the policy designating the beneficiary is to be treated as of testamentary character, and is to receive as nearly as possible the same construction as if used in a will. In determining the intention as to the beneficiaries, the policy should be so construed, if possible, as to give effect to every clause and word, and obviously clerical errors will be corrected or disregarded."

In this case, by agreement between the deceased and Evelyn M., she adopted his surname, and was called by them and by her and his acquaintances "Evelyn M. Cummings," and by their agreement she was called his wife. A person may adopt or assume a different name from his or her true name and transact business in such assumed name. 29 Cyc. 270 states the law upon this subject thus: "Without abandoning his real name, a person may adopt any name, style, or signature wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued. Such assumed or fictitious name may be either a purely artificial name, or a name that is or may be applied to natural persons." On page 271 of the same book, the author further states the rule thus: "It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth."

When a policy is issued and delivered, naming a beneficiary to whom the money is to be paid, without a reservation of power to change the beneficiary, an irrevocable trust is created. Bacon, Ben. Soc. § 292.

It is the settled law of this country that a person has a right to insure his own life and have the money made payable to any person whom he may desire, whether such beneficiary has an insurable interest in his life or not. Brett v. Warnick, 44 Or. 519, 102 Am. St. Rep. 639, 75 Pac. 1061; Dolan v. Supreme Council, C. M. B. A. 152 Mich. 266, 16 L.R.A.(N.S.) 555, 116 N. W. 383, 15 Ann. Cas. 232; Reed v. Provident Life Assur. Soc. 190 N. Y. 111, 82 N. E. 734; Locher v. Kuechenmeister, 120 Mo. App. 701, 98 S. W. 92; Hess v. Sengenfelder, 127 Ky. 348, 14 L.R.A.(N.S.) 1172, 128 Am. St. 47 L.R.A.(N.S.)

Rep. 343, 105 S. W. 476; Union Fraternal League v. Walton, 109 Ga. 1, 46 L.R.A. 424, 77 Am. St. Rep. 350, 34 S. E. 317; Langdon v. Union Mut. L. Ins. Co. (C. C.) 14 Fed. 272, 25 Cyc. 708; Hill v. United L. Ins. Asso. 154 Pa. 29, 35 Am. St. Rep. 807, 25 Atl. 771; Milner v. Bowman, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094.

In Brett v. Warnick, 44 Or. 519, 102 Am. St. Rep. 639, 75 Pac. 1061, Justice Wolverton says: "It is beyond cavil that a person may take out a policy of insurance on his own life and make it payable to whomsoever he pleases, he being the moving spirit and assuming the responsibility of meeting the premiums or assessments."

In Reed v. Provident Life Assur. Soc. 190 N. Y. 111, 82 N. E. 734, the New York court of appeals says: "But a person may insure his own life, and provide in the contract of insurance that the money shall be payable to anyone whom he may appoint or assign the policy to."

In Dolan v. Supreme Council, C. M. B. A. 152 Mich. 266, 16 L.R.A.(N.S.) 555, 116 N. W. 383, 15 Ann. Cas. 232, the supreme court of Michigan says: "The authority of these cases [referred to in the opinion] and their reasoning warrants the statement that the rule of public policy which forbids one insuring a life in which he has no insurable interest does not prevent his being made a beneficiary in an insurance policy secured by the insured."

In the case of Union Fraternal League v. Walton, 109 Ga. 1, 46 L.R.A. 424, 77 Am. St. Rep. 350, 34 S. E. 317, the supreme court of Georgia says: "But we feel assured, both by reason and the long line of adjudicated cases to which only partial reference has been made, that the true rule which should obtain in such cases is that where one obtains a contract of insurance on his own life, and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another whom, from love, friendship, or any other reason he desires to benefit, the name beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life or the deceased than exists in his good will, and emanates from his expressed wish to benefit."

In this case the policy was made payable to Evelyn M. Cummings, designated as the wife of the insured. She was not his lawful wife, but she was reputed to be his wife. The insurance company is not making any defense in this case, and, in fact, it admits its liability.

The living together as husband and wife of the deceased and the beneficiary, while the deceased had a wife living, was an act

of gross immorality that cannot be too strongly condemned, but this illicit relation between them did not incapacitate him to make a valid contract of insurance upon his life for the benefit of his reputed wife. If he had made her a present of \$2,000, the gift would have been valid as to all the world, excepting his creditors. A man or a woman, being of lawful age and *compos mentis*, has power to give all his or her property to his or her paramour, and no one but the creditors of the person making such a gift can successfully contest the validity thereof. The immoral relation between the parties does not vitiate their contract or gift.

It may have been the insured's duty to provide for his wife and child, and to have made no provision for the woman with whom he lived illegally. We do not doubt his duty in the premises, but this duty is of imperfect obligation, and this court has no power to make a contract for him, or to change one he has made. By the contract which he made with the insurance company, the proceeds of the policy were to be paid, at his death, to the appellant, Evelyn M. Cummings. We have no power to decree that, when he stipulated that this money should be paid to Evelyn M., his wife, he meant that it should be paid to Sophia J., his wife. It is true that Evelyn M. was not his lawful wife, but she was his reputed wife and was generally so known. It is our duty to construe the policy so as to effectuate the intention of the insured and the company that issued the policy. It is morally certain that the parties to this contract intended that the proceeds of the policy should be paid to Evelyn M., and not to Sophia J.

The case of *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 622, is very much like this case. There a husband abandoned his wife, but thereafter promised to marry one whose Christian name was "Emma L." His fiancée did not know of his previous marriage, but she knew that he had lived with the woman who was his wife. She claimed, however, that she did not know of his marriage to her. He obtained a policy on his life and made it payable to his fiancée as "Mrs. Emma L. Thompson, his wife." His wife's name was Eliza Jane Thompson. Both he and his wife died, and his fiancée and the administrator of his wife's estate each claimed the proceeds of the policy. A suit of interpleader was brought, and the wife's administrator claimed the money on the ground that his intestate was the wife of the insured, and that his illegal fiancée was not his wife, but the court held that the insured intended his fiancée to have the

money, and gave it to her. The court said: "The defendant contends that the designation 'wife' indicated Thompson's intention to designate his lawful wife, Eliza Jane Thompson. In view, however, of the difference in names, and of his engagement to marry the plaintiff, and of the delivery of the contract (policy) to her, it is manifest that by such designation he intended to name the plaintiff, and not his lawful wife, Eliza Jane Thompson. The duty of the court is to ascertain the intention of the member of the beneficiary order, and to give that intention effect, provided it does not contravene public policy or any statute." The court decided that the woman to whom the insured was illegally engaged was entitled to the money.

In *Story v. Williamsburg Masonic Mut. Ben. Asso.* 95 N. Y. 474, the facts were: Story married a woman named Mary and lived with her as his wife until his death, but he had a lawful wife living in England. During his life he obtained a policy and made it payable to "Mary Story, his wife." After his death, she claimed the proceeds of the policy and sued the insurance company. The court of appeals held that the reputed wife, named as the beneficiary, was entitled to the money, and that it was not necessary that she should be his lawful wife, although she was referred to in the policy as his wife.

In the case of *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040, the facts were briefly these: Jos. R. Lampkin obtained a policy of insurance on his life, and made it payable to Lou Lampkin as his wife. He died, and the beneficiary sued the company to recover the insurance, and the company defended on the ground that the beneficiary named was not his wife, and that he had a lawful wife living. The company claimed that the statement in the application for the policy, that the beneficiary was his wife, was a warranty. The insured had lived with the beneficiary as his wife. The court of appeals, however, held that the statement in the application that the beneficiary was his wife was not a warranty, but a mere description of the person. The court held also that a woman who lives with a man as his wife, although she is not his wife, has an insurable interest in him.

In this case the insurer makes no defense, and there is no issue as to fraud or breach of warranty, and therefore the cases on those subjects, are irrelevant.

The counsel for the respondent placed much reliance on the case of *Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136. The facts were these: Michael Hogan, who could neither read nor write, obtained a policy of insurance on his life, and it was made pay-

able to "Mrs. Kate Hogan, his wife." Another person filled out the application for the insured, and made a mistake in the name of the beneficiary. His wife's name was Ellen B. Hogan. The insured lived with her until the time of his death and had several children by her. He never had any other wife. His sister's maiden name was Kate Hogan, but when this policy was issued her name was Kate Wallace. His wife and his sister each claimed the proceeds of the policy. His sister's name did not correspond with the name in the policy, as it was payable to Mrs. Kate Hogan, his wife, while her name was Kate Wallace, and of course she was not his wife. His wife's name was Ellen B. Hogan. The court, after hearing the evidence, decided that there was an error in the name, and gave the money to the wife on the grounds that it was the intention of the insured to provide for her.

In this case it is morally certain that there was no error in the name of the beneficiary; the appellant having adopted the name "Cummings" with the approval of the insured, and he having held her out to the public as his wife. We are satisfied that he intended that she should receive the proceeds of the policy, and that his lawful wife should have no interest therein.

The respondent's counsel claims that the findings of the court below should be of persuasive force on this appeal, but § 405, L. O. L., expressly provides that equity cases shall be tried anew in this court without reference to such findings. This indicates that the findings of the court below, in equity cases, should be disregarded on appeal.

The decree of the court below is reversed, and a decree of this court will be entered requiring the payment to Evelyn M. Cummings, the defendant and appellant, of the said sum of \$1,974.36 deposited in this case in the court below, as the proceeds of said policy of insurance, by the complainant, the Mutual Benefit Life Insurance Company of Newark, New Jersey, and neither party will be allowed costs or disbursements in this court or in the court below.

Moore and Burnett, JJ., concur.

McBride, Ch. J., dissenting:

The cases cited in the opinion fully justify upon authority the conclusion reached, but in my opinion they all overlook to a great extent the element of morals and public policy which enters into the question. Under the testimony here we have a case of a man deserting his lawful wife and living in adultery with another woman, who, the circumstances indicate, must have 47 L.R.A.(N.S.)

been aware of his offense against his wife and family. In this situation he takes the money that should have been expended for the protection of his lawful wife and buys a policy of insurance for his mistress. To allow the mistress under such circumstances to recover would, in my judgment, be contrary to public policy and good morals. It would tend to encourage such illicit relations and to promote their continuance. Though the contract was void as against good morals, the insurance company has not made such a defense, but by its interpleader has brought the money into court and says that it is indifferent as to who takes it. Since the money of the husband bought the policy, and we are sitting as a court of equity to dispose of it, I am of the opinion that it would be good equity to turn it into the husband's estate.

There is no precedent for the course thus indicated, but, in my judgment, the supreme court of Oregon should make one, as I believe the law justifies it, and the conservation of public morals requires it.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.

HARRY K. JOHNSON, Plff. in Err.,

v.

UNITED STATES.

(228 U. S. 457, 57 L. ed. 919, 33 Sup. Ct. Rep. 572.)

Witnesses — self-crimination — use of bankrupt's books.

The books of a bankrupt which have been

Note. — Use in criminal proceedings of books which one has been required to produce in another proceeding as violation of his right against self-crimination.

The general question of the admissibility in evidence against accused of documents or other things taken from him is treated in the notes to State v. Edwards, 59 L.R.A. 465, and State v. Fuller, 8 L.R.A.(N.S.) 762. And as to incriminating evidence furnished by defendant acting under compulsion, see note to State v. Turner, 32 L.R.A.(N.S.) 772. As to admissibility of schedules filed in Federal bankruptcy proceedings in a prosecution against a bankrupt for concealment of property, see Johnson v. United States, 18 L.R.A.(N.S.) 1194, and note appended thereto.

As to right of officer of a corporation to refuse to turn over its books to a receiver, upon the ground that they have a tendency to incriminate him, see note to Manning v. Mercantile Securities Co. 30 L.R.A.(N.S.) 725. That note is of special interest in con-

transferred to the trustee in accordance with the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511), § 70 may, be produced before the grand jury and before the petit jury at the trial of the bankrupt for concealing money from the trustee, without infringing the bankrupt's constitutional privilege against self-crimination.

(April 28, 1913.)

ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment convicting defendant of concealing money from his trustee in bankruptcy. Affirmed.

The facts are stated in the opinion.

Messrs. Edward J. Fox, James W. Fox, and Robert A. Stotz, for plaintiff in error: The bankrupt's books may not be used against him in a criminal proceeding.

Re Harris, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557; Wigmore, Ev. § 2263;

nection with the present note, as several cases are discussed therein which involved the question whether the courts in a civil proceeding, upon compelling the production of books, will also extend protection against their use in any subsequent criminal prosecution.

The exact question held to have been presented in *JOHNSON v. UNITED STATES* does not seem to have been directly passed upon in any other case. However, in *Com. v. Ensign*, 40 Pa. Super. Ct. 157, affirmed on opinion below in 228 Pa. 400, 77 Atl. 657, wherein an involuntary bankrupt was prosecuted for accepting bank deposits while insolvent, it was held that bank books turned over to the trustee in bankruptcy were admissible in evidence in the criminal prosecution, but the court proceeded upon a different theory than that adopted in the *JOHNSON CASE*, namely, that books and schedules turned over to the trustee must be considered as having been voluntarily offered notwithstanding the bankruptcy proceedings were involuntary. In this connection the court said: "It is to be observed that the commonwealth did not obtain these documents by any compulsion exerted by it upon the defendants. But it is said the schedules were filed and the books were delivered to the trustee by compulsion of the provisions of the bankruptcy law and of the general orders in bankruptcy, and therefore they could not be used in any criminal prosecution of the defendants either in the state courts or in the United States courts. It is to be observed in this connection (1) that the bankruptcy act attaches no penalty to the bankrupt's failure to file the schedule; (2) that the schedules involved in the present case were not filed under compulsion of any special decree or order of court, or of any attachment or proceeding for attachment; (3) that the defendants did not object to filing them upon

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Ballmann v. Fagin*, 200 U. S. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212; *Blum v. State*, 94 Md. 386, 56 L.R.A. 322, 51 Atl. 26.

Mr. William R. Harr, Assistant Attorney General, for defendant in error:

The admissibility of the bankrupt's books and papers lawfully transferred to his trustee by operation of § 70, of the bankruptcy act of July 1, 1898 in a criminal proceeding against the bankrupt for an offense created by § 29b of the same act, is determined by the cases of *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Re Harris*, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557; *Kerreh v. United States*, 96 C. C. A. 258, 171 Fed.

the ground that thereby they would furnish evidence that might criminate them; (4) that they did not file them under the inducement of any provision of any act of Congress or of the state legislature prohibiting them from being used against them in any criminal prosecution in the state courts; (5) that it does not appear that at the time they filed them they were under arrest or had been charged with a criminal offense, or were under any sort of duress. Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements voluntarily given or made by a party or witness in a judicial proceeding are, as admissions and confessions, competent against him on the trial of any issue in a criminal case to which they are pertinent, and, according to the great weight of authority, such statements and testimony are considered voluntary when given or made under the circumstances above enumerated."

Another case which may be of interest in connection with *JOHNSON v. UNITED STATES* is *State v. Strait*, 94 Minn. 384, 102 N. W. 913, wherein there was a voluntary petition in bankruptcy, and the bankrupt's books and papers were turned over to the trustee without objection, and it was held that the bankrupt's constitutional privilege against self-crimination was not infringed by the production by the trustee of such books before the grand jury. It may be noted that the fact that the bankruptcy proceedings were voluntary probably would not differentiate the case from those in which the proceedings were involuntary (see *Re Harris*, 55 L. ed. U. S. 732, and note appended thereto.) It might also be noted in connection with *State v. Strait*, that the court therein said that it was neither prepared to accept the reason nor the conclusions reached in *Blum v. State*, infra.

And see *Bacon v. United States*, 38 C. C.

366, 215 U. S. 602, 54 L. ed. 344, 30 Sup. Ct. Rep. 402; and *United States v. Halstead*, 38 App. D. C. 69.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment for concealing money from the defendant's trustee in bankruptcy. The defendant was convicted and sentenced subject to exceptions which raised in different forms the questions whether his books properly were admitted against him, and whether the evidence warranted the verdict.

On the first point the facts are simply that the books had been transferred to the trustee in accordance with § 70 of the bankruptcy act of July 1, 1898 [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511], and were produced before the grand jury and before the petit jury at the trial. That the transfer lawfully could be required is established by *Re Harris*,

221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557. But the defendant lays hold of an expression in that case, "the properly careful provision to protect him from use of the books in aid of prosecution," as an intimation that the books could not be put to such a use.

Courts proceed step by step. And we now have to consider whether the cautious statement in the former case marked the limit of the law in a case where no rights, if there were any, were saved when the books were transferred. The answer was implied in that decision. A party is privileged from producing the evidence, but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume with a confession written on the fly leaf. It is held that a criminal cannot protect himself by getting the legal title to corporate books: *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158. But the con-

A. 37, 97 Fed. 35, writ of certiorari denied in 175 U. S. 726, 44 L. ed. 339, 20 Sup. Ct. Rep. 1022, wherein it was held that the books of a bankrupt turned over to a receiver, who turned them over to the governor, were admissible in evidence in a prosecution of the president of the bank for having made false representations.

But the rule announced in *JOHNSON v. UNITED STATES* does not seem to be the one applied in *Blum v. State*, 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26, it having been held that in that case that books turned over to a receiver in insolvency were not admissible in evidence in a subsequent prosecution of the insolvent for conspiracy to defraud creditors, upon the ground that their admission would have virtually compelled the defendants to furnish evidence against themselves, in violation of their constitutional rights. In this case the insolvency proceedings were commenced with the consent of the defendant, but the court said that it was "not correct to say that books had been voluntarily turned over to the receivers for the purpose for which they are now sought to be used. If we should grant, for the sake of argument, all that may fairly be implied from the fact that the proceeding for receivers was by consent, the fact would remain that the books were surrendered under the order of the court, and what is far more important, and, indeed, vital to the determination of the question, the further fact that it cannot for a moment be contended that the appointment of receivers contemplated any criminal proceeding against the traversers, and that they can therefore be held to have waived any constitutional privileges in their defense. . . . The effect of the order upon the admission of the books in this case can have no other or greater effect than an express order directed to the traversers, if there were no receivership, com- 47 L.R.A. (N.S.)

manding them to produce these books and papers to be used in evidence for the state."

The decision in *Blum v. State*, supra, however, finds support in *Hazlett's Estate*, 8 Pa. Dist. R. 201, wherein, in holding that the books of one being prosecuted for fraudulently receiving bank deposits while insolvent, which were in the hands of assignees for the benefit of creditors, could not be used in aid of the prosecution over the protest of such assignees, the court said that the books were still the property of the assignor, and that the assignees, occupying a representative capacity toward the assignor, ought not to be compelled to produce his books where he himself would not be compelled to do so.

And in some instances it has been expressly provided by statute that documentary evidence, etc., the production of which has been required, shall not be used in any subsequent criminal prosecution as against the ones compelled to produce the same. Such a statute was construed and applied in *United States v. Armour & Co.* 142 Fed. 808, it having been held therein that persons who, pursuant to orders of the commissioner of corporations given under authority conferred by the Federal labor and commerce act to investigate corporations other than common carriers engaged in interstate commerce, which gave him power to require the production of documentary evidence, produced documentary evidence, were immune from prosecution for conspiracy in restraint of trade in violation of the Sherman anti-trust act, under the immunity provisions of the labor and commerce act, which in effect declared that documentary evidence produced pursuant to the requirements of the commissioner of corporations could not be used in any criminal prosecution against the one so producing such documentary evidence.

G. J. C.

verse proposition is by no means true, that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it, after the title and possession have gone to someone else.

It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course, a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession come to a third hand *alio in titulu*, as this did, the use of it in court does not compel the defendant to be a witness against himself.

As to the question of evidence, it is enough to say that there was evidence tending, as far as it went, to show that the defendant foresaw what was coming and attempted to save something from the wreck. There is no certificate that all the evidence is before us, and we should not be warranted in declaring as matter of law that the government did not make out a case. See *Seigel v. Cartel*, 90 C. C. A. 512, 164 Fed. 891.

Judgment affirmed.

WASHINGTON SUPREME COURT.

L. C. DEATON, Respt.,

v.

ROBERT ABRAMS et al., Appts.

(60 Wash. 1, 110 Pac. 615.)

Servant — assumption of risk — wood yard.

1. An experienced employee in a wood yard assumes the risk of injury from the

fall of piles of wood which are too high to be safe.

Same — error of judgment — liability.

2. A master is not liable for injury to an employee engaged in sawing wood, by the fall of a pile 18 feet high, where the saw was set 20 feet from the pile, since the accident was due to an error of judgment in a mere detail of the work, and the master was not required to anticipate danger to men at work at a saw placed that distance from the pile.

(Fullerton, J., dissents.)

(September 3, 1910.)

APPEAL by defendants from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Beatty, and Hastings & Stedman, for appellants:

Where the danger of the employee's position was alike open and obvious to the employer and the employee, and the employee knew of the danger, or, by the exercise of reasonable care or caution could have known of it, the master is not liable for any injury resulting from such danger.

Ford v. Heffernan Engine Works, 48 Wash. 315, 93 Pac. 417; *Tham v. J. T. Steeb Shipping Co.* 39 Wash. 271, 81 Pac. 711, 18 Am. Neg. Rep. 659; *Anderson v. Inland Teleph. & Teleg. Co.* 19 Wash. 576, 41 L.R.A. 410, 53 Pac. 657; *Miller v. Moran Bros. Co.* 39 Wash. 631, 1 L.R.A. (N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089; *Olson v. McMurray Cedar Lumber Co.* 9 Wash. 500, 37 Pac. 679; *Week v. Fremont Mill Co.* 3 Wash. 629, 29 Pac. 215.

Defendants had a right to suppose that

Note. — *Servant's assumption of risk of danger from fall of piles or stacks of material.*

It is a general rule that servants whose place of work is in close proximity to stacks of material, such as lumber, sacks of cement, flour and other material, will be held to assume the risk of the fall of such materials, where there is no concealed danger and the only risk of injury is that caused by the operation of the natural law of gravity.

Arkansas Cotton Oil Co. v. Carr, 89 Ark. 50, 115 S. W. 925 (sacks of cotton seed meal piled in ordinary manner); *Brooks v. W. T. Joyce Co.* 127 Iowa, 266, 103 N. W. 91, 18 Am. Neg. Rep. 78 (lumber piled in negligent manner); *Langlois v. Maine C. R. Co.* 84 Me. 161, 24 Atl. 804 (lumber fell through fault of plaintiff or coemployee); *Hale v. Wayside Knitting Co.* 59 App. Div. 47 L.R.A. (N.S.)

395, 69 N. Y. Supp. 404 (negligence of fellow servant in piling cloth too near sewing machine where plaintiff worked); *Page v. Naughton*, 63 App. Div. 377, 71 N. Y. Supp. 503 (danger of piles of sacks of cement falling while plaintiff was removing some bags); *Cato v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 119 S. W. 132 (fall of pile of timber); *Vernon Cotton Oil Co. v. Catron*, — Tex. Civ. App. —, 137 S. W. 404 (pile of cotton seed); *Samardege v. Hurley-Mason Co.* 72 Wash. 459, 130 Pac. 755 (fall of pile of bags of cement 10 or 11 feet high); *Brown v. Conners*, 149 Wis. 403, 135 N. W. 857; *Baetz v. Valentine-Clark Co.* 152 Wis. 494, 140 N. W. 54 (taking cedar poles from a pile 16 feet high).

So, in *Lewis v. Koller & Smith*, 186 Fed. 403, it was held that there could be no recovery for injury caused to an experienced carpenter and joiner who was injured while pushing along on a floor cases of goods one

plaintiff would be alert and observe that diligence to detect and avoid danger which a man of ordinary prudence would exercise for self-preservation under like conditions.

Hoseth v. Preston Mill Co. 49 Wash. 682, 96 Pac. 423; *Bailey v. Mukilteo Lumber Co.* 44 Wash. 581, 87 Pac. 819; *Hogg v. Standard Lumber Co.* 52 Wash. 8, 100 Pac. 151; *Nordstrom v. Spokane & I. E. R. Co.* 55 Wash. 521, 25 L.R.A.(N.S.) 364, 104 Pac. 809; *Vianello v. Washington Iron Works Co.* 55 Wash. 552, 104 Pac. 784; *Decker v. Stimson Mill Co.* 31 Wash. 522, 72 Pac. 98, 14 Am. Neg. Rep. 225; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Jennings v. Tacoma R. & Motor Co.* 7

Wash. 275, 34 Pac. 937; *Brown v. Tabor Mill Co.* 22 Wash. 317, 60 Pac. 1126; *Thomp. Neg.* § 4063.

Where the facts in a given case are such that all reasonable men must draw the same conclusion, then the question of negligence or of assumed risk is for the court to determine.

Woolf v. Washington R. & Nav. Co. 37 Wash. 507, 79 Pac. 997; 2 *Thomp. Neg.* §§ 1236, 1237; *Jennings v. Tacoma R. & Motor Co.* 7 Wash. 275, 34 Pac. 937; *Decker v. Stimson Mill Co.* 31 Wash. 527, 72 Pac. 98, 14 Am. Neg. Rep. 225; *Hoffman v. American Foundry Co.* 18 Wash. 287, 51 Pac. 385; *Oregon R. & Nav. Co. v. Egley*,

piled above another, where there was no evidence that the cases did not fit flat on each other, and there was no evidence of any obstruction on the floor.

And in *Sutherland v. Garretson-Greaseon Lumber Co.* 149 Mo. App. 338, 130 S. W. 40, it was held that there could be no recovery for injuries to a servant caused by the falling of a pile of lumber due to the negligence of fellow servants either in piling the same or in attempting to move it. There was nothing to show any negligence on the part of the master.

In a number of the above cases, in which the servant was held to have assumed the risk, the danger was due to the fact that the condition of the place of work was constantly changing, because the servant was engaged in piling up the materials or in removing them.

Thus, in *Brown v. Connors*, 149 Wis. 403, 135 N. W. 857, it was held that the servant assumed the risk of the fall of piles of sheet steel which he was assisting to unload from a vessel, since the danger was due to the constant changing of the place of work.

And in *Bradley v. James H. Forbes Tea & Coffee Co.* 213 Mo. 320, 111 S. W. 919, it was held that where a servant's injury was due entirely to the manner in which he and his fellow servants removed stacks of coffee from a large pile, there could be no recovery, for in such a case he would be deemed to have assumed the risk. The court further said that in this case there was no negligence upon the part of the master.

But if there is some concealed danger, such as negligence in the piling of the material or an insufficient foundation, of which the servant is unaware, then, under the general rules of master and servant, he will not be held to have assumed the risk.

Peter & M. Steam Stone Works v. Green, 25 Ky. L. Rep. 946, 76 S. W. 844 (pile of stones on soft ground); *Weinert v. Merchants' & S. Warehouse Co.* 127 App. Div. 826, 112 N. Y. Supp. 123 (fall of sacks of flour in warehouse; foreman knew it was dangerous, but did not warn plaintiff); *Zintek v. Stimson Mill Co.* 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, second appeal, 9 47 L.R.A.(N.S.)

Wash. 395, 37 Pac. 340 (lumber negligently piled); *Scieczinski v. Filer & S. Co.* 147 Wis. 533, 133 N. W. 641 (bricks piled too high near where plaintiff had to work).

So, in *Standard Forging Co. v. Saffel*, — Ind. —, 96 N. E. 321, it was held that the master would be liable for injuries to an ignorant workman who was directed by the foreman to dig a deep hole in close proximity to a high and heavy pile of iron bars.

And in *Rigsby v. Oil Well Supply Co.* 130 Mo. App. 128, 108 S. W. 1128, it was held that a master was guilty of negligence in piling lumber in high piles and so insecurely fastened as to be likely to fall and injure servants required to work near by.

Where the plaintiff, who had been employed for two days in general work about defendant's lumber yard, was sent, without any instruction as to the dangers incident to the work, to assist in piling lumber from a wagon between two standing lumber piles, one of which fell injuring plaintiff, and it was shown that the pile which fell had not been piled in the usual manner adopted by lumbermen, it cannot be said that, to the plaintiff, unacquainted with the business, the danger was obvious; and a nonsuit upon that ground is set aside. *Floersch v. Donnell*, 77 N. J. L. 772, 73 Atl. 490.

An employee in a knitting factory can rely upon the assurance of the superintendent that there is no danger in a pile of cloth falling, or that the danger therefrom will be removed. *Stephens v. Hudson Valley Knitting Co.* 69 Hun, 375, 23 N. Y. Supp. 656.

A laborer, while proceeding to his work under docks upon which lumber is piled, does not assume the risk of danger from their falling by failure to inspect the same before going to work. *Dumas v. Walville Lumber Co.* 64 Wash. 381, 116 Pac. 1091.

In *Bryant Lumber Co. v. Stastney*, 87 Ark. 321, 112 S. W. 740, it was held that a master was liable for injuries to a servant received while obeying the instructions of a foreman to go from one place of work to another, which way led him over a pile of lumber, which, due to defective piling, fell while the plaintiff was upon it.

W. M. G.

2 Wash. 409, 26 Am. St. Rep. 860, 26 Pac. 973.

Mr. B. Sweeney for respondent.

Chadwick, J., delivered the opinion of the court:

Defendants were the owners of a wood yard located on the shores of Lake Union, where they were engaged in converting the mill wood coming from the Edgewater Lumber Company into stove lengths. In the yard at the time of the injury complained of there were two long ricks of wood, each from 60 to 75 feet long. The one being next to a barbed-wire fence skirting the railroad right of way was, according to the evidence of plaintiff, 18 feet high, and in the judgment of his other witnesses 16 to 18 feet high. The other paralleled the first pile at a distance of about 2 feet, and, according to the testimony of at least one witness, these piles in some degree supported each other. The second pile was about half the height of the first pile. The wood had been cut into 4-foot lengths at the sawmill, and had been hauled by defendants' teams and piled more than a year before the accident, during which time plaintiff had been in the employ of the defendants. During a part of the time, and at and before the accident complained of, plaintiff was the sawyer having charge of the saw, and in the absence of Richard Abrams, one of the defendants, seemed to have charge of the yard and the men, although he testified that he gave no orders unless directed by Mr. Abrams. The saw, which was operated by a gasolene engine, was moved from one place to another about the yard. On the evening before the accident occurred, the crew was engaged in sawing wood in the dry kiln. Having used up the dry wood, plaintiff was directed to move the saw out into the yard and saw off of the lower of the two piles hereinbefore referred to. The saw was moved out into the yard and placed at a point, according to plaintiff's evidence, about 20 feet from the higher pile. Other witnesses fixed the distance at about 15 feet, and it is more likely that they are correct in their judgment than is plaintiff. The crew began sawing the first thing in the morning, plaintiff being at the platform and propelling the carriage. They had been at work about fifteen or twenty minutes when the high pile fell its full length. Some of the wood struck the first bearer or passer, knocking him down and against plaintiff, so that plaintiff fell over the carriage and onto the saw, receiving the injuries of which he complains. Plaintiff began an action in the court below, and from a judgment in his favor defendants have appealed.

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Two elements of negligence were set up in the pleadings,—the incompetence of a fellow servant and negligence in piling the wood to an extreme height upon sloping ground. The first ground of negligence was practically abandoned on the trial, leaving only the question: Did respondent assume the risk of his employment? No defect in piling is shown except in the height of the pile. In passing upon a motion for a nonsuit made during the progress of the trial, the judge who tried the case said: "Now, the only evidence of negligence with respect to the piling of this slab wood is as to the height of the pile, as counsel has stated. I do not believe it will be contended that the evidence shows any negligence with respect to the pile of wood, unless the height of the pile constituted negligence in the piling of it. Now, if the appellants were negligent in piling the wood in that way, they would not be liable if the plaintiff appreciates the fact that it was piled too high, and the danger incident to the piling of it in that way. Whether he assumed the risk is a question of fact. Reasonable minds may differ about it. It might be that one man, from his ignorance or inexperience, would not appreciate the danger to be apprehended from a pile of slabs that was piled higher than it ought to be." The trial judge then left the question to the jury, saying: "If a man goes to work in a place of open and manifest danger, if he knows the danger attendant upon his employment, or ought to know it in the exercise of reasonable care for his own safety, if he appreciates the risks of danger in his position, or ought to appreciate them in the exercise of ordinary care and observation on his part, he cannot recover even though he may be injured while at work. Where the employer and the employee are on a plane of equal information, then the employer cannot be held liable for accidents that result from the open and manifest danger. If there are dangers connected with an employment which are known to the employer, and not to the employee, which he does not observe, or would not see in the exercise of ordinary care, it is the duty of the employer to inform the employee of these unseen dangers,—dangers that are not patent and visible. So, with respect to this defense of assumption of risk, it is for you to inquire from the evidence in this case, in the first place, whether this rick of slabs was negligently constructed, whether it was built unreasonably high or unreasonably unsafe, and whether, if so, the plaintiff, by reason of his information and experience, was aware of the dangers that surrounded him, and went to work with knowledge and apprecia-

tion of these dangers, or whether he ought to have known about it in the exercise of ordinary care. Notwithstanding the negligence and the danger, if the plaintiff himself knew of it and appreciated it, or ought to have done so, and went to work under those circumstances, under the law he would be held to an assumption of the risk, and he could not recover." We think there was no question for the jury. Respondent was neither ignorant nor inexperienced. He had worked about wood yards for four or five years, and in this particular wood yard for more than one year. In the absence of Abrams he was capable of running the yard and did so. He knew all the conditions; not only the physical conditions, but those attending his employment. He knew that the wood was piled dangerously high.

He says:

Q. I will ask you, now, Mr. Deaton, is it not a fact that it is dangerous to pile mill wood eighteen feet high?

A. Certainly it is.

Q. It is?

A. Yes, sir.

Q. Any man ought to know that, oughtn't he, that it is dangerous to pile it that high?

A. That is pretty high,—18 feet high is pretty high.

Q. Would you say that any man ought to know that was too high to pile wood?

A. Yes, sir; it is too high.

With this his witnesses agree. There are some things which must be charged to the common knowledge of all men. That a pile of wood 4 feet wide and 18 feet high is obviously dangerous, and that it might fall at any time, is apparent to anyone in possession of his faculties. As said in *Godard v. Interstate Teleph. Co.* 56 Wash. 536, 106 Pac. 188: "In this case everything was out in the open." There were no hidden defects, and no knowledge was withheld. In *Soderburg v. Wells*, 57 Wash. 281, 106 Pac. 751, the following rules from the courts of other states were adopted by this court: "In discussing the safe place doctrine in *Borden v. Daisy Roller Mill Co.* 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91, the court said: 'In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in

hand will generally disclose to a person of ordinary intelligence and experience in such work.' In *Illinois C. R. Co. v. Sanders*, 58 Ill. App. 117, the court said: 'A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate.' In *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355, the court said: 'While the employee may repose confidence in the prudent and cautious adherence to duty by the employer, yet he may not repose that blind confidence in the performance of the employer's duty, which fails to observe the patent defects which an ordinary observation of the employee's duty would readily disclose.' In *Chesson v. John L. Roper Lumber Co.* 118 N. C. 59, 23 S. E. 925, the court said: 'The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it.'" These rules are in entire harmony with the former decisions of this court. See *Shore v. Spokane & I. E. R. Co.* 57 Wash. 212, 106 Pac. 753, where the authorities are collected. To which may be added *Hoseth v. Preston Mill Co.* 49 Wash. 682, 96 Pac. 423; *Hogg v. Standard Lumber Co.* 52 Wash. 8, 100 Pac. 151; *Nordstrom v. Spokane & I. E. R. Co.* 55 Wash. 521, 25 L.R.A. (N.S.) 364, 104 Pac. 809; *Anderson v. Columbia Improv. Co.* 41 Wash. 83, 2 L.R.A. (N.S.) 840, 82 Pac. 1037, 19 Am. Neg. Rep. 585; *Vianello v. Washington Iron Works Co.* 55 Wash. 552, 104 Pac. 784. In the latter case the court said: "While it is the duty of the master to warn his employees of dangers with which they are surrounded, especially when they are ignorant thereof, and such ignorance is known to the master, it would be difficult to assume that an employee who had been engaged as the respondent had been for the period of six months did not have ample opportunity for observing all apparent dangers with which he was surrounded, or that he did not observe the same, and that the master should warn him." The consensus of these decisions is that, where the danger is alike open and obvious to the servant as well as the master, both are upon an equality, and the master is not liable for an injury resulting from a danger incident to the employment.

Respondent relies upon the case of *Zintek v. Stimson Mill Co.* reported in 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, and in 9 Wash. at page 395, 37 Pac. 340. These cases are not in point. In neither of them was the defense of assumption of risk set up. In the first report of the case the only question before the court was the question

of fellow servant and contributory negligence, where the fact was that the lumber which fell upon and killed Zintek was negligently piled. In the second report it is said that there was no testimony whatever to show that Zintek had any knowledge as to the manner in which the lumber had been piled, or anything to call his attention to the defective condition of the foundation of the pile of lumber. We have not overlooked the argument made in the brief (although it may be questioned whether the issue is raised by the pleadings) that respondent was directed to work at the particular place the saw was set, and that he did not know the danger and that the employer did, and is therefore liable. We think the testimony will hardly bear out this theory. It is true that a general direction was given to go out and saw off of the smaller rick, but there is no testimony to show that Abrams directed this, or that it was necessary to put the saw in a place of danger. On the other hand, the saw was set about 20 feet from the high pile, to meet the convenience of the crew of which he was the sawyer, showing that the accident resulted through an error of judgment attending a mere detail of the work, and that it would be unjust to charge any of the parties with the anticipation of danger to life or limb, for they had assumed what would appear to be a reasonably safe place to work.

For these reasons, the judgment of the lower court is reversed and the cause remanded, with instructions to enter a judgment of dismissal.

Rudkin, Ch. J., and Morris and Gose, JJ., concur.

Fullerton, J., dissenting:

I think the evidence justified the verdict. I therefore dissent from the judgment ordered.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

FORDYCE LUMBER COMPANY, Appt.,
v.

T. E. LYNN.

(— Ark. —, 158 S. W. 501.)

Master and servant — simple tools — inspection.

1. A master is under no obligation to in-

spect strips of lumber or sticks furnished to the operator of a lath machine to keep clear the chute carrying the sawdust from the machine.

Same — assumption of risk — breaking of stick.

2. One operating a lath machine assumes the risk of injury from being thrown against the saws by the breaking of a stick or strip of lumber with which he undertakes to clear the chute carrying the sawdust from the machine.

(May 19, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Dallas County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Kirby, J.:

Appellee brought this suit against the Fordyce Lumber Company for damages for personal injuries resulting in the loss of his right hand, which occurred while he was unchoking or cleaning out a sawdust box or chute at the lath machine at which he was employed.

The negligence alleged was that the lumber company had failed to exercise reasonable care to furnish him a reasonably safe place and reasonably safe instrumentalities with which to perform his work, especially that it failed to exercise ordinary care in furnishing him a stick, not reasonably safe and strong, to be used in unchoking said lath machine when the saws of same should become obstructed by dust or *débris*, and that, by reason of said negligence, he received the injury complained of. The answer denies any negligence, and pleads assumption of risk and contributory negligence in bar of the action.

Appellee was twenty-three years old when the accident occurred, and had been working for the lumber company about nine months. He first worked at the lath machine in catching stock. He also worked putting slabs in the long conveyer chain that runs out to the fire. He was changed from first one place to the other and worked mostly at tying lath behind the little machine, and had worked at the little lath machine, tying lath, before he was hurt, about fifteen days. Before he began work at this machine he was told by the foreman to go upstairs and tie lath, and be particular to keep the lath machine going.

Note. — As to liability of master for injuries caused by defects in simple tools, see notes to *Vanderpool v. Partridge*, 13 L.R.A.(N.S.) 668; *Sheridan v. Gorham Mfg. Co.* 13 L.R.A.(N.S.) 687; and *Parker v. 47 L.R.A.(N.S.)*

W. C. Wood Lumber Co. 40 L.R.A.(N.S.) 832. See also *Stirling Coal & Coke Co. v. Fork*, 40 L.R.A.(N.S.) 837, and *St. Louis & S. F. R. Co. v. Mayne*, 42 L.R.A.(N.S.) 645.

His regular duty on the day he was hurt was tying lath. It was the duty of the feeder to unchoke the sawdust chute, and of the tyer to take the feeder's place and keep the machine going during his absence. The machine at which he was hurt was about 3 feet long, and in the middle of it there are three saws about 18 inches in diameter that run a quarter of an inch apart, and about an inch and a quarter of which project up above the surface of the table. The feeder pushes the lath in the saws, and they are held in place by a guide which pushes the lath, and the grader then takes the bundle. The saws are about 18 inches in diameter. The sawdust box was on the front side of the machine beneath the saws. The lath machine sometimes choked up. There was a dust trough to the left of the machine. The dust pit or box was 3 feet at the top and 6 inches at the bottom. To get the sawdust out of the box or receptacle, you take a stick 6 feet long and with it you push the sawdust and other particles falling from the laths gradually down to the lower part of the sawdust receptacle. One man worked the stick down from above where the sawdust went out of the box, and then a man below the mill floor worked up towards him. The box sometimes became choked for the reason that it was tapering; it was smaller at the bottom than at the top. A small piece of lath would get in the box and the sawdust would get in there and choke. When the sawdust got up to the saws, it would smoke.

Appellee was feeding the machine when he was hurt, the regular feeder having gone over to the store, and had run about three bundles through it. His brother was tying and grading also. When he was injured he was unchoking the lath machine, and described the occurrence as follows: "In unchoking the machine, I took a stick about 6 feet long and worked it down to where I supposed was the bottom of the pit where the narrow part came in. I would have to put my weight on the stick and work it gradually. When I had worked the stick to the bottom, another man worked up to it from beneath, and sometimes the sawdust would slip down 5 or 6 inches and hang again. I think about the time the stick struck the bottom it overbalanced me and I struck the saw. The saws were right in front of me. Another time I was working the stick down there was a hole in the floor beside the man where I was working. The pit that received the sawdust was between me and the saws. I had to lean over in order to work the stick down. The trough or sawdust pit was to my right and I stood in front of the machine. My right hand

was next to the machine. I was unchoking it and the sawdust pit in front of me. I could not push the stick through the sawdust without working it in the manner just stated. The teeth of the saw which hurt me were about 1½ inches long. I did not shut the machine down when I began to unchoke the sawdust spout. It had never been the custom to do this. I had never seen anybody else shut it down. The three saws were located about 6½ or 8½ inches from the edge of the table. The table through which the saws ran was a flat one, and had an apron attached to it. The apron was iron. While I was working the stick down, it broke in two as I was leaning forward. My right hand went into the saws. It went under the table and came in contact with the saw. I received a cut on my hand and had the hide of this finger knocked off. My right hand was cut so badly that nothing but the little finger was left. It is cut off just above the thumb and cut right straight across down to the root of the little finger. All of the fingers and the thumb, except my little finger, are gone. The little finger is perfectly stiff. I got the stick I was using near the end of the stairway that goes up in the room. Mr. Wells had put the stick there. There were six or eight sticks in the pile piled up near the steps of the fire room, and I went around about 8 feet from where I was and picked one up. I could have picked up any stick I might have selected. I didn't look at the stick."

Witness's brother went down below and was working from the bottom with a stick up the chute, and pulled out a piece of the stick that broke off when appellee was using it from above. He said the stick was cross-grained and broke in two and split diagonally about 2½ inches at the point of breaking. The sticks were about 5 feet long and about an inch square, with one end somewhat sharpened. They had been taken off the slasher saws, and it seems as though no special effort was made to furnish any particular grade of stick for the purpose. Another witness testified that what was meant by the grain in lumber was the stripes that run lengthwise in a stick. The grain runs lengthwise usually, and it is not true that it will break in two on account of the crossgrain in handling it unless it is rotten.

The court instructed the jury, which returned a verdict against the lumber company, and from the judgment thereon it appealed.

Mr. T. D. Wynne, for appellant:

The rule of law that it is the duty of the master to exercise ordinary care to provide

the servant reasonably safe appliances for the performance of his work, and to exercise ordinary care to inspect the same, can have no application to the facts of the case at bar.

1 Labatt, Mast. & Serv. § 154, p. 331; 4 Thomp. Neg. 2d ed. § 4708; St. Louis & S. F. R. Co. v. Kelton, 55 Ark. 484, 18 S. W. 933; Marcum v. Three States Lumber Co. 88 Ark. 36, 113 S. W. 357; Gulf, C. & S. F. R. Co. v. Larkin, 98 Tex. 225, 1 L.R.A. (N.S.) 944, 82 S. W. 1026; Masich v. American Smelting & Ref. Co. 44 Mont. 36, 118 Pac. 764, 2 N. C. C. A. 101; Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131; Olson v. Doherty Lumber Co. 102 Wis. 264, 78 N. W. 572; Miller v. Erie R. Co. 21 App. Div. 45, 47 N. Y. Supp. 285; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Garnett v. Phoenix Bridge Co. 98 Fed. 192; Burlington & C. R. Co. v. Liehe, 17 Colo. 290, 29 Pac. 175; Holt v. Chicago, M. & St. P. R. Co. 94 Wis. 596, 69 N. W. 352; Golden v. Ellis, 104 Me. 177, 71 Atl. 649; Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; Koschman v. Ash, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514; Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497.

Plaintiff's injuries resulted proximately from risks, dangers, and hazards which he assumed as a matter of law.

2 Labatt, Mast. & S. § 603, p. 1743; 4 Thomp. Neg. 2d ed. §§ 4708, 4616; Fordyce v. Stafford, 57 Ark. 506, 22 S. W. 161; St. Louis, I. M. & S. R. Co. v. Goins, 90 Ark. 392, 119 S. W. 277; Holt v. Chicago, M. & St. P. R. Co. 94 Wis. 596, 69 N. W. 352; Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350; Maloney v. United States Rubber Co. 169 Mass. 347, 47 N. E. 1012; Borden v. Daisy Roller Mill Co. 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91; Golden v. Ellis, 104 Me. 177, 71 Atl. 649; Deering v. Canfield & W. Co. 126 Mich. 373, 85 N. W. 874; Houston & T. C. R. Co. v. Martin, 21 Tex. Civ. App. 207, 51 S. W. 641.

Plaintiff contributed to his injuries by his own negligence.

Henry Wrape Co. v. Huddleston, 66 Ark. 239, 60 S. W. 452; St. Louis, I. M. & S. R. Co. v. Goins, 90 Ark. 392, 119 S. W. 277.

It was incumbent upon appellee to show by affirmative proof that a stick with a crossgrain was not reasonably fit for the use to which it was put. The mere fact that the stick broke will not raise a presumption of negligence.

Chicago Mill & Lumber Co. v. Cooper, 90 Ark. 331, 119 S. W. 672; Arkansas Cotton Oil Co. v. Carr, 89 Ark. 52, 115 S. W. 925.

Messrs. Powell & Taylor for appellee. 47 L.R.A. (N.S.)

Kirby, J., delivered the opinion of the court:

It is insisted for appellant that the rule of law devolving the duty upon the master to exercise ordinary care to provide the servant with reasonably safe instruments and appliances for the performance of his work, and to exercise ordinary care in the inspection thereof, has no application to the facts of this case, which it is insisted comes within the exception to the rule relating to simple tools and appliances, and that the court should have directed a verdict in its favor.

The instrument complained of in this instance was a common ordinary stick or strip about 6 feet long and 1 inch square, pointed at the end, and its structure and grain were obvious and as easily comprehended by the servant as the master, and by one man as another. The sticks were not manufactured for the particular use, except the sharpening at one end, and were selected from another department of the mill on account of their length and size adapting them to the use to which they were put. There was no dangerous machinery in the chute, in the cleaning out and unchoking of which the sticks were to be used, with which the person using it could come in contact, and the sticks were not expected to last permanently or long, and were likely to be broken or split and destroyed in the using, as was apparent from the number supplied. Appellee acted upon his own initiative and without direction from anyone, and could consume as much time in unchoking the sawdust chute as was necessary without hurry or haste, and, when the chute choked up, walked around the machine to where the pile of sticks lay, some 6 or 8 feet away, and picked up one of them for that purpose, while his brother went downstairs to assist from below. The stick was an instrument or appliance as simple as any that can be used in the performance of any kind of work.

Thompson on Negligence says (vol. 4, § 4708, 2d ed.): "A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood. It is a part of this doctrine that the duty of inspection by an employer of the appliances used by his employees does not extend to the small and common tools of everyday use, of the fitness of which the employees using them may reasonably be supposed to be competent judges."

In Labatt on Master & Servant, vol. 1, § 154, p. 331, it is said: "The duty of inspection does not extend to the small and common tools in everyday use, of the fit-

ness for use of which the employees using them may reasonably be supposed to be competent judges."

In *Masich v. American Smelting & Ref. Co.* 44 Mont. 36, 118 Pac. 764, 2 N. C. C. A. 101, a case where the plaintiff was injured by getting his hand caught between rollers in a rock crusher about which he had been employed for some time, and his work required him to shovel ore into the breakers, and, when a rock became lodged in the crushers or rollers, to push it through with a stick, for which purpose the company furnished sticks cut from rough pine boards. While attempting to push some rock through the rollers with a pine stick 3 feet long, 1 inch wide, and half an inch thick, his hand and arm were drawn between the rollers and crushed. It was alleged that the smelting company was negligent in furnishing him a defective stick, the surface of which was rough and splintered at the point where plaintiff took hold of it, and that, by reason of its condition, his glove on his right hand became fastened to the stick and was held by it so that he could not withdraw his hand from the glove or turn the stick loose, by reason of which his hand and arm were drawn between the rollers and crushed. The court held that the stick was a simple appliance, and that no negligence could be imputed to the master for the failure to inspect it, and quoted, in support of the decision, from the opinion in *Longpre v. Blackfoot Mill Co.* 38 Mont. 99, 99 Pac. 131, as follows: "Among the particular duties incumbent upon him [the master] is that of inspection of the machinery and appliances to discover defects in them, both at the time of furnishing them and during the course of the employment, for this is the only means by which he may guard the safety of those employed by him in the use of them. . . . But it is not always absolute. It is not the duty of a railroad company or other persons engaged in great industrial enterprises to inspect, much less to test, every tool or appliance put into the hands of an employee. This duty arises only when the appliance is of such a character that a man of ordinary prudence would, under the same circumstances, make an inspection as a precaution against injury to his servant. The master is not required to inspect simple appliances, such as hammers, saws, spades, hoes, lanterns, push sticks, and the like, the character and use of which are understood by all alike. A tool of this class is so simple in its construction, and so well understood by men of ordinary intelligence, that it would seem absurd to say that the master should make a careful inspection of it before he commits it to

the hands of his servant, who has the same capacity to understand its character and uses that he himself has." Continuing, it said: "The cases cited and relied upon by this court in the *Longpre* Case above fairly illustrate the exception to the rule which requires that the master shall inspect the appliances which he furnishes to his servant. So long as it is the rule of law that a master is relieved from the duty of inspecting simple tools and appliances, and that burden is imposed upon the servant, the rule must be susceptible of application, or it becomes a protection to the master in theory only, and is without practical value. . . . The complete description of this instrument as given in the record is a pine stick 3 feet long, an inch wide, and half an inch thick. If it was not a simple tool or appliance, then we are unable to imagine what application the term 'simple' can have when used to characterize the instrumentalities of any occupation."

In *Gulf, C. & F. R. Co. v. Larkin*, 98 Tex. 225, 1 L.R.A.(N.S.) 944, 82 S. W. 1026, a case where a brakeman complained of the railroad's failure to inspect a lantern furnished him, which, by reason of some defect not patent to ordinary observation, exploded and injured him, the court said: "It is not the duty of a railroad company to inspect every implement or tool that it furnishes to its employees; . . . that duty arises whenever the machinery or implement is of such character that a man of ordinary prudence would, under the same circumstances, inspect the machinery or implement as a precaution against injury to the servant. . . . A master is not required to inspect the common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses. . . . If this requirement were sustained, then every farmer or housekeeper who furnishes an ax to his [or her] servant with which to cut wood for use upon the premises, or for other purposes, must use that care which would here be required with regard to the lantern by an inspection, to discover the condition of the ax before he purchased it, and, during the use of it by the servant, he must keep up a course of inspection in order to insure safety. . . . Likewise, it is a matter of common knowledge that a lantern globe is one of the simplest appliances that can be furnished to a servant for use, as well as being in common use; and the court knows, as a matter of law, that it does not require special knowledge or skill to understand the lantern, nor is there any reason why the servant who handles it should not be fully acquainted with its condition, especially

when, as in this case, it is committed to his exclusive control and care. There may be, and doubtless are, cases in which it is a question of fact that should be submitted to the jury as to whether the machinery or implement, tools, and the like were of such character as to require inspection as a safeguard against danger; but there was no reason for submitting the question to the jury in this case." See also *Stirling Coal Co. v. Fork*, 40 L.R.A.(N.S.) 837, and case note on page 832 thereof (141 Ky. 40, 131 S. W. 1030); *Vanderpool v. Partridge*, 13 L.R.A.(N.S.) 668, and authorities in case note (79 Neb. 165, 112 N. W. 318); *Sheridan v. Gorham Mfg. Co.* 28 R. I. 256, 13 L.R.A.(N.S.) 687, 66 Atl. 576.

The defect or crossgrain in the stick selected by the servant from the number supplied was obvious and patent, and as easily discovered by the servant as it could have been by the master, and, it being a simple tool, no duty devolved upon the master to inspect it, and appellant assumed the risk attendant upon its use.

In *Marcum v. Three States Lumber Co.* 88 Ark. 36, 113 S. W. 359, the court said: "Where the servant is engaged in ordinary labor, with tools of simple construction, which are used by himself alone, and where the facts are undisputed, the reasonable minds must inevitably come to the same conclusion. Hence there is nothing to submit to the jury." See also *St. Louis, I. M. & S. R. Co. v. Goins*, 90 Ark. 392, 119 S. W. 277; *Henry Wrape Co. v. Huddleston*, 66 Ark. 238, 50 S. W. 452; *Fullerton v. Henry Wrape Co.* — Ark. —, 151 S. W. 1005.

It may be that, if appellee had adopted a different method of unchoking the chute with the stick used, no injury would have occurred in any event. If, instead of bearing down with his whole weight upon the stick to push it through, he had worked in unchoking it in prizing and lifting the obstruction therein from the side or end of the chute, he might have accomplished the purpose as well, and, if the stick had broken, there would have been no throwing him forward nor upon the saws. The method of doing the work was entirely under his own control, as well as the selection of a stick from those furnished with which to do it.

In *Chicago, R. I. & P. R. Co. v. Smith*, — Ark. —, 156 S. W. 170, we said: "There is no hard and fast rule that may be laid down as governing the liability of an employer for a defect in common tools. In view of this condition, we do not undertake to say what state of facts the rule of liability should embrace, and what state of facts it should not." In that case the servant was not permitted to make his own se-

lection of the tool to be used by himself alone.

It follows, from the principles announced, that no negligence was shown upon the part of the master, and that the injury occurred from an ordinary risk incident to the employment, which was assumed by appellee upon engaging therein.

The court erred in not directing a verdict for appellant, and its judgment is reversed, and the cause dismissed.

Petition for rehearing denied.

KANSAS SUPREME COURT.

FIRST NATIONAL BANK OF OLATHE v.

H. C. LIVERMORE et al., Admrs., etc., of
M. G. Miller, Deceased, Appts.

(— Kan. —, 133 Pac. 734.)

Bank — authority of cashier.

1. It is assumed, but not decided, that a cashier has authority, in virtue of his office, to extend the time of payment of a note belonging to the bank, even if sureties are thereby released, where new security is taken.

Bills and notes — second note — effect on first.

2. Where a new note, payable at a future date, is taken for the same debt evidenced by a past-due note, which is not surrendered, the parties are presumed to intend that action on the old note shall be suspended until the maturity of the new one, in the absence of anything to indicate a contrary contention.

Surety — director of corporation — extension — effect.

3. Where one of the principal stockhold-

Headnotes by MASON, J.

Note. — Extension of time to corporation as affecting liability of officers or stockholders who sign as sureties or indorsers.

The distinctive question treated in this note is the effect of the fact that a surety was a stockholder or officer in a corporation, upon his suretyship or indorsement for the corporation, where there has been an extension of time. The question presupposes that the extension of time was one which would have relieved the surety or indorser but for the fact that he was an officer or stockholder. Viewed in this light there is very little authority on the question.

In *Home Nat. Bank v. Waterman*, 134 Ill. 461, 29 N. E. 503, certain stockholders of a harvester company guaranteed to a bank which held certain notes payable to the company as collateral security, that if the

ers, who is also a director, signs a note with the corporation, given to raise money for its benefit, intending to be bound only as a surety, he is not entitled to the same liberality of treatment that the law accords to volunteer sureties; and where the corporation is granted a valid extension of time, without his knowledge, he is not thereby released from liability, unless he suffers some injury therefrom.

(July 5, 1913.)

APPEAL by defendants from a judgment of the District Court for Johnson County in plaintiff's favor in an action brought to recover a balance alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. J. W. Parker, for appellants:

The burden is upon the plaintiff to show consent to the extension in order to make a binding contract.

Stowell v. Goodenow, 31 Me. 538; Okey v. Sigler, 82 Iowa, 94, 47 N. W. 911; Tenney v. Knowlton, 60 N. H. 572; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683.

The act of the creditor discharges the surety without any act of dissent on the part of the surety.

Riggins v. Brown, 12 Ga. 271; McNulty v. Hurd, 86 N. Y. 547; Gallaway v. Price, 32 Gratt. 1; Hart v. Hudson, 6 Duer, 305; Peru Plow & Wheel Co. v. Ward, 1 Kan. App. 6, 41 Pac. 64; Schnitzler v. Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

bank would deliver up the notes to the harvester company for collection, the collaterals would be replaced by others or paid. Neither having been done, the bank filed a claim against the estate of one of the deceased stockholders, based upon the agreement. It was urged by the bank that the agreement became and constituted an original and direct engagement or undertaking by the stockholders, as distinguished from a guaranty or collateral engagement to an owner for the debt of another. The court assumed the correctness of this claim, but stated that this was not decisive of the case. The court then stated: "It is manifest that, notwithstanding that promise, the debt as between the company and the signers of the writing continued to be the debt of the company, and that had such signers paid the debt to the bank, they would have had recourse for the amount so paid upon the company;" and held that by reason of the extension of time to the company, the stockholders were relieved of their liability. The court stated: "The rule is too well settled to require the citation of authorities that if a creditor, by a valid and binding agreement, without the assent of a surety, gives further time for payment to the principal debtor, the surety will be discharged. We understand the doctrine to be that where two persons are bound for the same

Mr. S. T. Seaton, for appellee:

There was no evidence of an agreement on the part of the bank to accept the note and mortgage of June 4th as payment of the past-due obligations of the milling company to it; and the fact that it retained the old note on its books, and did not place and carry the new note and mortgage thereon as a part of its assets, rebuts conclusively any such contention.

Topeka Capital Co. v. Merriam, 60 Kan. 398, 56 Pac. 757.

The burden was on each of the defendants to prove affirmatively that, without his knowledge or consent, a valid contract upon a sufficient consideration was made for an extension. He cannot rest his defense upon mere presumption.

Livermore v. Ayres, 86 Kan. 55, 119 Pac. 549.

The ordinary rule as to the release of sureties by reason of an extension of time to the principal does not apply for the reason that Livermore and Miller were stockholders in the milling corporation, and to the extent of their stock were the beneficial and equitable owners of its property.

First Nat. Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 361; Richardson v. Draper, 87 N. Y. 337; National Exch. Bank v. Gay, 57 Conn. 233, 4 L.R.A. 343, 17 Atl. 555; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 788; Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218;

debt, and there is an obligation on the part of one to exonerate the other in the event of payment being enforced against such other, and this is known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though such other debtor occupies the position of a principal debtor to the creditor."

A case of some interest in this connection, although not in point, is that of Allred's Estate, 229 Pa. 632, 79 Atl. 143. In this case it was held that stockholders, who had indorsed a note of the corporation which was given as collateral security to the indorser of another note of the corporation, and who accepted a deed of trust to indemnify them as such indorsers, became so far principals as to prevent them from properly claiming the privilege which might be asserted by a surety who was without indemnity. It was accordingly held in the case that the extension of time on the principal note did not affect the note on which the stockholders were indorsers, and which was given as collateral.

As to the effect of extension of time by a creditor on assumption of debts on dissolution of partnership, see subdivision IV, c, 3 (b) of note to Dean v. Collins, 9 L.R.A. (N.S.) 49.

W. A. E.

Fitch v. Fraser, 84 App. Div. 119, 82 N. Y. Supp. 138; United States use of J. B. Van Seiver Co. v. United States Fidelity & G. Co. 178 Fed. 721.

Having treated it as invalid, the appellants are estopped to say that the transaction was valid, and amounted to a valid extension of time to the company.

Williams v. Martin, 2 Duv. 491.

A surety signing as a maker on the face of the note has always been "primarily" liable thereon.

Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280, and note; Richards v. Market Exch. Bank Co. 81 Ohio St. 354, 26 L.R.A.(N.S.) 99, 90 N. E. 1000.

A valid extension of time to the principal will not discharge a surety.

Richards v. Market Exch. Bank Co. 81 Ohio St. 355, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; Lane v. Hyder, 163 Mo. App. 688, 147 S. W. 514.

The taking of a new note and mortgage as collateral does not release sureties.

1 Brandt, Suretyship & Guaranty, §§ 402-404; Mobile & M. R. Co. v. Brewer, 76 Ala. 135; Phoenix Brewing Co. v. Rumbarger, 181 Pa. 251, 59 Am. St. Rep. 647, 37 Atl. 340; Buck v. Wilson, 113 Pa. 423, 6 Atl. 97; Globe Mut. Ins. Co. v. Carson, 31 Mo. 218; Hawkins v. Gibson, 74 Ga. 405; Noll v. Oberhellmann, 20 Mo. App. 336; Fireman's Ins. Co. v. Wilkinson, 35 N. J. Eq. 179; Gahn v. Niemcewicz, 11 Wend. 320; Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102.

The facts admitted are sufficient to establish a reservation of remedies against both the milling company and Miller and Livermore on the note in suit.

Paine v. Voorhees, 26 Wis. 522; Gorman v. Dixon, 26 Can. S. C. 87; Big Rapids Nat. Bank v. Peters, 120 Mich. 518, 79 N. W. 891.

Mason, J., delivered the opinion of the court:

The Olathe Milling & Elevator Company, a corporation, borrowed \$2,000 of C. L. Hayes for use in its business, and gave him a note therefor, signed by the corporation and by three individuals who were the principal stockholders, and were also directors of the corporation, but who otherwise received no benefit from the transaction, and who intended to bind themselves as sureties only. The note was purchased by the First National Bank of Olathe, which brought action for a balance due thereon against two of the individual signers H. C. Livermore and M. G. Miller. It recovered judgment, from which an appeal is taken.

47 L.R.A.(N.S.)

The principal contention in behalf of the defendants is that they were discharged from liability by an extension of time given by the bank to the milling company for a valuable consideration, without their consent. After the maturity of the note referred to, the milling company executed to the cashier, for the benefit of the bank, a negotiable note for \$12,700, due in ninety days, on account of various items of indebtedness, including the \$2,000. The defendants did not sign this note, and did not consent to it. The old note was not surrendered, and the new note was not entered on the books of the bank, but was placed in an envelop containing notes that had been charged off. As security for the same indebtedness the milling company also executed a mortgage, which was afterwards held void as to creditors.

The defendants maintain that the transaction referred to amounted to a payment of the \$2,000 note. The decision of the trial court implies a finding that the new note was not accepted as payment of the old, and this finding was warranted, if not compelled, by the evidence. The plaintiff challenges the authority of the cashier to bind the bank by the acceptance of the new note. Such authority was not shown, unless it is to be regarded as incidental to the office. It has been held that a cashier has no implied authority to extend the time of payment of a note where the effect would be to release a surety. Bank of Ravenswood v. Wetzel, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 Ann. Cas. 48; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47. The contrary is held in Wakefield Bank v. Truesdell, 55 Barb. 602, cited in 5 Cyc. 473. We shall assume, without deciding, that where, as in this case, additional security was taken, the cashier may, in virtue of his office, extend the time of payment of a note, even if it results in the release of a surety. Such a transaction would be merely the exchange of one form of security for another.

If there were anything in the conduct of the parties from which an inference might be drawn that they did or did not intend an extension of the time of payment of the original debt, the question would be one of fact, upon which the decision of the trial court would be final. But we think there was no substantial evidence on the subject beyond the bare fact of the making and acceptance of the later note; and, in the absence of anything to indicate the contrary, by the weight of authority the presumption is that action on the first note was to be suspended until the maturity of the second. 7 Cyc. 891, 892; note in 4 Ann. Cas. 884. The defendants were clear-

ly sureties in the sense that, if they had paid the \$2,000 note, they would have been entitled to reimbursement from the corporation. It is agreed that the bank, when it bought the note, knew that the defendants claimed to be sureties, and it must be deemed to have known of their actual relation to the transaction. If the matter were ruled by the present statute relating to negotiable instruments, no extension of time given to the corporation would release the other signers of the note. That statute provides that one who by the terms of an instrument, is absolutely required to pay it, is "primarily liable." Gen. Stat. 1909, § 5249. It enumerates the methods by which one who is secondarily liable may be released, one of them being by an extension of time to the principal. Gen. Stat. 1909, § 5373. It also enumerates the methods by which the instrument may be discharged, without including any reference to the effect of an extension of time upon any of the parties. The inference is reasonable that comakers of the note, although in fact sureties, cannot claim a discharge on this ground, and this interpretation is well fortified by the decisions. Notes in 10 L. R. A. (N.S.) 129, and 26 L.R.A.(N.S.) 99; Lane v. Hyder, 163 Mo. App. 688, 147 S. W. 514; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000. This statute, however, has no application to this case, because the note was executed in 1904, and the statute, which was enacted in 1905, includes a section reading: "The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage thereof." Gen. Stat. 1909, § 5252.

The plaintiff contends that the defendants were not released from liability, even if the milling company was given a valid extension of time, for the reason that they were not entitled to the privileges of mere volunteer sureties in this respect, because, being themselves the principal stockholders, they had a personal interest in the making of the loan to the corporation. In Seymour D. Thompson's article on Corporations, in the *Cyclopedia of Law and Procedure*, it is said: "As the promise of a shareholder to pay a debt of the corporation is a promise to pay the debt of another, it entitles the promisor to all the rights and remedies of a surety as to extensions and renewals of credits not authorized by him." 10 Cyc. 651. Only one case is cited in support of the proposition. *Home Nat. Bank v. Waterman*, 134 Ill. 461, 25 N. E. 648, 29 N. E. 503. There the ground of the ruling is stated to be that a corporation is a different person from any of its members. The particular question now suggested was not dis- 47 L.R.A.(N.S.)

cussed. In *Pelton v. San Jacinto Lumber Co.* 113 Cal. 21, at pages 24, 25, 45 Pac. 12, action was brought upon a note signed by a corporation and indorsed by two stockholders. The indorsers defended on the ground that, without their knowledge, the note was altered before delivery by the insertion of a provision making it payable in another state. The court said: "That the alteration of the note was material, and such as would discharge sureties, whether indorsers or guarantors, is unquestionable. . . . These propositions, as general rules, are not controverted by counsel for respondent, but they contend that by reason of the circumstance that Caswell and Fuller were stockholders of the corporation defendant, and by virtue of that relation would be indirectly and incidentally benefited by the loan, they are not entitled to the favor accorded by law to uninterested sureties. But to this point they have cited no authority, and I have found none. Conceding that Caswell and Fuller indirectly benefited, the benefit could have been only in proportion to the stock owned by them at the time of the loan, and to that extent they were made personally liable by force of § 322 of the Civil Code, independently of any contract. But they are not sued on their statutory liability. . . . They are sued on an alleged contract which, according to the findings of fact, they never executed." Under the circumstances stated, the stockholders would not have been liable, even if they had been principals, as no question peculiar to suretyship was involved.

In *Salina Nat. Bank v. Prescott*, 60 Kan. 490, at page 497, 57 Pac. 121, it was said, referring to a claim that the statutory liability of stockholders for a debt of the corporation had been released by an extension of time given to the company: "We are not satisfied that the stockholders stand in such relation to the corporation as to entitle them to that favor and strict construction of their contracts which is accorded to sureties." In *Richardson v. Draper*, 87 N. Y. 337, the administrator of one of several stockholders who had jointly guaranteed the payment of bonds of the corporation defended an action on the guaranty by invoking the rule which had been thus expressed in *Getty v. Binsee*, 49 N. Y. 385, at page 388, 10 Am. Rep. 379: "It is a well-settled principle that, in case of a joint obligation, if one of the obligors die, his representatives are at law discharged, and the survivor alone can be sued. . . . It seems to be equally well settled that if the joint obligor, so dying, be a surety, not liable for the debt, irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the sur-

vivor only being liable. In such case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and the limit of his obligation. He signs a joint contract and incurs a joint liability, and no other. Dying prior to his comaker, the liability all attaches to the survivor." The rule was conceded to be as so stated, but was held to be inapplicable, because the guarantors, as owners of the stock in the corporation, were interested in the loan made to the corporation. In the opinion it was said "In guarantying the bonds, the obligors did not act as mere sureties; they were seeking a benefit for themselves in promoting an enterprise in which they were largely interested. Whatever would benefit the company would benefit them. They were acting to put profits in their own pockets." *Richardson v. Draper*, 87 N. Y. 337, 347. The case is in point upon the proposition that one who, to facilitate the raising of money by a corporation of which he is a stockholder, guarantees the payment of the loan, is not entitled to that extreme liberality of treatment which is accorded a volunteer surety. The rule by which an extension of time to the principal operates to discharge a surety is almost as technical as that by which the estate of a surety who is one of several joint obligors was held to be relieved of liability by his death. It is true that such extension for the time being prevents the surety from paying the debt, and at once proceeding against the principal, and to that extent affects his legal rights. But where the rule applies, he is relieved of liability, although he may not suffer the least actual injury. The result is the same even where, as often happens, the extension of time increases the likelihood of payment by the principal. The real basis of the rule is that sureties are favorites of the law, and its application may well be limited to those who assume an obligation for others, having no personal interest in the matter. In *United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co.* (*United States Fidelity & G. Co. v. United States*) 191 U. S. 416, at pages 423, 424, 48 L. ed. 242, 245, 246, 24 Sup. Ct. Rep. 142, a surety company bond was given to insure the payment of laborers and materialmen by a contractor engaged in the erection of a public building. Action was brought on the bond on account of the failure of the contractor to pay for some brick furnished him. The surety company defended on the ground that, without its consent, the brick company had given the contractor an extension of the time of payment, taking his notes due in thirty and sixty days. Against this contention the argument was advanced that

a surety who receives compensation for his risk is not released by an extension of time to his principal, unless he suffers injury therefrom. The proposition was thus stated: "Counsel for the brick company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract." The court refused to express any opinion on this question. The surety company was held liable upon the ground that the credit given to the contractor was only such as was customary, and could fairly have been anticipated at the time the bond was given. In the opinion, however, it was said: "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor." 191 U. S. 426.

In *United States*, use of *J. B. Van Sciver Co. v. United States Fidelity & G. Co.* (C. C.) 178 Fed. 721, a number of Federal cases were reviewed, and a conclusion was reached which is fairly indicated by a headnote in these words: "The rule of *strictissimi juris*, ordinarily applied in relief of an individual voluntary surety, is inapplicable to relieve a paid surety on a contractor's bond because of an extension of time to the principal; but such surety must show, in addition, actual injury." Section 2. Substantially this view has been taken by the circuit courts of appeals for the third and fourth circuits. *United States Fidelity & G. Co. v. United States*, 102 C. C. A. 192, 178 Fed. 692; *Atlantic Trust & D. Co. v. Laurinburg*, 90 C. C. A. 274, 163 Fed. 690. One who, after having executed a real estate mortgage, conveys the property to a grantee who assumes the payment of a debt, may become entitled to the same treatment as a volunteer surety, although originally he was the principal. *Union Stove & Mach. Works v. Caswell*, 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65; note in 4 L.R.A. (N.S.) 666. That situation, however, grows out of the peculiar relationship of the par-

ties. The mortgagee is not necessarily affected by the agreement between the mortgagor and the purchaser of the land; but, if he elects to hold the latter personally, he is required to treat his original debtor as a mere surety.

We acquiesce in the view that where a principal stockholder signs a note with the corporation, intending to be bound only as surety, he is not entitled to the same liberality of treatment which the law accords the volunteer surety; that where the corporation is granted an extension of time, for a consideration, the stockholder is not released from liability, although he did not consent thereto, unless it is shown that he suffered some injury therefrom.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied October 23, 1913.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES MCCREERY & COMPANY

v.

LUTHER MARTIN, Appt.

(— N. J. —, 87 Atl. 433.)

Husband and wife — right to pledge credit for necessities.

1. A man who furnishes his wife, with

Note. — Liability of husband for necessities furnished wife while living with him.

I. Personal necessities.

- a. Implied agency in law, 279.
- b. Effect of notice to tradesmen, 280.

II. Family necessities.

- a. Generally, 280.
- b. Medical services, 281.

III. Husband's liability affected by style of life he adopts.

- a. Effect of notice to tradesmen, 281.
- b. Burden of proof, 281.

IV. Presumptive agency arising from cohabitation, 281.

- a. May be rebutted, 282.
- b. Burden of proof, 282.

V. Authority implied from husband's assent to previous transactions, 282.

VI. Liability of husband by reason of estoppel or ratification, 282.

VII. Money loaned wife to purchase necessities, 283.

VIII. In the absence of certainty, as to whom credit was given, 283.

IX. Statutes, 283.

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whom he is living, an allowance sufficient to purchase the necessities for the family, is not liable for goods of the general description of necessities furnished to her on credit which he has forbidden her to pledge. Same — assumption as to authority.

2. A tradesman approached by a wife to furnish family necessities on credit for the first time cannot assume that she has authority to pledge her husband's credit therefor.

(White, J., dissents.)

(July 2, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Essex County in plaintiff's favor in an action brought to recover for merchandise sold and delivered by plaintiff to defendant's wife. Reversed.

The facts are stated in the opinion.

Messrs. McDermott & Enright, for appellant:

Under the statute the husband is not liable for his wife's purchases.

Wilson v. Herbert, 41 N. J. L. 460. 32 Am. Rep. 243.

Mr. Martin provided amply for the needs of his family, furnished all the necessities, and fulfilled his legal obligation.

The presumptive agency of the wife had been revoked.

22 Am. & Eng. Enc. Law, 2d ed. 142, 178; Farmers' & M. Bank v. Green, 30 N. J. L. 316; Fellows v. Hartfield & N. Y. S. B. Co. 38 Conn. 197; 1 Am. & Eng. Enc. Law, 2d ed. 1221.

X. Funeral expenses and medical attendance during wife's last sickness, 283.

Scope.

The earlier cases considering the question under annotation will be found in the note to Wanamaker v. Weaver, 65 L.R.A. 529. As in that note, cases considering the liability of the husband not only by reason of his obligation as such to support and maintain his wife, but also on account of the presumptive agency arising from cohabitation, as well as on account of any acts or omissions constituting an assent, actual or constructive, on his part, have been included. Cases considering the liability of the husband when the wife is such by repute only have been excluded, and also those which turn upon whether the purchases made were necessities, the question of the husband's liability not being considered except by implication.

I. Personal necessities.

a. Implied agency in law.

A wife has implied authority to purchase a set of artificial teeth on the credit of her

A newspaper warning against trusting the wife is sufficient.

Allen v. Rieder, 41 Pa. Super. Ct. 538.

When a wife goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchants her authority therefor, or for the merchant to request such disclosure.

Wanamaker v. Weaver, 176 N. Y. 79, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 136; *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 50 L. J. Q. B. N. S. 155, L. R. 6 App. Cas. 24, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252, 2 Eng. Rul. Cas. 441.

husband. *Clark v. Tenneson*, 146 Wis. 65, 36 L.R.A. (N.S.) 426, 130 N. W. 895, Ann. Cas. 1912 C. 141.

And this though he never had had any dealings with the dentist, and the wife had always attended to the dental affairs of herself and children and paid the bills, there being nothing to show that the payments had been made out of her separate estate. *Ibid*.

And in *Thrall Hospital v. Caren*, 140 App. Div. 171, 124 N. Y. Supp. 1038, the husband was held liable for the expenses of an operation performed upon his wife, presumptively through himself, or her implied authority to call a physician to attend the family.

And a husband is liable for board and lodging furnished his wife, though he did not contract the debt or promise to pay the same. *Edminston v. Smith*, 13 Idaho, 645, 14 L.R.A. (N.S.) 871, 121 Am. St. Rep. 294, 96 Pac. 842.

But the wife's implied authority to bind her husband for necessities applies only when he fails to furnish them. *Schwartz v. Cohn*, 129 N. Y. Supp. 464.

And the presumption of the implied agency is overcome when it conclusively appears, by the course of the dealings between a merchant and the wife, that the credit was given to the wife, and not to the husband. *Ibid*; *Goodson v. Powell*, 9 Ga. App. 497, 71 S. E. 765.

b. Effect of notice to tradesmen.

In *Meuschke v. Riley*, 150 Mo. App. 331, 140 S. W. 639, it appeared that the husband had published a notice in a local newspaper that he would not pay any bills contracted in his name except when accompanied by his written order; that he provided his wife and child with all they needed to eat and wear, and had a standing arrangement with one or two merchants of his city to provide all his wife might ask for, including small sums of money; that they did so, and the husband paid the bills; and so it was held that the husband was not liable for wearing apparel furnished by a merchant with whom the wife had not

Mr. James D. Carpenter, Jr., also for appellant.

Messrs. Peirce & Hoover for respondent.

Gummere, Ch. J., delivered the opinion of the court:

McCreery & Company, the plaintiffs below, by this suit seek to compel the defendant, *Luther Martin*, to pay for goods purchased from time to time by the defendant's wife at their store in New York. The goods were purchased by *Mrs. Martin* while she and her husband were living together, and constituted the first credit dealings with the plaintiffs, either of herself or her husband. The plaintiffs' claim is that the goods purchased were "necessaries," and that, being such, the wife, by reason of the marital relation,

previously pledged his credit, though the merchant was without knowledge of the published notice. The court said that to hold otherwise would be to hold that the husband cannot control where his wife shall purchase goods, whether necessities or not, except he bring knowledge of the notice home to everybody, which is hardly possible.

II. Family necessities.

a. Generally.

Unless the wife expressly assumes the liability, the husband is liable for necessities furnished the wife and children. *Oliver v. Webb*, 12 Ga. App. 216, 76 S. E. 1081.

And also for board and lodging furnished the wife and child, though the contract was made by her. *Ruhl v. Heintze*, 97 App. Div. 442, 89 N. Y. Supp. 1031.

The fact that the wife told the merchant that she owned the house she lived in and other realty is not sufficient evidence upon which to base the conclusion that she made an agreement to charge herself with the payment of the goods purchased. *Valois v. Gardner*, 122 App. Div. 245, 106 N. Y. Supp. 808.

Nor was the fact that the wife went to a grocer and ordered groceries, that they were delivered to her home, that the bills were sent to her, and that subsequently to the sending of the bills, on being asked for payment, she said that she had no money then, that he would have to wait, sufficient to render the wife personally liable for the groceries. *Speckmann v. Foote*, 138 N. Y. Supp. 380.

But a wife cannot avoid liability on the ground that the husband is bound to support her, where board was furnished her and her child solely on her credit. *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875.

And in *Caldwell v. Blanchard*, 191 Mass. 489, 77 N. E. 1036, it was held that since, by statute, a married woman may bind herself personally to pay for goods purchased, a jury would be justified in finding that a wife acts for herself, and not as agent for

had a right to pledge her husband's credit for their payment.

The defendant sought to avoid liability by showing that he furnished his wife from time to time during the period in which these purchases were made, with moneys sufficient to pay for all necessities required by his wife and family, and suitable for their position, and further, that he had expressly forbidden her to run accounts against him in department stores. The store conducted by the plaintiffs came within that description. The evidence tending to establish this defense was overruled by the court. At the close of the case the court charged the jury that, if they believed the articles which were the subject-matter of the suit were of the kind and character ordinarily

used for domestic purposes in the household of the defendant, and that they were purchased by the wife while living with her husband, then the defendant was liable therefor, whether the goods were actually needed or not; that it was sufficient that the goods purchased were of the general character and nature used in the defendant's household. The court refused to charge at the request of the defendant, that a husband discharges his marital obligation to his wife (*i. e.*, the obligation to furnish her with necessities) either by supplying them himself, or by giving her an adequate allowance in money with which to purchase them; and that, having done this, he is not liable to tradesmen who, without his authority, furnish her with such necessities.

her husband, where she directs furniture purchased to be charged to her, though the furniture be sent to the marital home.

The husband is liable for family necessities purchased by the wife, notwithstanding the married women's act. *Ponder v. Morris*, 152 Ala. 531, 44 So. 651.

And in *Mandel Bros. v. Simpson*, 67 Misc. 386, 122 N. Y. Supp. 397, it was held that the recovery for family necessities must be against the husband, and not the wife, though in the state where the goods in question were purchased, by statute, the husband and the wife were both liable, and could be sued jointly or severally for the same, such statute having no extraterritorial effect.

b. Medical services.

In the absence of proof to the contrary, the wife will be presumed to be acting as agent of her husband in requesting medical services for their infant child. *Howell v. Blesh*, 19 Okla. 260, 91 Pac. 893.

And the wife is the implied agent of the husband to pledge his credit for a necessary surgical operation to be performed upon their child, and the fact that the husband privately informs the wife not to permit the operation will not defeat the husband's liability, such prohibition not being communicated to the surgeon. *French v. Burlingame*, 155 Mo. App. 548, 134 S. W. 1100.

Nor is the wife personally liable for medical services rendered herself and daughter at her request, in the absence of special agreement making her so, though by statute actions are permitted against married women. *Richards v. Young*, 84 N. Y. Supp. 265.

III. Husband's liability affected by style of life he adopts.

Where the articles purchased are other than bare necessities essential to sustain life, it is a question of fact whether, under all the circumstances, there was an authority expressed or implied for the wife to purchase the articles as her husband's agent, or whether, if such purchase was made with-

out authority, he subsequently ratified it. *Cooper v. Haseltine*, — Ind. App. —, 98 N. E. 437.

And so the husband was held liable as for necessities, for the purchase price of various articles of jewelry purchased by his wife on his credit, as the evidence showed that the articles sold were in keeping with the means and station in life of the husband. *Ibid*.

But where the husband gives the wife an adequate allowance for personal needs, there must be proof of prior authority or of a subsequent ratification, in order to hold the husband liable for furs furnished wife by a tradesman as necessities suitable to the husband's position and means. *Weingreen v. Beckton*, 102 N. Y. Supp. 520.

a. Effect of notice to tradesmen.

A notice inserted by the husband in a Paris newspaper long after the purchases in question, that he would no longer be responsible for his wife's bills, was held inadmissible in *Rosenfeld v. Peck*, 149 App. Div. 663, 134 N. Y. Supp. 392, an action by a tradesman to recover from the husband for goods purchased by his wife.

b. Burden of proof.

Where goods purchased were of a kind which had theretofore been used by the wife, and were appropriate to the station in life and style of living of husband and wife, it is a matter of defense that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with sufficient money to pay cash therefor. *Rosenfeld v. Peck*, 149 App. Div. 663, 134 N. Y. Supp. 392.

IV. Presumptive agency arising from cohabitation.

The wife's presumptive agency to purchase necessities arises out of the circumstances of cohabitation. *Bergh v. Crosby*, 162 Ill. App. 536.

And so a wife who is living with her husband is presumed to be acting as agent for

The trial resulted in a verdict and judgment in favor of the plaintiffs for the full amount of their bill. The defendant, by proper exceptions to the rulings, instructions to the jury, and refusal to instruct, which we have recited, and by proper causes of reversal based thereon, now presents to this court for determination the question whether a husband may be held liable for goods purchased by his wife which come

within the general description of necessaries, notwithstanding the fact that he himself furnishes her with moneys sufficient to purchase such necessities as she and his children may from time to time reasonably require, and forbids her to pledge his credit for such purchases.

Although this precise question has not until now been presented to this court for decision, it has frequently received consid-

her husband in the purchase of necessary clothing for her own use. *Feiner v. Boynton*, 73 N. J. L. 136, 62 Atl. 420.

And, also, there is legal presumption of the agency of the wife to purchase upon the husband's credit articles of jewelry necessary and in keeping with her means and station in life. *Cooper v. Haseltine*, — Ind. App. —, 98 N. E. 437.

But in *Martin v. Oakes*, 42 Misc. 201, 85 N. Y. Supp. 387, citing *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135, it was held that the agency of the wife for the husband is a question of fact, and the marital relations alone do not create a presumption of such agency.

a. May be rebutted.

The wife's presumptive agency for husband to provide medical services for their infant child may be rebutted. *Howell v. Bleah*, 19 Okla. 280, 91 Pac. 893.

The husband may show in defense that the wife was amply supplied with articles of the same character as those purchased. *Leichtenstein Millinery Co. v. Peck*, 59 Misc. 193, 110 N. Y. Supp. 410; *Cooper v. Haseltine*, — Ind. App. —, 98 N. E. 437.

And the husband is relieved from all liability for necessities furnished his wife, where he has made her an allowance amply sufficient to supply her needs. *Oatman v. Watrous*, 120 App. Div. 66, 105 N. Y. Supp. 174.

And, also, the wife's implied agency to pledge her husband's credit for necessities arising from cohabitation is withdrawn by publishing a notice that he will not be liable for bills contracted by her. *Meuschke v. Riley*, 159 Mo. App. 331, 140 S. W. 639.

b. Burden of proof.

That the wife has been furnished with articles purchased is a matter of defense to rebut the legal presumption of the agency of the wife to purchase them on her husband's credit. *Cooper v. Haseltine*, — Ind. App. —, 98 N. E. 437.

V. Authority implied from husband's assent to previous transactions.

It is a question of fact for the jury as to whether the husband is liable for expensive clothing and millinery furnished the wife on his credit, where the husband had paid 47 L.R.A.(N.S.)

previous bills for the same character of articles sold his wife by the same merchant, and there was a dispute between the husband and the merchant as to whether the former had notified the latter that he would pay no more such bills. *Levison v. Davis*, 212 Pa. 148, 61 Atl. 819.

In *Rosenfeld v. Peck*, 149 App. Div. 663, 134 N. Y. Supp. 392, citing *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135, the merchant was held justified in continuing to sell goods to a wife on her husband's credit until the husband gave notice prohibiting him longer to extend credit, though the merchant himself had not previously sold to the wife on credit, but it appeared that he had formerly been connected with an establishment from which the wife had been in the habit of purchasing similar articles on the husband's credit, and those bills had been paid.

And in *Meuschke v. Riley*, 159 Mo. App. 331, 140 S. W. 639, it was said that a merchant's lack of knowledge of the publication of notice withdrawing the wife's right to pledge the husband's credit might be important in determining the husband's liability, if the wife had before dealt with such merchant on the husband's credit.

VI. Liability of husband by reason of estoppel or ratification.

There is evidence amply sufficient to show either previous authority or subsequent ratification, or both, where it is proved that the husband told his wife that his credit was good and to get anything she wanted; that when the wife purchased certain goods, she told the merchant that her husband had authorized her to make the purchases, and when the husband later went into the store and told the merchant to extend her no further credit, and was informed that a bill had already been sold her, he said that was all right, but not to sell her any more; and it was further shown that she wore the articles furnished in his presence many times without objection. *Cooper v. Haseltine*, — Ind. App. —, 98 N. E. 437.

And in *Landgrof v. Tanner*, 152 Ala. 511, 44 So. 397, it was held that the husband either assented to his wife's purchase or subsequently ratified it, where it appeared that the wife made the purchase and said that the husband would call later and pay for the same, and he did go with his wife and make a payment and said he would call later and pay the balance.

And it will be presumed that the wife

eration in other tribunals, and the weight of authority supports the doctrine that a husband who is living with his wife, and who supplies her with necessities suitable to his position and her own, or furnishes her with ready money with which to pay cash therefor, is not liable for the purchase price of other goods sold to her of the same character as necessities, in the absence of affirmative proof of his prior authority to

make them, or his subsequent sanction of such purchases. *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135; *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 299, 12 Week. Rep. 473, 2 Eng. Rul. Cas. 437; *Debenham v.*

was authorized to purchase on her husband's credit, and that he knew that the goods were charged to him, where the goods purchased were in large part used on his table, and were purchased from a corporation of which the husband was president and general manager. *Repetti v. Repetti Co.* 127 N. Y. Supp. 229.

And, also, in *Marshall v. Curry*, 23 Pa. Super. Ct. 143, it was held that the husband must have knowledge of the merchant's account for articles furnished his wife on his credit for her use, and that of her children, where the account was for a period of nearly three years.

And a husband who visits a shop with his wife and, knowing what she had ordered, either makes no objection to the purchases, or expressly approves and promises to pay for them, ratifies the wife's action making the purchases, and furnishes the evidence necessary to establish an agency on her part to make the purchase on credit. *Nagler v. L'Esperance*, 126 N. Y. Supp. 655.

But that the husband was present when his wife made a purchase could not be considered as knowledge on his part that she was purchasing upon his credit, or as a ratification of a purchase, as such presence is equally as consistent with the fact that the credit was extended to her, as that the sale was made upon his credit, especially where no express authority on the part of the husband is shown, and there never had been any other transactions between the parties establishing a course of prior dealings. *Schwartz v. Cohn*, 129 N. Y. Supp. 464.

VII. Money loaned wife to purchase necessities.

It cannot be implied that the wife acted as agent for her husband where money is advanced to her on her own contract, though it may have been advanced to enable her to purchase necessities. *Ellenbagen v. Slocum*, 66 Misc. 611, 121 N. Y. Supp. 1110.

VIII. In the absence of certainty, as to whom credit was given.

In *Ponder v. Morris*, 152 Ala. 531, 44 So. 651, the court refused to disturb a judgment against the husband for family necessities furnished the wife on his credit, though there was a conflict as to whom was given credit as there was evidence tending to support the averments that the credit was extended to the husband. 47 L.R.A.(N.S.)

IX. Statutes.

In *Fitzmaurice v. Buck*, 77 Conn. 390, 59 Atl. 415, an action for shoes purchased by wife for herself and children, under a statute which provides that both the husband and wife "shall be liable when any articles purchased by either shall have in fact gone to the support of the family or for their joint benefit, or both, or for the reasonable apparel of the wife," it was held error for the trial court to make the provision by the husband of suitable support for his wife and family, the test of his liability, and to tell the jury that such provision of itself, although unknown to the sellers, would deprive them of the benefit of his credit, and relieve him of all responsibility for his wife's purchases, although they in fact went to the support of the family.

X. Funeral expenses and medical attendance during wife's last sickness.

The husband is liable for physician's services rendered his wife, and they cannot be recovered from her separate estate. *Re Stadtmuller*, 110 App. Div. 76, 96 N. Y. Supp. 1101.

Nor does the statute creating the wife's statutory estate relieve a husband from liability for his wife's medical attendance and surgical expenses. *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139.

The husband has a direct and primary obligation to pay the expenses of his wife's last sickness, including the funeral expenses, and the same cannot be recovered by him from his wife's personal estate. *Skillman v. Wilson*, 146 Iowa, 601, 140 Am. St. Rep. 295, 125 S. W. 343; *Ketterer v. Nelson*, 146 Ky. 7, 37 L.R.A.(N.S.) 754, 141 So. 409; *Lumbers v. Montgomery*, 20 Manitoba L. Rep. 444, 17 West. L. Rep. (Can.) 77.

But a husband is not liable for medical services furnished his wife, where the evidence was that she recognized her personal liability therefor. *Re Totten*, 137 App. Div. 273, 121 N. Y. Supp. 942.

And it seems to be the rule in New York, that the husband may recover from his deceased wife's estate the necessary expenses incurred by him in her burial. *Pache v. Oppenheim*, 84 N. Y. Supp. 926, reversed in 93 App. Div. 221, 87 N. Y. Supp. 704; *Re Stadtmuller*, 110 App. Div. 76, 96 N. Y. Supp. 1101.

J. H. B.

Mellon, L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252, 2 Eng. Rul. Cas. 441; Morel Bros. v. Westmoreland [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. 636, 19 Times L. R. 43. And this doctrine is, as we conceive, sound in principle.

A wife has no power to make a contract binding upon her husband, unless upon his authority express or implied. In cases where the authority is to be implied from the marital relationship and the cohabitation of the parties, the presumption which the law raises is based upon the obligation of the husband to supply necessaries to the wife. It may be that it is to be presumed that goods of the character of necessaries purchased by the wife on the credit of the husband are the very ones with which he was bound to supply her. But certainly this is not a presumption *juris et de jure*, and may be overcome by proof to the contrary. This duty which the law imposes upon the husband, and which he must discharge to the extent of his ability, is satisfied by a single performance. In other words, having once performed it, the law does not impose upon him the obligation of duplicating that performance. When he has supplied his wife with those necessaries which their station in life and his financial standing entitle her to have at his hands, or has furnished her with moneys sufficient to enable her to purchase them for herself, he is under no obligation to pay bills incurred by her for what would have been necessaries if he had not already supplied her therewith, but which are not, in fact, such, because of the precedent supply. The husband may permit such extravagance on the part of the wife if he sees fit; but, having discharged the obligation which the law imposes upon him with relation to his wife's necessaries, he is entitled to regulate her expenditures for which he is to become responsible, by his own discretion and judgment.

It is argued that the tradesman is entitled to assume that the wife has authority to pledge the credit of the husband for necessaries, unless he receives notice to the contrary. This may be conceded when the husband, by his conduct, has led the tradesman to believe that the wife has such authority. But there seems no ground for such assumption on the part of the tradesman who deals with the wife for the first time. He is supposed to know that the wife's power to pledge her husband's credit is not without limit; that she can only do so for the purpose of obtaining those necessaries which the law requires him to furnish her, and to the extent that they remain unfurnished; and he can readily ascertain by 47 L.R.A.(N.S.)

inquiry the fact of the wife's authority to pledge her husband's credit for the purchases which she desires to make. The suggestion that such action on the part of the tradesman might readily be considered offensive, not only by the wife who seeks to make the purchases, but by the husband whose credit she seeks to pledge, is fully answered by what was said by Bramwell, L. J., in *Debenham v. Mellon*, 49 L. J. Q. B. N. S. 497, 2 Eng. Rul. Cas. 441, *viz.*: "If it be said that such a proceeding would offend the customer, I answer that that may be an excellent reason why the tradesman should not ask the question; but it is no reason for seeking to make the husband pay because the question is not asked."

We conclude that the grounds of appeal which we have set out in the beginning of this opinion are well taken. The judgment under review will be reversed, and a venire *de novo* awarded.

White, J., dissents.

NEW YORK COURT OF APPEALS.

CHARLES W. CLOWE, Trustee, etc., of
Elizabeth S. C. Seavey, Bankrupt, Resp^t.,
v.

ELIZABETH S. C. SEAVEY et al., Appts.

(208 N. Y. 496, 102 N. E. 521.)

Fraud — transfers to defraud creditors — effect of honesty of transferee.

1. A transfer of property for the purpose of securing it for the benefit of the transferor and his children, in fraud of his creditors, is not validated by the fact that the transferee is ignorant of the fraudulent intent.

Bankruptcy — contingent estate — right of trustee.

2. The estate of a grandchild under the will of its grandfather, which is dependent upon its surviving its father, although contingent, passes to his trustee in bankruptcy, under a statute providing that expectant estates, which include contingent future estates, in which the person to whom they are limited to take effect remains uncertain, are descendible, devisable, and alienable.

(June 3, 1913.)

Note. — Estates in remainder as assets which will pass to the trustee in bankruptcy.

The term "estates in remainder," as used in the above title and in the following note, includes both vested and contingent remainders (under some decisions a "remainder" is not an "estate").

The question whether a particular remainder is vested or is contingent is, of

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Saratoga County in plaintiff's favor in an action brought to set aside a transfer of property as in fraud of creditors. Affirmed.

The facts are stated in the opinion.

Messrs. Beardsley, Hemmens, & Taylor, for appellants.

Defendant possesses a possibility not coupled with an interest. She does not possess an expectant estate, nor a beneficial interest.

Clark v. Cammann, 160 N. Y. 316, 54 N. E. 709; Re Baer, 147 N. Y. 348, 41 N. E. 702; Lewisohn v. Henry, 179 N. Y. 352, 72

N. E. 239; Re Crane, 164 N. Y. 71, 58 N. E. 47; Salter v. Drowne, 205 N. Y. 204, 98 N. E. 401; Hall v. LaFrance Fire Engine Co. 158 N. Y. 570, 53 N. E. 513; Fargo v. Squiers, 154 N. Y. 250, 48 N. E. 509; Mc Gillis v. McGillis, 154 N. Y. 532, 49 N. E. 145; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; Striker v. Mott, 28 N. Y. 82; Mason v. Jones, 2 Barb. 229; Schell v. Carpenter, 50 Misc. 400, 100 N. Y. Supp. 554, affirmed in 190 N. Y. 552, 83 N. E. 1131; 2 Reeves, Real Prop. p. 1158; Dougherty v. Thompson, 167 N. Y. 472, 60 N. E. 760; Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805; Smith v. Edwards, 88 N. Y. 92; Re Smith, 131 N. Y. 239, 27 Am. St. Rep. 586, 30 N. E. 130; Washb.

course, not entered into, as that is preliminary to the question herein under discussion.

As to what contingent interests may be reached by a creditors' bill, see note to Clarke v. Fay, 27 L.R.A.(N.S.) 454. And as to what expectant and contingent interests in real estate are subject to attachment or levy on execution, see notes to Walker v. Alverson, 30 L.R.A.(N.S.) 115, and Young v. Young, 23 L.R.A. 642.

For contingent remainder as subject of devise by remainderman, see note to Fisher v. Wagner, 21 L.R.A.(N.S.) 121.

The provision of the bankruptcy act of 1898, under which the question as to whether estates in remainder pass to the trustee in bankruptcy arises, is that part of § 70, subdivision a, paragraph (5), which provides that the trustee in bankruptcy shall be vested by operation of law with the title to all property which, prior to the filing of the petition, the bankrupt "could by any means have transferred, or which might have been levied upon and sold under judicial processes against him." The test, therefore, as to whether or not any particular "remainder" is property of a character which will pass to the trustee as assets of the remainderman, depends upon the local laws as declared by the state statutes and decisions.

There is no doubt but that a vested remainder passes to the trustee in bankruptcy as assets of the remainderman. The following cases so hold, the jurisdiction in which they arose being parenthetically noted: Re Wood, 98 Fed. 972 (N. Y.); Re Shenberger, 102 Fed. 978, 4 Am. Bankr. Rep. 487 (Ohio); Re St. John, 105 Fed. 234, 5 Am. Bankr. Rep. 190, 3 N. B. N. Rep. 120 (N. Y.); Re Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539, 3 N. B. N. Rep. 752 (Pa.); Re McHarry, 49 C. C. A. 429, 111 Fed. 498, 7 Am. Bankr. Rep. 83 (Ill.); Re Hamlett, 116 Fed. 680 (Ga.); Woods v. Little, 67 C. C. A. 157, 134 Fed. 229 (Pa.); Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167 (Conn.).

As to what contingent remainders pass to the trustee, however, there is not a consensus of opinion, even among cases which 47 L.R.A.(N.S.)

are held to be controlled by the same local laws. In the majority of the cases, the principal controversy centers around and is made dependable upon the question whether the contingency is one of person or of event. In the former case, the majority of the courts have held that there is no interest which can pass to the trustee under § 70, a (5), although in some of such cases a contrary conclusion probably would have been announced had CLOWE v. SEAVEY preceded them. Where the contingency is one of event only, the true rule, except of course in case of contrary statutory provision, would seem to vest the remainderman's contingent estate or interest in his trustee in bankruptcy. In such case the contingency is one affecting the value rather than the existence of an interest.

CLOWE v. SEAVEY, which holds that contingent remainders pass to the trustee in bankruptcy, is directly supported by Clark v. Grosh, 81 Misc. 407, 142 N. Y. Supp. 966, which is almost identical as regards facts and reasoning with that case. (The holding in Van Heusen v. Van Heusen Charles Co. 74 Misc. 292, 131 N. Y. Supp. 401, to the effect that an estate in remainder, contingent upon the remainderman surviving the life tenant, will not pass to the remainderman's trustee in bankruptcy, must be regarded as overruled by CLOWE v. SEAVEY, and is seemingly in direct conflict with Clark v. Grosh, supra.)

Another case which is almost identical with the CLOWE CASE as regards facts and reasoning is Re St. John, 105 Pa. 235, 5 Am. Bankr. Rep. 190, 3 N. B. N. Rep. 120, in which, after deciding that the remainder was a vested one and as such passed to the trustee, the contention that the remainder was a contingent one was taken up, and it was said that, under the New York statutes, the remainder in question would have passed to the trustee even granting that it was a contingent one.

And in Earle v. Maxwell, 86 S. C. 1, 138 Am. St. Rep. 1012, 67 S. E. 962, where the bankrupt was one of a class among the survivors of which the proceeds of the sale of the remainder of an estate were to be divided, it was held that since, in South Caro-

Real Prop. 6 ed. § 1557, p. 527; 2 Cruise, Dig. Huntington ed. title 16, chap. L, §§ 19, 20.

The bankrupt possesses, therefore, not an expectant estate or a beneficial interest, but a mere chance or naked possibility not coupled with an interest.

Jackson v. Waldron, 13 Wend. 178; *Miller v. Emans*, 19 N. Y. 384; 4 Kent, Com. 262; *Wilson v. Wilson*, 32 Barb. 328; *Johnston v. Spicer*, 41 Hun, 475, affirmed in 107 N. Y. 185, 13 N. E. 753.

The bankrupt's chance or possibility of inheritance under the will is not property capable of transfer or sale under judicial process.

Edwards v. Varick, 5 Denio, 665; *Stover v. Eyclesheimer*, 46 Barb. 84; *Re Stephens*, 64 N. Y. Supp. 990; *Johnson v. Williams*, 63 How. Pr. 233; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Pelletreau v. Jackson*, 11 Wend. 110; *Wright v. Wright*, 1 Ves. Sr. 409; *Jackson ex dem. Varick v.*

Waldron, 13 Wend. 178; *Robinson v. New York L. Ins. & T. Co.* 75 Misc. 361, 133 N. Y. Supp. 257; *Lampet's Case*, 10 Coke, 46; *Manning's Case*, 8 Coke, 94b; *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, affirmed in 203 N. Y. 556, 96 N. E. 1122; *Upington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359; *Johnston v. Spicer*, 41 Hun, 475, affirmed in 107 N. Y. 185, 13 N. E. 753; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *Salter v. Drowne*, 205 N. Y. 204, 98 N. E. 401; *Gilliam v. Guaranty Trust Co.* 111 App. Div. 656, 97 N. Y. Supp. 758; *Shindler v. Robinson*, 150 App. Div. 875, 135 N. Y. Supp. 1056; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Herzog v. Title Guarantee & T. Co.* 177 N. Y. 86, 67 L.R.A. 146, 69 N. E. 283; *Beatty v. Godwin*, 127 App. Div. 98, 111 N. Y. Supp. 373; 2 *Reeves*, *Real Prop.* p. 1189; *Towle v. Remsen*, 70 N. Y. 303; 4 Kent, Com. § 262, p. 289; *Jacobson v. Smith*, 73 App. Div. 412, 77 N.

lina, such a contingent interest was personally and assignable, the remainder was one which passed to the trustee in bankruptcy under § 70 of the bankruptcy act of 1898.

And in *Re Haslett*, 116 Fed. 680, decided under the laws of Georgia, it was stated that the rule is that a remainder which is contingent as to event only will pass to the trustee in bankruptcy, under the act of 1898.

So, it has been held that a vested interest in a contingent remainder passes to the trustee in bankruptcy of a remainderman, under § 14 of the bankruptcy act of 1867, which vested all the bankrupt's "property and estate, both real and personal" in the trustee. *Minot v. Tappan*, 122 Mass. 535; *Belcher v. Burnett*, 126 Mass. 230; *Putnam v. Story*, 132 Mass. 205; *Bodenhamer v. Welch*, 89 N. C. 78. And that the interest of one having a vested interest in a contingent remainder will pass to the trustee in bankruptcy, under the act of 1898, see *Hammond v. Whittredge*, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396, affirming 198 Mass. 45, 75 N. E. 222; and *Clarke v. Fay*, 205 Mass. 228, 27 L.R.A.(N.S.) 454, 91 N. E. 328. In the latter case the bankrupt had a fixed right subject to be defeated by his failure to survive the life tenant, and subject to diminution or increase by enlargement of or a decrease in the class to which he belonged. The court said that his interest was a vested one in a contingent right, and that the possibility of a change in the number of persons among whom the remainder would be divisible merely affected the amount, and not the fact, of the bankrupt's interest.

And in England, under 13 Eliz. chap. 7, § 2, which empowered the bankruptcy commissioners to assign over "all that the bankrupt might depart withal," it was held that the contingent interest in a remainder, arising

from a devise to such of the children of the life tenant as might survive her, passed to the commissioners in bankruptcy of one of such children, who became bankrupt while the life tenant was still alive, the ground taken being that such remainderman might have released his contingent interest. *Higden v. Williamson*, 3 P. Wms. 132, affirmed on appeal by Lord Chancellor King,—see note to case as reported in 24 English Reprint, 1000.

But in *Re Hoadley*, 101 Fed. 233, 3 Am. Bankr. Rep. 780, 2 N. B. N. Rep. 704, where the remainder was contingent as to the persons who would take, it was held that one of the class in whom the remainder would vest, it being limited to the children or children's heirs surviving the life tenant, had no estate or interest while the life estate was outstanding which would vest in his trustee in bankruptcy as assets. This decision was based on the New York law which controlled, and which it was said did not make remainders which were contingent as to the persons who would take alienable; but, as pointed out in *CLOWE v. SEAVEY*, under the New York statute, now at least, it is settled that there is no difference between uncertainty of person and uncertainty of event.

Re Hoadley was cited and seemingly followed with approval in *Re Gardner*, 5 Am. Bankr. Rep. 432, a case arising in New York, wherein it was held that one who, should he survive certain persons then living, would be one of a class to whom the remainder in certain property was devised, had no then present alienable interest which would pass to his trustee in bankruptcy. Here, too, the court laid stress upon the fact that the remainder was contingent as to the persons who would take.

Another case closely analogous to *Re Hoadley*, supra, is *Re Wetmore*, 47 C. C. A.

Y. Supp. 49; Washb. Real Prop. 6th ed. § 1557, p. 527; Re Hoadley, 101 Fed. 233, 3 Am. Bankr. Rep. 780; Re Gardner, 5 Am. Bankr. Rep. 432; Re Wetmore, 4 Am. Bankr. Rep. 335, 47 C. C. A. 477, 108 Fed. 520, affirmed in 6 Am. Bankr. Rep. 210; Re Ehle, 6 Am. Bankr. Rep. 476, 109 Fed. 625; Re Twaddell, 6 Am. Bankr. Rep. 539, 110 Fed. 145; Re McCrea, 20 Am. Bankr. Rep. 412; Van Heusen v. Van Heusen Charles Co. 74 Misc. 292, 131 N. Y. Supp. 401.

The assignee, Mary E. Seavey, was an innocent purchaser for value. The assignment should not therefore have been set aside.

Kerker v. Levy, 140 App. Div. 428, 125 N. Y. Supp. 357; Willis v. Willis, 79 App. Div. 9, 79 N. Y. Supp. 1028; De Hierapolis v. Reilly, 44 App. Div. 22, 60 N. Y. Supp. 417, affirmed in 168 N. Y. 585, 60 N. E. 1110; Greenwald v. Wales, 174 N. Y. 140, 66 N. E. 665; Waterbury v. Sturtevant, 18 Wend. 353; Dudley v. Danforth, 61 N. Y. 626; Stearns v. Gage, 79 N. Y. 102; Starin

477, 108 Fed. 520, affirming 102 Fed. 290, 4 Am. Bankr. Rep. 335, which involved the same provisions of the New York statute construed in the foregoing cases and in CLOWE v. SEAVEY, wherein it was held that one who, should he survive the life tenant, would be one of a class determinable at the death of the life tenant entitled to a distributive share of the remainder unappointed by the life tenant under a power in the will, had no estate or interest during the life of the life tenant which would pass to his trustee in bankruptcy. In this connection the circuit court of appeals said that, "if the contingency or uncertainty be such as relates to the person, and not merely to the event, and he who is to take remains unascertained by name, designation, or description, obviously no given individual while so unascertained can be held to have a property right to or in the subject-matter of the gift or limitation."

And in Re Ehle, 109 Fed. 625, 6 Am. Bankr. Rep. 476, it was held that a contingent remainder did not pass to the trustee in bankruptcy of the remainderman. This case arose in the United States district court for Vermont, and although no reference is made to the Vermont laws, the court seems to have proceeded upon the assumption that the estate would have had to have been a vested one in order for the trustee to take. It might also be of interest that, although the uncertainty was not one as to persons, the bankrupt having been expressly named, the court referred with approval to Re Hoadley and Re Gardner, *supra*.

And the question as to what contingent remainders pass to a trustee in bankruptcy, as affected by the question whether the remainder is contingent as to person or as to event, was interestingly discussed in Re Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539, 3 N. B. N. Rep. 752, wherein Pennsylv- 47 L.R.A. (N.S.)

v. Kelly, 88 N. Y. 418; Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Bush v. Roberts, 111 N. Y. 278, 7 Am. St. Rep. 741, 18 N. E. 732; Hine v. Bowe, 114 N. Y. 350, 21 N. E. 733; Knower v. Central Nat. Bank, 124 N. Y. 552, 21 Am. St. Rep. 700, 27 N. E. 247; Wilson v. Marion, 147 N. Y. 589, 42 N. E. 190; Farley v. Carpenter, 27 Hun, 359; Bogert v. Hess, 50 App. Div. 253, 63 N. Y. Supp. 977; Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. Supp. 1063; Lary v. Pettit, 55 App. Div. 631, 66 N. Y. Supp. 834; Colnon v. Buckley, 117 App. Div. 742, 102 N. Y. Supp. 912; Tisdale v. Rider, 119 App. Div. 594, 104 N. Y. Supp. 77; Barr v. Sofranski, 130 App. Div. 783, 115 N. Y. Supp. 533.

Messrs. Edgar T. Brackett and William E. Bennett, with Mr. Hiram C. Todd, for respondent:

The interest of the defendant Elizabeth S. C. Seavey in the estate of her grandfather,

vania statutes similar to the New York statutes, except as to the addition of a pertinent proviso to the provision that contingent and vested estates are assignable, if "there be a real interest in the defendant in the execution, legal or equitable," were under consideration. The court said: "In the law of contingent remainders there is a fundamental distinction between contingency as to the person who is to take, and contingency as to the event on the happening of which a right, interest, or estate is to be acquired under the limitation over. Where the contingency relates to the event, and not to the person, the remainderman possesses a right or title which may indifferently be considered or termed a 'vested right' in or to a contingent interest or estate, or a 'contingent right' to a future interest or estate, and such a right is alienable and transmissible to heirs or personal representatives according to its nature. But where the contingency relates to the person, the case is essentially different. A contingent remainder is none the less a remainder because limited to persons not *in esse*. But such a limitation *ex vi termini* excludes the alienability or transmissibility of the remainder so long as it remains contingent. If land be devised to one for life, and at his death in fee to such of his children as shall survive him, there can be, before his death occurs, no remainderman *in esse* having capacity to take. In such a case it would seem that the existence of remaindermen cannot be disassociated from their capacity to take, and that, as such capacity cannot exist before their ascertainment by the death of the first taker, they cannot be regarded as *in esse* before that event, so far as the alienability or transmissibility of any interest or title under the limitation is concerned."

G. J. C.

William H. Clement, deceased, constituted property.

Moore v. Littell, 41 N. Y. 66.

The law favors the vesting of estates.

Lytle v. Beveridge, 58 N. Y. 592; Miller v. Von Schwarzenstein, 51 App. Div. 18, 64 N. Y. Supp. 475; Manice v. Manice, 43 N. Y. 303; Embury v. Sheldon, 68 N. Y. 227; Thomson v. Hill, 87 Hun, 111, 33 N. Y. Supp. 810; Hersee v. Simpson, 154 N. Y. 496, 48 N. E. 890; Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859; Riker v. Gwynne, 201 N. Y. 143, 94 N. E. 632.

Mere postponement of the time of payment will not make a legacy contingent.

Bushnell v. Carpenter, 92 N. Y. 270.

Nor do the words "from and after," or the like, reach the result of making a legacy contingent.

Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812; Moore v. Lyons, 25 Wend. 119; Hersee v. Simpson, 154 N. Y. 496, 48 N. E. 890; Purdy v. Hayt, 92 N. Y. 447; Tiers v. Tiers, 98 N. Y. 568; Beardley v. Hotchkiss, 96 N. Y. 201; Byrnes v. Stillwell, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241; Clark v. Cammann, 160 N. Y. 315, 54 N. E. 709; Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515; Re Seebeck, 140 N. Y. 241, 35 N. E. 429; Connelly v. O'Brien, 166 N. Y. 406, 60 N. E. 20.

The law favors such a construction as will avoid the disinheritance of the remainderman who chances to die before the determination of the precedent estate.

Mitchell v. Knapp, 54 Hun, 500, 8 N. Y. Supp. 40, affirmed in 124 N. Y. 654, 27 N. E. 413; Sage v. Wheeler, 3 App. Div. 38, 37 N. Y. Supp. 1107; Connelly v. O'Brien, 166 N. Y. 406, 60 N. E. 20; Re Russell, 168 N. Y. 169, 61 N. E. 166; Re Brown, 93 N. Y. 295.

Where the gift is to be severed *instantly* from the general estate, for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall, at all events, have the principal, and is to wait for the payment only until the day fixed.

Warner v. Durant, 76 N. Y. 133; Re Vanderbilt, 172 N. Y. 69, 64 N. E. 782; Dougherty v. Thompson, 167 N. Y. 472, 60 N. E. 760; Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312; Vanderpoel v. Loew, 112 N. Y. 167, 19 N. E. 481; Re Manhan, 98 N. Y. 372; Bushnell v. Carpenter, 92 N. Y. 270; Smith v. Edwards, 88 N. Y. 92; Sage v. Wheeler, 3 App. Div. 38, 37 N. Y. Supp. 1107, affirmed in 158 N. Y. 679, 52 N. E. 1126; Geisse v. Bunce, 23 App. Div. 289, 48 N. Y. Supp. 249; Wadsworth v. Murray, 29 App. Div. 191, 51 N. Y. Supp. 1038, affirmed in 161 N. Y. 274, 76 Am. St. Rep. 265, 55 47 L.R.A. (N.S.)

E. 910; Karstens v. Karstens, 29 App. Div. 229, 45 N. Y. Supp. 966, 51 N. Y. Supp. 795; Chanler v. New York Elev. R. Co. 34 App. Div. 305, 54 N. Y. Supp. 341; Zartman v. Ditmars, 37 App. Div. 173, 55 N. Y. Supp. 908; Aldridge v. Aldridge, 43 App. Div. 411, 60 N. Y. Supp. 69; Canfield v. Fallon, 43 App. Div. 561, 57 N. Y. Supp. 149, affirmed in 161 N. Y. 623, 55 N. E. 1093; Re Dippel, 71 App. Div. 598, 76 N. Y. Supp. 201; Williams v. Boul, 101 App. Div. 593, 92 N. Y. Supp. 177, affirmed in 184 N. Y. 605, 77 N. E. 1198; Re Merriman, 91 Hun, 120, 36 N. Y. Supp. 131, affirmed in 154 N. Y. 313, 48 N. E. 537; Re Schmitt, 137 App. Div. 286, 121 N. Y. Supp. 982; Ogden v. Ogden, 40 Misc. 473, 82 N. Y. Supp. 710; Hess v. Zahn, 57 Misc. 515, 107 N. Y. Supp. 951; Clark v. Goodridge, 51 Misc. 140, 100 N. Y. Supp. 824.

The corpus of this trust is vested in Elizabeth S. C. Seavey, the enjoyment of the principal only being postponed.

Vail v. Broadway R. Co. 147 N. Y. 377, 30 L.R.A. 626, 42 N. E. 4, 9 Am. Neg. Cas. 644; Re Embree, 9 App. Div. 602, 41 N. Y. Supp. 737, affirmed in 154 N. Y. 778, 49 N. E. 1096; Re Roberts, 112 App. Div. 732, 98 N. Y. Supp. 309; Roosa v. Harrington, 171 N. Y. 341, 64 N. E. 1; Miller v. Von Schwarzenstein, 51 App. Div. 18, 64 N. Y. Supp. 475; Hersee v. Simpson, 20 App. Div. 100, 46 N. Y. Supp. 755, affirmed in 154 N. Y. 496, 48 N. E. 890; Bowditch v. Ayrault, 138 N. Y. 222, 34 N. E. 514; Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388; Van Nostrand v. Marvin, 16 App. Div. 28, 44 N. Y. Supp. 679, appeal dismissed in 161 N. Y. 650, 57 N. E. 1127; Van Axte v. Fisher, 117 N. Y. 401, 22 N. E. 943; Re Brown, 154 N. Y. 313, 48 N. E. 537; Canfield v. Fallon, 43 App. Div. 561, 57 N. Y. Supp. 149, affirmed in 161 N. Y. 623, 55 N. E. 1093; Re Farmers' Loan & T. Co. 189 N. Y. 202, 82 N. E. 181; Stringer v. Young, 191 N. Y. 157, 83 N. E. 690; Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828; Re Young, 145 N. Y. 535, 40 N. E. 226; Warner v. Durant, 76 N. Y. 133; Vanderpoel v. Loew, 112 N. Y. 167, 19 N. E. 481; Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312; Loder v. Hatfield, 71 N. Y. 92; Re Tienken, 131 N. Y. 391, 30 N. E. 109; Linton v. Laycock, 33 Ohio St. 128; Collier v. Grimesey, 36 Ohio St. 17; Durfee v. MacNeil, 58 Ohio St. 238, 50 N. E. 721; Bolton v. Ohio Nat. Bank, 50 Ohio St. 290, 33 N. E. 1115; Flickinger v. Saum, 40 Ohio St. 591.

The appellants are estopped from claiming that the interest of the defendant Elizabeth S. C. Seavey was not assignable.

National Park Bank v. Billings, 144 App. Div. 536, 129 N. Y. Supp. 846.

The assignment made by the defendant to her mother-in-law was fraudulent and void.

Young v. Heermans, 66 N. Y. 374; *Kain v. Larkin*, 4 App. Div. 209, 38 N. Y. Supp. 546; *Robinson v. Stewart*, 10 N. Y. 189; *Townsend v. Bumpus*, 29 App. Div. 122, 51 N. Y. Supp. 513; *Schenck v. Barnes*, 156 N. Y. 316, 41 L.R.A. 395, 50 N. E. 967, affirming 25 App. Div. 153, 49 N. Y. Supp. 222; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531.

The plaintiff represents creditors and can maintain the action.

Collier, Bankr. 8th ed. p. 843; *Re Mullen*, 4 Am. Bankr. Rep. 224, 101 Fed. 413; *Re Gray*, 47 App. Div. 554, 62 N. Y. Supp. 618; *Beasley v. Coggins*, 12 Am. Bankr. Rep. 355; *Bush v. Export Storage Co.* 14 Am. Bankr. Rep. 138, 136 Fed. 918; *Ruhl-Koblegard Co. v. Gillespie*, 22 Am. Bankr. Rep. 643; *Thomas v. Roddy*, 122 App. Div. 851, 107 N. Y. Supp. 473; *Mueller v. Brusa*, 8 Am. Bankr. Rep. 442; *Re Gerstman*, 19 Am. Bankr. Rep. 145; *Manning v. Evans*, 19 Am. Bankr. Rep. 217; *Ryker v. Gwynne*, 21 Am. Bankr. Rep. 95, 201 N. Y. 143, 94 N. E. 632; *Skilton v. Codrington*, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; *Dunn Salmon Co. v. Pillmore*, 55 Misc. 546, 106 N. Y. Supp. 88; *Wall v. Cox*, 4 Am. Bankr. Rep. 659; *Zartman v. First Nat. Bank*, 189 N. Y. 267, 12 L.R.A.(N.S.) 1083, 82 N. E. 127.

Miller, J., delivered the opinion of the court:

This action is brought by a trustee in bankruptcy to set aside a transfer made by Elizabeth S. C. Seavey, the bankrupt, to her mother-in-law, of all her right, title, and interest, present and future, in and to the estate of her grandfather. She had no other property. The court found upon sufficient evidence that she made the transfer with intent to cheat and defraud creditors, and in effect that it was voluntary, except for the sum of \$1,000 loaned by the transferee upon the security of it. The court also found that the transferee did not participate in said fraudulent intent. The judgment provides for the repayment of said loan with interest. The instrument of transfer was executed by both parties. The transferee expressly agreed that, in consideration of the transfer, she would devise and bequeath the estate transferred to her, as well as all of her other estate, in trust for the use of the transferor and her husband during their lives and the life of the survivor, with remainder to their son. The particular clause of the will creating said interest reads as follows: "In the event of the death of my said son, and the remarriage

of his said wife, should she survive him, I desire and direct my said trustees, John B. Clement and John Cox, to pay to my said grandchildren, lawful children of my son Henry S. Clement, or their descendants, all the estate hereby devised to my son, Henry S. Clement, and his children, as aforesaid."

It is of no consequence that the transferee had no intent to hinder, delay, or defraud the creditors of the transferor. A person cannot successfully put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee may have the best of motives, and be ignorant of his fraudulent intent.

The important question in the case is whether the interest of the bankrupt passed to the trustee in bankruptcy. Curiously enough the inalienability of that interest is asserted by those who claim under an assignment of it. It is forcibly urged by the learned counsel for the respondent that said interest is a vested remainder. However, we do not consider it necessary to determine whether it was vested or contingent, because we are of the opinion that in either view it was alienable.

It was decided in *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846; *Id.*, 203 N. Y. 556, 96 N. E. 1122, that future contingent interests in personal property were alienable, the same as contingent remainders in real property, but it is argued that that case is distinguishable in that in this case the persons who are to take cannot be ascertained until the death of the life beneficiary. The writer did observe in that case that there was no uncertainty of the person, and it has been stated by textwriters, and often assumed by judges, that contingent interests are mere possibilities, and not alienable, where there is uncertainty of the persons who are to take. That doctrine had its origin in conditions which no longer exist. It did not survive the adoption of the Revised Statutes, which divided expectant estates into (1) future estates, and (2) reversions, and provided that a future estate is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that "an expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession." Rev. Stat. pt. 2, chap. 1, title 2, §§ 9, 13, and 35; now real property law (Consol. Laws, chap. 50) §§ 36, 40, 59. Those provisions are plain and simple, and leave no room for the refinements of the ancient common law.

Assuming the interest of Mrs. Seavey under her grandfather's will to be contingent,

it will be extinguished by her death before the death of her father. If the person to take were certain, and the event uncertain, the contingent interest or estate would never vest in possession, unless the event happened. The statute makes no distinction between uncertainty of person and uncertainty of event, and there is no sound reason to make such a distinction with respect to the alienability of contingent interests. Whatever the uncertainty, they are defined by the statute as estates. Of course, the contingency may be such that the interest or estate is not transmissible, descendible, or devisable, but so far as the nature of the contingency admits, all expectant estates are descendible, devisable, and alienable. The interest of Mrs. Seavey is certain to vest in possession and enjoyment if she survives the event, and there is no substantial difference between this case and *National Park Bank v. Billings*, supra. In that case, as in this, the interest was contingent upon the survivorship, but in this case, as in that, it is not subject to the will of a third party, and is more than a mere possibility, *e. g.*, the chance of sharing as next of kin in the estate of another upon his death, or "that which the heir has from the courtesy of his ancestor," or a mere possibility of reverter, which was involved in *Uppington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359.

We should not introduce subtleties into the plain rule of the statute, unless constrained to do so. It will not be profitable to discuss in detail the many cases cited by the appellants. Expressions may be found in judicial opinions which, apart from their context, may seem to support the distinction sought to be made between uncertainty of person and uncertainty of event, but it is sufficient to say that the precise point has already been decided by this court in favor of the respondent, and that the case relied upon by the appellants did not deal with it.

Jackson ex dem. Varick v. Waldron, 13 Wend. 178, and *Edwards v. Varick*, 5 Denio, 664, are only of historical interest. The involved an assignment made in 1804. Their authority, even as to the common law, was much weakened, if indeed they were not overruled, in *Miller v. Emans*, 19 N. Y. 384. *Moore v. Littel*, 41 N. Y. 66, was the first authoritative decision on the effect of the Revised Statutes. It involved a grant made in 1832 to one John Jackson, "for and during his natural life, and after his decease to his heirs and their assigns forever." The question was whether the children of John Jackson had an interest in the premises which they could convey during his life. Judge Woodruff was of the

opinion, first, that the remainders were vested, and, second, that if contingent, they were alienable under the Revised Statutes, although the uncertainty was as to the persons. A majority of the court concurred on the latter ground, as was pointed out by Judge Finch in *Hennessy v. Patterson*, 85 N. Y. 91, 104. While *Moore v. Littel* has sometimes been criticized, it has never been overruled, but has been cited many times as authority for the proposition that contingent estates are alienable. *Ham v. Van Orden*, 84 N. Y. 257, 270; *Beardsley v. Hotchkiss*, 98 N. Y. 201, 213; *Dodge v. Stevens*, 105 N. Y. 585, 588, 12 N. E. 759; *Griffin v. Shepard*, 124 N. Y. 70, 76, 26 N. E. 339; *Re Pell*, 171 N. Y. 48, 54, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *Roosa v. Harrington*, 171 N. Y. 341, 353, 64 N. E. 1; *Baltes v. Union Trust Co.* 180 N. Y. 183, 187, 72 N. E. 1005.

It seems strange that the question should still be thought open. It should be set at rest. We adhere to the ruling of *Moore v. Littel* not alone because it has been recognized as authority so long, but because that ruling gives effect to the plain language of the statute. I may add that the rule is the same in Massachusetts. *Putnam v. Story*, 132 Mass. 205; *Whipple v. Fairchild*, 139 Mass. 262, 30 N. E. 89.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Willard Bartlett, Chase, Cuddeback, and Hogan, JJ., concur. Grey, J., not voting.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

PHYSICIANS' DEFENSE COMPANY, Appt., v.

E. C. COOPER, Insurance Commissioner of the State of California.

(118 C. C. A. 50, 199 Fed. 576.)

Insurance — undertaking to defend lawsuits — right to do business.

Undertaking to meet the expense of defending suits against physicians for civil

Note. — What constitutes insurance.

This note does not include cases where the contract in question was assumed to be one of insurance, and the question was merely as to the particular kind of insurance; nor does it cover the question whether the contracts of mutual benefit companies or associations in general constitute insurance, or whether such concerns are regarded as insurance companies. For a note

malpractice, to the total expenditure of a specified amount, for compensation, is insurance within the meaning of a statute requiring the filing of a bond and securing authority, to be entitled to do business in the state.

(October 7, 1912.)

APPEAL by plaintiff from a decree of the Circuit Court of the United States for the Northern District of California dismissing a bill filed to enjoin interference by defendant with plaintiff's business. Affirmed.

Statement by Wolverton, District Judge:

The Physicians' Defense Company is a corporation of Indiana. It is engaged in

on the question whether a benefit association is an insurance company, see *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33.

Nature of insurance in general.

Insurance has been defined,

—as “a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril.” *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528;

—as “an agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss, damage, or prejudice to certain property described in the agreement, for a specified period, by reason of specified perils.” *Barnes v. People*, 168 Ill. 425, 48 N. E. 91;

—again, as “an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.” *Com. v. Wetherbee*, 105 Mass. 149.

This last definition was adopted by Mass. Stat. 1887, chap. 214, § 3. *Claffin v. United States Credit System Co.* 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293.

The statute involved in *State v. Alley*, 96 Miss. 720, 51 So. 467, defines insurance as “an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value, to the assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest.” A similar statutory definition appears in *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396.

In *Marchesseau v. Merchants' Ins. Co.* 1 Rob. (La.) 438, where a policy of fire insurance was involved, the court said that the contract of insurance was one essential-

a business whereby it issues to its patrons and customers a form of contract in purport as follows: In consideration of the printed application and the sum of \$15, being the consideration of one year's defense, and the further payment of \$15 annually during the life of the contract, the Physicians' Defense Company agrees to defend the legally qualified physician “against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding \$5,000 in defense of any one suit, nor exceeding in the aggregate \$10,000 in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which

ly of indemnity, and its object was not to put the insured in the same situation in case of loss in which he would have been had the adventure on which it was effected terminated successfully.

And in the following cases, a policy of insurance was said to be a contract of indemnity: *Whitney Estate Co. v. Northern Assur. Co.* 155 Cal. 521, 23 L.R.A. (N.S.) 123, 101 Pac. 911, 18 Ann. Cas. 512 (rent insurance); *Davis v. Phoenix Ins. Co.* 111 Cal. 409, 43 Pac. 1115 (fire insurance); *Vredenburg v. Physicians' Defense Co.* 126 Ill. App. 509 (physicians' defense); *Whitehouse v. Cargill*, 88 Me. 479, 34 Atl. 276 (fire insurance); *Rumford Falls Paper Co. v. Fidelity & C. Co.* 92 Me. 574, 43 Atl. 503 (employers' liability); *Lahiff v. Ashuelot Ins. Co.* 60 N. H. 75 (fire insurance); *Scheel v. German-American Ins. Co.* 228 Pa. 44, 76 Atl. 507 (fire insurance); *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205, 78 Am. Dec. 418 (fire insurance); *Annelly v. De Saussure*, 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490 (fire insurance); *Plimpton v. Farmers' Mut. F. Ins. Co.* 43 Vt. 500, 5 Am. Rep. 297 (fire insurance); *Kohne v. Insurance Co. of N. A.* 1 Wash. C. C. 93, Fed. Cas. No. 7,920 (marine insurance); *Northern Trust Co. v. Snyder*, 22 C. C. A. 47, 46 U. S. App. 179, 76 Fed. 34 (fire insurance); *Hedger v. Union Ins. Co.* 17 Fed. 498 (fire insurance).

In *Davis v. Phoenix Ins. Co.* 111 Cal. 409, 43 Pac. 1115, where a policy of fire insurance was involved, the court said that a contract of insurance was one of indemnity, and that the term “indemnity” excluded all idea of profit to the insured. And to the same effect is *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 16 L.R.A. (N.S.) 1055, 68 Atl. 484.

It has been held that an agreement to save harmless from a part of a loss is as much a contract of insurance as an agreement to indemnify against an entire loss. *Physicians' Defense Co. v. O'Brien*, supra.

In *State v. Vigilant Ins. Co.* 30 Kan. 585, 2 Pac. 840, where assessments were relied upon to pay the losses resulting from the death of animals, etc., it was held that the

this contract shall be renewed, all in the manner and upon the conditions hereinbelow stated." After providing for notice to the company of suit brought against the physician for malpractice, the agreement further provides: "Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof. Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error, or other legal proceedings shall have

been exhausted, or until the above mentioned sums shall have been expended in said defense, providing that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services. Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it. . . . Each consecutive full year's renewal of this contract shall add five per cent (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits, within one year, conformably with the table of accumulations indorsed hereon, but such addition shall never exceed fifty per cent

contract was nevertheless one of insurance; the court remarking that it was a contract of indemnity, and that it did not matter how the funds for the payment of losses were secured.

And in *Com. v. Wetherbee*, 105 Mass. 149, it was held that neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement was a contract of insurance; but it was held that all that was requisite to constitute such a contract was the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract.

It has been held that the character of the contract must be determined by its nature, and not by its terminology. *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396; *State v. Beardsley*, 88 Minn. 20, 92 N. W. 472.

Specific risks and schemes—defense of physicians.

The authorities are in conflict upon the question whether undertakings to defend malpractice suits brought against physicians constitute insurance contracts.

In accord with the result reached in *PHYSICIANS' DEFENSE CO. v. COOPER*, it was held in *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396, that an undertaking by a company upon payment of a consideration, to defend physicians against civil suits for damages for malpractice during a certain time, at its own expense, not exceeding a named sum in defense of one suit, or another sum in the aggregate, but providing that the company would not obligate itself to pay or to assume or secure any judgment rendered, constituted a contract of insurance, and that the company issuing it was required to comply with the statutory provisions regulating foreign insurance companies. The court said: "The books are full of definitions of insurance, 47 L.R.A. (N.S.)

and the contract has been variously described and characterized. Underlying all the definitions, except in life insurance, is the idea of indemnity. We are not required to go afield for a definition, as *Rev. Laws, 1905, § 1596*, states that insurance, within the meaning of this chapter, is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage. The nature of the contract must be determined from its contents, and not by its terminology. Comparing this contract with the statutory definition, we find that one party (the company), for a consideration (stated therein), undertakes to indemnify (that is, protect against, make good, by standing the expense of the litigation), another (the physician) to a specific amount (not to exceed \$5,000, etc.), against loss or damage from a specific cause (an action for malpractice). In addition to paying the expenses of the litigation, the company agrees to employ counsel and defend suits; that is, in the language of the statute, to 'do some act of value to the insured in case of such loss or damage.' It does not require the citation of authorities to show that an agreement to save the assured harmless from a part of a loss is as much a contract of insurance as an agreement to indemnify against an entire loss. A physician is subject to the ever-present peril of an action for malpractice. The defense of such an action, regardless of its merits, requires the expenditure of time and money. If the defense is successful, there is nevertheless a financial loss; if unsuccessful, the amount of the judgment is added to this initial loss. The judgment in favor of a defendant always leaves him a loser, because but a part of the actual expenses of the litigation are taxable as costs against the plaintiff. If judgment in a malpractice case is rendered against the physician, it is so much in excess of what he has incurred in the defense of the suit. In every case the defendant suffers a financial loss. Under this contract the company does not

(50%) of the aforesaid principal sums. This contract shall not lapse at the end of the time as stated above, if the holder hereof shall pay the annual consideration in advance at the home office in Ft. Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt signed by the president and secretary, and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid."

The plaintiff, the appellant here, by its bill of complaint shows that it commenced operations in California in September, 1902, and has since so continued, building up a large and remunerative business, but that it has not filed the bond provided by

§ 623 of the Political Code of the state, nor has it procured the certificate of authority required by § 596, of such Code to be obtained by companies transacting an insurance business within the state, nor any certificate or certificates of authority to do business within the state, other than the annual certificates issued by the secretary of state to foreign corporations upon payment of the license tax imposed thereon by the laws of the state. It is further shown that the defendant, being the insurance commissioner of the state, claiming that plaintiff is engaged in insurance business, asserts that plaintiff has no right nor authority to transact such business within the state without first filing a bond as required by said § 623 of the Political Code, and having

agree to pay the judgment, but it does agree to defend the action at its own expense, and thus in substance indemnify the physician against the risk or peril of being called upon to defend such an action. The consideration is paid annually. If no action is brought during the life of the contract, the company gains the amount of this compensation which it received for subjecting itself to the risk of being called upon to defend an action at its own expense."

In *Vredenburg v. Physicians' Defense Co.* 126 Ill. App. 509, however, it was held that a company which undertook to defend suits against physicians for malpractice at its own expense, not to exceed a certain amount in any one suit, or another named sum in the aggregate, did not undertake to indemnify the assured against a judgment recovered, or even the costs; that the contract was not one of insurance, and that consequently, the company was not required to comply with the conditions regulating insurance companies. The court said: "The statutes of this state relating to insurance (Rev. Stat. chap. 73) recognize and contemplate the formation of companies whose purpose shall be to furnish indemnity for loss or damage, whether by fire, marine and inland navigation, lightning and storms, loss of life, loss and injury by accident, burglary, and other casualties. Nowhere does it appear that the statutes relating to insurance are applicable, or intended to be applicable, to persons or corporations not furnishing such indemnity. The contract in controversy does not fall within the foregoing definitions. By it appellee undertakes, at its own cost and expense, to defend the other party to the agreement against suits of a specified character, brought within a specified time, in consideration of a fixed payment which may be deemed as in the nature of a retainer, such as an attorney may lawfully receive from a client. The company does not undertake to indemnify the holder of its agreement against a judgment, or to pay such judgment nor any part of it, not even the costs of a suit. It is true that, in making defense, it may have to pay out more than

the sum it receives. So, also, an attorney who may agree with a client to defend a suit for an agreed compensation may find himself compelled to expend time and labor worth more than he has agreed to charge and receive. The contract has no element, so far as we can discover, of indemnity. Appellee does not insure the holder against suits for malpractice. It merely makes a business of defending against them when they are brought, provides legal services for its patrons, and we perceive no reason why it should be compelled to comply with the requirements of the statutes referred to relating only to insurance companies."

A like result was reached in *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 96, 76 N. E. 567, where a contract of the same character was held to be merely a contract for services.

—securing against loss by giving credit.

A contract by which a company, in consideration of the payment of a certain sum, agrees to indemnify against losses by uncollectable debts, is held to be a contract of insurance, and therefore to be most strongly construed against the insurer. *State v. Phelan*, 66 Mo. App. 548; *Robertson v. United States Credit System Co.* 57 N. J. L. 12, 29 Atl. 421; *Lexington Grocery Co. v. Philadelphia Casualty Co.* 157 N. C. 116, 72 S. E. 870; *American Credit Indemnity Co. v. Athens Woolen Mills*, 34 C. C. A. 161, 92 Fed. 581; *Tebbets v. Mercantile Credit Guarantee Co.* 19 C. C. A. 281, 38 U. S. App. 431, 73 Fed. 95. In the last case the court said: "Corporations entering into contracts like the one at bar may call themselves 'guaranty' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.

issued to it a certificate of authority under § 596 of such Code, and threatens to prevent plaintiff from further transacting business within the state unless it complies with the provisions of said sections. An injunction is prayed against the threatened acts of the insurance commissioner. The sufficiency of the bill was tested by a demurrer thereto, which was sustained, and, a decree having been given and entered dismissing the bill, the plaintiff appeals.

Argued before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

Messrs. Goodfellow, Eells, & Orrick, with Mr. Stanley Moore, for appellants:

The main purpose and controlling features of the contract, and not its incidents,

determine its nature and proper classification.

Vance, Ins. pp. 16, 17; Briggs v. McCullough, 36 Cal. 551; Stern v. Rosenthal, 71 Misc. 422, 128 N. Y. Supp. 711; Beck v. Pennsylvania R. Co. 63 N. J. L. 232, 76 Am. St. Rep. 215, 43 Atl. 908; Richards, Ins. p. 5.

The contract in its nature is one for the rendition of personal services, and not one of insurance.

Com. ex rel. Hensel v. Provident Bicycle Asso. 178 Pa. 636, 36 L.R.A. 589, 36 Atl. 197; State ex rel. Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567; Vredenburg v. Physicians' Defense Co. 126 Ill. App. 509; Stern v. Rosenthal, 71 Misc. 422, 128 N. Y. Supp. 713; Opinions of Atty.

And an agreement of the same character was assumed to be a contract of insurance in Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004, and was construed most strongly in favor of the insured.

And a contract of a corporation purporting to bind it in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors or judgment debtors against whom execution should be returned unsatisfied, is a contract of insurance within the meaning of the Massachusetts insurance act of 1887, regulating insurance companies. Clafin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 523, 43 N. E. 293.

The court in United States Credit System Co. v. American Indemnity Co. 51 Fed. 751, held that a patent based on a scheme for indemnifying against losses for bad debts was void for want of invention, and said: "I cannot see any ground on which to sustain this patent. It is void for want of invention. The guarantying of men's financial ability to pay is not an invention of the complainant. Nearly all forms of guarantying or insuring have been in existence for many years, notably fidelity, casualty, fire, lightning, and other forms of insurance, all of which are based upon averages obtained from practical experience. It required no inventive genius to form and plan the insurance on this basis. One is not entitled to a patent for a plan or method of business which only requires good judgment and foresight. In this case, ordinary business judgment would suggest this system of guarantying."

—employers' indemnity.

Generally, as to employers' indemnity policies, see Index to L.R.A. Notes, Insurance, § 212.

In Employers' Liability Assur. Corp. v. Merrill, 165 Mass. 404, 29 N. E. 529, the court said that contracts insuring against claims for compensation for accidental in-

juries to employees and third persons by the insured's horses, vehicles, elevators, or by his workmen in the course of building, plainly constituted contracts of insurance. The question there involved, however, was whether they came within the provisions of a statute authorizing companies to issue only particular kinds of insurance.

And in Standard Life & Acci. Ins. Co. v. Bambrick Bros. Constr. Co. 163 Mo. App. 564, 143 S. W. 845, where the validity of an assignment of an employers' liability policy was involved, the court remarked that contracts to indemnify an employer against liability for personal injuries suffered by his employees were regarded as contracts of insurance.

—fidelity of employees.

Generally, as to fidelity bonds, see Index to L.R.A. Notes, Bonds, § 11.

The guarantying of the fidelity of persons holding places of trust and the performance of contracts constitutes insurance, and is within the meaning of a statute authorizing the incorporation of concerns, but excepting those doing an insurance business from the benefit of its provisions. People ex rel. Kasson v. Rose, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246; United States Fidelity & G. Co. v. First Nat. Bank, 233 Ill. 475, 84 N. E. 670, affirming 137 Ill. App. 382; American Bonding & T. Co. v. New Amsterdam Casualty Co. 125 Ill. App. 33.

And it has been laid down in numerous cases that undertakings guarantying the fidelity of employees are in the nature of contracts of insurance, and are to be construed most strongly against the insurer. Title Guaranty & S. Co. v. Bank of Fulton, 89 Ark. 471, 35 L.R.A.(N.S.) 676, 117 S. W. 537; Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; Fidelity & G. Co. v. Western Bank, 29 Ky. L. Rep. 639, 94 S. W. 3; Crystal Ice Co. v. United Surety Co. 159 Mich. 102, 123 N. W. 619; Roark v. City Trust, S. D. & S. Co. 130 Mo. App. 401, 110 S. W. 1; Bank of Tarboro v. Fidelity & D. Co. 128 N. C. 368, 83 Am. St.

Gen. of Mass. (1898) p. 28, cited in 1 May, Ins. p. 3.

The contract is not an insurance contract within the meaning of the statutes of California.

Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; State ex rel. Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 78 N. E. 567; Weller v. Eames, 15 Minn. 461, Gil. 376, 2 Am. Rep. 151; Com. ex rel. Hensel v. Provident Bicycle Asso. 178 Pa. 636, 36 L.R.A. 589, 36 Atl. 197; State ex rel. Clapp v. Federal Invest. Co. 48 Minn. 110, 50 N. W. 1028.

Messrs. U. S. Webb, Attorney General, and E. B. Power, Assistant Attorney General, for appellee:

The complaining corporation is doing an insurance business.

Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396.

Rep. 682, 38 S. E. 908; Remington v. Fidelity & D. Co. 27 Wash. 429, 67 Pac. 989; American Surety Co. v. Pauly, 170 U. S. 136, 42 L. ed. 978, 18 Sup. Ct. Rep. 552; Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766, affirming 68 Fed. 459; Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co. 83 C. C. A. 431, 154 Fed. 545, writ of certiorari denied in 207 U. S. 589, 52 L. ed. 354, 28 Sup. Ct. Rep. 256.

Under chap. 160, § 2, Acts of 1895, and chap. 31, Acts of 1899, of Tennessee, defining an insurance contract as "an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value, to the assured, upon the destruction or injury, loss, or damage of something in which the other party has an insurable interest," it has been held that a company guarantying the fidelity of persons holding positions of public and private trust and the performance of contracts other than insurance policies, and also executing and guarantying bonds and undertakings required or permitted in all actions or proceedings, or by law allowed, carries on an insurance business within the meaning of acts 1907, chap. 541, § 6, imposing privilege taxes upon insurance companies. American Surety Co. v. Folk, 124 Tenn. 139, 135 S. W. 778, Ann. Cas. 1912 D, 1024. The court said: "The text-books upon the subject and the adjudged cases define insurance to be a contract by which one party, for an adequate consideration paid to him, undertakes to indemnify or guarantee the other against loss by certain specified risks, —an agreement wherein one becomes surety to another that the latter shall not suffer loss or damage upon the happening of certain contingencies, upon specified terms. 1 May, Ins. §§ 1, 2; 1 Phillips, Ins. § 1; 11 Am. & Eng. Enc. Law, 280; 22 Cyc. 1384. Upon the precise question we have before us, Mr. Joyce, in his work on Insurance, vol. 1, § 12, says: 'Guaranty insurance is a contract whereby one, for a consideration, 47 L.R.A.(N.S.)

Wolverton, District Judge, delivered the opinion of the court:

But one question is presented on this appeal, which is whether the plaintiff is transacting an insurance business within the meaning of the statutes of California relating to the subject. If it is, it is admitted that the insurance commissioner's position is the correct one. If not, then the commissioner should be restrained from interference with plaintiff's continuing to transact business with the state.

All persons and companies are prohibited from transacting insurance business within the state of California without first obtaining a certificate of authority from the insurance commissioner, and filing a bond as may be required by such commissioner. §§ 596 and 623, Political Code. The Civil Code of the state, under chapter 1 of title 11, "Insurance in General," defines insur-

agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employees and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against other breaches of contract. It includes other forms of insurance, which are specifically classed as 'fidelity guaranty,' 'credit guaranty,' etc. Mr. Frost says: 'In view of all that has been said in this immediate connection, can it be affirmed that fidelity, commercial, and judicial bonds or policies, as issued by the so-called surety companies, constitute a contract of insurance within the strict legal signification of that term? The answer to the foregoing query must be unqualifiedly in the affirmative. That such policies are essentially insurance contracts has been settled by the overwhelming authority of a large number of courts of last resort, the decisions to the contrary being few and far between.' Frost, Guaranty Ins. 2d ed. p. 11."

—guarantying performance of contracts.

See, also, note in 33 L.R.A.(N.S.) 513. It is held that a bond executed upon a consideration by a bonding company, to secure the performance of a building contract, is in effect a contract of insurance, and should be construed most strongly against the insurer. Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623. The court said: "In all essential particulars the appellee here is an insurance company, and its obligation in this particular instance was that of an insurer. It was paid for its undertaking, the amount of its compensation being based on the calculation of the risk assumed. The trend of all our modern decisions, Federal and state, is to distinguish between individual and corporate suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In

ance to be: "A contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." § 2527, Pomeroy's Civil Code of California.

Section 2531 declares what events may be insured against, namely: "Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him."

But the provisions of the chapter (§ 2532) do not authorize insurance pertaining to a lottery or lottery drawing a prize. It is further declared (§ 2534) that "all kinds of insurance are subject to the provisions of this chapter."

A person or company engaging in such

the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance."

And to the same effect are *Lesher v. United States Fidelity & G. Co.* 239 Ill. 502, 88 N. E. 208; *George A. Hormel & Co. v. American Bonding Co.* 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12; *Lakeside Land Co. v. Empire State Surety Co.* 105 Minn. 213, 117 N. W. 431; *German-American Title & T. Co. v. Citizens' Trust & Secur. Co.* 190 Pa. 247, 42 Atl. 682; *Union Trust Co. v. Citizens' Trust & S. Co.* 185 Pa. 217, 39 Atl. 886; *Cowles v. United States Fidelity & G. Co.* 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; *Pacific Bridge Co. v. United States Fidelity & G. Co.* 33 Wash. 47, 73 Pac. 772.

And in *Industrial & General Trust Co. v. Tod*, 56 App. Div. 39, 67 N. Y. Supp. 362, it was held that a company which, for a consideration, enters into contracts of suretyship on appeal bonds, is an insurance company within the meaning of the insurance laws forbidding a company to expose itself to a risk exceeding 10 per cent of its capital and surplus.

—guarantying rents.

It has been held that a contract protecting one against loss of rents is in its nature a contract of indemnity, and cannot be made the subject of profit by the insured. *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 16 L.R.A.(N.S.) 1055, 68 Atl. 484. See note to this case, supplemented by note in 23 L.R.A.(N.S.) 123, as to construction of policy or contract insuring against loss of rents.

—guarantying value of crops grown.

A corporation which undertakes to guarantee a fixed revenue per acre from farming 47 L.R.A.(N.S.)

business as is here attempted to be defined may be said to be transacting insurance business. The statutory definition of insurance does not differ greatly from that usually given by lexicographers, text writers, and judges, and yet it is practically as comprehensive as any. Webster defines it as: "The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks." Webster. Dict. "Insurance."

The Standard Dictionary defines it as: "An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several

lands, and which, in order to do so, contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon said land, irrespective of its value, has been held to be an insurance company within the meaning of a statute regulating insurance companies and agents, and defining insurance as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. *State v. Hogan*, 8 N. D. 301, 45 L.R.A. 166, 73 Am. St. Rep. 759, 78 N. W. 1051.

—accidents and theft.

Generally, as to burglary and theft insurance, see note to *Rosenthal v. American Bonding Co.* 46 L.R.A.(N.S.) 561.

In *State v. Vigilant Ins. Co.* 30 Kan. 585, 2 Pac. 840, a company formed to afford mutual indemnity and protection of its members in case of loss by accidents, death, and theft of horses, mules, jacks, and jennies, whose funds were secured by *pro rata* assessments against its members, was held to carry on an insurance business, and therefore to be bound to comply with the provisions regulating insurance companies. The court said: "The corporation proposes to 'indemnify its members for loss or damage by accidents, death, and theft of animals belonging to members.' It says, it is true, in one of its circulars, that it does not sell insurance, and does not receive premiums for insurance; but, nevertheless, its single, unmistakable business is that of contracting for indemnity for loss. Its method is this: Each member pays a membership fee and annual dues. This is for the purpose of keeping up the organization, paying officers' salaries, etc. Then, for losses, assessments are made upon the members, and only members can share in the benefit of the corporation. There is no accumulated fund out of which to pay losses, but reliance is wholly upon the assessments. But this is insurance. It is contracting for indemnity. It matters not how the funds for the payment of losses are secured. So long as the contract is such that in case of

parties to another party, in certain contingencies, upon specified terms."

And the Century Dictionary: "In law, a contract by which one party, for an agreed consideration which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes."

As to the textwriters, May defines insurance as: "A contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

Such, says the author, is the definition of the term in its most general terms, and, speaking further, he says: "It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its

ever-widening fields, and, under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended, or protection required, it holds out its fostering hand and promises indemnity." May, Ins. §§ 1, 2.

Phillips defines it as: "A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phillips, Ins. § 1.

Smith, in his work on Commercial Law, defines it as: "A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a

loss the promisee is entitled to claim compensation for the loss, it is a contract of indemnity."

And in *Re Solebury Mut. Protective Soc.* 3 Del. Co. Rep. 139, it was held that the concern for which a charter was sought was an insurance company, where the application set forth that its purpose was "the recovery of property that may be stolen from its members, and, in the event of a failure to recover such property, to pay to the loser such part of the value thereof as the company may hereafter determine and set forth in its by-laws. If a member may meet with loss for which the company is liable, and the property shall not be found and returned to the owner, a tax sufficient to raise the required amount shall be assessed equally upon the members."

—contracts by which individuals or firms undertake to indemnify each other.

Where a statute enacted to prevent foreign insurance companies without actual capital, having no officer authorized to accept service of summons, from doing business in the state, defines "company" to mean "all corporations, associations, partnerships, or individuals," and provides that an insurance contract is "an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value, to the assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest," it has been held that an association composed of manufacturing lumbermen admitted as members after investigation, which is without capital other than the premiums paid, and whose object is to indemnify its members for loss by fire, and which is conducted along the lines of an ordinary insurance company, comes within the terms of the statute referred to, and must comply with its terms. *State v. Alley*, 96 Miss. 720, 51 So. 467.

It has been held, however, that a contract between a limited number of individuals, partnerships, and corporations engaged in the same line of business, by 47 L.R.A. (N.S.)

which they merely undertake to indemnify each other against loss by fire, and do not purpose to issue policies to others not parties to the contract, is not a contract for the creation of an insurance business, within arts. 6 & 7, chap. 119, Mo. Rev. Stat. 1899, regulating insurance companies, but is an interindemnity contract, the making of which is declared by Laws 1911, p. 307, not to constitute insurance. *Isaac H. Blanchard Co. v. Hamblin*, 162 Mo. App. 242, 144 S. W. 880; *Christie Lithograph & Printing Co. v. Hamblin*, — Mo. App. —, 144 S. W. 882. The decision in *State v. Alley*, supra, was distinguished in this case, the court holding that the construction of their statute relating to insurance rendered the rules announced in the earlier case inapplicable.

—scheme for investment of small sums.

A company whose business is to provide means for the profitable investing for certificate holders of small sums, to be paid in monthly instalments until the sum accumulated should reach a sufficient amount to redeem in the order of the issuance of the certificates, is not a life endowment or casualty insurance company, and is not subject to the provisions of chapter 184, Laws 1885. *State ex rel. Clapp v. Federal Invest. Co.* 48 Minn. 110, 50 N. W. 1028. The court said: "The very essence of any definition of insurance is indemnity for loss in respect of a specified subject. The contract of life insurance, or of insurance upon a life, in the ordinary form, is a contract to pay a certain sum of money on the death of the insured. Another form, known as 'endowment insurance,' is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated. In either of these forms the contract is, strictly speaking, an insurance on the life of the party, although the latter is generally denominated 'endowment' insurance. . . . 'Casualty' insurance has a well-defined meaning, as insurance against loss, through accidents or casualties resulting in bodily injury or death. As applied to injuries re-

larger sum on the happening of a particular event." Smith, Com. Law, 299.

This collation of definitions is taken, with some rearrangement, from *People ex rel. Kasson v. Rose*, 174 Ill. 310, 314, 44 L.R.A. 124, 51 N. E. 246, 247.

"An insurance contract," says the court, in *Shakman v. United States Credit-System Co.* 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528, "is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril."

Again, the court, in *Com. v. Equitable Beneficial Asso.* 137 Pa. 412, 419, 18 Atl. 1112, 1113, says of insurance, that "It is a purely business adventure, in which one, for

a stipulated consideration or premium per cent, engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to loss of life. To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance."

We will refer to but one more definition of the term, which is that given by 22 Cyc. p. 1384, as follows: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage

sulting in death, this is really but a contract of life insurance limited to specified risks. Of course, neither the times nor amounts of payments by the assured, nor the modes of estimating or securing the payment of the sums to be paid by the insurance, are important or controlling in determining whether a transaction is a contract of insurance, but, in order to render it such, it must contain the essential element of indemnity for loss in respect to some specified subject from some specified risks; and, to constitute a contract one of either a life, endowment, or casualty insurance, the payment of the indemnity must be contingent either upon the duration of human life or the happening of a casualty resulting in bodily injury to the insured. . . . The by-laws merely provide a detailed method by which this shall be carried into effect. We shall not attempt to state the provisions of these by-laws, as they will speak for themselves. Suffice it to say that it clearly appears that the certificates issued to members are in no respect contracts of indemnity against loss of any kind, nor is their payment contingent either upon the duration of human life or the happening of any casualty."

—loan contracts canceled upon death:

It has been held that a contract by which a company agrees to make a present payment of a certain sum in consideration of the assured's undertaking to pay a specified sum each month for a term of years or during his lifetime, if he should die during the term, and the execution of his bond secured by a deed of trust upon his real estate, providing for a surrender of the bond and deed of trust upon payment in full, upon proof of the assured's death, and stipulating for a sale of the premises upon default, create a contract of life insurance, governed by the rules of construction generally applicable to such contracts. *United Security L. Ins. & T. Co. v. Bond*, 16 App. D. C. 579.

And in *Missouri, K. & T. Trust Co. v. Krumseig*, 23 C. C. A. 1, 40 U. S. App. 620, 47 L.R.A. (N.S.)

77 Fed. 32, a contract issued after the applicant had passed a medical examination, by which a loan was made to the applicant, who gave a number of promissory notes payable in monthly instalments covering the sum loaned, interest, and cost of guaranty to cancel the debt in case of death, and secured by deed of trust or mortgage, and by which the company issuing it undertook, in case of the applicant's death before all payments had been made, to release the unpaid portion of the debt, if previous instalments had been promptly made, was held by *Caldwell, J.*, to be a combination of a mortgage loan and policy of life insurance, so that it was incumbent upon the company issuing it to comply with the laws governing insurance companies. The case was decided upon other grounds, however, and was affirmed on those grounds in 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179.

And it has been held that a contract by which the insured agrees to pay a certain sum per month and is to receive a monthly sum to be applied on the payment of a home, which provides that, in certain cases of disability or death, the unpaid balance of the indebtedness should be canceled, is a contract of life insurance within the laws 1895, chap. 175, regulating life insurance companies. *State v. Beardsley*, 88 Minn. 20, 92 N. W. 472.

—bicycle insurance.

It has been held that a bicycle association which, for a stated yearly membership fee, agrees to clean a member's bicycle twice during the year, repair tires and the bicycle when damaged by accident, and to replace it if stolen, unless found within a certain time, and undertakes to provide a bicycle during the time named, does not constitute an insurance company, which is required to be chartered under the act of 1876, providing for the organization of companies undertaking to pay a gross sum upon the happening of a particular event. *Com. ex rel. Hensel v. Provident Bicycle Asso.* 178 Pa. 636, 36 L.R.A. 689, 36 Atl. 197.

by the happening of the perils specified to certain things which may be exposed to them."

The principal ingredients of such a contract are the consideration, the risk, and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified. Insurance, under the statute, is a contract to indemnify "against loss, damage, or liability." We think the addition of the word "liability" to the usual definition of the term does not operate to enlarge its sig-

nificance. The kinds of insurance which have grown up and are denominated insurance under the usual definition have become very numerous. 22 Cyc. 1386. And now the business of insuring against the liability of employers for the personal injuries of their employees and others is one well recognized and established. 15 Cyc. 1035.

Now, we may look to the contract in question, and determine whether it falls within the category of insurance, and whether a continuance of the issuance of such contracts does or does not constitute insurance business. In case the holder of the contract is sued for damages for civil malpractice, the Defense Company engages to employ a local attorney, in whose selec-

—contracts providing for burial expenses.

See note to *State v. Willett*, 23 L.R.A. (N.S.) 197.

—associations providing relief for railroad employees.

It is held that the relief department of a railroad company, having a fund created by contributions by the company and the employees who become members, out of which certain sums are payable in case of sickness, injury, or death, does not carry on an insurance business, and that the company need not comply with the insurance laws. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 280, 70 N. W. 630, 80 N. W. 315, 2 Am. Neg. Rep. 15; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 241, 76 Am. St. Rep. 211, 43 Atl. 908, 6 Am. Neg. Rep. 601; *State ex rel. Sheets v. Pittsburgh, C. C. & St. L. R. Co.* 68 Ohio St. 9, 64 L.R.A. 495, 96 Am. St. Rep. 635, 67 N. E. 93; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854.

—amount payable speculative on marriage.

It has been held that a contract between unmarried men, by which they undertake to pay an initiation fee and certain annual dues for nine years, and as much longer as they remain single, and a certain amount on the marriage of an associate, and by which each agrees, upon pain of forfeiture, that he will not marry within two years from his admission, and by which the company undertakes to pay his wife, if married after the expiration of two years, as many dollars as there are associates in the order, not exceeding one thousand, is not a contract of insurance, and is invalid as a gambling contract, and does not come within the supervision of the insurance commissioner. *State v. Towle*, 80 Me. 287, 14 Atl. 195. The court said: "It is not to be conceded, we think, that this contract, in the sense of any modern use of the term, is an insurance policy. No loss or casualty or peril is named for which any indemnity is promised. 47 L.R.A. (N.S.)

It is more of a betting contract on a future event. It is true that there was formerly a class of betting contracts styled insurances, and that a narrow line once existed between gambling and betting contracts and those then denominated contracts of insurance. . . . It does not seem probable that the legislature intended to commit to the care of the commissioner the business of illegal or illegitimate insurance companies. It would be tolerating, instead of condemning, them. He has the power to issue and suspend licenses. But there must be cause for either act. *Rev. Stat. chap. 49, §§ 73, 75.* His business is to deal with such companies as can, when licensed, issue legal policies. His act cannot confer legality upon companies doing illegal business."

And similar undertakings were held invalid in *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586, and *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325.

—newspapers undertaking to indemnify against accident.

A newspaper which, in order to increase its circulation, promises to pay a certain amount to the heirs of one who meets death by accident while pursuing his ordinary avocation, provided a copy of the paper or a coupon taken from it was found on his person at the time of the accident, carries on an accident insurance business, which is unauthorized under a charter empowering it to publish a newspaper. *Com. ex rel. Hensel v. Philadelphia*, 15 Pa. Co. Ct. 463. The court said: "It is too clear for denial—and no denial is made—that the defendant is seeking to increase the circulation of its journal, and for that purpose is offering to insure purchasers or subscribers against accident. The consideration which the defendant receives, or hopes to receive, is a larger total revenue, and in view thereof it promises to each possessor of its journal who signs his name in the blank space left for the purpose, the temporary protection of an accident insurance policy. In other words, it promises to pay to certain per-

tion the holder of the contract shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder, and this to the extent of the exhaustion of the sum named in the policy, which for the defense of one suit is \$5,000; if others in one year, \$10,000. It seems plain that when the holder is sued for civil malpractice, which he deems is wrongful, and the necessity of making defense is thrust upon him, he must suffer loss, damage, or liability within the meaning of the contract, to the extent that he is obliged to employ attorneys and meet the expenses of the trial in regular course. He must pay his attorneys for their services in his behalf, and he must pay his costs on the trial. These are the contingencies which the Defense Company agrees to meet. True, the company does not agree to pay to the holder of the contract the amount of such expenses incurred up to the sum of \$5,000; but it does agree to lift them from the burden or liability of the holder, so that he will not be required to use his own money to meet them. The contingency of paying the expenses of attorneys and cost of defense in case of suit for civil malpractice is the risk of peril which the company agrees that it will meet, and it can make no difference whether it

pays the amount of the expenses and costs incurred to the parties doing the service or to the holder of the contract, so that he may himself meet such expenses and costs. The indemnity is the amount of such expenses and costs to be paid. Or, to put it another way, the Defense Company agrees to hold the holder of the contract harmless in that respect to the extent of \$5,000 in the event of the happening of the contingency specified.

Such a contract, in our opinion, cannot be classed as a contract for personal services. The company is not itself an attorney, and does not undertake the defense as such. What it does undertake is, in case of suit, to employ a local attorney, in whose selection the holder shall have a voice, who, with the company's attorney, will defend the case, and to relieve the holder from the expense thereof, an expense which must follow the happening of the very contingency provided against. Not only this, but the company must relieve the holder of paying the costs of suit. Suppose the contract had been to repay to the holder whatever sums, not exceeding \$5,000, he should be required to pay out for attorneys and costs in case of such litigation. Could there be any question that there would be a contract of insurance? We think not. Can it

sons, who are to be identified by having its journal in their possession, a definite sum of money upon the happening of a specified contingency. This we understand to be insurance, and we think a simple test will demonstrate the correctness of this conclusion. If an accident insurance company was doing precisely what is now in question, would it enter the mind of anyone to suppose that the transaction was not the issuing and acceptance of a policy such as it was authorized to issue?"

—payment contingent on price of shares.

It has been held that an agreement, in consideration of a certain sum, to pay a larger amount in case Brazilian shares should be done at a certain sum on a given date, is a policy of insurance, and is void under 14 Geo. III. chap. 48, where the parties have no interest in the subject-matter. *Patterson v. Powell*, 9 Bing. 320, 2 Moore & S. 399, 2 L. J. C. P. N. S. 13.

—against loss because of unsanitary conditions.

The inspection and certification as to the sanitary conditions of buildings and premises, against loss or damage to life or health from causes arising from imperfect sanitary conditions, is not insurance in any sense, and is not within the purview of statutes 47 L.R.A. (N.S.)

regulating the insurance business. *People ex rel. Woodward v. Rosendale*, 142 N. Y. 126, 36 N. E. 806, reversing 5 Misc. 378, 25 N. Y. Supp. 769.

—lightning rod contracts.

In *Cole Bros. v. Haven*, — Iowa —, 7 N. W. 383, it was held that a contract by one who had erected lightning rods, that the rods would protect the building for a certain term of years, which undertakes to make good all such immediate damage as might occur by lightning during that term, not exceeding a certain amount, was a contract of guaranty, and not one of insurance, and that the statutes regulating insurance companies were therefore inapplicable. The court said: "If one is employed to watch a building, he may agree, in consideration of such employment, that he will pay therefor if it burns down through his negligence. In fact, the agreement to pay might be absolute and unconditional. This would not be a contract of insurance, but a guaranty. So one may sell goods, and agree that the purchaser will receive certain named benefits or advantages. Such a contract would be a guaranty or warranty, and not a contract of insurance. The plaintiff 'guaranteed' the lightning rods would protect the building from all damages by lightning, and if they failed in so doing, the plaintiff would pay a certain specified amount. Such a contract could be lawfully made, and the note is not without consideration."

change the character of the contract in this respect that it purports to hold the holder harmless against the payment of such expenses and costs? The contract, reduced to its simplest idea, is but an agreement to pay the expenses and costs that the holder would have to pay in the contingency specified. This is indemnity pure and simple, and with whatever verbiage the contract may be clothed, it does not serve to cover its real purpose, which is one to indemnify the holder against damage and liability for attorney's expenses and costs of defense, in the event he is sued for malpractice.

It is faulty logic to say that this is not a loss, damage, or liability of the contract holder, premising that he does not incur it, and concluding that it is the liability of the Defense Company. The loss, damage, or liability follows the suit for malpractice; and, were it not for the contract of the Defense Company, the holder must bear it. Whose loss, damage, or liability would it then be? That of the person sued, of course. It is this very burden which the Defense Company agrees to bear in case the contingency of the holder being sued happens, and this is insuring the holder against the risk dependent upon the contingency. Looking on the other side, if this be a con-

tract for personal services, why limit the amount of the services to be rendered in dollars and cents? Attorneys do not take contracts for defending parties sued in that way. How peculiar it would be for an attorney to say: "I will engage in your defense \$5,000 worth." It would follow that when the fund was exhausted, the attorney would quit, whether the case was brought to a close or not. The very uncertainty of the amount to be paid by the Defense Company to meet the exigency contracted against is persuasive that the contract is not one of hiring, but one rather of indemnity. And such is our conclusion. See *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396. The reasoning of the court in this case is both cogent and persuasive.

The plaintiff cites with confidence *Vredenburgh v. Physicians' Defense Co.* 126 Ill. App. 509, and *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N. E. 567. While these cases are squarely opposed to our position, we are unable to adopt their reasoning.

It follows that the decree of the court below should be affirmed; and it is so ordered.

—guarantying payment of labor on goods destroyed.

An agreement by which a tailor undertakes to make trousers from material furnished by his employer, which specifies that in consideration of a reduction of \$1 from every \$100 worth of work done, the employer should pay the value of the work put upon the material if it should be damaged or destroyed by fire, has been held to be a contract of employment, and not one of insurance within the meaning of the insurance laws. *Stern v. Rosenthal*, 71 Misc. 422, 128 N. Y. Supp. 711. The court said: "An analysis of the contract shows that it lacks an essential element to enable it to be treated as a contract of insurance. There can be no contract of insurance unless there be a risk insured against. As Lord Mansfield said in the early case of *Tyrie v. Fletcher*, Cowp. Pt. 2, p. 666: "The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands, fails, and therefore he ought to return it." In the contract under the consideration the defendants ran no risk. They were obligated to pay off the plaintiff for his labor absolutely and unconditionally. If the goods were not destroyed, they were bound to pay the plaintiff, and if the goods were destroyed, they were required to pay him. While, as pledgees of the goods left with

the plaintiff, they had an insurable interest in the goods, it is not claimed that the defendants agreed to indemnify anyone for the loss of the goods. Indeed, as they were themselves the owners of the goods, there was no one whom they could indemnify against their loss. The defendants' obligation was merely to pay the plaintiff for his labor, and this labor was necessarily to be performed before the goods were destroyed. The defendants' obligation was in no sense contingent. If the goods were not destroyed, they were required to pay the plaintiff for his labor when the goods were returned to them. If the goods could not be returned to them on account of their destruction by fire, they were also to pay the plaintiff for the labor which he had performed upon them up to that time. In either event the defendants' obligation to pay was absolute. In no event was the obligation of the defendants to pay contingent upon any risk. Any risk the defendants ran related to the goods, and not to their obligation to pay for the labor of the plaintiff. The payment which the defendants agreed to make was not to be made to the person who suffered the loss. The payment was to be made to the person hired for the services which he had rendered.

As to insurance covering automobiles, or indemnity against injury or liability for injury caused thereby, see note to *Harris v. American Casualty Co.* 44 L.R.A. (N.S.) 70. J. T. W.

KANSAS SUPREME COURT.

T. C. NEWBY, Appt.,

v.

J. J. NORTON et al.

and

EL DORADO NATIONAL BANK, Appt.

(— Kan. —, 133 Pac. 890.)

Marshaling — mortgages — personal liability of claimant.

1. The owner of a tract of land, who gives a mortgage upon it and then conveys it in consideration of the buyer assuming the mortgage debt and giving him a note for the rest of the purchase price, secured

Headnotes by MASON, J.

Note. — Marshaling assets for benefit of mortgagor.

For rule as to inverse order of alienation as affected by assumption of mortgage debt, see the note to Chancellor v. Towell, 39 L.R.A.(N.S.) 359.

For duty of one debtor to exonerate the other, as affecting the rule which denies the right to marshal assets where the funds are not derived from a common source, or are not in the hands of a common debtor, see the note to Carter v. Tanners' Leather Co. 12 L.R.A.(N.S.) 965.

It will be seen that it is decided in NEWBY v. NORTON that the fact that the mortgagor is a debtor does not prevent securities being marshaled in his favor.

The old idea that securities would not be marshaled at the request of the debtor is no longer unqualifiedly true, if ever it was.

As far as mortgagors are concerned, the statement that the debtor has no right to have securities marshaled is generally made in such a manner as to suggest that the mortgagor is a person not entitled to any consideration; i. e., he has given a lien on his property, and if he does not pay the debt, he is not to be permitted to offer any suggestions to the mortgagee concerning its collection.

But such is not at all the view which equity takes of the mortgagor. On the contrary it regards him with much consideration. It is, for example, a rule of law that, upon a mortgage foreclosure, the mortgagee is entitled to no more than the sale of a sufficient amount of land to pay his claim and costs, whether the land is described in the mortgage in parcels or in one piece. Wiltsie, Mortg. Foreclosure, §§ 573, 574. See also, to the same effect under the Louisiana Code, Blanchard v. Naquin, 116 La. 806, 41 So. 99. Thus, where the statute provided that the property mortgaged, or so much thereof as might be necessary for the satisfaction of the debt and costs, be sold, it was held that no more of the mortgaged premises should be sold than sufficient to pay the debt and expenses,—otherwise a sale would be set aside. Thomas v. Few-47 L.R.A.(N.S.)

by a second mortgage on a part of the tract, is not precluded by the fact that he is personally liable for the payment of the first mortgage, from requiring a marshaling of securities, so that the parcel of land on which he has no lien shall be appropriated to the payment of the first mortgage before the remainder of the tract is resorted to for that purpose.

Same — sale under single encumbrance — notice — effect.

2. In the situation stated the right to a marshaling of securities is not defeated by the sale of the tract which is subject only to the first mortgage, to a purchaser for value, who from the record has notice of both mortgages and of the assumption of the first mortgage debt by the maker of the second mortgage, although such sale is made before such right has been asserted.

ster, 95 Md. 446, 52 Atl. 750. See also Quigley v. Beam, 137 Ky. 325, 125 S. W. 727. The rule is not an arbitrary one, but is to be enforced in the sound discretion of the court when necessary to protect the rights of the debtor, and to insure the best prices that can be obtained for the property. Miller v. Trudgeon, 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 739.

The question of the marshaling of securities at the mortgagor's request is therefore not to be approached with any preconceived idea that the mortgagor, when he makes a mortgage, puts himself out of court. The true principle would seem to be that securities will be marshaled in favor of one in whom there is a substantial equity or the superior equity, whether he be mortgagor or junior creditor (provided, of course, in all cases there be no infringement of any substantial right of the mortgagee).

One of the most frequently cited cases denying the right of marshaling to a debtor is Rogers v. Meyers, 68 Ill. 92, holding that where a judgment creditor of the mortgagor has sold mortgaged property, the mortgagor cannot prevent the mortgagee from suing him at law, nor, if he pays the mortgage, can he be subrogated to the rights of the mortgagee against the rights of the judgment creditor, who has bought the mortgaged property. The court said: "We do not see that the principle that where a creditor has a lien on two funds, and another creditor has a lien on one of those funds, the former will be required to satisfy his claim out of the fund upon which the other has no lien, can be applied in this case. That is a rule that may be invoked as between different creditors, but has, so far as we are aware, never been applied as between debtor and creditor."

It must be confessed that cases are comparatively rare where it clearly appears that securities were marshaled in favor of a debtor against the objection of the creditor. It would seem that the proposition that securities may be marshaled at the request of the debtor would be supported

Same — instigation of owner — effect.

3. In that situation the rights of one who has purchased the first mortgage are not diminished by the fact that such purchase was made at the instance and for the benefit of the owner of the tract covered only by that mortgage.

(July 5, 1913.)

APPEAL by plaintiff and the defendant bank from a judgment of the District Court for Butler County refusing to require the amount of a mortgage upon a tract of land to be paid from a portion of the tract, in aid of the liens of appellants upon the other portion. Modified.

The facts are stated in the opinion.

by cases which hold that where a mortgagor has conveyed part of the mortgaged property to one who assumes the payment of the entire mortgage, the property so conveyed ought to bear the entire mortgage in exoneration of the part retained by the mortgagor. But on looking into the cases, it will be seen that most of them simply discuss the question as between the mortgagor and his grantee, not discussing the right of the mortgagee to object.

No other case has been found containing the precise situation considered in *NEWBY v. NORTON*, of a sale by the mortgagor of all the mortgaged premises, he taking back a mortgage on a part of the land, where the question of marshaling securities in favor of the mortgagor has arisen. But this raises practically the same question as a sale of part of the premises with an assumption by the grantee of the entire mortgage. As has been just said, the cases on this subject (see the note to *Chancellor v. Towell*, 39 L.R.A. (N.S.) 359) usually do not discuss the question as between mortgagor and mortgagee.

It was held in *Halsey v. Reed*, 9 Paige, 448, that when, as between mortgagor and his grantee of a part of the mortgaged premises, the latter has become liable to pay the whole mortgage, upon foreclosure the proper course is for the mortgagor to ask for a decree compelling the owner of the mortgage to exhaust first his remedy by a sale of the property conveyed. So it was said, on the authority of this case, in *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90, that "if a mortgagor conveys part of the mortgaged premises subject to the whole mortgage, the part sold is first liable for the debt, i. e., it becomes the principal debtor; and the mortgagee must exhaust it before he can seek other property of the mortgagor, who has become in equity the surety."

In *Waters v. Hubbard*, 44 Conn. 340, where a mortgagor sold some of the property, the grantee assuming the payment of the entire mortgage, and later making a mortgage to the original mortgagee to secure the same debt that he had assumed, it 47 L.R.A. (N.S.)

Messrs. V. P. Mooney, E. D. Stratford, George J. Benson, and T. A. Kramer, for appellants:

Where the conditions exist the junior mortgagee can have the doctrine of marshaling liens enforced as a matter of right, unless something has occurred which changes the general rule.

Equitable Mortg. Co. v. Lowe, 53 Kan. 39, 35 Pac. 829; *Story*, Eq. Jur. § 633; *Burnham v. Citizens' Bank*, 55 Kan. 545, 40 Pac. 912; 1 Jones, *Mortg.* § 875; 19 Am. & Eng. Enc. Law, 2d ed. p. 1256; 26 Cyc. 927.

A conveyance of real estate does not defeat a marshaling of liens.

Oliver v. Wright, 47 Or. 322, 83 Pac. 870; *Boone v. Clark*, 129 Ill. 460, 5 L.R.A.

was held (the law in Connecticut being that the mortgagee was entitled to all the property until his debt was paid) that the original mortgagor could not claim that his mortgage should be collected first out of the property which he had conveyed, but that such a claim would have been just and equitable in a jurisdiction where the mortgage was collected by a sale of the property and an appropriation of the proceeds to the payment of the debt.

Where property had been conveyed to a person who assumed the payment of a mortgage, which mortgage also covered land retained by the grantor, it was held, in an action by the grantor to compel the foreclosure of this mortgage and to have the property which he had conveyed sold first, that he was entitled to such a decree, the mortgagee not objecting. The court stated that under these circumstances it was not necessary for them to determine whether an action would lie to compel the mortgagee to foreclose his mortgage. *Mowry v. Mowry*, 137 Mich. 277, 100 N. W. 388.

It may be noted that even in Illinois it has been held, where a mortgagor sold part of the property to a person who assumed payment of the entire mortgage debt, that upon foreclosure of the mortgage the mortgagor was entitled to have the property which he had conveyed sold first. *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719. But it does not appear that there was any objection to this on the part of the mortgagee.

Mortgages covering both exempt and non-exempt property.

The principle that a mortgagor may have securities marshaled in his favor is illustrated in the cases of mortgages covering both exempt and nonexempt property. Perhaps the most frequent cases of this kind arise where the exempt property is a homestead, and here there is a difference of opinion among the courts. These homestead cases, while often decided upon general principles, depend largely upon the terms of particular statutes, and are not included here.

276, 21 N. E. 850; 19 Am. & Eng. Enc. Law, 2d ed. 1260, 1261; Union Stove & Mach. Works v. Caswell, 48 Kan. 689, 16 L.R.A. 85, 29 Pac. 1072; Mulvane v. Sedgley, 63 Kan. 105, 55 L.R.A. 552, 64 Pac. 1038; 1 Story, Eq. Jur. 637; Knowles v. Williams, 58 Kan. 221, 48 Pac. 856; Frazier v. Jeakins, 64 Kan. 615, 57 L.R.A. 575, 68 Pac. 24.

Messrs. Dale, Amidon, & Madaleno and C. L. Aikman, for appellee:

The doctrine of marshaling securities "will never be applied unless both sources of payment belong to a common debtor."

Perry v. Elliott, 101 Va. 709, 44 S. E. 919.

The principle of marshaling assets is inapplicable where, the person seeking to in-

vokes the doctrine (Newby) is himself bound to the creditor (Hairtront) entitled to the double security.

19 Am. & Eng. Enc. Law, 1286; 1 Story, Eq. Jur. § 643; 3 Pom. Eq. Jur. § 1414; Rogers v. Meyers, 68 Ill. 92; Boone v. Clark, 129 Ill. 466, 5 L.R.A. 270, 21 N. E. 850; New York Co-op. Bldg. & L. Asso. v. Brennan, 62 App. Div. 610, 70 N. Y. Supp. 916.

Mason, J., delivered the opinion of the court:

T. C. Newby owned a farm containing 520 acres. He procured a loan upon it for \$4,500, executing to the Warren Mortgage Company a mortgage and a commission mortgage, which will be spoken of as one in-

It has been held that a judgment creditor who has bought up a mortgage upon both exempt and nonexempt property, in selling under the mortgage, must sell the nonexempt property first (Baughn v. Allen, — Tex. Civ. App. —, 68 S. W. 207); and that the debtor is entitled by injunction to prevent the contrary (Hays v. Barlow, 98 Miss. 487, 54 So. 2, Ann. Cas. 1913B, 394).

In Miller v. McCarty, 47 Minn. 321, 28 Am. St. Rep. 375, 50 N. W. 235, the court stated that, in common with some other jurisdictions, it had adopted the rule that a mortgagor is entitled both as against the mortgagee and subsequent encumbrancers to require the mortgagee to collect his debt out of the nonexempt property, if that is sufficient, but, in the case itself, it was held that the debtor cannot do this when he has practically abandoned the nonexempt property to the junior creditor, and has permitted him to go to expense in regard thereto.

In Frantz v. Hanford, 87 Iowa, 469, 54 N. W. 474, where there were two mortgages on both exempt and nonexempt property, and these mortgages had been acquired under the statute by an attaching creditor who, obtaining judgment and issuing an execution, sold the nonexempt property and applied the proceeds first upon the first mortgage, paying it off, secondly upon his judgment, it was held that this he could not properly do, as the money applied upon the judgment ought to have been applied upon the second mortgage, for otherwise the exemption would have been destroyed.

In Sanders v. Phillips, 62 Vt. 331, 20 Atl. 104, it was held that where a creditor holds a mortgage on exempt property, and also another unsecured claim against the debtor, and he recovers judgment upon the unsecured claim and issues execution upon part of the mortgaged property, which sells for more than enough to pay the mortgage, the mortgage is paid and discharged, that is, that the money must be applied first to the payment of the mortgage, and that this will release the other mortgaged property which is exempt.
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But in Citizen's Sav. Bank v. Wood, 134 Iowa, 232, 111 N. W. 929, the court declined to extend the principle to a debtor whose principal debt was as tenant. Thus, it was held in the case that where a landlord has a lien by statute upon all the crops and personal property, and other creditors have a lien by mortgage upon the other personal property, the tenant cannot object if the landlord stands aside and permits the mortgagees to collect their debts from the mortgaged property, although this results in the landlord being obliged, in order to make his debts, to sell all the crops, including a part of the crops which would have been exempt to the tenant from all claims except those of the landlord. The court, however, said: "Possibly, if the mortgages had covered exempt and nonexempt property, the debtor might insist upon the nonexempt property being first sold. Sanders v. Phillips, supra. See also Frantz v. Hanford, supra."

Miscellaneous.

It may be noted that in Whittaker v. Belvidere Roller Mill Co. 55 N. J. Eq. 674, 38 Atl. 289, it was held that neither the mortgagor nor his fraudulent grantee could compel a first mortgagee to resort first to that tract upon which his mortgage and that of a subsequent mortgagee were both liens, nor could they deprive a second mortgagee of his equity to have the assets so marshaled that both mortgages might, if possible, be paid.

Reference may be made here to Solicitors' & General L. Ins. Soc. v. Lamb, 2 De G. J. & S. 251, 33 L. J. Ch. N. S. 426, 10 Jur. N. S. 739, 10 L. T. N. S. 792, 12 Week. Rep. 941, where a life insurance policy declared that it was void unless it had been assigned for valuable considerations, and the assured borrowed money secured by the policy and real estate mortgages, and committed suicide. It was held that the company, having paid the insurance, was not entitled to any surplus from the mortgaged property over the balance of the debt. B. B. B.

strument. Later he sold it to J. J. Maxey, who in the deed assumed the payment of the existing mortgage on the entire tract, and also gave Newby a note for \$10,100, secured by a second mortgage upon 360 acres of it. Maxey then sold the land to W. F. Young, who sold it to J. J. Norton. Neither Young nor Norton became personally liable for any part of the mortgage debt, but each accepted a deed reciting that the land was subject to both mortgages. Norton sold to Charles Bradshaw the 160 acres that was not covered by the second mortgage; the deed providing that this tract should be subject to 36 per cent of the first mortgage. Both mortgages being in default, Newby began an action for the foreclosure of that owned by him, making Charles Harttront, who had purchased the first mortgage, a party. A decree was rendered for the foreclosure of both mortgages. The two tracts, that owned by Norton and that owned by Bradshaw, were ordered to be sold separately; 64 per cent of the first mortgage debt to be paid from the proceeds of the former, and the remaining 36 per cent from the proceeds of the latter. Newby appeals; his chief contention being that the entire proceeds of the tract on which he had no lien should have been appropriated, so far as necessary, to the payment of the first mortgage, which covered both tracts, before the other was resorted to for that purpose.

The principle which the appellant invokes has been thus stated: "The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only (as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another), the former must seek satisfaction out of that fund which the latter cannot touch." 4 Pom. Eq. Jur. 3d ed. § 1414; 19 Am. & Eng. Enc. Law, 1256.

"The doctrine of marshaling assets and securities is that where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity, on the application of the latter, will compel the former to make his debt out of that fund to which the latter cannot resort." 26 Cyc. 927.

Here Harttront and Newby each have a personal claim against Maxey, who, by the assumption of the first mortgage, became directly indebted to Newby. Harttront's 47 L.R.A. (N.S.)

claim is secured by a first lien on the tract owned by Bradshaw and also on that owned by Norton. Newby's claim is secured only by a second lien on the Norton tract. Newby has a right to require that Harttront shall look first to the Bradshaw tract, unless this right is defeated either (1) by the fact that he is personally liable on the debt secured by the first mortgage, or (2) by the fact that the Bradshaw tract is no longer owned by Maxey, but has been bought and paid for by Bradshaw. Harttront has no real concern in the matter. His security is abundant, and in any event he can suffer no prejudice from being required to resort first to one tract rather than to the other. The controversy is between Newby and Bradshaw, and turns upon the question, Which has the superior equity?

It has been said that a marshaling of securities cannot be required by a "single creditor" (that is, one having a lien only on a single fund) who is himself bound to the "double creditor" (the one having a lien on both funds). 19 Am. & Eng. Enc. Law, 1286, note 7; 26 Cyc. 937, note 46. In the case cited in each of the notes referred to, Lord Westbury said: "The doctrine of marshaling is no more than this: That where one person has a clear right to resort to two funds, and another person has a right to resort to one only of these two funds, the latter may say that, as between himself and the double creditor, that double creditor shall be put to exhaust the security upon which the single creditor (if I may so call him) has no claim. But it would be utterly impossible to apply that doctrine to a case where the single creditor is in truth himself bound to the party entitled to the other security." *Dolphin v. Aylward*, L. R. 4 H. L. 486, 505. There, however, the situation was such that the "single creditor" had no right to require the debt he owed to be made out of the property, as appears from the statement: "Nor is any contract taken that the land shall be the primary . . . fund for the payment of these debts." Page 504. The intimation is clear that, if the primary liability had been against the property, the fact that the "single creditor" was also personally liable would not have destroyed his right to ask a marshaling of securities. "Where land is sold subject to a mortgage, the effect, as between the grantor and the grantee, is to make the land the primary fund for the satisfaction of the encumbrance." 27 Cyc. 1343.

Here Newby sold the land to a buyer who assumed the mortgage debt. Young and Norton each took subject to the mortgage. While the deed from Norton to Bradshaw

purported to convey title to the 160 acres subject only to 36 per cent of the first mortgage, this was consistent with the theory that Newby's personal liability was secondary to the lien on the land. And doubtless no arrangement between the grantor and grantee in that instrument could re-establish the primary liability of Newby. He therefore owed no duty to Bradshaw to pay the first mortgage, and his obligation to to Hartront was not fatal to his claim for a marshaling of securities.

If proceedings to enforce the two mortgages had been begun while Maxey still owned the land, Newby would clearly have had the right to insist that the tract on which he had no lien should be first exhausted. To determine how far his rights in this respect were affected by the sale to Bradshaw involves the consideration of a question concerning which there is some conflict in the authorities. After noting one aspect of this conflict, the author of the article on "Marshaling Assets" in the American and English Encyclopædia of Law continues: "Subject to the foregoing qualifications, it may be stated as a general rule that the right of the junior creditor as against the common debtor is practically absolute, and consequently prevails against all those claiming under the debtor by lien or title subsequent in time. Generally, however, the equity will not be enforced to the prejudice of one having an equal or superior right. Subsequent purchasers or encumbrancers, with actual or record notice of the facts giving rise to the equity, have no such superior standing, however, as to enable them to prevent the application of the doctrine." 19 Am. & Eng. Enc. Law, 1260, 1261.

Where a condition has arisen under which the holder of a mortgage on a part of a tract, the whole of which is covered by a prior mortgage, would have a right to invoke the doctrine of marshaling securities against the first mortgagee and the common debtor, this right continues against anyone who acquires an interest in the part of the tract not covered by the second mortgage in any of the following ways: By virtue of an attachment or judgment lien; by a voluntary or fraudulent conveyance; by purchase with actual or constructive notice that the second mortgagee has already asserted such right. See context to last citation, and notes. There are cases holding that the right may be successfully invoked against one who has purchased and paid for the tract which is subject only to the first mortgage, with notice from the record of the existence of the second mortgage; this is on the theory that such purchaser has notice of the facts which give the right, and that with such notice he can

acquire no more advantageous position than that occupied by his grantor, and therefore that he takes title subject to the same equities. *Conrad v. Harrison*, 3 Leigh, 532; *Robeson's Appeal*, 117 Pa. 628, 12 Atl. 51; *Boucher v. Smith*, 9 Grant, Ch. (U. C.) 347. The weight of authority, however, seems to support the contrary view, which is elaborated in an opinion by Judge Horace H. Lurton in *Gilliam v. McCormack*, 85 Tenn. 597, at page 606, 607, 4 S. W. 521, where the prior decisions are carefully reviewed. It was there said: "The proposition contended for would amount to this: That, if at any time the situation of several subsequent mortgagees is such that as between themselves, such a marshaling of securities could have been invoked, by proper application to a court of equity, as would result in the satisfaction of the senior mortgages out of a fund which the junior mortgagee could not reach, whereby the fund upon which he could only go should be left for his satisfaction, that this inchoate equity cannot be disturbed, displaced, or defeated by any subsequent alienation or mortgage by the common debtor or mortgagor. This rule, if admitted, would result in elevating an inchoate equity to marshal assets or securities to the high plane of a lien. Yet it would be an encumbrance or lien of which a subsequent mortgagee would have no notice by record or otherwise. It would clearly be in antagonism to our registry laws. . . . It follows, therefore, from this view of the question, that the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but, on the contrary, is one to be determined at the time the marshaling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced; and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds." This reasoning is very persuasive, but if the conclusion is accepted it does not necessarily determine the exact question here involved.

The rule that, as between the original parties, the mortgagee of a part of a tract may require the holder of a prior mortgage upon all of it to proceed first against that not covered by the second mortgage is manifestly fair. It does no injury to one creditor, and confers a benefit on the other, while the common debtor cannot be heard to complain. Whether it should be applied against new parties depends upon their comparative equities. 26 Cyc. 931. One who acquires title through the debtor without parting with value (as a judgment creditor or a grantee in a voluntary conveyance) cannot thereby gain any superior

standing. Even a purchaser for value who becomes such with notice of a proceeding to enforce the right to have the securities marshaled must be deemed to have acted at his peril. But it might unduly extend this merely equitable right to allow its enforcement against one who has bought and paid for the singly mortgaged land, knowing, to be sure, of the existence of the two mortgages, but having no particular reason to anticipate that the doctrine of marshaling securities will ever be invoked. The present case, however, is affected by a special feature of the relation between Newby and Maxey. The principle followed in the Tennessee case, with the reason upon which it is based, has been given this expression: "The equity of marshaling arises where the owner of property subject to a charge has subjected it, together with another estate, to a paramount charge, and the estate thus doubly charged is inadequate to satisfy both the claims. . . . The equity is apparently not binding on the debtor's alienee for value, notwithstanding that he may have taken with notice of the facts, unless his interest were acquired after the institution of a suit. For, although the ordinary rule is that an alienee with notice is bound by all the equities which bound his alienor, yet there is a distinction in regard to this particular equity, because the omission of the creditor to take an express collateral charge raises a presumption that he meant to leave the equity defeasible and to continue the owner's power of dealing with the second estate for value, unfettered by his claim. It is otherwise if the debtor, on creating the single claim covenants to satisfy the paramount charge out of the other estate, or fraudulently conceals its existence. For then a purchaser taking with notice of the covenant or concealment will be bound by the same equity as the debtor himself." Adams, Eq. 8th ed. pp. 271, 273.

The general rule as thus stated applies to the ordinary case where the owner of land first mortgages all of it to one creditor and then mortgages a part of it to another. The mortgagor gives the second mortgagee no assurance that he will pay the first mortgage, or that the land covered by the second mortgage shall be exonerated from liability upon the first. Equity does not read such an assurance into their contract, but merely as a matter of fairness requires the first mortgage to be paid out of the tract not covered by the second. Here, however, Maxey specifically agreed that he would pay not merely the second mortgage debt but also the first. He thereby bound himself that the first mortgage should be paid without recourse upon the tract mort-

gaged to Newby; in effect that the other tract should be first exhausted. This obligation, being essentially contractual, could not be affected by the transfer of the singly encumbered tract. All grantees claiming under Maxey had notice from the record of his assumption of the first mortgage debt (Knowles v. Williams, 58 Kan. 221, 48 Pac. 856), and were bound by the implied agreement to exonerate the singly mortgaged tract from liability therefor.

A very similar situation arises where several portions of a mortgaged tract are successively conveyed to different grantees, under an actual or virtual agreement that the grantor shall pay off the lien. In that case the parcels conveyed are chargeable in the inverse order of alienation (19 Am. & Eng. Enc. Law, 1773; 27 Cyc. 1307), and the rule is held not to be affected by the subsequent transfer of any of the portions sold (19 Am. & Eng. Enc. Law, 1275). The equity arising from this situation is stronger than that ordinarily requiring the marshaling of securities. It really rests upon the contract. The mortgagor who conveys a part of the mortgaged premises by warranty deed undertakes that the buyer shall be saved harmless from the mortgage, that the tract retained shall bear the entire burden, and that the tract sold shall be exonerated. The right to the enforcement of this understanding is essentially contractual, and ought not to be disturbed by subsequent transfers of the property. This distinction was noted in the Tennessee case, where it was said: "A marked distinction exists between the cases holding lands sold subject to the lien of a vendor, or that of a mortgage or judgment, liable for the discharge of such lien in the inverse order of alienation. In all such cases the parcels were all actually bound by a lien or encumbrance, of which the alienees had notice, either actual or constructive, and not by a mere equity, such as that to have a marshaling." Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521.

Indeed, the whole practice of charging separate parcels of a mortgaged tract (when conveyed successively to different persons by deeds in which the grantor undertakes to pass a clear title), in the inverse order of alienation, rests upon the theory that he who buys one parcel, knowing that another has already been sold, stands on no better footing than his grantor and must submit to his own land being appropriated to the payment of the lien before that previously deeded is resorted to. This is essentially the situation here presented. Maxey at one time owned the land, all of which was subject to a first mortgage. He had given a second mortgage to

Newby on a part of it, and had specifically agreed with Newby to pay the first mortgage debt. The title which Bradshaw subsequently acquired, through Young and Norton, to the tract not covered by the second mortgage, was carved out of Maxey's interest, and was subject to the same equities. If Maxey had deeded to Newby the tract covered by the second mortgage, in satisfaction of the note thereby secured, and had then conveyed the rest of the land to Bradshaw, directly or through others, Newby's equity would be directly within the protection of the rule regarding the inverse order of alienation. The fact that Newby held a mortgage on the parcel in which he was interested, instead of a deed, does not lessen his claim, since the essential element is present of a guaranty by the owner of the land that he shall be saved harmless from the first mortgage. That this view accords with the opinion in the Tennessee case appears from what was later said by the supreme court of that state: "If the person who ought to pay the debt has conveyed different parcels of land bound for its payment, at several times, to bona fide purchasers, as between such purchasers, the lands are chargeable in the inverse order of their alienation.' . . . It will . . . be seen that, though adopted by the courts without the aid of a statute, yet it [the rule] has been so long established, and so uniformly applied, that it may well be regarded as a rule of property in this state. . . . The true foundation of the doctrine is in the equities subsisting between the vendor or mortgagor and his grantee of a part of the premises subject to the superior lien. Wherever a portion of lands so subject is conveyed by a warranty deed that is properly registered, and a portion is retained by the grantor, as between himself and his grantee, that part retained becomes in equity a primary fund for the discharge of this superior lien. As is well expressed by Mr. Pomeroy, in § 1224, third volume, of his work on Equity Jurisprudence: 'The form of the deed shows that the grantee not only assumed payment of no portion of the mortgage debt, but did not buy his parcel even subject to the mortgage; and the entire burden was therefore left upon the portion of land remaining in the ownership of the mortgagor. Whatever be the rights of the mortgagee to resort to either or both of the parcels, it is plainly the equitable duty of the mortgagor to assume the whole debt and thus to free the grantee's parcel from the lien. . . . The doctrine being thus established that the grantee obtains an equitable prior-

ity as against the mortgagor, and the portion of the premises left in the mortgagor's hands is primarily chargeable with the whole mortgage, the inference is natural, if not necessary, that the same burden follows this portion when subsequently conveyed by the mortgagor to the second grantee.'" Meek v. Thompson, 99 Tenn. 732, 735-737, 42 S. W. 685, 686, 687.

It cannot be contended that Newby, in failing to have Maxey's note to him secured by a mortgage on the entire farm, expressed a willingness that the tract which was afterwards conveyed to Bradshaw might be disposed of by Maxey without any regard to his rights. What motives actuated Newby and Maxey in making their contract is not a matter of inquiry. The contract made, even when interpreted as giving full force to Newby's equity of marshaling the securities, did not place Maxey in the same situation as though he had given a mortgage for the \$10,000 upon the entire 520 acres. He was at liberty by paying the first mortgage to free the 160-acre tract absolutely from all lien.

The suggestion is made that the doctrine of marshaling securities was not rightfully invoked, because proof was not made that Newby's lien was insecure. There was sufficient evidence, however, to that effect, and in any event, if Newby's claim is actually secure, the order regarding the marshaling of securities can work no prejudice to the other parties.

The appellant also maintains that Hartmont bought the first mortgage at the instance of Bradshaw to have this mortgage handled in such a manner as to be most beneficial to his own interest. The claim is made that this arrangement resulted in Newby's mortgage becoming a first lien. No reason is perceived why such result should follow.

The El Dorado National Bank has a claim upon the second mortgage, and has also appealed from the judgment but for the purpose of the questions here involved its interests are the same as those of Newby, and no separate statement of them is required.

The judgment of the District Court is modified so as to require all the proceeds of the Bradshaw tract to be devoted to the payment of the first mortgage before any part of the proceeds of the Norton tract are applied to that purpose. The necessary change of language will be indicated in the mandate.

All the Justices concur.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

FIDELITY & DEPOSIT COMPANY, Plff.
in Err.,
v.

WILLIAM A. SHEAHAN.

('—Okla. —, 133 Pac. 228.)

Limitation of actions — nonresidence — effect.

1. The residence out of the state which suspended the running of the Illinois statute of limitations in that state from October 5, 1897, up to and including October 5, 1907, was the fixed abode entered into with the intention to remain permanently, at least for a time, for business or other purposes.

Headnotes by SHARP, C.

Note. — Limitation of actions: what constitutes residence out of the state within the meaning of the statute.

The earlier cases on this question are gathered in note to Kerwin v. Sabin, 17 L.R.A. 225.

As to sufficiency of return to state to start statute of limitations running, see note in 23 L.R.A.(N.S.) 547.

As to applicability to nonresident of provision suspending limitation against defendant who is out of state, until his return, see note to 25 L.R.A.(N.S.) 24.

As to effect of mortgagor's absence from state to toll a statute of limitations as against foreclosure proceedings against his grantee, see note in 26 L.R.A.(N.S.) 898.

As to applicability of tolling provision in general statute when defendant is absent from state, to special limitations imposed by statute creating cause of action for wrongful death, see note to 38 L.R.A.(N.S.) 521.

As to applicability of provision that time during which defendant is a nonresident shall not be computed, to defendant who was a nonresident when cause of action accrued, see note in 34 L.R.A.(N.S.) 436.

The cases are not uniform as to what constitutes residence out of the state.

Residence for this purpose is not equivalent of domicil, and one may be a nonresident although his domicil is within the state. Johnson v. Smith, 43 Mo. 499; Rhodes v. Farish, 16 Mo. App. 430; Bennett v. Watson, 21 App. Div. 409, 47 N. Y. Supp. 569.

Conversely, it has been held that one may be a resident within the state for the purposes of the statute, although his domicil is out of the state. Bell v. Lamprey, 52 N. H. 41.

But in Massachusetts a change of domicil is held to be necessary. Slocum v. Riley, 145 Mass. 370, 14 N. E. 174; Whitton v. Wass, 109 Mass. 40; Perkins v. Davis, 109 Mass. 239.

In Hart v. Kip, 148 N. Y. 306, 42 N. E. 712, the court said that while it may not 47 L.R.A.(N.S.)

Same — change of domicil — necessity.

2. It is not necessary that there should be an actual change of the party's domicil in the strict legal sense of that word,—that is, an abandonment of his domicil in Illinois and the acquisition of a domicil elsewhere,—to bring him within the meaning of the statute of limitations; but he must have acquired a fixed and permanent abode or dwelling place out of that state, at least for the time being.

Trial — failure of defense — peremptory instruction.

3. Where, upon the issue of limitations, the undisputed evidence shows that plaintiff's cause of action is not barred by operation of the statute, it is error for the trial court to refuse a peremptory instruction to return a verdict for the plaintiff.

(April 5, 1913.)

have been necessary, in order to establish nonresidence, to show that defendant had changed his domicil, the distinction between domicil and residence had no application to the facts of the case.

To constitute nonresidence, the defendant must, while absent, at least take up his temporary abode in some particular place with the intention of making it his home while so absent, and actually residing there. Ibid.

A settled, fixed abode, and intention to remain permanently at least for a time, for business or other purposes, is essential in order to constitute a residing without the state, within the statute. Farr v. Durant, 90 Wis. 341, 63 N. W. 274.

In some states absence for a substantial period beyond reach of process is regarded as the test. This test, however, has reference to substituted forms of service by posting, leaving notice at residence, etc., and not merely to personal service.

Under the influence of this test, it has been held that nonresidence suspending the running of the statute was shown.

—where defendant was absent from the state for several years in performance of his duties as special agent of the General Land Office of the United States, his wife being also absent for three years of that time, though for the purpose of caring for her invalid married daughter, defendant having retained no property or business in the state, although he intended to return upon the termination of his employment, and did return upon resigning his position. Hedges v. Jones, 63 Iowa, 573, 19 N. W. 675;

—where a bachelor who, while in the state, usually boarded at a hotel and had no fixed home, was absent from the state for over two years, there being no place at which nor person with whom a summons could be left, so as to impart legal notice to him, although he did not acquire a fixed residence or domicil elsewhere. State v. Furlong, 60 Miss. 839;

—where a debtor left the state and was absent for over three years, and his family

ERROR to the Canadian County Court favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Robert N. McMillen and Johnson & Wishard, for plaintiff in error:

Where a cause of action arose in another state, the statute of limitations does not begin to run against it until the debtor becomes a resident of Oklahoma.

Richardson v. Mackay, 4 Okla. 337, 46 Pac. 546; Keagy v. Wellington Nat. Bank, 12 Okla. 35, 69 Pac. 811.

Defendant became a nonresident of Illinois about January, 1907, and became a

resident of Oklahoma territory on or about that date.

Hanson v. Graham, 82 Cal. 631, 7 L.R.A. 127, 23 Pac. 56; Lawson v. Adlard, 46 Minn. 243, 48 N. W. 1019; Weitkamp v. Loehr, 21 Jones & S. 82; Frost v. Brisbin, 19 Wend. 11, 32 Am. Dec. 423; Barney v. Oelrichs, 138 U. S. 529, 34 L. ed. 1037, 11 Sup. Ct. Rep. 414; Morgan v. Nunes, 54 Miss. 308; Keller v. Carr, 40 Minn. 428, 42 N. W. 292; Krone v. Cooper, 43 Ark. 547; Pells v. Snell, 130 Ill. 379, 23 N. E. 117; Penfield v. Chesapeake, O. & S. W. R. Co. 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566; Hart v. Kip, 74 Hun, 412, 26 N. Y. Supp. 522; Bennett v. Watson, 21 App. Div. 409, 47 N. Y. Supp. 569.

—moved from the homestead and resided with a relative in another county during his absence, there being no usual place of abode in the state where process could have been left with a member of the family. Miller v. Tyler, 61 Mo. 401;

—where a commercial traveler who was a bachelor, and who had no fixed place of residence or any family with whom he stayed upon whom service could be made in his absence, but who stayed at hotels and boarding places or at a rented room while in the city, was absent for long periods of time for over five years, returning to the state between trips, and at other times when out of employment. Rhodes v. Farish, 16 Mo. App. 430;

—where the defendant was absent for one year immediately preceding the commencement of the suit, so that service of process could not have been made upon him. Bigmold v. Carr, 24 Wash. 413, 64 Pac. 519;

—where a widow left the state taking her family with her, and taught school at the same place in another state for eleven years, retaining the house which she rented and paying the rent during her absence throughout the vacation periods, when she returned to her former state, her visits being to different places in that state, and not to the farm which she owned and claimed as her home, the dwelling house thereon having been destroyed by fire. Dignam v. Shaff, 51 Wash. 412, 22 L.R.A. (N.S.) 996, 98 Pac. 1113.

In State ex rel. Shipman v. Allen, 132 Mo. App. 98, 111 S. W. 622, it was held that evidence tending to show that the debtor and his family left the state and resided elsewhere for about four years, and had no place of abode within the state where service of process could be made, justified submission of the question of nonresidence to the jury, although he occasionally returned to the state for the purpose of attending court and looking after other business.

But under the influence of this test, it has been held that nonresidence suspending the running of the statute was not established,

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—where one was absent from spring to fall in Europe, where he had gone with his family for his health, it appearing that he left his house with all his furniture undisturbed, so that service could have been made by posting, as prescribed by statute. Dent v. Jones, 50 Miss. 265;

—where a debtor left his family on the homestead, and was absent in another state for three years, until his death, being a political refugee during the War, and practicing medicine during that period, it appearing that service of process could have been obtained so as to authorize a personal judgment against him, by service of the summons upon some member of the family on the homestead. Bensley v. Haeberle, 20 Mo. App. 648;

—where one was absent in Italy for eleven years, having left his family in the state and conveyed his property to a trustee for their support until his return, as service of process such as would have authorized a personal judgment could have been had by leaving a copy of the petition and writ at the usual place of abode, which was deemed to be where the family permanently resided. Venuci v. Cademartori, 59 Mo. 352;

—where defendant, upon leaving the state, retained his valuable residence within the state, at which his family continued to reside, where service of process could be made, and he continued to act as president of a bank at the same place, and often returned, although he engaged in business without the state and established a permanent office, and there rented apartments at a hotel by the year. State v. Snyder, 182 Mo. 462, 82 S. W. 12;

—where a debtor left the state of New Hampshire and resided in Massachusetts with his family, but was in New Hampshire most of the time for several years at various places on business, and had property in the latter state, as personal service could have been had or his property could have been attached; and it was immaterial where he had his domicile. Bell v. Lamprey, 52 N. H. 41;

—where a debtor gave up his house, and

Messrs. Blake & Boys, for defendant in error:

The intention of a person as to the place of his residence is a question of fact to be determined by verdict of the jury or finding of the court, and such determination is conclusive upon appeal, if there is any evidence reasonably tending to support it.

Cornelison v. Blackwelder, — Okla. —, 131 Pac. 701; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768.

Sharp, C., filed the following opinion:

The question presented for our consideration is one of limitations. The note

his wife went to her father's home and occupied two rooms which were furnished with part of her own goods, the rest being stored in the attic of her father's house, and he engaged in business in another state, where he was employed by various parties for a period of six or seven months, returning every few weeks to visit his family, as he had a usual place of abode within the state where service of process could have been had by leaving a copy of the writ with his wife. *Gray v. Fifield*, 59 N. H. 131;

—where a resident of the state left his family in a rented house, and was absent in another state, working at his trade, for a number of years, but corresponded with his wife regularly, and always claimed New Hampshire as his home, and visited his family every year, as service which would support a personal judgment could have been secured by leaving an attested copy of the writ or summons at the usual place of abode. *Quarles v. Bickford*, 64 N. H. 425, 13 Atl. 642;

—where a defendant who was temporarily absent from the state part of the time covering a period of several years, but who maintained a home within the state in which his wife and children resided during his absence, and service of summons so as to bind him personally could have been had by leaving a copy at his usual place of abode. *Crowder v. Morphy*, 61 Wash. 626, 112 Pac. 742.

Other cases, without either affirming or denying the test, have held that nonresidence was not established,

—where one was absent from the state on short business trips, but with no purpose or intention of changing residence. *Drake v. Stuart*, 87 Iowa, 341, 54 N. W. 223;

—where a married man leased his home in Illinois, reserving one room in which he stored a portion of his household goods, left the state, residing at Ann Arbor, Michigan, where he studied law four years in the state university, and lived with his wife in a rented house, which was furnished with the remainder of his household goods. The court held that he did not acquire such a permanent abode in the state of Michigan 47 L.R.A. (N.S.)

sued on was executed at Peoria, Illinois, October 5, 1897, and was payable one year after date. Action to recover judgment was begun October 7, 1909, in the county court of Canadian county. The defendant pleaded the Illinois statute of limitations, which provides that actions on promissory notes shall be commenced within ten years after the cause of action shall have accrued. The plaintiff replied, setting up another provision of the Illinois statute of limitations, which follows: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or return to the state; and if after the cause of action accrues, he departs from and resides out of the state [then] the

as to make him a nonresident of Illinois, within the meaning of the statute. *McClure v. Putnam*, 142 Ill. App. 497;

—by mere absences as a traveler for business or pleasure, averaging about fifty days in each year for seven successive years, without the intention of remaining away, followed in each case by a return to the state. *Tomes v. Barney*, 35 Fed. 112; *Hennequin v. Barney*, 24 Fed. 580;

—by mere absence as a traveler for business or pleasure, in Europe, for two and a half years, by one who had a residence and his domicile within the state. *Hart v. Kip*, 148 N. Y. 309, 42 N. E. 712;

—where a resident of the state of Wisconsin retained his domicile in the state, but was absent in California three times during the period of seven years, the absences aggregating thirty months in all, and being for business or pleasure, and not such as to constitute a fixed and permanent abode there, even for the time being. *Farr v. Durant*, 90 Wis. 341, 63 N. W. 274;

—where a widower without children left his homestead and went to another state, where he spent most of his time during a period of six years with relatives, and returned occasionally to his homestead, until his death. *Taylor v. Thieman*, 132 Wis. 38, 122 Am. St. Rep. 943, 111 N. W. 229.

In *Bennett v. Watson*, 21 App. Div. 409, 47 N. Y. Supp. 569, where a resident of New York gave up his house, stored his furniture, and left the state, and took his family with him, and went to Florida and then abroad for the purpose of benefiting the health of his son, and with the intention of staying until he accomplished his object, and did actually remain absent for several years, until his son's death, it was held that he was a nonresident of the state during his absence, since he was not a mere traveler, although his domicile was still in the state of New York.

Residence out of the state is a temporary abode where one settles down with some business or some other purpose which requires it, with the intention of remaining in that place until such object is accomplished. *Ibid.*

time of his absence is no part of the time limited for the commencement of the action." Hurd's Rev. Stat. 1911, chap. 83, § 18. The material facts concerning defendant's departure from the state of Illinois, and his place of residence, were not disputed, and it is urged on the part of the plaintiff in error that the court erred in overruling the plaintiff's request for a peremptory instruction.

If, after the cause of action accrued, the defendant departed from the state of Illinois and resided outside its borders until the date of the institution of the present action, then we think the contention sound. The precise question, therefore, necessary for our determination, is: Did the defendant, according to the testimony, reside out of the state of Illinois after the accrual of plaintiff's cause of action, for it cannot be denied that he did depart therefrom. The testimony was that defendant's family resided at 914 Oakward boulevard, Chicago, since May 1, 1906. That defendant was in the employ of the Iron Mountain Railroad Company as its roadmaster at Poplar Bluff, Missouri, from April 1 to November 1, 1906, and was at his home in Chicago from the latter date to December 28th following, attending to some personal affairs. On the latter date he was employed by the Rock Island Railroad Company, and a few days thereafter was sent to Geary, Oklahoma, as trainmaster of the Panhandle division of said railroad company, and so continued until June 1, 1908, and remained there until the division officers were removed to El Reno on July 1, 1908, when defendant went to El Reno, retaining his former position as trainmaster, and which position he held until a short time before the trial, in the month of July, 1910, when he moved to Eldon, Missouri, at which place he was trainmaster for the same company. While in Geary his family occasionally visited him there. While in Oklahoma he did not vote there or in any other state, but it was shown that on August 10, 1907, a written petition was signed by him,

in which he gave Geary, Oklahoma, as his place of residence, and stated that he had resided there for a period of eight months. Much of defendant's time while in the railroad company's employment was occupied with his duties extending over several hundred miles of track, both in and out of the state; but that his office and headquarters were first at Geary, and afterwards at El Reno, is not disputed. It does not appear that defendant visited his family in Chicago from January, 1907, to the time of the trial in July, 1910.

Did the defendant, within the meaning of the statute, reside out of the state of Illinois during the period of his absence therefrom? It was stated by defendant while on the witness stand that he resided in the state of Illinois all the time while employed in Oklahoma, but, considering the testimony as a whole, it is obvious that during said term of years the defendant did not live in Illinois, and that it could only have been intended that during said time defendant maintained his home or domicile in said state. Construing the statute in question, the supreme court of Illinois in *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117, said: "The signification of the word 'reside,' as used in the present statute, presents a question not altogether free from difficulty. Numerous definitions of residence are to be found in the books, differing from each other mainly in respect to the greater or less degree of permanence of the inhabitancy or abode which they involve. See *Abbott's Law Dict.*, title, *Reside*. There seems, however, to be . . . a fixed and permanent abode or dwelling place, at least for the time being, as contradistinguished from a mere temporary locality of existence." The court, after reviewing decisions of the supreme court of Massachusetts, Vermont, Maine, and New Hampshire, observed: "We would not be understood as adopting the doctrine of the decisions above cited to the extent of holding that there must be an actual change of the party's domicile, in

The statute involved in these New York cases was amended May 14, 1896, and non-residence is no longer required to prevent the operation of the statute in that state. Hence, cases involving this later statute are not in point in this note.

In *Ware v. Gowen*, 111 Mass. 526, where a resident of the state who was absent for several years, working under a contract with a foreign government to raise sunken ships, intended to return, and did return, upon the completion of his contract, he having left the children with a relative in the state and having stored his goods there, taking his wife and one child with him, it was held that there was evidence to go to

the jury that defendant resided out of the state.

In *Coleman v. Territory*, 5 Okla. 201, 47 Pac. 1079, it was held that a defendant who sought to establish that he was "an inhabitant or usually resident within the territory," within the meaning of the statute, must show that he had a fixed, permanent, and established home where his personal presence might reasonably be known, and that one who returned to the territory, and resided at different places for the purpose of concealing himself, was not an inhabitant or usually resident within the territory, so as to enable him to claim the benefit of the running of the statute.

A. H. N.

the strict legal sense of that word, that is, an abandonment of his domicile in this state and the acquisition of a domicile elsewhere, to bring him within the meaning of our statute of limitations; all we intend to hold being that he must acquire a fixed and permanent abode or dwelling place out of this state, at least for the time being."

As was observed by the Supreme Court of the United States in *Barney v. Oelrichs*, 138 U. S. 529, 34 L. ed. 1037, 11 Sup. Ct. Rep. 414, in construing the words "to reside out of the state," in § 100 of the New York Code of 1849: "We hold that the residence out of the state which operated to suspend the running of the statute under § 100 as originally framed was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes, and, as there was no evidence tending to establish such a state of fact here, the judgment must be reversed. The same conclusion has been reached in effect by many of the state courts, and reference to decisions in Massachusetts, Maine, Vermont, and New Hampshire will be found in the well-considered opinion of the supreme court of Illinois in *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117, where the terms of the statute were nearly identical with those of that of New York, and the court approved the definition of 'residence' as given in *Re Wrigley*, 8 Wend. 134, *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423, and *Boardman v. House*, 18 Wend. 512." The latter case reviews the former decisions of that court in *Penfield v. Chesapeake, O. & S. W. R. Co.* 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566, and a large part of the early decisions of the appellate courts of New York, including the leading case of *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423, and points out with great clearness the difference between the meaning of the words "residence," "domicil," and "inhabitaney." In quoting from *Burroughs v. Bloomer*, 5 Denio, 532, 535, it was said: "The expressions 'and reside out of the state,' and 'the time of his absence' have the same meaning; they are correlative expressions. So that, while the defendant in this case resided out of, he was absent from, the state."

The converse then should apply here, under the facts proven; for, if the defendant had departed from, he was not an actual resident of, the state of Illinois. A mere transient visit of a person for a time at a place does not make him a resident while there; something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for

business or other purposes, to constitute a residence within the legal meaning of that term. A person may be a resident of one state, and have his domicile in another. He can have two or more places of residence, but only one domicile. Residence is an act; domicile is an act coupled with an intent. *Keller v. Carr*, 40 Minn. 428, 42 N. W. 292; *Long v. Ryan*, 30 Gratt. 718. Obviously the defendant lived in first the territory, afterwards the state, of Oklahoma for a period of over three years. That was the place of his actual residence, as distinguished from his domicile, and it is this character of residence that the statute contemplates. The defendant had a settled, fixed abode, while in the discharge of his services to his employer. His employment was continuous for a period of over three years, and it matters not that he did not vote in the state or elsewhere, or that he took no part in local affairs, as a failure to discharge fully all of the privileges and duties of a citizen does not of itself determine the question of one's residence. Where a man's family resides is not necessarily the place of his residence. *Frost v. Brisbin*, and *Penfield v. Chesapeake, O. & S. W. R. Co.* supra; *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411; *Krone v. Cooper*, 47 Ark. 547; *Amsbaugh v. Exchange Bank*, 33 Kan. 100, 5 Pac. 384. To our minds the statute contemplated actual residence out of the state, and it being shown, and not denied, that the defendant did reside for a period of over three years in what is now this state, and while here occupied a permanent position, he therefore had departed from and resided out of the state of Illinois. *Johnson v. Smith*, 43 Mo. 499; *Huss v. Central R. & Bkg. Co.* 66 Ala. 472; *Hanover Nat. Bank v. Stebbins*, 69 Hun, 308, 23 N. Y. Supp. 529; *Hart v. Kip*, 74 Hun, 412, 26 N. Y. Supp. 522; *Re Austen*, 13 App. Div. 247, 42 N. Y. Supp. 1097; *Bennett v. Watson*, 21 App. Div. 409, 47 N. Y. Supp. 569; *Weitkamp v. Loehr*, 21 Jones & S. 79; *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Hanson v. Graham*, 82 Cal. 631, 7 L.R.A. 127, 23 Pac. 56; *Morgan v. Nunes*, 54 Miss. 308; *Lawson v. Adlard*, 46 Minn. 243, 48 N. W. 1019.

From the undisputed evidence, the plaintiff's cause of action was not barred by limitation, and the amount to which it was entitled to recover, if at all, not being controverted, it was error for the trial court not to grant the plaintiff's request for a peremptory instruction to return a verdict for the plaintiff.

The judgment should be reversed and the cause remanded, with instructions to the

trial court to render judgment for the plaintiff.

Per Curiam:

Adopted in whole.

Petition for rehearing denied June 20, 1913.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

W. A. HORTON, Plff. in Err.,
v.

M. M. EARLY.

(— Okla. —, 134 Pac. 436.)

Justice of peace — appeal — amendment of pleadings.

1. The right to file amended pleadings in the county court, on appeal from a justice of the peace court, depends upon whether it is in furtherance of justice to permit them to be filed, and is to be determined by that court in the exercise of a sound judicial discretion.

Appeal — amendment of pleadings — error.

2. Where damages are sought to be recovered, and the only amendment made is to increase the amount or to add a new element of damages, and no objection to such amendment is made other than to object to answers to questions propounded to witnesses during the trial, no available error is presented on appeal.

Principal and agent — authority of agent.

3. The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury.

Landlord and tenant — implied warranty of fitness.

4. In the lease of a building for mercantile purposes, there is no implied warranty that it is suitable or properly adapted for the uses to which it is applied, nor that it shall continue to be suitable for the lessee's use or business, or safe from exposure to danger from the elements.

Same — negligent repairs — liability.

5. A lessor who, in the absence of a stipulation to repair, nevertheless, at the request of the lessee, gratuitously authorizes re-

pairs to be made upon the leased premises, but does so in such a negligent and unskilful manner that damages therefrom result to the tenant, is liable to the latter for such loss and damage.

Appeal — error in instructions — correct verdict.

6. Where it appears from the evidence that a verdict is so clearly right that, had it been different, the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instructions.

(August 6, 1913.)

ERROR to the Bryan County Court to review a judgment in defendant's favor in an action brought to recover rent of a store building alleged to be due and unpaid. **Affirmed.**

The facts are stated in the Commissioner's opinion.

Messrs. W. H. Ritchey and Phillips & Fowler for plaintiff in error.

Messrs. Deck & Elting, for defendant in error:

There was either an express or implied agency.

31 Cyc. 1215, 1217.

Under the rules of pleading and amendment, it was not an abuse of discretion on the part of the trial court to permit the defendant to amend.

Pinson v. Prentise, 8 Okla. 143, 56 Pac. 1049; Simon v. Aubrey, 3 Ind. Terr. 680, 64 S. W. 575; Van Alstyne v. Morrison, 33 Tex. Civ. App. 670, 77 S. W. 666.

Sharp, C., filed the following opinion:

This case originated in a justice court in Bryan county. Plaintiff, in his bill of particulars, sought to recover judgment for \$25 for the rent of a store building in the city of Durant for the month of April, 1910. Defendant filed a written answer, claiming damages to her stock of goods by reason of the fact that the roof of the store building leaked, and that, in consequence thereof, her stock of goods was damaged in the sum of \$50. A trial being had, the defendant prevailed, whereupon plaintiff appealed to the county court, and filed therein a motion to require defendant to make more definite and certain the allegations of her answer in reference to damages. An amended answer was filed in the

Headnotes by SHARP, C.

Note. — The general question as to whether there is an implied covenant as to the fitness of the premises for the purposes for which they are leased is considered in the note to Clifton v. Montague, 33 L.R.A. 449; and especially with reference to the landlord's liability for injury to tenant from defects in the premises in the notes to Hines v. Willcox, 34 L.R.A. 824, and, covering the 47 L.R.A. (N.S.)

general subject of the liability of the landlord for injury to the tenant from defects in the premises, Walsh v. Schmidt, 34 L.R.A. (N.S.) 798. See cases cited at page 806 of the later note, as to the liability of the landlord for injury to the tenant from the negligent and unskilful manner in which repairs are made by the landlord.

county court on March 2, 1911, in which it appears that the defendant attempted to comply with the order of the court in the particular mentioned, but in which amended answer she sought to recover damages of plaintiff on account of loss sustained by reason of the leaky roof, in the sum of \$115. No objection to the filing of the amended answer was made by motion to strike or otherwise. Issue was joined thereon by written reply, and the case went to trial in the county court upon the issues as amended in that court.

The only objection urged in regard to the amendment was during the examination of defendant, when she was asked the following questions:

Q. At this time what was the condition of the floor on the inside?

A. Water standing all over it and over my rubbers.

Q. What effect did that have on your trade? (Objection.)

Q. That is, could you carry on your trade?

A. No, sir. (Objection.)

It will be noted that in neither instance was any objection made until the witness had answered the question. It is a familiar rule of law that, although the question propounded to a witness be objectionable, opposing counsel cannot complain of the prejudicial effect thereof, where no objection was made until after the answer was given, and where no request was made to exclude the testimony from the consideration of the jury. The question is one that has recently been before this court in *St. Louis & S. F. R. Co. v. Davis*, — Okla. —, 132 Pac. 337, where numerous authorities are cited in support of the rule announced.

The right to file amendatory pleadings in the county court, where permitted by the court in furtherance of justice, is expressly authorized by § 5467, Rev. Laws 1910. The question of the right to file amended pleadings or new pleadings is one that must rest largely in the sound discretion of the trial court. While on appeal a new cause of action should not be permitted to be introduced by amendment to the pleadings, yet as the case is to be tried *de novo* in the county court, and as the statute expressly authorizes the filing of amended or new pleadings, amendments, where properly confined and made in furtherance of justice, will not form sufficient ground for reversal, at least where the only objection urged arises during the trial by objection made after answer to questions propounded to the witnesses.

Where the only change effected is to increase the amount of damages, or to add

an element of damage, and where the original cause of action remains the same, we cannot say the trial court abused its discretion in permitting the amendment. *St. Louis & S. F. R. Co. v. Steele*, — Okla. —, 133 Pac. 209; *Stevens v. Perrier*, 12 Kan. 297; *Robbins v. Sackett*, 23 Kan. 302; *Kansas City, Ft. S. & G. R. Co. v. Hays*, 25 Kan. 193; 24 Cyc. 727 et seq.

It is next urged that the plaintiff's agent, Downing, was without authority in the premises, except to collect and receipt for the rents on the building occupied by defendant. The question of agency was one of fact to be gathered from all the facts and circumstances in evidence. *Ricker Nat. Bank v. Stone*, 21 Okla. 833, 97 Pac. 577; *Minneapolis Threshing Mach. Co. v. Humphrey*, 27 Okla. 694, 117 Pac. 203; *Port Huron Engine & Thresher Co. v. Ball*, 30 Okla. 11, 118 Pac. 393; *Allen v. Kenyon*, 30 Okla. 536, 119 Pac. 960; *Midland Sav. & Loan Co. v. Sutton*, 30 Okla. 448, 120 Pac. 1007; *Yukon Mills & Grain Co. v. Imperial Roller Mills Co.* 34 Okla. 817, 127 Pac. 422; *Kelley v. Wood*, 32 Okla. 105, 120 Pac. 1110. At the time in question the plaintiff was in Mexico. Defendant made complaint to Colonel Downing about the condition of the roof. The complaint Downing communicated to the plaintiff, who answered, stating that he would be back home soon, and authorizing Downing to arrange the matter the best he could. An attempt was made to repair the roof, and the cost thereof was afterwards authorized by plaintiff to be deducted from the rents. So that, regardless of any express authority from the plaintiff to his agent, the evidence shows a ratification of the agent's acts. The fact that plaintiff instructed his agent to do the best he could toward a settlement of his tenant's complaint would alone be a sufficient authorization to the agent to exercise his judgment concerning the particular act in question, and when the agent did act, and his action was ratified and approved by the principal, by directing payment of the cost of repair, no room for question as to the liability of the principal can exist.

It is urged that the court erred in instructing the jury as set out in instruction number 9. The instruction is open to the objection urged against it, as it is a well-recognized principle of law that, in the absence of a statute or agreement, there is no implied warranty that leased premises are suitable for the purposes for which they are demised, or that the lessor will keep the property in repair. *Hanley v. Banks*, 6 Okla. 79, 51 Pac. 664; *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 287, and note; *Petz v. Voight Brewery Co.* 116 Mich. 418, 74 N. W. 651, 72 Am. St.

Rep. 531, and note; Minneapolis Co-op. Co. v. Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473, and note; Gregor v. Cady, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; Ward v. Fagin, 101 Mo. 669, 14 S. W. 738, 10 L.R.A. 147, 20 Am. St. Rep. 660, and note; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 34 L.R.A. 824, and note, 54 Am. St. Rep. 823. The building being one used for business or mercantile purposes (§ 3813, Rev. Laws 1910) can have no application. Tucker v. Bennett, 15 Okla. 187, 81 Pac. 423; Edmlson v. Aslesen, 4 Dak. 145, 27 N. W. 82; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; 1 Tiffany, Land. & T. p. 578. While the giving of the instruction was erroneous, it does not necessarily follow, for that reason alone, the judgment of the trial court should be reversed, for, where it appears from the evidence that the verdict is so clearly right that, had it been different, the court should have it set aside, such verdict will not be disturbed merely on account of the fact that some one of the instructions given misstated the law. It is said in Hughes on Instructions to Juries, § 243: "So, where the evidence standing uncontradicted is sufficient to sustain the verdict rendered, error in the giving of instructions will be regarded as harmless. Thus, where the plaintiff's cause of action is clearly established by the admissions of the defendant, there can be no ground for complaint in the giving or refusing instructions, even though they are erroneous." While we do not attempt to defend the instruction complained of, yet under the evidence, it is manifest that the jury reached a correct conclusion in finding for the defendant, the amount of the verdict not being complained of. Shawnee Nat. Bank v. Wooten & Potts, 24 Okla. 425, 103 Pac. 714; Mitchell v. Altus State Bank, 32 Okla. 628, 122 Pac. 666.

Notwithstanding that plaintiff was not legally bound to repair the roof, yet, having undertaken so to do, he is liable for the damage sustained on account of a failure to make said repairs in a proper and skilful manner. The principle that governs in such cases being that, although the landlord is not bound to repair in the absence of an express covenant to repair, where no controlling statute interferes, and though his promise to repair, made subsequent to the execution of the lease, is without consideration, and hence is unenforceable, yet, if he shall voluntarily and gratuitously undertake, during the term, to repair the demised premises, he is bound in so doing to use ordinary care and diligence. He may be held responsible for his negligence or lack of care and skill, or the negligence of his servants, or those employed by him in do-

ing what, in the first instance, he was not bound to do. The distinction is made by the authorities between nonfeasance and misfeasance of the landlord. In other words, the law distinguishes between the failure or refusal of the landlord to do what he has not promised to do, or is not legally bound to do, and his doing it in a negligent manner. But if the landlord voluntarily repairs and actually enters upon the carrying out of his scheme of repair, he will be responsible for the want of due care in the execution of the work, upon the principle of liability for negligence, without reference to any question of implied contract to repair, or implied consideration. Mann v. Fuller, 63 Kan. 664, 66 Pac. 627; Upham v. Head, 74 Kan. 17, 85 Pac. 1017, 20 Am. Neg. Rep. 348; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 836; Glickauf v. Maurer, 75 Ill. 289, 20 Am. Rep. 238; Hamilton v. Feary, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N. E. 48; Rice v. Whitley, 115 Iowa, 748, 87 N. W. 694; Michael & Bro. v. Billings Printing Co. 150 Ky. 253, 150 S. W. 77; Gregor v. Cady, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; Buldra v. Henin, 212 Mass. 275, 98 N. E. 863; Rehder v. Miller, 35 Pa. Super. Ct. 344; Shute v. Bills, 191 Mass. 433, 7 L.R.A. (N.S.) 965, 114 Am. St. Rep. 631, 78 N. E. 96; Peerless Mfg. Co. v. Bagley, 126 Mich. 225, 53 L.R.A. 285, 86 Am. St. Rep. 537, 85 N. W. 568; Little v. McAdaras, 38 Mo. App. 187; Finer v. Nichols, 158 Mo. App. 539, 138 S. W. 889; Broame v. New Jersey Conference Camp Meeting Asso. 83 N. J. L. 621, 83 Atl. 901; Salvetta v. Farley (Sup.) 123 N. Y. Supp. 230; Wilcox v. Hines, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297; Dalkowitz Bros. v. Schreiner, — Tex. Civ. App. —, 110 S. W. 564; Wertheimer v. Saunders, 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824; Underhill, Land. & T. § 518; Tiffany, Land. & T. § 87, pp. 609, 610.

There is little or no controversy but that the repairs to the roof were made in response to the defendant's complaints. That the roof was old and in bad condition stands confessed; that the repairs made failed of their purpose, and that, as a result thereof, the defendant's stock of goods, contained in the storeroom, was damaged, as well as her trade interfered with, is abundantly borne out by the testimony. The plaintiff had full knowledge of the defective condition of the roof, and on one occasion, prior to the death of the defendant's husband, he himself attempted to repair it. It is admitted further that Col. Downing was plaintiff's agent for the purpose of collecting rent, though plaintiff denied the authority of his agent to make or authorize

the making of any repairs. The jury, however, concluded from the testimony that the agent possessed such authority. It is significant too, in this behalf, that plaintiff authorized the payment of the cost of repairs, and that the amount thereof was deducted out of the rents is nowhere denied by plaintiff.

Having thus concluded, we are of the opinion that the judgment of the trial court should be sustained.

Per Curiam:

Adopted in whole.

WASHINGTON SUPREME COURT.
(Department No. 1.)

JOHANNA PAULINA CARLSON et al.,
Respts.,
v.

M. B. KIES, Receiver of Commercial National Bank of Vancouver, Appt.

(— Wash. —, 134 Pac. 808.)

Bank — special deposit — money left for distribution.

Money delivered to a bank by an administrator and attorney in fact for heirs, to be held until receipts can be secured from them, when it is to be forwarded to them by bank draft, is a special deposit, entitled to preference when the bank goes into the hands of a receiver, although the bank commingles the money with its general funds, if cash in excess of the deposit remains in the possession of the bank at all times subsequent to the deposit, and passes into the hands of the receiver.

(August 28, 1913.)

APPEAL by defendant from a judgment of the Superior Court for Clarke County in plaintiffs' favor in an action brought to recover a sum of money alleged to have been placed in the defendant bank as a special deposit a few days before the closing of its doors. Affirmed.

The facts are stated in the opinion.

Mr. H. L. Parcel for appellant.

Messrs. McMaster, Hall, & Drowley and George H. Shepherd, for respondents:

Money deposited for a particular purpose is a special deposit, and is held in trust for the depositor.

5 Cyc. 515; Fogg v. Tyler, 109 Me. 109,

Note. — The question as to when a bank deposit is to be regarded as a special deposit is discussed in the note to Fogg v. Tyler, 39 L.R.A.(N.S.) 847.
47 L.R.A.(N.S.)

39 L.R.A.(N.S.) 847, 82 Atl. 1008; Taggart v. First Nat. Bank, 12 Wash. 538, 41 Pac. 892; Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515; Covey v. Cannon, 104 Ark. 550, 149 S. W. 514; Smith v. Sanborn State Bank, 147 Iowa, 640, 30 L.R.A.(N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; Dolph v. Cross, 153 Iowa, 289, 133 N. W. 669; Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Massey v. Fisher, 62 Fed. 958; People v. City Bank, 96 N. Y. 32; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 116; Re J. M. Acheson Co. 95 C. C. A. 597, 170 Fed. 427; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118.

It is sufficient to trace the money into the bank vaults, if it appears that a sum equal to it remained continuously there until the receiver was appointed.

Peters v. Bain, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; Massey v. Fisher, 62 Fed. 958; Smith v. Mottley, 80 C. C. A. 154, 150 Fed. 266; Boone County Nat. Bank v. Latimer, 67 Fed. 27; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; Fogg v. Tyler, 109 Me. 109, 39 L.R.A.(N.S.) 847, 82 Atl. 1008; Kimmel v. Dickson, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561; 5 Cyc. 515; Taggart v. First Nat. Bank, 12 Wash. 538, 41 Pac. 892; Re Northrup, 162 Fed. 763; Re Stewart, 178 Fed. 472.

The presumption of law is that the funds on hand included the special deposit or trust fund; or if such amount is less, that it is the residuum of the special deposit or trust fund.

Boone County Nat. Bank v. Latimer, 67 Fed. 27.

And that in disbursing money between the date of deposit and of insolvency, the bank used its own money.

Ibid.; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 68, 26 L. ed. 699.

The receiver and creditors stand on no higher plane than the bank, and can no more assert that it was the bank's money than the bank could. It is not important that the money bore no marks and cannot

be identified. It is sufficient to trace it into the bank's vaults, and find that a sum equal to it continuously remained there until the receiver took it.

Fogg v. Tyler, 109 Me. 109, 39 L.R.A. (N.S.) 847, 82 Atl. 1008; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Stoller v. Coates, 88 Mo. 514; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; People v. City Bank, 96 N. Y. 32; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 Am. St. Rep. 85, 6 S. W. 802; Fisher v. Knight, 9 C. C. A. 582, 17 U. S. App. 502, 61 Fed. 491; Kimmel v. Dickson, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 909.

The general creditors are entitled to only so much of the assets of insolvents as remain after liens paramount to their claims, and other preferred charges, are satisfied.

Independent Dist. v. King, supra; McLeod v. Evans, 66 Wis. 406, 57 Am. Rep. 287, 28 N. W. 173, 214; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; Harrison v. Smith, 83 Mo. 212, 53 Am. Rep. 571; People v. City Bank, 96 N. Y. 35; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 61, 26 L. ed. 697; Dows v. Kidder, 84 N. Y. 121; Van Alen v. American Nat. Bank, 52 N. Y. 1.

Gose, J., delivered the opinion of the court:

This is a suit to recover of the receiver of the Commercial Bank of Vancouver, Washington, a sum of money which it is alleged was placed in that bank as a special deposit a few days before it closed its doors. The receiver has appealed from an adverse judgment.

The uncontroverted facts are that Fred Olson, the original plaintiff, was administrator of the estate of Carl Peter Johnson and the attorney in fact for Johanna Paulina Carlson and Nora Danielson, his heirs at law. As such attorney in fact he had in his possession on the 14th day of December, 1910, in money belonging to the heirs, the sum of \$3,070.60. One of the heirs resided in Sweden and the other in the state of New York. Desiring to hold the money until the return of proper vouchers which he had forwarded to them, he placed the money in the Commercial Bank and received from it a receipt therefor written at his instance and signed by the cashier as follows:

Vancouver, Wash., Dec. 14, 1910.

Received of Fred Olson three thousand seventy & 60/100 dollars, to be held until 47 L.R.A.(N.S.)

receipts are received from heirs. Then same to be forwarded by bank draft.

G. W. Daniels, Cashier.

\$3,070.60.

Margin. "The Commercial Bank, Vancouver, Wash."

The money was commingled with the general funds of the bank. The bank closed its doors five days after receiving the money. The examiner then took charge of its affairs until a receiver was appointed. A few days after its suspension, Mr. Olson received the vouchers, presented the receipt, and demanded payment, which being refused, this action was commenced. As administrator of the Johnson estate he had done business with the same bank presumably in the usual way. The cashier admitted that he knew that the money belonged to the Johnson heirs. Mr. Olson died pending the suit and the heirs were substituted as plaintiffs. The case was tried to the court. In addition to the facts stated, the court found that the money evidenced by the receipt was placed in the bank for safe-keeping pending the receipt of the vouchers, when it was to have been forwarded to the heirs by bank drafts; that the bank commingled the money with its general funds; and that, prior to the commencement of the action, the receiver refused to comply with a demand for a return of the money. It was stipulated at the trial that, at the time of receiving the money in controversy, and continuously thereafter until the bank closed its doors, it had on hand in cash not less than \$13,000, which passed into possession of the receiver. These findings have abundant support in the record. Mr. Olson testified that he told the cashier that he desired to leave the money in the bank for safe-keeping pending the return of the vouchers, when he would purchase drafts for remittance to the heirs. The cashier admitted that he drew and delivered the receipt at the request of Mr. Olson. He further said that he at the same time drew a certificate of deposit, which remained in the bank and which was tendered to Olson after the examiner had taken charge of the affairs of the bank. Olson testified that nothing was said about a certificate of deposit at the time the money was placed in the bank, but that it was offered him in exchange for the receipt after the examiner had assumed control.

A deposit in a bank is either general or special. Where a general deposit is made, it is either credited to the account of a depositor subject to his check, or evidenced by a demand or time certificate. The title to the deposit in such cases passes to the bank and it becomes the debtor of the de-

positor. On the other hand, when a bank accepts a special deposit it becomes a trustee of the depositor, and holds the money subject to the trust. The receipt itself affords strong, if not conclusive, evidence of a special deposit. It shows that the money was placed in the bank for a special purpose. Fortified by the evidence of the depositor and the admitted circumstances here present, it is obvious that both parties to the transaction intended to make a special, and not a general, deposit. It follows, therefore, that the bank holds the money, not as a general debtor, but in a fiduciary capacity. 5 Cyc. 514, 515; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 909; *Fogg v. Tyler*, 109 Me. 109, 39 L.R.A.(N.S.) 847, 82 Atl. 1008; *Anderson v. Pacific Bank*, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; *Shopt v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515; *Covey v. Cannon*, 104 Ark. 550, 149 S. W. 514; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 669; *People v. City Bank*, 96 N. Y. 33; *Massey v. Fisher* (C. C.) 62 Fed. 958.

"A deposit is not special unless made so by the depositor, or unless made in a particular capacity. . . . In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and, if it fail to apply it at all or misapply it, it can be recovered as a trust deposit." 5 Cyc. 514, 515. This view was recognized by this court in the *Blake Case*, where it was said: "If it had been delivered to the bank, not as a general deposit, but for a particular purpose, it would have been a trust fund in the first instance, and the title would not have passed to the bank; but even then it could not have been recovered without showing that it had gone into the hands of the receiver."

In the *Anderson Case* money deposited in the bank as indemnity for its furnishing bail for the depositor was held to be a special deposit and recoverable as such, notwithstanding the fact that it was commingled with the general funds of the bank, but without the knowledge of depositor.

In *Peak v. Ellicott* the plaintiff delivered money to the cashier of the bank for the purpose of paying his note then held by a nonresident of the state. It was held that he could recover the money from one to whom the bank had made an assignment for the benefit of its creditors. The ruling was based upon the ground that the bank held the money in a fiduciary capacity, and that the assignee had no authority to retain a

trust fund belonging to the plaintiff. The *Myers Case* is to the same effect.

In *Dolph v. Cross* money was deposited in a bank for the purpose of meeting checks which the depositor had issued against the deposit; the depositor stating that fact to the officer or clerk who received the money. The bank placed the money to the credit of the depositor. The deposit was held to have been special for the benefit of the particular check holders; the court saying that the form of bookkeeping followed by the bank was not controlling.

The appellant has cited *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211, and *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329. In the *Bowman Case* it was held that, where a customer sends a draft to a bank for collection and remittance, and the bank collects the draft, places the money in its vaults, and forwards its draft in payment, which the customer accepts and forwards to the drawee bank for payment, the relation of debtor and creditor is created. A like rule is announced in *Hallam v. Tillinghast*, where the bank made a collection for a local customer and placed the proceeds to his credit without express direction. That these cases are inapposite is too obvious to require further comment.

The appellant suggests that the identical money was not traced into the hands of the receiver. That is true, but the old rule requiring an identification of the specific fund or its avails in the hands of a receiver has been relaxed in the later cases. The doctrine of the modern authorities, and what we consider the sounder view, is that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension, and passed to the receiver. *Fogg v. Tyler*, 109 Me. 109, 39 L.R.A.(N.S.) 847, 82 Atl. 1008; *Shopt v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515; *Covey v. Cannon*, 104 Ark. 550, 149 S. W. 514; *Massey v. Fisher* (C. C.) 62 Fed. 958; *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; *Smith v. Mottley*, 80 C. C. A. 154, 150 Fed. 266; *Boone County Nat. Bank v. Latimer* (C. C.) 67 Fed. 27; *Re Northrup* (D. C.) 152 Fed. 763; *Re Stewart* (D. C.) 178 Fed. 463.

In *Fogg v. Tyler* it was held that, where a sum of money in excess of the amount of a special deposit was in the hands of the trustee bank when it became insolvent, the trust will be enforced notwithstanding the fact that the identical money cannot be identified. It was said that it suffices if it can be traced into the hands of the trustee "either in its original or its altered state." The *Shopt Case* voices a like rule. There

the court also said that receivers take the property of the insolvent subject to all legal and equitable claims, and that, when a fund consists of money, "identification does not require that the identical bills or coins be discovered, but the ascertainment of the fund into which it has entered and lodged is sufficient." *Covey v. Cannon* is to the same effect.

In *Massey v. Fisher* (C. C.) 62 Fed. 958, it is said that "it is not important that the plaintiffs' money bore no mark and cannot be identified. It is sufficient to trace it into the bank's vaults and find that a sum equal to it (and presumably representing it) continuously remained there until the receiver took it." Some courts have slightly modified this doctrine by saying that the presumption is that money disbursed by a bank between the date of the deposit and the date of the insolvency was money which the bank might lawfully use (*Boone County Nat. Bank v. Latimer* (C. C.) 67 Fed. 27; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 68, 20 L. ed. 699), and as a corollary that the presumption is that funds in the hands of the insolvent included all trust funds, or, if less than the trust fund, that the residuum belonged to the latter fund. *Boone County Nat. Bank v. Latimer*, supra. This limitation is not important here because no evidence was offered to overthrow the legal presumption. Indeed, it would seem that the limitation is of little value, because, if the trust fund has been commingled with the general funds of the bank, the source of disbursement cannot be known unless, at some date following the special deposit, all the funds of the bank had been abstracted or disbursed. The limitation is of little value for another reason, namely, the bank may lawfully disburse all moneys received as a general deposit, and the limitation could only operate between special depositors, and between them the maxim that equality is equity would seem to control.

The decree is affirmed.

Crow, Ch. J., and Mount, Parker, and Chadwick, JJ., concur.

WASHINGTON SUPREME COURT.
(Department No. 2.)

RACHEL SALLASKE, Appt.,

v.

LONDA L. FLETCHER et al., Respts.

(73 Wash. 593, 132 Pac. 648.)

Appeal — review of evidence — sufficiency of exception.

1. A general exception to findings of fact 47 L.R.A. (N.S.)

and conclusions of law is not sufficient to permit the appellate court to review the evidence.

Fraudulent conveyance — existing equities — contingent liability for rent.

2. The contingent liability of an unreleased assignor of a leasehold for rent is an existing equity within the meaning of a statute providing that a conveyance by a man to his wife shall not affect existing equities in favor of creditors of the grantor at the time of the transfer.

Evidence — cross-examination — financial statement.

3. In an action to enjoin the sale of property conveyed by a man to his wife, for the payment of a claim for rent against him, which did not mature until after the conveyance, he may properly be required to testify on cross-examination as to a financial statement showing property owned by him, which he made to a trust company, to secure a loan, if the company afterwards acted as agents for the owners in making the lease.

(May 24, 1913.)

Note. — Fraudulent conveyances: conveyance or transfer by one secondarily liable.

The present note is confined to cases which discuss the question whether or not conveyances by persons such as sureties, guarantors, indorsers, etc., who are contingently liable, are within the statutes avoiding fraudulent conveyances or transfers as against the original obligee or his transferee or creditors. The question, therefore, as to whether those contingently liable are creditors within the meaning of such statutes, is not presented. (For cases illustrative of this class, see cases cited in opinion in *SALLASKE v. FLETCHER*.)

As to right of surety prior to obtaining a judgment or lien to enjoin principal's transfer of property to defraud him, see note to *O'Day v. Ambaum*, 15 L.R.A. (N.S.) 484.

And the question whether or not the holders of unmatured and unliquidated claims or demands are creditors within the meaning of statutes avoiding fraudulent conveyances or transfers is not treated in the present note, although in a sense their rights might be considered as contingent. And in fact the liability or debt in such cases has been spoken of as contingent. See, as illustrative, *McLaughlin v. Bank of Potomac*, 7 How. 220, 12 L. ed. 675, wherein the holder of a renewal note, although not due when the conveyances complained of were made, was held to be a creditor at the time of the conveyance, entitled to have the conveyance set aside as fraudulent, provided circumstances existed indicative of fraud.

The question considered is merely whether secondary liability constitutes a debt or equity for the purposes of a suit to avoid a conveyance as fraudulent as to creditors,

APPEAL by plaintiff from a decree of the Superior Court for Spokane County in defendants' favor in a proceeding to enjoin the sale of property alleged to be plaintiff's separate estate, under executions against her husband. Affirmed.

The facts are stated in the opinion.

Mr. Samuel R. Stern for appellant.

Mr. George D. Lantz, with Messrs. Danson, Williams, & Danson, for respondents:

A lessor may, upon nonpayment of rent according to the terms of the lease, attack a conveyance as fraudulent, even though, at the time of the conveyance, all accrued rent is paid.

O'Brien v. Whigam, 9 App. Div. 113, 41 N. Y. Supp. 40; Young v. Heermans, 66

N. Y. 374; Anderson v. Anderson, 64 Ala. 403; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Bump, Fraud. Conv. § 503; 20 Cyc. 421; Thomson v. Crane, 73 Fed. 327; Bowen v. State, 121 Ind. 235, 23 N. E. 75; Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232; Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Gannard v. Eslava, 20 Ala. 732; Stone v. Myers, 9 Minn. 303, Gil. 287, 86 Am. Dec. 104.

A general exception to the findings of fact is insufficient to present any specific finding of fact for review.

Yakima Grocery Co. v. Benoit, 56 Wash. 208, 105 Pac. 476; Pease v. Clayton, 62 Wash. 26, 112 Pac. 943; Snohomish River Boom Co. v. Great Northern R. Co. 57 Wash. 693, 107 Pac. 848; Fender v. Mc-

and the question whether the particular conveyance was in fact fraudulent is not within the scope of the note.

Although strictly and technically sureties are primary obligors, they have been included in the present note because, from a practical point of view, their relation to the obligation is very similar to that of a secondary obligor.

The general rule is that one contingently liable is a debtor from the inception of such liability, and that the obligee is a creditor within the meaning of the statutes declaring conveyances fraudulent as to creditors. In fact, but little real conflict exists, as in most cases in which a conclusion contrary to that above stated is reached, the seeming conflict can be explained by reference to the terms of the statute involved and the particular facts of the case.

Indorsers as debtors.

An indorser upon a note made prior to the execution by him of a voluntary conveyance of his property has been held to be a debtor to the holder within the meaning of the statutes against fraudulent conveyances, although the liability at the time of the conveyance was contingent only, the court adhering to the rule that a contingent claim is as fully protected as one that is absolute. Jones v. Leeds, 10 Ohio S. & C. P. Dec. 173, 7 Ohio N. P. 480; Farmers' Nat. Bank v. Thomson, 74 Vt. 442, 52 Atl. 961; Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232.

So, a voluntary conveyance by the maker of a prior accommodation note, the execution of which imposes a contingent liability in favor of anyone becoming an indorsee thereof for value, has been held to be fraudulent as to such an indorsee, although the note was not indorsed and discounted until after the execution of the conveyance, it being said that, as regards the indorsee, the note would be regarded as a valid claim from its date. Williams v. Banks, 11 Md. 198.

And in Hamet v. Dundass, 4 Pa. 178, the accommodation indorser of a note was 47 L.R.A.(N.S.)

held to be a debtor under the statute against fraudulent conveyances, at the time of a voluntary conveyance by him, although the note at that time had not been dishonored.

And in Cook v. Johnson, 12 N. J. Eq. 51, 22 Am. Dec. 381, where an accommodation indorser voluntarily transferred his property after the note was protested, but before judgment thereon, it was held that the conveyance was fraudulent as to the payee of the note, who, by the default, became the creditor of the indorser. So, in Citizens' Nat. Bank v. Fonda, 18 Misc. 114, 41 N. Y. Supp. 112, it was held that a bank which had discounted a note, relying in part, at least, upon an accommodation indorsement, stood in the relation of a creditor to the indorser, notwithstanding the fact that his liability was contingent only, and that it could attack as fraudulent a conveyance made by such indorser before his liability became absolute. To the same effect is Cutler v. Steele, 85 Mich. 627, 48 N. W. 631.

But in Severs v. Dodson, 53 N. J. Eq. 633, 51 Am. St. Rep. 641, 34 Atl. 7, where the rule of evidence (referred to in SALLASKE v. FLETCHER as having been a statutory provision) was said to be that voluntary conveyances are presumptively fraudulent as to "existing debts," it was held that an accommodation indorser of a promissory note that had not been dishonored was not a present debtor, so as to render fraudulent as to the holder of a voluntary conveyance made after the indorsing of the note, but before its dishonor. But it seems that this rule would not prevent the holder of the note from setting aside the voluntary conveyance by the indorser contingently liable if actual fraud were shown. See Long Branch Bkg. Co. v. Dennis, 56 N. J. Eq. 549, 39 Atl. 689.

As to rights between coindorsees, see cases in subdivision entitled "Miscellaneous cases," infra.

Guarantors as debtors.

The rule that a contingent debtor cannot fraudulently convey as against the principal obligee or his creditor has been held

Donald, 54 Wash. 130, 102 Pac. 1026; Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747; Pederson v. Ullrich, 50 Wash. 211, 96 Pac. 1044; F. T. Crowe & Co. v. Brandt, 50 Wash. 499, 97 Pac. 503.

Ellis, J., delivered the opinion of the court:

This is an action to restrain the sale of property under executions issued upon judgments against the plaintiff's husband; the plaintiff claiming the property as her separate property. The court by separate findings, among other things, found, in substance, the following facts, which we deem controlling: In February, 1911, the plaintiff's husband leased certain premises from the defendants Fletcher and Stebbins for

a term of one year at an agreed rental of \$165 a month. The premises were used by the husband in carrying on a clothing business. In March, 1911, he sold this stock of goods and assigned the lease to one Herwig, who immediately entered into possession, occupied the premises, and paid the rent until July, 1911. The plaintiff's husband sought to be released from his lease of the premises upon this assignment, but was informed by the agent for Fletcher and Stebbins that they would not release him. On May 9, 1911, her husband conveyed to the plaintiff without consideration all the property owned by the community composed of himself and the plaintiff, which was of a value of from \$30,000, to \$35,000, subject to a mortgage of \$2,500.

to apply to a guarantor, though the liability was contingent until after the conveyance. Jackson ex dem. Van Wyck v. Seward, 5 Cow. 87, reversed on other grounds in 8 Cow. 406.

And the assignee of a judgment, payment of which was guaranteed by the assignor, has been held to be a creditor of the latter within the meaning of a statute avoiding conveyances in fraud of creditors, and therefore entitled to attack a conveyance made by the assignor while his liability was still contingent. Van Wyck v. Seward, 18 Wend. 375.

And a voluntary conveyance by a guarantor whereby his means were impaired to the prejudice of the holders of the contingent obligation has been held fraudulent as to such creditors where made after the obligation was entered into, but before default and entry of judgment against him. Thomson v. Crane, 73 Fed. 327. In this case it was contended that complainants were not creditors of the guarantor until entry of judgment against him, and that the guaranty only created a contingent liability upon the guarantor's part, which might result in his becoming indebted to the complainants in the event of default by the principal obligor; but the court refuted this contention, saying, among other things, that "a creditor is not simply a person to whom a debt is due, but a person to whom any obligation is due. It is a person who has the right to require the fulfillment of any obligation, contract, or guaranty; and he is to be considered as a creditor of such obligor or guarantor from the time of his entering into the obligation."

Sureties as debtors.

And a surety upon an appeal bond has been held to be a debtor within the meaning of a statute avoiding conveyances by debtors, made in fraud of creditors, as to a conveyance made after the signing of the bond, although no judgment had been obtained against him on his bond. Kerber v. Ruff, 3 Ohio N. P. 165, 4 Ohio S. & C. P. Dec. 406. So it has been held that where

the liability of a person engaged to refund the amount of a judgment was conditioned upon the outcome of a statutory proceeding to review such judgment, a voluntary conveyance made without consideration by such person after the satisfaction of the judgment, but before the determination of the review proceedings, may be set aside as fraudulent at the suit of the one seeking the review, it being said that if the contingent liability was not a debt at the time of the conveyance, it was in the nature and within the reason of one. Parsons v. McKnight, 8 N. H. 35. And in Hanna v. Hurley, 162 Mich. 601, 127 N. W. 710, in holding that an appeal bond created the relation of debtor and creditor between the surety thereon and the obligee thereof from the date of its execution, so as to render fraudulent as to the obligee a conveyance made by the surety to avoid payment of the bond, the court said: "The only question of law requiring consideration is: Was Kronman, the obligee in the appeal bond, a creditor of George D. Hanna, the surety on such bond, prior to the conditions of the bond becoming absolute. . . . It is urged by appellant that George D. Hanna's liability upon the bond could not be fixed until judgment upon appeal, and therefore that the obligee in the bond was not, at the time of the sale, one of his creditors. A creditor is 'one who has a right to require of another the fulfillment of a contract or obligation.' 11 Cyc. 1193, and cases cited in the note. It cannot be said that George D. Hanna's liability was not fixed at the moment he signed the bond. It was fixed in amount, though contingent upon the failure of his principal to prosecute his appeal, and reverse or pay the judgment. . . . George D. Hanna was accepted as surety upon the appeal bond solely on account of his ownership of the stock of goods in question. To permit him to dispose of his stock immediately thereafter, without notice to the obligee in the bond, thus rendering the bond worthless, would result in encouraging the very fraud which the statute was designed to prevent. The statute is remedial in character, and should

The money derived from the mortgage was used in paying all debts against the community, excepting the contingent liability arising from the lease. At the time of this conveyance there was no rent due upon the lease. On July 1, 1911, Herwig defaulted in payment of the rent, and in September of the same year Fletcher and Stebbins recovered a judgment in the superior court of Spokane county against the plaintiff's husband and the community composed of himself and the plaintiff for the rent due upon the lease to that date, and again in January, 1912, they recovered a similar judgment for the balance of the rent. About the time the last judgment was rendered, the plaintiff's husband was adjudged a voluntary bankrupt in the Federal

court, and the judgments were filed as claims in the bankruptcy proceedings, in which no assets were scheduled by the bankrupt. Thereafter the defendants Fletcher and Stebbins, through the trustee in bankruptcy, caused executions to be issued. Returns nulla bona were made. Alias executions were then issued and levied upon the property which had been conveyed to the plaintiff herein. The court made appropriate conclusions upon these findings and decreed that the judgments constituted valid and subsisting liens upon the property in question. From that decree the plaintiff appeals.

The only exception taken to the findings of fact and the conclusions of law based thereon was a general exception as follows:

be given such a construction as will effect the plain legislative intent."

And a surety upon a bond for costs was held to be a debtor within the law against fraudulent conveyances in *Russell v. Stinson*, 3 Hayw. (Tenn.) 1, where a voluntary conveyance was made by the surety after the signing of the bond and before judgment thereon, so as to enable the obligee as creditor to attack the conveyance; it being said that a surety is as much prohibited by such statute from making a fraudulent conveyance to defeat creditors as if he were the principal obligor, since the creditor perhaps would not have trusted the principal had it not been for the supposed sufficiency of the surety.

So it has been held that a surety on an official bond cannot validly voluntarily convey, without valuable consideration, all of his property as against the obligee in the bond, even though the bond had not been proceeded upon at the time of the conveyance,—especially where the inference is strong that the conveyance was made to save the property from being taken to satisfy the bond. *Bay v. Cook*, 31 Ill. 336. In this case it was said that such contingent liabilities should be regarded as equivalent to an actual judgment, and that it not only would be unjust, but against public policy, to allow the bond to be defeated by such a conveyance.

And a conveyance by a surety on a liquor dealer's bond was held to be fraudulent as to those for whose protection the bond was given, in *People use of Clinton v. Rice*, 79 Mich. 354, 44 N. W. 790.

And in *Bowen v. State*, 121 Ind. 235, 23 N. E. 75, in holding that a surety on a guardian's bond cannot dispose of his property by voluntary conveyance without valuable consideration, to the detriment of the obligee, and that an action to set aside such a conveyance may be joined with an action on the bond, the court said: "It is manifest, as it seems to us, that the liability of a surety on a guardian's bond must be governed by the same general principles which govern the liability of sureties on other obligations; that he cannot

give away all of his property to the detriment of those for whose benefit the bond is given. The contract of suretyship is in force from the date of the execution of the bond, though the liability of the surety to pay depends upon the conditions of the bond." And in *Thompson v. Thompson*, 19 Me. 244, 36 Am. Dec. 751, the court, in again holding that the obligee in a guardian's bond, as a creditor, might impeach any conveyance made by a surety thereon after the bond is entered into, even though prior to a breach thereof, said: "What is the object intended to be secured by the requirement of the statute that such a bond shall be taken? Can it be treated as having no existence, until there is some mismanagement, some pecuniary liability aside from the bond, resting upon the principal obligor? Or is it not rather that there shall be the acknowledgment of an existing debt, to be canceled only when all duties required are fully discharged? It is given in the expectation, and it is accompanied with the power and the duty, of taking the whole property of the ward into the custody of the guardian, whatever the amount may be. Those to be benefited are incapable of speaking for themselves, and protecting their own rights; their property, it may be, to almost an unlimited amount, is secured by nothing but the official bond of the guardian.

. . . And why all this requirement for the protection of minors and others incapable, if the obligors can, immediately after and before any breach of the bond, divest themselves of all which rendered their names valuable, by voluntary or fraudulent conveyances? . . . The sureties on such bonds know their liability, and are supposed to be apprised of their danger, often before a breach. They may see the extravagance and mismanagement, generally, of their principals, before any of the property which they are appointed to protect may have come to their hands; they may wish to escape from their obligations, whether present or future, and the doctrine contended for by the demandant's counsel would enable them always to shun their liability, throwing the loss from themselves

"To all of which plaintiff at the time excepts, which exception is allowed by the court." No exception of any kind was taken to the refusal of the court to make certain findings requested by the appellant. Such an exception is, as we have repeatedly held, wholly insufficient to permit a review of the evidence on appeal. *Pederson v. Ullrich*, 50 Wash. 211, 96 Pac. 1044; *Warehime v. Schweitzer*, 51 Wash. 299, 98 Pac. 747; *Snohomish River Boom Co. v. Great Northern R. Co.* 57 Wash. 693, 107 Pac. 848; *Pease v. Clayton*, 62 Wash. 26, 112 Pac. 943. The same rule is applicable even in equitable causes where findings are made. *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476. Being precluded from reviewing the evidence, except in one particular, to which we will advert later, we must affirm the decree if these findings are sufficient to support it.

The only question involved in this appeal is: Did the respondents Fletcher and Stebbins have an existing equity by reason of the lease at the time the conveyance was made to the appellant on May 9, 1911, so that the conveyance was, as to them, fraudulent and void? The statute, *Rem. & Bal.*

Code, § 8766, provides: "A husband may give, grant, sell, or convey directly to his wife, . . . his . . . community right, title, interest, or estate in all or any portion of their community real property. And every deed made from husband to wife . . . shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. . . . Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance." The appellant contends that the judgment creditor had no existing equity at the time of the husband's transfer to the wife, and there only existed a contingent liability against the husband, which it is claimed was not sufficient under the statute to defeat the transfer. While some courts have held, under statutes declaring conveyances void as to "existing debts," that such conveyances are not void *per se* as to contingent liabilities only, we do not think these decisions applicable under the above-quoted statute. There is a clear dis-

upon those who, it is the plain intention of the law, should be made secure."

So, in *Carlisle v. Rich*, 8 N. H. 44, it was held that the execution of an administrator's bond rendered the surety thereon a then-present debtor to the obligee, so as to render a subsequent voluntary conveyance by the surety fraudulent irrespective of condition broken or rendition of judgment.

And in *Sanderson v. Snow*, 68 Ill. App. 384, it was held that a surety on a note could not voluntarily convey his property without consideration, so as to defeat his contingent obligation, even though his principal was able at the time to pay the debt, it being said that such a conveyance will in law be regarded as fraudulent, and will be set aside upon the application of the party aggrieved.

And see *Duke v. Pigman*, 110 Ky. 756, 62 S. W. 867, wherein the judgment was premised upon the fact that property conveyed in fraud of the grantor's creditors was subject to the payment of a debt for which he was bound as surety.

But see *Fales v. Thompson*, 1 Mass. 134, holding that one who, as surety, entered into a rule of reference, did not thereby become a debtor so as to enable another party to the rule to defeat a subsequent conveyance by the surety as in fraud of creditors, where the conveyance was executed before judgment was obtained on the rule.

As to rights between cosureties, see cases in following subdivision.

Miscellaneous cases.

The obligor in an indemnity bond of a bail has been held to be a debtor and the 47 L.R.A. (N.S.)

one indemnified a creditor, so as to enable the latter to avoid a fraudulent conveyance by the former even before payment of the recognizance debt. *Carr v. Davis*, 64 W. Va. 522, 20 L.R.A. (N.S.) 58, 63 S. E. 326, 16 Ann. Cas. 1031.

So, a voluntary conveyance by a stockholder of an insolvent bank, executed in anticipation of a call to respond to his statutory obligation as a stockholder, has been held ineffectual as against existing creditors of the bank. *Yardley v. Tarr*, 67 Fed. 857, wherein it was said that the stockholder's obligation to the creditors of the bank was a debt in no respect different from other debts subject to contingencies. And under statutes making members of corporations liable for its judgment debts in case of its failure to meet them within a certain length of time, it has been held that a conveyance by a member of his interest in the corporation without adequate consideration, and for the purpose of avoiding his liability as a member of the corporation, was fraudulent as to creditors of the corporation, although such creditors had not reduced their claims to judgment at the time of the transfer. *Marcy v. Clark*, 17 Mass. 330. (This decision was severely criticized by the reporter.)

And an agent who has securities of his principal for which he is liable to account, although no demand has been made therefor at the time of a voluntary conveyance by him of all his property, has been held to be contingently liable so as to make him a debtor and the principal a creditor for the purpose of avoiding the conveyance under the statute against fraudulent conveyances. *Young v. Heermans*, 66 N. Y. 374.

inction between "existing debts" and "existing equities." The legislature in using the latter expression must be presumed to have used it advisedly and to some purpose. An existing equity, on the one hand, implies an existing liability on the other. That liability may be either present or contingent. In either case it is existent. An existing debt implies a present enforceable liability; a debt as distinguished from an equity. One must be said to have an existing equity when he has an existing right to future payment, though it be contingent, of which it would be inequitable to deprive him. This distinction is made plain in a cases chiefly relied upon by the appellant (*Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641, 34 Atl. 7), where the liability of an accommodation indorser, contingently liable upon current notes, was held not to be an "existing debt" under a statute avoiding transfers as to existing debts. The court intimates that had the statute used the words "existing liabilities," it would have compelled a contrary decision, though the court reprobates as unwise and inexpedient such a statute as relating to fraudulent conveyances generally.

And it has been held that a voluntary conveyance made during the trial of an action in equity by one who was contingently liable for costs therein was fraudulent and could be set aside at the suit of one obtaining such a judgment against the conveyor for costs. *McLaggan v. Smith*, 35 Misc. 564, 71 N. Y. Supp. 1121.

And the obligor in a penal bond conditioned for the conveyance of real property has been held to be the debtor of the obligee from the execution of the bond, so as to entitle the latter to attack as fraudulent a conveyance by the obligor, made after the execution of, but prior to the breach of, the bond. *Stone v. Myers*, 9 Minn. 303, Gil. 287, 86 Am. Dec. 104.

But in *Henderson v. Dodd*, Bail. Eq. 138, it was held that a remainderman was not such a subsisting creditor of the life tenant of a slave which the latter sold absolutely, as to entitle the remainderman to set aside as fraudulent a voluntary conveyance of the life tenant's property, the court saying that since the life tenant's liability for selling the slave was contingent upon the slave's surviving him, he could not be regarded as a subsisting debtor at the time of the voluntary conveyance of his property, and that under the statute of 13 Elizabeth, a creditor, to set aside a conveyance merely because it was voluntary, must be a subsisting creditor.

As between cosureties, it has been held that a surety is an existing creditor entitled to protection against a fraudulent conveyance made by his cosurety at any time subsequent to the execution of the common obligation, the rule being that his right

The term "existing equity" is certainly as comprehensive as the term "existing liability."

We have nothing to do with the unwisdom or inexpediency of the statute. Those are matters of legislative concern. We are constrained to give effect to the statute as it is written. The term "existing equity" is broad enough to include existing contingent liabilities as well as existing absolute debts. It is too broad to include only the latter. To so confine it would be to do violence to the language of the statute, and go contrary to the universal rule that such statutes are to be construed liberally, as in favor of the enforcement of just obligations. *Bump, Fraud. Conv. § 502; 20 Cyc. 341.* We will remark in passing, however, that we do not share in the animadversions of the New Jersey court upon the wisdom or expediency of the broader terms of the statute. The claim that a statute giving the holder of a contingent liability founded in a definite and certain contract the benefit of the act without proof of actual fraud would tend to render voluntary settlements uncertain and precarious appeals to us with less force than the equal-

relates back to the date of the obligation, and therefore antedates any conveyance made subsequent thereto, so that it can be attacked by him. *Yeend v. Weeks*, 104 Ala. 331, 53 Am. St. Rep. 50, 16 So. 165 (sureties on administrator's bond); *Washington v. Norwood*, 128 Ala. 383, 30 So. 405 (sureties on administrator's bond); *Gibson v. Love*, 4 Fla. 217 (sureties on executor's bond); *Howe v. Ward*, 4 Me. 195, sureties on sheriff's bond); *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (sureties on probate bond); *Smith v. Rumsey*, 33 Mich. 183 (sureties on town treasurer's bond); *Pashby v. Mandigo*, 42 Mich. 172, 3 N. W. 927 (sureties on note); *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. Rep. 728 (sureties on note); *Neilson v. Williams*, 42 N. J. Eq. 291, 11 Atl. 257 (sureties on guardian's bond); *Raymond v. Cook*, 31 Tex. 373 (sureties to execution); *Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485 (sureties on sheriff's bond); *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848 (sureties on note). But it has been held that in such a case the complaining surety, in order to set the conveyance aside, must show that the defendant surety is insolvent, or that there is some other necessity for resort to the property alleged to have been fraudulently conveyed. *Mason v. Pierron*, 63 Wis. 239, 23 N. W. 119.

And the general rule applied as between cosureties has been held applicable as between coindorsers of notes. *Hayden v. Thrasher*, 28 Fla. 162, 9 So. 855; *Pulsifer v. Waterman*, 73 Me. 233; *National Valley Bank v. Hancock*, 100 Va. 101, 57 L.R.A. 728, 93 Am. St. Rep. 933, 40 S. E. 611.

G. J. C.

ly certain result that the narrower provision would tend to render the enforcement of contracts solemnly made easily avoided and so precarious that suretyship, guardian's and personal indemnity bonds, lease, and the like, would be of little value, since proof of actual fraudulent intent is usually impossible. The broader construction of the statute has the merit of encouraging honesty and fair dealing. *Gannard v. Eslava*, 20 Ala. 732, 742. Were the question not a new one, this would end our discussion; but the question being new, and the contrary view being ably presented by counsel, we deem it not improper to consider it from another angle.

It is obvious that under our statute the motive actuating the voluntary conveyance to the other spouse is immaterial. Even assuming, therefore, as counsel would have us assume, that existing debts and existing equities are synonymous terms, this statute would be in effect the same as those statutes directed against fraudulent conveyances generally, under which, without regard to the actual motive of the donor, voluntary conveyances are universally held void as to existing creditors, the collection of whose debts they hinder or delay. Under such statutes the act of voluntary conveyance itself is conclusive evidence of fraud. "The intent is presumed from the act." *Bump, Fraud. Conv.* 4th ed. § 242. In this aspect, and indulging counsel's assumption, there is absolutely no difference between the statute here involved and the statutes against fraudulent conveyances generally. Under such statutes, both on what we conceive to be the better reasons and the more persuasive authorities, existing creditors are held to be all persons having subsisting obligations against the donor at the time of the voluntary transfer, although their claims be immature or even contingent.

"A contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute; and whoever has a claim or demand arising out of a pre-existing contract, although it may be contingent, is a creditor whose rights are affected by such conveyances, and can avoid them when the contingency happens upon which the claim depends." 20 Cyc. 421. See also to the same effect, *Bump, Fraud. Conv.* 4th ed. § 503.

In *Anderson v. Anderson*, 64 Ala. 403, 405, under a statute construed as avoiding all voluntary conveyances as to existing creditors, though such conveyances were not infected with actual fraud, the court, holding a voluntary conveyance subject to be defeated by the subsequently maturing though then contingent liability of the grantor as administrator of an estate, 47 L.R.A. (N.S.)

said: "The term 'creditors,' as employed by the statute, has been construed liberally, and not in a narrow, strict, or technical sense. Whoever has a right, claim, or demand, founded on contract, whether contingent or absolute, for the performance of a duty, or for the payment of damages if the contract should not be fully performed, has been regarded as a creditor, within the meaning, of the statute, against whom a voluntary conveyance will not be supported, though no breach of the contract, furnishing a cause of action, may occur until after the execution of the conveyance. *Bibb v. Freeman*, 59 Ala. 615; *Foot v. Cobb*, 18 Ala. 585; *Gannard v. Eslava*, 20 Ala. 732." The following cases announce and exemplify the same principle: *Thomson v. Crane* (C. C.) 73 Fed. 327; *Bowen v. State*, 121 Ind. 235, 23 N. E. 75; *Crocker v. Huntzicker*, 113 Wis. 181, 88 N. W. 232; *Young v. Heermans*, 66 N. Y. 374; *Stone v. Myers*, 9 Minn. 303, Gil. 287, 86 Am. Dec. 104; *Gannard v. Eslava*, supra.

This court has declined to construe the term "creditor" in the general statute in the narrow sense as including only a person to whom there is due a fixed and certain present debt. In *Bates v. Drake*, 28 Wash. 447, 455, 68 Pac. 961, 964, we said: "The statute of 13 Eliz. chap. 5, which is a part of the common law of this state (*Wagner v. Law*, 3 Wash. 500-502, 15 L.R.A. 784, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927) provided that all conveyances made with the intent to hinder, delay, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., should be deemed and taken as void, and of none effect. In those states where a similar statute is in force, or which recognize this statute as being a part of their common law, it is the almost uniform holding that a person having a claim against another for damages sounding in tort is a creditor of that other within the meaning of the rule, and this holding, we think, is supported by the better reason."

Strictly speaking, the lease here in question created a present existing, but contingent, liability; not mature, it is true, but payable in future on a contingency. It was none the less a present obligation the equity of which it should be as much the policy of the law to protect as any other obligation. The case of *O'Brien v. Whigam*, 9 App. Div. 113, 41 N. Y. Supp. 40, seems to us directly applicable. In that case the conveyance was executed in 1893. The lease expired next year, but was renewed. There was a default in the payment of rent under the renewed lease. Though there was evidence of actual fraudulent intent, the court also indicates that even in the absence of

this element, the landlord, as a creditor, within the meaning of the statute, could assert his claim for rent as against the conveyance, citing *Young v. Heermans*, 66 N. Y. 374, and *Anderson v. Anderson*, supra. The court said: "At the time when this conveyance was made, there was a subsisting lease, the privilege of renewal existed, and whether it should be renewed or not was at the option of the lessee. She having exercised that option by a renewal, there was at all times an existing, continuing liability upon her part to pay the rent secured thereby. This condition constituted the plaintiffs creditors within the meaning of the statute, at the time the transfer was made."

We are not impressed with the argument based upon a supposed analogy between debts which avoid a voluntary conveyance and debts provable in bankruptcy. It is true that the Federal courts have held that rent falling due after the filing of a petition in bankruptcy is not a debt provable in bankruptcy, but that is because the contract to pay rent, the lease, is not terminated by the bankruptcy, but is still a subsisting obligation against the bankrupt after his discharge. In the case chiefly relied upon by the appellant in this connection, it is said: "The date of filing the petition in bankruptcy is intended to mark the line of separation between debts that are probable and those that are not provable against the bankrupt's estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge. The adjudication of bankruptcy does not dissolve contractual relations between the bankrupt and others. It takes from him his property and devotes it to the payment of debts which are provable under §§ 63a and 63b of the bankruptcy act [act July 1, 1898, chap. 541, 30 Stat. at L. 562, 563, U. S. Comp. Stat. 1901, p. 3447], but it does not absolve him from the obligations of contracts." *Colman Co. v. Withoft*, 115 C. C. A. 222, 195 Fed. 250. The decision was thus squarely based upon § 63 of the bankruptcy act, which defines a provable debt as "a fixed liability . . . absolutely owing at the time of the filing of the petition against him." U. S. Comp. Stat. 1901, p. 3447. The statute here involved contains no such narrowing clause. The distinction between a debt absolutely owing and an existing equity is plain. The analogy assumed is in fact wanting. The distinction is further emphasized in *Bray v. Cobb* (D. C.) 100 Fed. 270, 274, where the court, placing its decision distinctly upon § 63a, subd. 1 of the bankruptcy act, says: "In a court of equity many questions might

arise, and conclusions be reached which are not tenable in a court of bankruptcy. Due regard being had to the rights of other creditors, keeping in view that the ordinary contractual relations of the bankrupt are terminated by the adjudication, and giving consideration to the words of the statute, the claimant, if entitled to prove any claim based on the agreement, is only entitled to prove for what was absolutely due at the time of the filing of the petition in bankruptcy."

We have examined the many authorities cited by counsel for appellant; but a further review of them would serve no useful purpose, since we deem the authorities we have noted determinative of the question here involved.

The only question arising upon the evidence, which we are permitted by the state of the record to review, is the admission by the trial court, on cross-examination of appellant's husband, of a financial statement made by him to the Washington Trust Company, which was agent for Fletcher and Stebbins. In this statement he represented that he had property of an aggregate value of about \$41,000. It is true this statement was made in order to procure a loan, and not in view of the lease afterwards entered into through the trust company as agent. The evidence was, however, properly admissible on cross-examination. The purpose of the statement did not affect its admissibility.

Notwithstanding the fact that the absence of proper exceptions to the findings precludes a reversal for insufficiency of the evidence, we have examined the record with care, and we are satisfied that the findings of the trial court are sustained by it in any event.

The decree is affirmed.

Crow, Ch. J., and Fullerton, Morris, and Main, JJ., concur.

ALABAMA SUPREME COURT.

● HOMER STEWART, Appt.,

v.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY COMPANY.

(— Ala. —, 61 So. 73.)

Master and servant — standing engine — threatening collision — fright of engineer — liability.

1. A railroad company is not liable for

Note. — Duty to warn trainmen as to location of cars seen ahead on spurs near track.

A search of the authorities justifies the

injury to an engineer who leaps from his engine upon seeing the headlight of another engine a short distance ahead apparently on the main track, but in fact on a spur, because of failure to warn him of the existence of the spur, or because of leaving an engine standing so near the main track with headlight burning.

Same — assumption of risk — ordinary conditions.

2. A locomotive engineer assumes the risk of determining his course of action upon misjudging ordinary and usual conditions appearing to be dangerous, but not so in fact.

(January 17, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Madison County

in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. James H. Branch and Kirk, Carmichael, & Rather for appellant.

Messrs. Spragins & Speake, for appellee:

The negligence was not the proximate cause of the injury.

Western R. Co. v. Mutch, 97 Ala. 199, 21 L.R.A. 316, 38 Am. St. Rep. 179, 11 So. 894; Crowley v. West End, 149 Ala. 613, 10 L.R.A.(N.S.) 801, 43 So. 359; Wilson v. Louisville & N. R. Co. 146 Ala. 285, 8 L.R.A.(N.S.) 987, 40 So. 941.

statement of the court that the foregoing case is one of first impression upon the question of the duty of a railroad company to notify trainmen of cars standing on spurs in close proximity to the track.

In addition to the point actually decided, the case is valuable as illustrating the rule stated in the note to *Scheurer v. Banner Rubber Co.* 28 L.R.A.(N.S.) 1216, where it is said: "In every case involving the liability of the master for an injury to a servant, it is elemental that there can be no recovery unless the master has been negligent,—has been guilty of some breach of duty owing by him to the servant." This point is frequently passed over, and recovery is denied upon the ground of the servant's assumption of risk or contributory negligence, in cases in which there is in fact no negligence on the part of the master, and consequently he is not prima facie liable and need not resort to the affirmative defenses to prevent a recovery. This is, in many cases, probably justifiable, as the evidence clearly shows that the servant did assume the risk or was guilty of contributory negligence, while it is not so clear that the master was not guilty of negligence on his part. But the point should not be overlooked that, irrespective of the conduct of the servant, there can be no recovery without negligence on the part of the master.

As to the point actually decided by the court, it is submitted that one essential point was not given due weight and was in fact practically ignored. This is the question of the servant's knowledge of the location of the spur at this particular place and the consequent probability of cars standing upon it. It is true, as the court says, that the construction and use of side tracks and spurs at convenient places is but an ordinary incident to the use and operation of railroads, but it is not shown in any way that the plaintiff had ever passed over this road before, or had acquired knowledge in any way as to the location of this spur; and in the absence of such knowledge it would seem to be a very strict application of the doctrine of imputed knowledge, to hold that a servant, in 47 L.R.A.(N.S.)

the absence of any actual knowledge, must be presumed to have taken into consideration by his contract of service the danger of suddenly encountering on a curve of the road a bright headlight indicating the presence of a locomotive, which, owing to the particular situation of the main track and the spur, had the appearance of being upon the main track. If such a danger is one which can be said, as a matter of law, to be one ordinarily incident to the business of railroading, then the decision is unquestionably correct.

The decision in the foregoing case is supported to some extent, at least, by the doctrine which is laid down by good authority, that the rule that a servant may be freed from the charge of contributory negligence by the fact that his act was committed while confronted by a sudden emergency is not applicable where the servant was not confronted by an actual danger. See 3 *Labbatt, Mast. & S.* 2d ed. § 1274. A reading of the context and authorities would lead one to believe, however, that the true rule is that the servant is not required to act with more care than a reasonably prudent man would exercise under the same circumstances, and that, if the emergency or danger is caused by the negligence of the defendant, the danger need not be an actual one, but only of such character that a reasonably prudent man, under all of the circumstances, would believe that the danger was an actual and imminent danger.

It should be noted that in the foregoing case the defendant was not the master of the plaintiff. The foregoing discussion has assumed that this was a case of a servant suing the master, since the court in its discussion so assumed, as is shown by the last paragraph of the opinion.

Although the court does not expressly pass upon the question whether the conduct of the servant was that of a reasonably prudent man or not, a note upon "Care required of one in sudden emergency," attached to *Lemay v. Springfield Street R. Co.* 37 L.R.A.(N.S.) 43, may be of interest in this connection.

W. M. G.

Stewart was a mere licensee, and there was no duty to warn him, and no liability except for wanton or wilful wrong.

Birmingham Southern R. Co. v. Kendrick, 155 Ala. 352, 46 So. 588; Western R. Co. v. Russell, 144 Ala. 143, 113 Am. St. Rep. 24, 39 So. 311; Bailey, Mast. & S. pp. 158-166; Sloss Iron & Steel Co. v. Knowles, 129 Ala. 410, 30 So. 584.

It was plaintiff's duty to ascertain the precise location of the switches and side tracks with reference to the performance of his duties.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322.

The defendant is not liable for a breach of duty owing to plaintiff by his employer.

Broslin v. Kansas City, M. & B. R. Co. 114 Ala. 398, 21 So. 475, 1 Am. Neg. Rep. 549; Travis v. Kansas City, S. & G. R. Co. 119 La. 489, 10 L.R.A. (N.S.) 1189, 121 Am. St. Rep. 526, 44 So. 274.

Somerville, J., delivered the opinion of the court:

The plaintiff, a locomotive engineer in the service of the Southern Railway Company, while operating his engine at night over a section of the defendant's main line, used by his employer under an agreement with defendant, discovered, about 40 yards ahead of him, another engine with headlight burning, and, supposing it to be on the main line, and a collision with it imminent, was seized with fright, leaped from his engine, and was injured. It is alleged that plaintiff's inference and his fright, and his effort to escape from the supposed peril, were, under the circumstances, reasonable and proper; and that his injury was due to defendant's breach of duty owed to him in not warning him of the existence and use of the spur track, or in leaving its engine so close to the main line as to deceive him, or in not screening or extinguishing the engine's headlight.

We are referred by counsel to no precedent for a recovery in such a case as this, and our own researches lead us to conclude that the case is one of first impression in the courts. If plaintiff is entitled to recover, it can only be because defendant has violated some duty owed to him in the premises.

We are referred by plaintiff's counsel to the doctrine which justifies one who is assaulted by the wilful act of another to act reasonably upon appearances, and to do in defense what a reasonable man would do under like circumstances; and, again, to the right of recovery for a civil assault, when one is put in fear by an apparent demonstration of force, although there was no intent to harm, and no danger of harm 47 L.R.A. (N.S.)

in fact. Reference is made, also, to the doctrine that one who is, by the wrongful or negligent conduct of another, in violation of a duty owed him, brought into sudden peril, and who, in the effort to escape it, acts wildly and runs into danger and is injured, although cool circumspection would have enabled him to choose a safe escape, is nevertheless not barred of his recovery by reason of contributory negligence, if his conduct was that of an ordinarily prudent man under such circumstances. Louisville & N. R. Co. v. Thornton, 117 Ala. 274, 23 So. 778; Postal Tele. Co. v. Hulsey, 132 Ala. 447, 31 So. 527; Pierson Lumber Co. v. Hart, 144 Ala. 239, 39 So. 566. In the first two instances, however, there is a wilful breach of an unquestionable duty not to put anyone in fear by any demonstration reasonably calculated to do so; and in the last there is actual peril to the plaintiff, resulting from a breach of the defendant's specific duty not to thus cause him an injury.

The case of Birmingham R. & Electric Co. v. Butler, 135 Ala. 388, 33 So. 33, is more nearly in point. There a passenger sued the carrier company, and the complaint alleged in the alternative that the defendant's servant caused another of its cars "to appear to be in imminent danger of collision" with the car on which plaintiff was riding, whereby he was caused to jump, to his injury. On demurrer, it was held that, to state a cause of action, it should appear that the appearance of imminent danger was such as to convince a reasonable person of the imminence of such danger; and that plaintiff jumped from the car to save himself, as any reasonable person might have done under such circumstances. We are not disposed to question the view that such a count states a good cause of action in favor of a passenger against his carrier. We assume, however, that even in that case there must be actual negligence in the management of the carrier's cars, and actual danger to the passenger in the situation produced, though it may not be actually imminent; or else there must be a wilful attempt by the carrier's servant to frighten the passenger,—itself, of course, a breach of the specific duty owed him. But, however that may be, that case is clearly not applicable here.

The construction and use of side tracks and spurs at convenient places is but an ordinary incident to the use and operation of railroads. They are not, in themselves, dangerous, and add nothing to the perils of service on the main line, except as they may be negligently left open at improper times. And so their use for the purpose here complained of is both customary and

proper, and did not endanger the safety of any train or any person passing over the main line. It does not appear that this spur was not ordinarily visible to an engineer approaching it on the main line, nor that the position of an engine standing on the spur would not be plainly marked to him by its supporting rails branching from the main line. We are unable to see that its structure and proper use was in any sense a menace to the employees of either company; nor can we predicate thereon a duty to warn employees of the existence of something which defendant might reasonably assume could and would be perceived and understood by them in the ordinary course of their service. So of the position of the engine on the spur. If it was stationed at a safe distance from the main line, there was no breach of defendant's duty in that respect; and certainly no breach of duty in keeping the headlight burning, if, indeed, that was not itself a positive duty, under the circumstances.

It may be conceded that plaintiff's leap to escape from the flaming face of a mogul engine thus unexpectedly seen in the night might be no more nor less than what a reasonable man might have done, had he supposed it to be standing on the main line. Nevertheless, we think his case must fail, because the defendant was not guilty of any breach of duty to him, and because he must be held to have assumed the responsibility of determining for himself what he would do for his own safety, when he misjudged ordinary and usual conditions which were not at all dangerous in fact.

Reduced to its last analysis, the complaint would impose upon defendant the duty of informing plaintiff, not of danger, but of the absence of danger,—a rule of conduct not prescribed by any authority known to us, and which, we think, cannot be supported by either reason or the requirements of sound policy.

We have considered the case as if the defendant owed to the employees of the licensee company the same duty it owed to its own employees, which, however, we do not decide, and in the light of the averments of those counts which state the case most strongly and favorably for the plaintiff; and our conclusion is that they show no right of action. The judgment of the Circuit Court sustaining the demurrer must therefore be affirmed.

Dowdell, Ch. J., and McClellan and Sayre, JJ., concur.

Petition for rehearing denied February 6, 1913.

47 L.R.A.(N.S.)

ALABAMA SUPREME COURT.

MARGARET ANDERSON, Appt.,

v.

JOHN J. ROBINSON.

(— Ala. —, 62 So. 512.)

Landlord and tenant — covenant to repair — liability for injuries.

1. A covenant to repair in a lease does not render the landlord liable in tort for injuries to the tenant, his family, servants, or guests, caused by defects in the premises, unless they existed at the time of the lease, were known to the landlord, and concealed from the tenant.

Appeal — sustaining demurrer to count — harmless error.

2. Sustaining a demurrer to a good count in a declaration is not reversible error if it is so similar to a count which is sustained that plaintiff had the benefit of all evidence which could have been offered under it.

(May 21, 1913.)

APPEAL by plaintiff from a judgment of the City Court of Montgomery in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Anderson, J.:

The facts made by the pleadings are that defendant had rented to the husband of plaintiff a certain store in the city for the year beginning October 1, 1911, and ending October 1, 1912, and that during that year plaintiff was employed by her husband in the sale of goods in said store. The lease was entered into between plaintiff's husband and defendant, and that a portion of said lease provided that the said Robinson should repair all the rotten planks in said flooring; and that it became and was the duty of the defendant Robinson to provide a safe and suitable flooring in said storehouse in the flooring thereof, and, instead of having said flooring repaired, over which it was necessary that plaintiff should pass in conducting the business affairs of her husband, defendant permitted said flooring to have a rotten plank in said flooring (here follows description of location of the plank); and that the flooring was defective,

Note. — As to right of tenant to recover for personal injuries received in consequence of landlord's breach of contract to repair, see notes to *Dustin v. Curtis*, 11 L.R.A.(N.S.) 504, and *Walsh v. Schmidt*, 34 L.R.A.(N.S.) 804. The latter note, in connection with a note in 34 L.R.A. 824, covers the general question as to the liability of a landlord for injury to tenants from defects in premises.

and was discovered before the injury hereinafter mentioned was received, and that said defects existed before said lease was signed, and was drawn to the attention of defendant at the time said lease was signed, and was drawn again and again to the attention of defendant before said plaintiff was injured, and defendant was requested and notified to have said flooring repaired, but that he failed and neglected to do so. That it became necessary for plaintiff, in the discharge of her duties about said store, to pass over the said rotten plank, and that, while she was exercising due and proper care in passing over said rotten plank while waiting on her husband's customers in said store on a certain day, without negligence or fault on her part, the said flooring in said store broke with her (and here follows catalogue of her injuries and damages). Count 2 alleges the same thing, except that the rotten plank was not discovered by plaintiff before the injuries complained of were received. Count 3 is a short rendering of the same state of facts as shown in count 1. Count 4, after averring the lease as averred in count 1, avers that plaintiff was employed and fell through the floor as described in count 1 on account of the floor yielding on account of its bad condition, and it is alleged that it was the duty and obligation of the defendant to keep the said building in good condition and habitable for the tenants, servants, or guests entering upon said premises with the permission of said tenant, and that the vices and defects in the floor could have been discovered by an architect or skilled builder, and were not due to any fault of plaintiff, who was in the discharge of her duties, and had no means of observing the condition of the floor. The plaintiff was ignorant of the dangerous condition, and without fault or negligence on her part she fell through the defective flooring, and was injured as set out in count 1. Count 5 alleges that on July 12, 1911, a lease was entered into between C. W. Anderson, husband of plaintiff, and one John J. Robinson, defendant, for the rent of a certain storehouse in the city of Montgomery for the year from October 1, 1911, to October 1, 1912, and that plaintiff was employed by her husband in the sale of merchandise in said store, and without fault on her part plaintiff was injured by falling through a defective plank in said flooring; that said defective plank was in such defective and unsafe condition at the time of the leasing and taking possession of the same by the husband of plaintiff, and that defendant knew of this condition, and notwithstanding his knowledge fraudulently concealed it, and that said defect was not obvious, and could not be discovered

by the exercise of ordinary care; and in the performance of her daily duties in the store the said defective plank was directly in her path, and she was required and compelled to pass over said defective plank; and that on or about July 3, 1912, while she was exercising ordinary care and performing her regular store duties, and without fault on her part, the said defective plank in said flooring gave way under her, and she was precipitated through said flooring, and as a proximate consequence suffered the injuries and damages alleged in the first count of the complaint. Count 6 is practically the same as count 1. Count 7 is the same as count 1, except that it alleges sufficient facts which, if followed, would have disclosed to defendant knowledge of the defective condition of the plank in the floor, etc. Count 8 is practically the same as count 7. Count 9 is very similar to count 5. The demurrers raise the question discussed in the opinion and other questions as to the nature of damages, not necessary to be here set out.

Mr. Warren S. Reese for appellant.
Messrs. Hill, Hill, Whiting, & Stern,
for appellee:

The tenant and his family cannot recover for a defect in a building from the landlord in an action of this kind for personal injuries.

Davis v. Smith, 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832; Miles v. Janvrin, 196 Mass. 431, 13 L.R.A.(N.S.) 378, 124 Am. St. Rep. 575, 82 N. E. 708; Morgan v. Sheppard, 156 Ala. 403, 47 So. 147.

Action in tort will not lie against a landlord in favor of a tenant who receives a personal injury because the landlord fails to comply with his contract to make repairs.

Dustin v. Curtis, 74 N. H. 266, 11 L.R.A. (N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; Morgan v. Sheppard, 156 Ala. 403, 47 So. 147.

It is the duty of the lessee to repair if the landlord does not.

Davis v. Smith, 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832; Hamilton v. Feary, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N. E. 48.

There is no duty arising under the law requiring the landlord to make repairs on the premises.

Morgan v. Sheppard, *supra*.

There must be a breach both of a legal duty and also of the contract; if both do not exist, then there can be no recovery for tort.

Duskin v. Curtis, *supra*.

The counts fail to state a cause of action.

Hamilton v. Feary, supra.

The judgment entry shows that demurrers were filed to each of the counts, but the record does not contain the demurrers to counts 8, 9, and 10; therefore the court will presume that, if they were defective, then the demurrers assigned grounds which reached the defect.

Parsons v. Age-Herald Pub. Co. — Ala. —, 61 So. 345; *Watts v. Atlanta, B. & A. R. Co.* — Ala. —, 60 So. 861; *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Comer v. Franklin*, 169 Ala. 573, 53 So. 797.

If it is contended that the court erred in sustaining the demurrers to count 9 of the complaint, then plaintiff had the benefit under count 5 of the complaint, of all the evidence that he could have offered under count 9.

Bradley v. Louisville & N. R. Co. 149 Ala. 545, 42 So. 818; *Henderson Law Co. v. Hinson*, 157 Ala. 640, 47 So. 717.

Anderson, J., delivered the opinion of the court:

In the case of *Morgan v. Sheppard*, 156 Ala. 403, 47 So. 147, this court, by the present writer, discussed the obligation and liability between landlord and tenant, their duties and liability to each other, as well as to third persons, and it was there stated, among other things, in speaking of the liability of a landlord for injuries caused by defects in the premises to the tenant, his family, servants, or guests, as distinguished from third persons: "The rule, however, of the liability of the landlord for renting premises in such a dangerous condition as to constitute a nuisance, does not exist in favor of the tenant, his servants, guests, or others entering under his title. . . .

As to them, in the absence of covenant to repair, he is only liable for the injuries resulting from latent defects, known to him at the time of the leasing, and which he conceals from the tenant. 24 Cyc. 1114, and cases cited in note 50; *Thomp. Neg.* §§ 1130, 1131. If the defect is obvious at the time of the letting, the tenant takes the possession of premises as he found them, and the landlord would not be liable for injuries resulting from said obvious defects to the tenant, his family, servants, or guests." It may be true that, in stating the rule, we were overcautious in confining it to cases in which there was no covenant to repair, but we did not hold that such a covenant would change the rule of liability, and expressly premitted the question further on in the opinion, in dealing with count four of the complaint in said case. In the case at bar, however, some of the counts set up a covenant to repair when the lease

was made and as a part of the consideration of same, but it seems from the great weight of authority that said covenant does not increase the liability of the landlord, or change the rule above set forth as to his liability in tort to the tenant, his family, servants, or guests for injuries caused by virtue of defects in the rented premises. In other words, it seems settled by the weight of authority that the landlord is not liable in tort for injuries to said class, whether there be a covenant to repair or not, unless the defects existed at the time of the letting, where known to him, and which he concealed from the tenant. This identical question has been decided in line with the present holding in the case of *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L.R.A. 478, 3 Ann. Cas. 832, and note; 106 Am. St. Rep. 691, and note. See also *Dustin v. Curtis*, 74 N. H. 266, 11 L.R.A. (N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; *Miles v. Janvrin*, 196 Mass. 431, 13 L.R.A. (N.S.) 378, 124 Am. St. Rep. 575, 82 N. E. 708. The ruling of the Rhode Island court in the case of *Davis v. Smith*, supra, that a landlord who has agreed with his tenant to make repairs is not liable in tort to a member of the tenant's family for personal injuries from the landlord's neglect to repair, accords with the general rule. *Shackford v. Coffin*, 95 Me. 69, 49 Atl. 57; *Brady v. Klein*, 133 Mich. 422, 62 L.R.A. 909, 103 Am. St. Rep. 455, 95 N. W. 557, 2 Ann. Cas. 464, 14 Am. Neg. Rep. 351; *Boden v. Scholtz*, 101 App. Div. 1, 91 N. Y. Supp. 437; *Stelz v. Van Dusen*, 93 App. Div. 358, 87 N. Y. Supp. 716; *Mitchell v. Stewart*, 187 Pa. 217, 40 Atl. 799, 4 Am. Neg. Rep. 578; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465; *Collins v. Karatopsky*, 36 Ark. 316; *Taylor, Land. & T.* 175a; *Wood, Land. & T.* 921. This is not only the American, but the English, rule as well. *Courtenay v. Earle*, 10 C. B. 73, 20 L. J. C. P. N. S. 7, 15 Jur. 15. None of the counts in plaintiff's complaint, to which demurrer was sustained, except perhaps count 9, brought her case within the protection of the rule authorizing a recovery for the injury set out, and the trial court did not err in sustaining the demurrers to all of said counts except 9.

While there may have been error in sustaining the demurrer to count 9, it is so similar to count 5, to which the demurrers were overruled, the the plaintiff got the benefit of all evidence under said count 5, which could have been offered under count 9, and this error was without injury. *Bessier v. Alabama City, G. & A. R. Co.* — Ala. —, 60 So. 82; *Bradley v. Louisville & N. R. Co.* 149 Ala. 545, 42 So. 818; *Hender-*

son Law Co. v. Hinson, 157 Ala. 640, 47 So. 717. The case of Finney v. Steele, 148 Ala. 197, 6 L.R.A.(N.S.) 977, 41 So. 976, 12 Ann. Cas. 510, 20 Am. Neg. Rep. 255, cited by appellant, is in conformity with, rather than opposed to, the general rule heretofore laid down; and, while it quotes from the case of Hines v. Willcox, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; Willcox v. Hines, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297, which places a liability in tort upon the landlord if he knew of the defect, or by ordinary care should have known of it, and conceals it from the tenant, we expressly declined to commit this court to said doctrine, but merely cited it as stating the strongest and most extreme limit to which a court has gone in fastening liability upon the landlord. There are a few other cases not cited by appellant, which extend the liability beyond the general rule, but they are opposed by the weight of authority in England and America.

The judgment of the City Court is affirmed.

Dowdell, Ch. J., and Mayfield and De Graffenried, JJ., concur.

ARKANSAS SUPREME COURT.

BANKERS' TRUST COMPANY OF ST. LOUIS, App't.,

v.

J. J. McCLOY et al.

(— Ark. —, 159 S. W. 205.)

Corporation — debt due — lien on stock.

1. The possibility of shrinkage in the assets of a business for which stock is issued by a corporation organized to take over the business, which, by resolution of the corporation, is to be made up out of dividends declared, is not a debt due within the meaning of a statute giving corporations a lien on stock for all debts due it from its members.

Same — resolution declaring lien — effect on bona fide purchasers.

2. A resolution of a corporation organized to take over a business, for the purchase price of which stock is issued, that any shrinkage in the assets shall be made good out of dividends declared, is not binding on bona fide purchasers of the stock without notice, although the stock was issued subsequently to and pursuant to the resolution.

Note. — For priority as between lien of corporation and pledgee or bona fide purchaser of corporate stock, see the note to Ardmore State Bank v. Mason, 39 L.R.A. (N.S.) 292.

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Same — sale of stock — implied warranty — voluntary payment — reimbursement.

3. Purchasers of corporate stock who comply with a demand of the corporation to pay an alleged lien against the stock, which could not have been legally enforced, cannot reimburse themselves from the vendors of the stock under the implied warranty of title.

(July 7, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Drew County in plaintiffs' favor in an action brought to recover damages for breach of an alleged warranty in the sale of certain shares of corporate stock. Reversed.

The facts are stated in the opinion.

Mr. J. C. Gillison for appellant.

Messrs. Williamson & Williamson, for appellees:

There was no necessity for an authentication of the claim in order to subject this stock to the payment of the debt *pro tanto*, for the bank, in effect, had the possession of the stock,

Mellroy Bkg. Co. v. Dickson, 66 Ark. 331, 50 S. W. 868; 10 Cyc. 589; Loeb v. German Nat. Bank, 88 Ark. 113, 113 S. W. 1017.

On the sale of this stock, appellant by law impliedly warranted its title to the stock to be clear and free from all encumbrances.

Lindsay v. Lamb, 24 Ark. 223; James v. Bocage, 45 Ark. 284; Smith v. Corege, 53 Ark. 295, 14 S. W. 93; Boyd v. Whitfield, 19 Ark. 447; Marshall v. Keach, 10 Ann. Cas. 168, note; 35 Cyc. 394; Broadus Institute v. Siers, 68 W. Va. 125, 69 S. E. 468, Ann. Cas. 1912 A, 920; St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912 B, 1337; Humphrey v. Merriam, 46 Minn. 413, 49 N. W. 199; McClure v. Central Trust Co. 165 N. Y. 108, 53 L.R.A. 153, 58 N. E. 777.

In cases where the vendor knows he has no title, or an imperfect title, and conceals the fact from the buyer, the seller is liable on the ground of fraud.

Benjamin, Sales, 2d ed. p. 512; Sumner v. Gray, 4 Ark. 467, 38 Am. Dec. 39.

The findings of a circuit court upon a disputed issue of fact submitted to it is as conclusive upon appeal as the verdict of a jury. That is to say, it will not be disturbed if there is any evidence to support it.

Toledo Computing Scale Co. v. Stephens, 96 Ark. 606, 132 S. W. 928; France v. Shockey, 92 Ark. 41, 121 S. W. 1056; Midland Valley R. Co. v. Moran Bolt & Nut Mfg. Co. 91 Ark. 108, 120 S. W. 396; Mason v. Gates, 90 Ark. 375, 119 S. W. 246.

Every presumption must be indulged in favor of the correctness of the ruling of the trial court.

Tharpe v. Western U. Teleg. Co. 94 Ark. 530, 127 S. W. 730.

McCulloch, Ch. J., delivered the opinion of the court:

Appellees, J. J. McCloy and V. J. Trotter, instituted this action in the circuit court of Drew county against appellant, Bankers' Trust Company of St. Louis, a foreign corporation, to recover damages, laid in the sum of \$2,478, on account of the breach of an alleged warranty in the sale of certain shares of the capital stock of the Chicot Bank & Trust Company, a banking corporation domiciled and doing business at Lake Village, Chicot county, Arkansas. The case was tried before the circuit court sitting as a jury, and the trial resulted in a judgment in favor of appellees for the recovery of the amount of damages claimed by them.

Appellant owned 160 shares of the capital stock of the Chicot Bank & Trust Company of the face value of \$100 per share. Negotiations between the parties looking to a sale of the stock were begun in February, 1910, which resulted in a sale of said shares by appellant to appellees on March 4, 1910, at the price of \$109 per share. The negotiations were conducted and consummated through written correspondence and telephone conversations; appellees residing at Monticello, Arkansas, and appellant acting through its officers from the St. Louis office. There was no express warranty of the stock, either as to the title or value, and appellees rely for recovery upon an implied warranty against encumbrances; and they adduced testimony tending to show that the stock was encumbered at the time of the sale to the extent of the amount named in the complaint.

The Chicot Bank & Trust Company was organized in August, 1907, and two other banking institutions doing business in Lake Village, namely, the Chicot Bank and the Bank of Lake Village, were at the time of its organization merged into it. The assets of the two old banking institutions were taken over by the new one and the liabilities thereof assumed, and stock in the new institution was issued to the stockholders of the two old ones of the estimated face value of said assets.

At the first meeting of stockholders upon the organization of the Chicot Bank & Trust Company, a resolution was unanimously adopted and placed upon the records of the company, reciting the conditions upon which the assets of the Chicot Bank and the Bank of Lake Village were to be

taken over and the liabilities thereof assumed and stock issued in payment thereof; the estimated value of the assets of the Chicot Bank being \$25,500 and of the Bank of Lake Village \$20,247.50. The resolutions continued as follows: "Said stock when issued shall be charged at par to the accounts of said banks on the books of said company, provided that the issue of said stock shall not exceed 97 per cent standing to the credit of said respective banks, until all the bills receivable, loans, overdrafts, and other indebtedness turned in by said banks as assets as shown by said exhibits have been collected; and should there be any loss on any such items, such loss shall be charged to said respective banks against said balances of accounts so retained, together with any extra expense incurred in collecting any of said items so turned in as assets, or in the attempt of collection; against said accounts so retained shall also be charged any current expenses or current liabilities that said company may be required to pay, and not shown on above exhibits, and which said respective banks should have paid but have been overlooked: Provided further that should said accounts so retained not be sufficient to cover all of above items that may be charged as provided, then this company is hereby authorized and empowered to, at any time, retain a sufficient amount of dividend declared and ordered paid on the aforementioned issue of stock to reimburse it for any and all losses and expenses incurred in the collection of the assets of either bank (provided that the real estate and furniture and fixture accounts turned in by both banks are not included in this provision, but same are accepted at the book and agreed value, and any loss sustained on same must be borne by said company), said balances of said accounts so to the credit of either bank shall be under the exclusive control of said company, and may be retained by it until all of the bills receivable, loans, and other items shown on said exhibits are collected and satisfied to its satisfaction. Any balances remaining when said company finally decides to close said accounts may be paid to said banks in paid-up stock (at par) of this company or in cash as its board of directors may direct."

The stock sold and transferred by appellant to appellees was a part of the stock issued to the stockholders of the Bank of Lake Village in payment of said estimated value of the assets of that institution. Of that stock there were 147 shares issued to J. E. Franklin, who appears to have been one of the officers of appellant corporation, and who was a stockholder of the Bank of Lake Village. This stock, together with 13

shares issued to other stockholders of the Bank of Lake Village, constituted the 160 shares sold and transferred by appellant to appellees.

The stock certificates were transferred in writing by appellant to appellees, but, on the presentation of same for transfer upon the books of the company and issuance of new stock, the officers of the Chicot Bank & Trust Company called attention to the fact that the stock was encumbered with liability for any loss which might finally accrue upon the assumed liabilities and assets of the Bank of Lake Village, and said officers declined to issue new stock except upon the recognition and assumption by appellees of such liability. Appellees protested against any such liability, but finally accepted, under protest, the issuance of said shares of stock thus encumbered with the asserted liability. Subsequently the Chicot Bank & Trust Company made demand upon appellees for the amount ascertained to be the *pro rata* part of such encumbrance charged against said stock, and the same was paid by appellees; the amount so paid, together with amounts deducted from dividends on the stock, aggregating the amount claimed by appellees in their complaint.

Appellees had no notice of the existence of the aforementioned stockholder's resolution when they purchased the stock from appellant and paid for it, nor did they have any notice that the Chicot Bank & Trust Company asserted any lien against the stock. The first information on the subject which came to them was when they presented the assigned shares for transfer on the books of the company. It is not contended that there was any statutory lien on the stock in favor of the Chicot Bank & Trust Company, and it is clear that none existed.

The statutes of this state provide that the stock of every such corporation shall "be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Kirby's Dig. § 853.

There were no "debts due" to the corporation from appellant as shareholder when the shares were assigned. The aforementioned resolution did not attempt to create a liability of the shareholders. It merely provided that, should there be any loss, the same should "be charged to said respective banks," and that the company was "authorized and empowered to, at any time, retain a sufficient amount of dividends declared and ordered paid on the aforementioned issue of stock to reimburse it for any and

all losses and expenses incurred in the collection of the assets of either bank." It created an encumbrance against the stock itself which "followed the stock," so to speak. That encumbrance was a conditional liability, and did not, in any sense, constitute a "debt due" to the corporation within the meaning of the statute. See authorities cited in appellant's brief.

There existed originally at common law no lien in favor of a corporation on its shares of stock for debts due from stockholders in the absence of statutory or charter authority. No lien could be created by by-law or resolution or by common custom, for the policy was to discourage secret liens which might hamper the transfer of shares of stock. 2 Cook, Corp. § 521; 4 Thomp. Corp. § 4000. But that policy was even at common law somewhat relaxed, and the rule was recognized that such a lien might, as between the corporation and its shareholders and a purchaser with notice, be created by by-law and even by common custom in such dealings. Child v. Hudson's Bay Co. 2 P. Wms. 207. That is the law now, we think, according to the weight of American authority. 4 Thomp. Corp. §§ 4003-4005; 2 Cook, Corp. § 522; Jennings v. Bank of California, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; Vansands v. Middlesex County Bank, 26 Conn. 144; Reading F. Ins. & T. Co. v. Reading Iron Works, 137 Pa. 282, 21 Atl. 169, 170; Des Moines Nat. Bank v. Warren County Bank, 97 Iowa, 204, 66 N. W. 154.

The distinction between liens created by statute or charter and those created by by-laws of a corporation is pointed out in an opinion of the supreme court of Mississippi, as follows: "It is well settled that at common law a corporation has no lien on the stock of its shareholders for an indebtedness to it. Such liens, when they exist, result either from a provision in the charter to that effect, or from a by-law enacted by the corporation in pursuance of authority conferred by the charter. Usually the lien, when it exists at all, is given by the charter, which, being a public law, as well as the act by which the corporation is created, is notice to all persons dealing with the company. Union Bank v. Laird, 2 Wheat. 390, 4 L. ed. 269. The lien may, however, be created by a by-law, as was held at an early day by Lord Chancellor Macclesfield in Child v. Hudson's Bay Co. supra, and very generally since. When thus created, there seems to be some diversity of opinion as to its effect against an innocent purchaser of the stock for value and without notice of the lien. . . . This difference is more apparent than real, for it seems to be well recognized

that a by-law has no extra corporate force, and is only binding on those dealing with the corporation who have notice of it, or who deal with it under such circumstances that they are bound to take notice of it. A solution of the question will be found in the right determination of the categories in which notice is inferred. By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth, therefore, that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice." *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

The purchaser of shares of stock is chargeable with notice of liens created under statutes or charter, but not those arising under the by-laws of the corporation or under the custom of dealing between the corporation and its shareholders. The reason for this rule cannot be stated in language clearer than that quoted above from the opinion of the supreme court of Mississippi. And that rule is sustained by the great weight of authority. 2 Cook, Corp. §§ 522 and 525; 4 Thomp. Corp. § 4007; Helliwell, *Stock & Stockholders*, §§ 87 and 164; *Bank of Holly Springs v. Pinson*, supra; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa, 204, 66 N. W. 164; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 48 L.R.A. 107, 56 N. E. 521; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200; *Bryon v. Carter*, 22 La. Ann. 98; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Brinkerhoff-Ferris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447, 24 S. W. 129.

"Where the right to a lien rests on a by-law merely, it cannot," says Mr. Thompson in his work on Corporations, "be enforced against a bona fide transferee of the shares who had no knowledge of its existence. A by-law does not ordinarily impart notice. The policy of the law is against secret liens

in respect of personal property, and, where the corporation establishes a by-law reserving a lien upon its shares for any debt due it by the holder of such shares, it owes it to the public to make known that fact by printing a notice of it on the certificate of shares or by some other appropriate means." § 4007. The same author (§ 4003) states the rule, and cites numerous authorities in support thereof, that "a by-law of this character would not be valid as against goodfaith transferees without notice of its existence, where the only authority on the subject given the corporation by its charter or the general law was merely to prescribe and regulate the mode of transferring shares."

Shares of stock in a corporation do not constitute negotiable paper within the law merchant, but in some of the authorities such instruments are spoken of as possessing elements of quasi negotiability, and the modern authorities generally lay down the rule that necessities of business require that shares of stock should be treated prima facie as evidence of unencumbered ownership of the holder thereof named in the certificate and upon the books of the company.

Judge Folger, speaking for the New York court of appeals in *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96, said: "Shares of stock are in general personal property to be dealt with as such, and with as much freedom and ease. The right to them is a chose in action, and though not transferable, so as to give the same safety in dealing, as is given to a bona fide taker of negotiable paper, the current of authority in this state is to the protection of the bona fide vendee against secret or equitable claims thereto of one who has induced the vendor with the indicia of ownership. It is evident that such a by-law as this in question, not made known upon the certificate of stock issued by the corporation, if it is to be upheld, is a very serious hindrance to the ease and safety with which sellers and buyers of shares of stock may deal therewith."

Mr. Justice Davis, speaking for the Supreme Court of the United States in the case of *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172, said: "It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage."

Mr. Helliwell lays down the same doctrine as follows: "Stock certificates are, at the present day, the basis of large commercial transactions throughout the world, and are bought and sold in open market

with the same freedom which characterizes the transfer of promissory notes and other forms of securities. They are not, it is true, negotiable instruments; so far as practicable, however, they are held by the courts to possess the elements of negotiability. Under the corporate seal, the public is assured that the holder of a certificate is entitled to the number of shares stated therein, and that these shares are transferable on the books of the corporation only in person or by attorney and upon surrender of the certificate. This constitutes a representation on the part of the corporation that a purchaser of the certificate, upon presenting the same to the corporation, duly assigned, with power of attorney to transfer, may have the shares stated recorded in his name." Helliwell, *Stock & Stockholders*, p. 309.

The rule is unaffected by the fact in this case that the resolution giving a lien upon the stock or, rather, the dividends, preceded the issuance of the stock, and that the stock was issued pursuant to the resolution. The resolution could not rise to a higher dignity than a by-law of the corporation. It was merely a contractual lien between the corporation and its shareholders, and all the reasons given for the requirement of notice to bona fide purchasers apply.

Appellees were bona fide purchasers for value without any notice of the bank's claim. There was nothing upon the face of the shares of stock to give them notice, and they were not, as we have already seen, chargeable with notice of the contents of the resolution adopted. They were entitled, as a matter of right, to have the stock transferred on the books of the company and new certificates therefor issued. The officers of the corporation had no legal right to refuse to make the transfer and issue new stock. Appellees had a complete remedy to compel the transfer, or to recover damages from the corporation on account of such refusal to make the transfer. 2 Cook, *Corp.* §§ 389 et seq.

Since, as we have seen, appellees obtained a clear and unencumbered title to the stock by their purchase from appellant, with the right to compel the corporation to recognize the transfer, there was no breach of the implied warranty as to title. Appellees were not compelled to comply with the demands made by the officers of the corporation, and were volunteers in making payment of the sum demanded. The implied warranty was only against legally enforceable demands against the stock, and an unenforceable demand, however just in morals, was not an encumbrance which constituted a breach of the warranty.

It follows that in no view of the case as
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presented by appellees have they any valid claim against appellant for damages, and the judgment is wholly without evidence to sustain it.

The judgment is therefore reversed, and the cause dismissed.

NORTH CAROLINA SUPREME COURT.

J. T. WILLIAMS et al., Appts.,

v.

BRANNING MANUFACTURING COMPANY.

(154 N. C. 205, 70 S. E. 290.)

Arbitration — attempt to oust court — validity of agreement.

An unexecuted agreement to arbitrate all disputes which shall arise in the execution of a contract, both as to liability and loss, is no bar to a suit upon the contract, since it is void as an attempt to oust the courts of their jurisdiction.

(February 22, 1911.)

Note. — Arbitration agreements, their validity and binding force.

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A PPEAL by plaintiffs from a judgment of the Superior Court for Hertford County in defendant's favor in an action brought to recover damages for breach of a contract to operate defendant's lumber plant. Reversed.

The facts are stated in the opinion.

Messrs. Winborne & Winborne, for appellants:

Agreements whereby the validity of a contract or the rights of parties are submitted to arbitration may operate to oust the courts of jurisdiction, and are so contrary to public policy that the submission may be revoked at any time before the award.

Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696.

Mr. John E. Vann also for appellants.

Messrs. Pruden & Pruden, W. M. Bond, and S. Brown Shepherd for appellee.

Walker, J., delivered the opinion of the court:

This case was before the court at the last term, and is reported in 153 N. C. 7, 31 L.R.A. (N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954. We then held that the award of the arbitrators barred the plaintiff's recovery in this action as to all dealings and transactions which occurred prior to February 20, 1906, that being the date of the submission to arbitration, and we reversed the judgment of the court below only to that extent. This

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| <p>XII. Arbitration agreements between partners, 373.</p> <p>XIII. Controversies beyond the scope of arbitration agreements, 376.</p> <p>XIV. Incidental arbitration agreements not made conditions precedent to suit, 378.</p> <p>XV. Arbitrations of auxiliary and subsidiary questions.</p> <p style="padding-left: 20px;">a. In general, 380.</p> <p style="padding-left: 20px;">b. Prices, values, damages, amounts payable, quantities, qualities, etc.</p> <p style="padding-left: 40px;">1. Features, 381.</p> <p style="padding-left: 40px;">2. Validity, 382.</p> <p style="padding-left: 40px;">3. Prices and values in sales, 384.</p> <p style="padding-left: 40px;">4. Damages, 385.</p> <p style="padding-left: 40px;">5. Payments contingent on awards, 386.</p> <p style="padding-left: 40px;">6. Rents, improvements, etc., in landlord and tenant agreements, 387.</p> <p>XVI. Arbitrations as conditions precedent to litigation, 387.</p> <p>XVII. The Pennsylvania doctrines, 399.</p> <p>XVIII. Rescission of arbitration agreements.</p> <p style="padding-left: 20px;">a. General right of revocation, 400.</p> <p style="padding-left: 20px;">b. When stipulated to be irrevocable, 402.</p> <p style="padding-left: 20px;">c. Submissions made rules of court, 403.</p> <p style="padding-left: 20px;">d. Submissions of preliminary and collateral questions, 404.</p> <p style="padding-left: 20px;">e. Revocability as affected by statute, 405.</p> <p style="padding-left: 20px;">f. Implied revocations, 406.</p> <p style="padding-left: 20px;">g. Revocation as affected by the consideration for the submission, 406.</p> <p>XIX. Breaches of agreements to arbitrate.</p> <p style="padding-left: 20px;">a. Revocation as a breach, 408.</p> <p style="padding-left: 20px;">b. Remedy for breach, 408.</p> <p style="padding-left: 20px;">c. Damages, 409.</p> <p>XX. Unperformed arbitration agreements.</p> <p style="padding-left: 20px;">a. Effect of refusal to perform, 410.</p> | <p>XX.—continued.</p> <p style="padding-left: 20px;">b. Effect of failure or neglect to arbitrate, 412.</p> <p style="padding-left: 20px;">c. Omission to make written request when request in writing is prescribed, 414.</p> <p style="padding-left: 20px;">d. Effect of phrase, "when appraisal has been required," 416.</p> <p style="padding-left: 20px;">e. Effect of mere silence, 417.</p> <p>XXI. Necessity for new arbitration after one fails, 419.</p> <p>XXII. Duty to act in good faith, 421.</p> <p>XXIII. Necessity for an actual controversy, 423.</p> <p>XXIV. Waivers, 425.</p> <p>XXV. Effect of unconditional denial of all liability, 427.</p> <p>XXVI. Pleadings, 431.</p> <p>XXVII. Legislation.</p> <p style="padding-left: 20px;">a. General effect of statutes regulating arbitrations, 432.</p> <p style="padding-left: 20px;">b. Valued policy statutes and total losses by fire, 433.</p> <p style="padding-left: 20px;">c. English and Canadian statutes, 436.</p> <p>XXVIII. Awards.</p> <p style="padding-left: 20px;">a. Awards after revocations, 441.</p> <p style="padding-left: 20px;">b. Need of unanimity, 442.</p> <p style="padding-left: 20px;">c. Finality, 442.</p> <p style="padding-left: 20px;">d. Enforcement, 445.</p> <p style="padding-left: 20px;">e. Annulment, 445.</p> <p>XXIX. Conclusion, 447.</p> <p style="text-align: center;"><i>I. Scope of note.</i></p> <p>This note has been restricted, as far as the nature of the subject would permit, to a presentation of the cases involving the validity and binding effects of agreements to arbitrate controversies likely to arise in the future between the parties to them, whether independent engagements or mere incidents to other contracts. A conspicuous exception is that class of cases in which persons making contracts requiring for their performance the ascertaining or fixing of a price, value, or quantity, have agreed to have the same appraised by appraisers chosen for the purpose. These cases have been included notwithstanding there is a broad distinc-</p> |
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decision was in perfect accord with the agreement of the parties, which, in express terms, restricted the arbitration to transactions which had occurred prior to that date, and in the answer of the defendant the arbitration and award are pleaded only in bar of a recovery for the damages which accrued before that date. In the superior court, judgment was entered upon the certificate of this court, not according to the opinion, which, we think, clearly defined the extent of the reversal of the former judgment, but to the effect that the agreement to arbitrate, pleaded by the defendant, is a bar to the plaintiff's entire cause of action, and it was directed that the defendant go without day and recover its costs. This judgment was beyond the

scope of our decision. We did not consider the legal effect of the agreement to arbitrate, but held that, so far as the parties had actually arbitrated their differences, and with respect to the matters embraced by the award, which was rendered before notice by the plaintiff of his election to revoke the arbitration, the award was a bar. The judgment of the court therefore was erroneous, unless it can be sustained upon the ground that the agreement to arbitrate all disputes between the parties, which should arise in the execution of the contract, is a bar to the further prosecution of this action to recover damages based upon transactions since February 20, 1906, which the defendant now insists deprives the plaintiff of the

tion between a submission to arbitration and a reference of a collateral or incidental matter of appraisement, calculation, or measurement. *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465.

The reference of a question of value or amount is not a submission to arbitration in any proper sense of the term (*Curry v. Lackey*, 35 Mo. 389), and an agreement for an appraisal of values by third persons technically is not an arbitration (*Rochester v. Whitehouse*, 15 N. H. 468).

In short, appraisers are not arbitrators (*Garred v. Macey*, 10 Mo. 161), unless, of course, in those cases where something previously in dispute is submitted to them for decision (*Norton v. Gale*, 95 Ill. 533).

Yet, all cases of this character are so closely analogous to arbitrations proper, and are governed so much by the same general principles, that it would be, if not unwise to leave them out, at least justifiable to take them into a commentary on the decisions respecting arbitrations.

In both the old and the new series of the L.R.A. there have, from time to time, been published important notes on the various phases of arbitrations. The notes, to which the attention of the reader should be called at the outset, are:—

1. That on fire insurance: submission to arbitration as a condition precedent to action, to *Hutchinson v. Liverpool & L. & G. Ins. Co.* 10 L.R.A. 558;

2. That on provisions in fire insurance policies for reference as to loss, to *Wainer v. Milford Mut. F. Ins. Co.* 11 L.R.A. 598;

3. That on agreements to arbitrate, to *Kinney v. Baltimore & O. R. Co.* 15 L.R.A. 142;

4. That on the conclusiveness of decisions of tribunals of associations or corporations, to *Ryan v. Cudahy*, 49 L.R.A. 353;

5. That on insurance, effect of failure of arbitration, to *Grady v. Home F. & M. Ins. Co.* 4 L.R.A.(N.S.) 288;

6. That on the right of arbitrators to rehear, or of a party to revoke, a submission, where the award is not coextensive with the submission, to *Frederick v. Margwarth*, 18 L.R.A.(N.S.) 1246;
47 L.R.A.(N.S.)

7. Those on arbitration as a condition precedent to action on insurance policy, to *Graham v. German-American Ins. Co.* 15 L.R.A.(N.S.) 1055, and *German-American Ins. Co. v. Jerrils*, 28 L.R.A.(N.S.) 104;

8. That on bringing suit before award, as revocation of submission to arbitration, to *Williams v. Branning Mfg. Co.* 31 L.R.A.(N.S.) 679; and

9. That on the right to withdraw from arbitration under a submission by rule or order of court, to *McCann v. Alaska Lumber Co.* 43 L.R.A.(N.S.) 711.

In addition to the notes above listed, there is another on the subject of arbitration appended to the report in 43 L. ed. 118, of the United States Supreme Court Reports, to *District of Columbia v. Bailey*.

It is purposed now to discuss the validity and obligatory force of compacts generally to arbitrate controversies known or unknown. The great majority of litigations on this subject have taken place over clauses, independent or integral, of contracts relating to other matters by which contracting persons essayed to provide for the settlement by arbitration of contingent disagreements. In compiling this note a studious effort has been made to avoid duplicating the work in the above notes, but it has been impossible frequently to escape the necessity of citing many of the cases in such notes, in order to show their relation to the general topic and qualifying effects upon one another.

The available material for this discussion is so abundant that all the cases that could be fundamentally differentiated from arbitrations, except as stated, were discarded. Of these there are three main classes, to wit: (a) Cases of constating agreements between members of voluntary associations, clubs, societies, and mutual corporations for the reference of disputes, *inter sese*, to their own committees and officials; (b) Cases of provisions in contracts for constructing buildings and other structures, railroads and other works, and for furnishing transportation or supplies to governments, to refer to architects, engineers, military, naval, or civil officers, questions

right to sue upon the contract, and confines him to the remedy by arbitration. Section 9 of the contract containing this agreement is fully set out in 153 N. C. 7.

It has generally been held that an agreement to arbitrate controversies which may arise in the course of executing a contract is void, as its effect is to oust the jurisdiction of the courts. It was held in *Kinney v. Baltimore & O. Employees' Relief Asso.* 15 L.R.A. 142, and note (35 W. Va. 385, 14 S. E. 8.), that a provision in a contract that all differences arising under it shall be submitted to arbitrators thereafter to be chosen will not prevent a party from maintaining a suit in the first instance in a court to enforce his rights under it. The court in *Home Ins. Co. v. Morse*, 20 Wall.

445, 22 L. ed. 365, relying upon the authority of Judge Story (Eq. Jur. § 670) and *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70, thus stated the rule: "Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of dispute, to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced." . . . 'While parties may impose, as con-

concerning the progress, character, extent, or value of the work done or materials furnished in fulfilling the contract, and respecting the payments due, as to time and amounts; and finally, (c) Cases of submissions of specific disputes in conformity with some express statute regulating arbitrations. Ordinarily, the requirements of statutes governing arbitrations do not apply to submissions under the common law. *Boots v. Canine*, 58 Ind. 450. A common-law submission is an affair altogether different from a submission under a statute. *Williams v. Walton*, 9 Cal. 142. The two are radically distinguished. *Tennessee Coal, Iron & R. Co. v. Roussell*, 155 Ala. 435, 130 Am. St. Rep. 56, 46 So. 866.

In general these cases have been omitted, but a goodly number of them involved contracts providing for arbitrations when the decisions of the architects, engineers, officers, or committees were unsatisfactory and unacceptable. Several contained matter of much value in this discussion. If any justification is needed for citing these cases, it may be found in the *dictum* of the New York court of errors that anyone to whom a dispute between others is referred for decision is an arbitrator (*Garr v. Gomez*, 9 Wend. 649), and in the views expressed by the New Hampshire supreme court, to wit: Although, said the latter court, in *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458, there are cases where it has been held that a reference to a third person to measure materials or work, to judge of their quality, to fix a price, to make an appraisal, or the like, is not a submission to arbitration, yet it seems to us that every agreement of parties by which they bind themselves to abide by the decision of an indifferent third person, as to any matter affecting their rights, is a submission to arbitration, and the decision of such third party upon the matter thus referred to him is an award. We do not perceive that any difference in the nature or importance of the question submitted, or of the evidence upon which it must be decided, or in the means to be used to arrive at a correct result, can affect in this respect the nature of the proceeding. 47 L.R.A. (N.S.)

If the parties have a difference or dispute, however trivial, or upon matters however simple, and in whatever mode the truth is to be ascertained, and they select an indifferent third person to be the judge between them, and bind themselves to abide his decision, that seems to us a submission to arbitration, and the decision to be an award.

II. Characteristics and qualifications of arbitrations and arbiters.

A submission of a matter in controversy is an agreement by the parties that the arbitrators shall by award define and settle their respective legal rights and duties in relation to such matter, and that they will respectively obey the award. *Robinson v. Bickley*, 30 Pa. 384.

It implies mutual promises to abide by the award of the arbitrators. *Dixon v. Morehead*, Addison (Pa.) 216; *M'Manus v. McCulloch*, 6 Watts. 357; *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 176.

One who agrees to a submission, either by himself or his authorized agent, is bound by the award. *Saengerbund v. Dunn*, 41 Tex. Civ. App. 376, 92 S. W. 429.

It has been said that if one personally or by duly authorized agent should assent to a submission and agree that it should determine his suit, he would probably be concluded by the award of the arbitrators, even though he did not actually take part in the arbitration. *Wright v. Evans*, 53 Ala. 103.

A submission is an act by which disputants refer a matter in dispute between them to the decision of others or of a third person. *Garr v. Gomez*, 9 Wend. 649.

It is a contract between two or more persons by which they agree to refer a subject in controversy to others, and to be bound by their award. *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 476.

A stipulation in a contract requiring the submission to arbitration of any given questions or controversies, in order to bind one party, must be obligatory on the other, and, in so far as the contract makes it in-

dition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdiction; as conditions precedent to an appeal to the courts, they are void.' Many cases are cited in support of the rule thus laid down. Upon its own merits this agreement cannot be sustained." The language of other courts is equally explicit: "Where a policy pro-

vides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void. The effect of such a provision is to oust the courts of their legitimate jurisdiction, which the parties cannot do." *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406. "There is no authority for holding that parties who have agreed to arbitrate have by their agreement precluded themselves from resorting to a court of justice. Such agreements will not be specifically enforced, nor will the arbitrators be compelled to act. . . . And it is well settled that they cannot be pleaded in bar." *McGunn v. Hanlin*, 29 Mich. 476. "The agreement to submit to arbitrators, not consummated by

operative against one party, the courts will hold it inoperative against the other. *Nelson-Bennett Co. v. Twin Falls Land & Water Co.* 14 Idaho, 5, 93 Pac. 789.

Unless the submission was binding, an action will not lie upon an award. *Ingraham v. Whitmore*, 75 Ill. 24.

An agreement to arbitrate is only executory, and an executory agreement can be nothing more than a cause of action. *McGunn v. Hanlin*, 29 Mich. 476.

An agreement to refer without saying how, when, and to whom the submission is to be, is inchoate and imperfect,—the first step only in a negotiation which falls of itself, if, subsequently, the arbitrators are not chosen. *Tobey v. Bristol County*, 3 Story, 800; *Fed. Cas. No. 14,065*.

A stipulation for an arbitration or appraisalment, which prescribes neither the number of the arbitrators or appraisers, nor a method of selecting them, has no force to suspend the right to bring suit. *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; *Greiss v. State Invest. & Ins. Co.* 98 Cal. 241, 33 Pac. 195.

In order that one may be clothed with the authority of an arbitrator, he must be chosen to determine the matter submitted, by persons who mutually agree to be bound by his decision. *Gordon v. United States*, 7 Wall. 188, 19 L. ed. 35.

Arbitrators derive their authority altogether from the agreement of the parties according to the terms of the submission. *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84.

A submission and an award made pursuant to provisions therefor in a contract must, in all substantial respects, agree with the terms of the contract; otherwise they will not be conclusive or afford any defense to an action on the contract. *Adams v. New York Bowery F. Ins. Co.* 85 Iowa, 6, 51 N. W. 1149.

An award by arbitrators chosen to determine the amount of a loss under the terms of a fire insurance policy, which does not conform to the submission in a material and essential matter, is not conclusive, and 47 L.R.A.(N.S.)

is no bar to the prosecution of the policy holders' action on the policy. *Coffin v. German F. Ins. Co.* 142 Mo. App. 295, 126 S. W. 253.

If an agreement to arbitrate fixes a time limit within which the submission must be made, or if a submission expressly limits the time within which an award must be made, the failure to submit within the time limited nullifies the agreement, and the expiration of the time limit for making the award automatically terminates the authority of the arbitrators to act. All proceedings after the time limited has expired are invalidated, and an award made afterwards is a nullity. *Johnson v. Crawford*, 212 Pa. 502, 61 Atl. 1103; *Jordan v. Lobe*, 34 Wash. 42, 74 Pac. 817.

The parties to an arbitration are free to clothe the arbitrators with such powers as they may deem it proper to confer, provided they do not violate any rule of law. *Cushing v. Babcock*, 38 Me. 452.

A submission to arbitration is to be liberally construed. *Garr v. Gomez*, 9 Wend. 649.

In theory an arbitration is a substitute for a proceeding in court. *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465.

It is a judicial proceeding directly affecting the interests of both parties to the submission. *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304.

A submission to arbitration under a rule of court regulated by statute is embraced in the phrase, "an action at law," for that includes every proceeding in a court of justice by one seeking such redress as the law provides for his grievance. *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715, 49 Atl. 198.

But a submission to arbitration at common law lacks all the requisites of a proceeding which either party controls, and through which he can compel complete justice to be done. *State, Knaus, Prosecutor, v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237.

Arbitrators are considered sometimes as the substitutes and sometimes as the judges

an award, is universally held to be no bar to a suit at law or equity; nor can it be the foundation of a decree for specific execution. In its very nature it must rest on the good faith and consent of the parties concerned. Parties litigant cannot by such arrangements oust the jurisdiction of the courts, or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award, the case is very different. Their decision is binding upon the parties, and can be successfully impeached only upon the grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is uni-

versally recognized by the authorities. *Morse, Arbitration*, 79, 90. One of the leading cases on the subject is that of *Tobey v. Bristol County*, 3 Story, 822, Fed. Cas. No. 14,065, where the whole subject is exhaustively considered, and many decisions cited by Mr. Justice Story. The only remedy for the party aggrieved is by an action for damages growing out of the breach of the submission." See also *Hill v. More*, 40 Me. 515; *Leach v. Republic F. Ins. Co.* 58 N. H. 245; *Nurney v. Fireman's Fund Ins. Co.* 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; *Haggart v. Morgan*, 55 Am. Dec. 350, and note (5 N. Y. 422); *The Excelsior (Potomac S. B. Co. v. Baker Salvage Co.)* 123 U. S. 40, 31 L. ed. 75, 8 Sup. Ct. Rep. 23; *Smith v. Alker*, 102 N.

of the parties to the submission. *Dixon v. Morehead, Addison (Pa.)* 216.

They are judges of a domestic tribunal chosen by the parties themselves (*Garred v. Macey*, 10 Mo. 161) to decide controversies (*Cushing v. Babcock*, 38 Me. 452) submitted to them, finally and without appeal (*Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96).

They are private extraordinary judges chosen by the litigants, empowered to adjudicate their dispute. *Perry v. Cobb*, 88 Me. 435, 49 L.R.A. 389, 34 Atl. 278; *Miller v. Junction Canal Co.* 53 Barb. 590.

They are both judges and jurors. *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370; *Dixon v. Morehead*, supra.

They are judges both of the law and the facts involved in every question included in the submission, and necessary to their decision and award. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 285.

Selected by the parties to act in a quasi judicial capacity and as a court, arbitrators should be free from all partiality and bias in favor of either party, so as to do equal and exact justice between both. *Hall v. Western Assur. Co.* 133 Ala. 637, 32 So. 257.

If an arbitrator named by one party is not disinterested, and his nominator knows he is not when he names him, and the other party does not know it, then the latter, although he may have ignorantly agreed to the prejudiced arbitrator, is not bound by the award, and may prosecute his action regardless of the submission and its outcome. *Hall v. Western Assur. Co.* supra, subsequent appeal 143 Ala. 168, 38 So. 853.

But to allow a party in interest, by himself or a representative, to be the arbitrator of his own dispute, is so repugnant to the judicial sense of propriety that courts will always, if it be possible to do so, construe the language of a contract in such wise as to preclude such a result. *Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138, 35 N. E. 168.

It is, however, only reasonable and proper to hold to the performance of his agreement one who deliberately and of his own free will makes choice of a person as fit 47 L.R.A. (N.S.)

and competent to act as an arbitrator and decide his dispute, and by whose determination he has agreed to abide. *Hudson v. McCartney*, 33 Wis. 343; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627.

He who consents to an arbitrator with full knowledge of his interest has no ground for objecting to the award on that score. *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370.

If, by their contract, persons appoint an arbiter to settle their differences arising in its performance, they are bound by his award, notwithstanding he may be interested in such contract. *Faunce v. Burke*, 16 Pa. 469, 55 Am. Dec. 519.

The fact that the arbitrator of a dispute between an individual and a corporation was an officer of the latter, if it was known to the former when he agreed to the submission, will not invalidate the award. *White v. Middlesex R. Co.* 135 Mass. 216.

The fact that an arbitrator is an employee of one of the parties to the submission is not a legal objection, provided the other party knew of the relation and accepted such arbitrator. *Travelers' Ins. Co. v. Pierce Engine Co.* 141 Wis. 103, 123 N. W. 643.

The mere fact that a referee is in the service of one of the parties to the controversy is no objection in law to the validity of a condition in a contract making his award a prerequisite to an action. *Campbell v. American Popular L. Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591.

That proposition was esteemed by the court to be too plain to require an argument. *Ibid.*

III. Judicial attitude toward arbitrations.

In early times the courts were disposed to look with jealousy on arbitrations, and to give them as little force as possible, but later, and, it is said, more intelligent, judicial sentiment is strongly in their favor. *Bishop v. Valley Falls Mfg. Co.* 78 S. C. 312, 58 S. E. 939.

In the modern view and practice, the

Y. 87, 5 N. E. 791. Numerous other cases are to the same effect, some of which are collected in the notes to 15 L.R.A. 142, and 55 Am. Dec. 350, cited above.

This court, by Justice Manning, in *Kelly v. Trimont Lodge*, 154 N. C. 97, — L.R.A. (N.S.) —, 69 S. E. 764, adopted the principle as stated in *Stephenson v. Piscataqua F. & M. Ins. Co.* supra, in the following words: "The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law." The learned justice then proceeds to state the result of the decisions in this court upon the subject: "Our court has

uniformly held to the doctrine that, when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements previously entered into to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy, and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer,"—citing *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477, and *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C.

settlement of disputes by arbitration is encouraged by the courts. *Toledo S. S. Co. v. Zenith Transp. Co.* 106 C. C. A. 501, 184 Fed. 391.

Mr. Justice Mellor, in *London Tramways Co. v. Bailey*, L. R. 3 Q. B. Div. 217, 37 L. T. N. S. 499, 26 Week. Rep. 494, 47 L. J. Mag. Cas. N. S. 3, thought it was quite reasonable that people should endeavor as far as possible to avoid the necessity of having recourse to the courts of law.

And the United States Supreme Court has expressed the opinion that arbitration as a method of settling disputes should receive every encouragement from courts of equity. *Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96.

These views have been generally approved in other courts.

The law favors and encourages the settlement of controversies by arbitration, *Payne v. Crawford*, 97 Ala. 604, 11 So. 725; *Howard v. Pensacola & A. R. Co.* 24 Fla. 560, 5 So. 356; *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975; *Dilks v. Hammond*, 86 Ind. 563; *Cushing v. Babcock*, 38 Me. 452; *Garred v. Macey*, 10 Mo. 161.

Arbitrations are favored and encouraged, for one reason, because they are a speedier, less expensive, and more amicable way than is offered by litigation, to settle disputes. *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *McNees v. Southern Ins. Co.* 69 Mo. App. 232; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

An arbitration is an expeditious, inexpensive, and proper mode; if not a better one than is afforded by a lawsuit, of ascertaining damages. *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055.

Arbitration clauses in policies insuring personal property, if lived up to in the spirit that justifies their encouragement by law, create a serviceable method of settling questions of loss or damage. *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22.

Arbitrations to settle particular questions auxiliary to their jurisdiction are 47 L.R.A. (N.S.)

highly favored by the courts. *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356.

The encouragement is given, so far as it can be, without controverting any principle of public policy. *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447.

And in general arbitrations *per se* are not regarded as contrary to public policy. *Alford v. Tibbler, McGloin (La.)* 151; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Buckwalter v. Russell*, 119 Pa. 495, 13 Atl. 310; *Gardner v. Lincoln*, 5 Phila. 24.

There is no reason of public policy, in the view of the court in the case of *Electric Lighting Co. v. Elder Bros.* 115 Ala. 138, 21 So. 983, which prevents persons contracting for the performance of work from agreeing that the decision of a third person respecting the sufficiency of the performance shall be conclusive.

The court in *Ark-Mo Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170, took the same view.

An agreement in a building contract for a reference, in case of a disagreement of a matter in difference, to disinterested arbitrators, is not against public policy. *Maxwell v. Thompson*, 15 S. C. 612.

Submissions of disputes to arbitrators are favored by the law, and approved by the enlightened sentiment of the world at large. *Horne v. Welsh*, 35 Pa. Super. Ct. 569.

The policy in Pennsylvania, it was said in one case, has been to encourage arbitration, and the courts have inclined to construe liberally the acts of assembly relating to it. *Bingham v. Guthrie*, 19 Pa. 418.

The courts go far in construing and giving effect to arbitration agreements, save only in the direction of sanctioning exercises of power not conferred upon the arbitrators. *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84.

All questions of public policy as to the propriety of arbitration have, in the state of Washington, been resolved both by the legislature and the courts in favor of recognizing it as a method by which disputants may settle their differences. *Zindorf Constr.*

28, 10 S. E. 1057. In Braddy's Case, *supra*, Justice Avery said: "While it is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person insured is not invalid (*Pioneer Mfg. Co. v. Phoenix Assur. Co. supra*; *Carroll v. Girard F. Ins. Co.* 72 Cal. 297, 13 Pac. 863), it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy that might arise between insurer and insured to such arbitrament is void as against public policy. *Angell, Ins.* 431; *Scott v. Avery*, 20 Eng. L. & Eq. Rep. 327; *S. C.* 8 Exch. 487; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur.*

Co. v. Western American Co. 27 Wash. 31, 67 Pac. 377.

Contracts to arbitrate, being in the interest of amicable adjustment of disputes which must otherwise become the subject of vexatious controversy and litigation, are upheld by the courts (*Murphy v. Northern British & M. Co.* 61 Mo. App. 323), and enforced so far as they can be consistently with the principles of law (*Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89).

Courts of equity, said Story, J., in *Tobey v. Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065, do not refuse to compel a party specifically to perform an agreement to refer to arbitration because they wish to discourage arbitrations as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, without hesitation or question, their awards when fairly and lawfully made.

The court in *Mittenthal v. Mascagne*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425, inclined to think that the tendency in modern times is to permit greater freedom in contracting with respect of arbitrations than formerly.

The courts, it has been said (*vide*, *Flint v. Pearce*, 11 R. I. 576), formerly leaned very strongly against enforcing agreements for arbitration, as tending to oust the courts of their lawful jurisdiction, but latterly the tendency of decisions has been more in favor of supporting them, and fraud and mistake excepted, there is no sound reason why they should not bind the parties.

The tendency of the more recent decisions, according to the court in *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250, is to narrow, rather than enlarge, the operation and effect of prior decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law.

The mode of settling controversies by arbitration has in modern times become peculiarly the favorite of the law, remarked the court in *Shockey v. Glasford*, 6 Dana, 47 L.R.A. (N.S.)

Co. 66 Cal. 256, 5 Pac. 232; 2 Biddell, *Ins.* § 1154." *Kelly v. Trimont Lodge, supra*, was a case for the recovery of money due for sick benefits. We held that the stipulation in the contract for arbitration of differences should be restricted to those of a legislative or administrative character, and was therefore valid, but that, as the question involved in the case related to the plaintiff's property rights, it could have no application, and the plaintiff could resort to the courts for the enforcement of those rights, notwithstanding the arbitration clause in the contract. The principle which we have stated as having received the sanction of the courts of England and this country is recognized as sound and well settled in other decisions

9, and the ancient niceties and technicalities applied to it have given way to a more rational and liberal construction, with a view to encourage and sustain this mode of putting an end to litigation; hence, it is that many of the more ancient adjudications upon this subject are found not to be good authority.

IV. The rules for construing arbitration agreements.

It is elementary that courts are in duty bound to enforce agreements made by competent persons upon good consideration. *Palmer v. Clark*, 106 Mass. 373.

All recognize, without questioning, the rule that courts must interpret and give effect to contracts according to the clear intent of the contracting persons as they have expressed their intentions in the writings they have deliberately executed. *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055.

Agreements to arbitrate form no exceptions to these rules.

If one has bound himself solemnly to an agreement, according to Chief Justice Cockburn in *Moffat v. Cornelius*, 26 Week. Rep. 914, he alone cannot revoke it, and a stipulation to refer is a part of the agreement and forms a part of the consideration for it.

And again, when people stand on equal footing and their contract is without legal objection, an arbitration clause in their agreement is as binding, and should be enforced the same, as any other provision in it. *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276.

Judicial tribunals are established by the government to enable people to enforce their rights when other means fail, but not, according to the court in *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89, to hinder them from adjusting their differences themselves or by agents of their own selection.

Nevertheless a contract which is intended to deprive a person of a right to appeal to the courts for redress, or to put conditions

of this court. *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831; *Tyson v. Robinson*, 25 N. C. (3 Ired. L.) 333; *Swaim v. Swaim*, 14 N. C. (3 Dev. L.) 24. There is no stipulation in this contract that no suit shall be brought until the amount of loss or damage is ascertained by arbitration, as in *Pioneer Mfg. Co. v. Phoenix Assur. Co.* supra, but a sweeping provision that both the liability and the loss shall be decided and settled by arbitrators, and by clear implication it excludes the right of resort to the courts. *Mutual F. Ins. Co. v. Alvord*, 9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752. Stipulations expressed in language not unlike that which the parties used in the arbitration clause of this contract have, as we have seen, been held to

be void and not available as a bar to an action on the contract. It may be observed that the defendant has not attempted to arbitrate the differences which have arisen. In *Smith v. Alker*, supra, it was said that this fact deprives him of the right to rely upon the agreement for arbitration. "No evidence," says the court, "was given that the defendant took any steps for their selection [of arbitrators]. It was no more the duty of the plaintiff than that of the defendant to do so. We need not inquire, therefore, how far, if at all, such defense would have availed," if such steps had been taken. His plea, based upon the clause as to arbitration, was accordingly overruled.

Our conclusion is that the judgment of the court below was not authorized by the

and limitations on the exercise of that right, should be strictly construed. *Wallace v. German American Ins. Co.* 4 McCrary, 123, 41 Fed. 742.

A court will not read into a contract for arbitration a condition not clearly written in it by the parties, which will operate to oust the court of its ordinary jurisdiction. *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 520.

For, although one by contract may sometimes bargain away his right to seek redress in the courts for his grievance, yet the agreement by which he does so will not be extended by construction or implication. *Western Assur. Co. v. Decker*, 39 C. C. A. 383, 98 Fed. 381.

The right to resort to the courts will never be deemed to have been surrendered by mere inference, but, if it can be surrendered at all, it will be so considered only when so stated in the clearest and most explicit terms. *Supreme Lodge, O. S. F. v. Raymond*, 67 Kan. 647, 49 L.R.A. 373, 47 Pac. 533.

A prohibition against bringing suit, not expressed in terms in an agreement to arbitrate, will not be implied, unless the necessity for such implication cannot reasonably be escaped. *Green v. American Cotton Co.* 112 Fed. 743.

As all persons who have money demands against others have a right to resort to the courts in the first instance when payment is withheld, to coerce payment, that right must exist in every case unless it clearly has been abridged or surrendered. *Bauer v. Samson Lodge, K. P.* 102 Ind. 262, 1 N. E. 571.

The right of one to appeal to the courts for the assessment of damages to which he has become entitled by a breach of his contract, although one which he may contract away, is lost only by clear and unequivocal language evincing an intention to submit to the decision of another tribunal. *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638.

A court will not and ought not to permit its powers and process to be stayed from taking cognizance of and adjudicating

controversies between persons, by any stipulation they may have made before the dispute arose, unless he who insists on such hindering of justice shall have brought himself fully and sharply within the letter, as well as the spirit, of the stipulation. *Harrison v. German American F. Ins. Co.* 67 Fed. 577.

The courts, in determining the question whether or not arbitration, as a condition precedent, has been waived, hold the party claiming its benefit to a strict compliance with the specific terms of the contract, before they will give effect to the condition so as to work a negation of the right to sue. *Ibid.*

A condition in an insurance policy that no action shall be maintained against the insurer to recover for a loss insured against, until the amount of such loss shall have been ascertained and fixed by appraisers, must, as against the insurer, be strictly construed. *Schouweiler v. Merchants' Mut. Ins. Asso.* 11 S. D. 401, 74 N. W. 356.

V. Competency of parties to agree to arbitrate.

In respect of such matters as men lawfully may distinctly and explicitly agree upon, a contract is a law unto its signatories. *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142.

A common-law agreement to arbitrate a dispute constitutes a contract, and as a general rule every one capable of disposing of his property or releasing his rights may make a submission to arbitration. *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

Any person competent to maintain an action at law is competent to submit its subject-matter to an arbitration. *Garr v. Gomez*, 9 Wend. 649.

That an independent agreement to submit to an award of arbitrators depends for validity on the existence of a right to contract, according to the court in *District of Columbia v. Bailey*, supra, is a proposition

opinion and certificate of this court, which covered only the items of the plaintiff's bill of particulars, dated prior to February 20, 1906. As to items of subsequent date, the judgment was erroneous. In that respect, it is not in accordance with our former decision, and cannot be upheld as justified by the defendant's plea based upon the arbitration clause of the contract, which we hold to be void.

so elementary as to make the citation of authorities in its support unnecessary.

In that case an agreement to arbitrate the claims of a contractor, growing out of a contract for resurfacing asphalted streets in the city of Washington, was held void for lack of power in the District Commissioners to enter into an arbitration.

But in *Cincinnati v. Cincinnati Southern R. Co.* 6 Ohio C. C. 247, 3 Ohio C. C. 438, a decision affirmed by the supreme court in 52 Ohio St. 637, 44 N. E. 1132, the court declared it was not aware of any principle of law which forbids a city to submit matters of difference with others to arbitration.

A married woman, at common law, is not legally competent to execute a submission to arbitration, or to empower another to execute one in her behalf. *Offerman v. Packer*, 26 Phila. Leg. Int. 205.

A married woman, however, was held to be competent to enter into, and to be bound by, an agreement for a common-law arbitration, in the case of *Hoeste v. Dalton*, 137 Mich. 522, 100 N. W. 750, notwithstanding a statute of the state authorizing statutory arbitrations excepted married women from among the persons allowed to arbitrate under the statute.

The parties who submit a dispute with a married woman to arbitration voluntarily, and with knowledge of her legal and civil status, are bound by an award in her favor. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.

A submission of a cause to arbitration, of an infant, whether by himself, his next friend, or his attorney, or all of these, has been held to be void. *Millsaps v. Estes*, 134 N. C. 486, 46 S. E. 988.

VI. Agreements to arbitrate in illegal contracts.

If a contract containing provisions for arbitration is itself illegal, and made in violation of law, then the provisions for arbitrating are also void, however valid may be like provisions in legal contracts, because the law will not enforce an award based on an illegal contract. *Pittsburgh Constr. Co. v. West Side Belt R. Co.* 151 Fed. 125.

An injured party having a remedy by civil action for the wrong, where the wrongdoer is also liable to indictment and a criminal prosecution for the offense, may lawfully refer to arbitration the question of the reparation which he shall receive, 47 L.R.A. (N.S.)

We would suggest that the plaintiff be permitted to file an amended complaint, eliminating the items of his account already passed upon, and confining the pleadings and issues to the matters which are now in dispute. This will prevent confusion in the further consideration of the case. The judgment is set aside, and the court will proceed further in the cause in accordance with this opinion.

notwithstanding a criminal prosecution may have been instituted. *Baker v. Townsend*, 7 Taunt. 422, 1 J. B. Moore, 120, 18 Revised Rep. 521; *Reg. v. Hardey*, 19 L. J. Q. B. N. S. 196, 14 J. B. 529, 14 Jur. 649.

A submission to arbitration, although by leave of court, which is entered into of purpose to abandon and end the prosecution of an indictment for obstructing a public road or way, is illegal and void, and cannot be the basis of any binding award. *Hungerford Twp. v. Lattimer*, 13 Ont. App. Rep. 315.

All agreements, including agreements to arbitrate, having for their object the stifling of a prosecution for a public offense, are contrary to public policy and void. The sanction of a magistrate cannot validate such an agreement. But when a public offense involves also an injury to the prosecutor's private rights, and the rights of the public are conserved by either a conviction or an acquittal of the accused, the questions between the parties may, by leave of court, be referred to arbitration, or be made otherwise the subject of agreement. *Ibid.*

VII. Oral submissions and awards.

At common law a submission of a controversy to arbitration, with an agreement to abide the award, may be either by parol or in writing. Oral agreements to arbitrate are equally valid with written ones. *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661; *Griggs v. Seeley*, 8 Ind. 264; *Carson v. Earlywine*, 14 Ind. 256; *Miller v. Goodwine*, 29 Ind. 46; *Webb v. Zeller*, 70 Ind. 408; *Dilks v. Hammond*, 86 Ind. 563; *Donnell v. Lee*, 58 Mo. App. 288; *Hewitt v. Lehigh & H. River R. Co.* 57 N. J. Eq. 511, 42 Atl. 325; *Garr v. Gomez*, 9 Wend. 649; *Cope v. Gilbert*, 4 Denio, 347; *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370; *Billmeyer v. Hamburg-Bremen F. Ins. Co.* 57 W. Va. 42, 49 S. E. 901; *Levy v. Scottish Union & Nat. Ins. Co.* 58 W. Va. 546, 52 S. E. 449.

An oral award is good at common law unless a written one was stipulated for in the submission. *Donnell v. Lee*, 58 Mo. App. 288; *Marsh v. Packer*, 20 Vt. 198.

And unless also the case is within the statute of frauds. *Peabody v. Rice*, 113 Mass. 31; *Hewitt v. Lehigh & H. River R. Co.* 57 N. J. Eq. 511, 42 Atl. 325.

An oral submission and award of the amount due for rent for past occupation of real estate under a parol lease is not

within the statute of frauds, and hence is valid and binding so far as it fixes the sum payable. *Peabody v. Rice*, supra.

And the same is true of an oral submission and an award under it, to determine simply what compensation shall be paid for a conveyance of land. *Hewitt v. Lehigh & H. River R. Co.* supra.

When a submission is made by parol, it is material to prove not only that each party promised to abide by the award, but that the promises were concurrent and mutual. *Ingraham v. Whitmore*, 75 Ill. 24.

To entitle a plaintiff to recover a sum awarded by arbitrators, after an arbitration pursuant to an oral agreement and common-law submission, he must establish, first, a mutual and concurrent submission by the disputants of their controversy to the selected arbitrators; second, a like agreement to be bound by the award; third, the choice of arbitrators as agreed; and fourth, a decision and award of the sum demanded pursuant to and in accord with the submission. *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661.

A submission by deed under seal may not effectually be revoked by parol. *Brown v. Leavitt*, 26 Me. 251; *Sutton v. Tyrrell*, 10 Vt. 91.

Certainly not a statutory submission in writing under seal after the arbitrators have been sworn. *Shroyer v. Bash*, 57 Ind. 349.

VIII. Submissions of pending lawsuits.

Persons are permitted to submit pending lawsuits and existing disputes to arbitration. *State ex rel. Watkins v. North American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

And there may be a common-law submission to arbitration of a controversy which is at the time the subject of a pending action. *Minneapolis & St. L. R. Co. v. Cooper*, 59 Minn. 290, 61 N. W. 143.

An agreement to arbitrate a pending action, however, is impliedly a submission by rule of court. *Zehner v. Lehigh Coal & Nav. Co.* 187 Pa. 487, 67 Am. St. Rep. 586, 41 Atl. 464.

The courts are in disagreement over the question as to whether or not agreements submitting to arbitrations controversies in pending suits and actions operate as discontinuances, or at all events as consents to discontinue the litigations.

Several of them have held that until award has been made such agreements have no such effect. *Nettleton v. Gridley*, 21 Conn. 531, 56 Am. Dec. 378; *Gore v. Chadwick*, 6 Dana, 477; *Dinsmore v. Hanson*, 48 N. H. 413.

A mere executory agreement to submit a controversy to arbitration is no bar to a suit when made before it was brought, nor to its further prosecution when made during its pendency; it has no binding force. *Wright v. Evans*, 53 Ala. 103.

A common-law submission to arbitration of a pending litigation neither ousts 47 L.R.A. (N.S.)

the court of jurisdiction, nor makes it erroneous for the court to proceed with the cause. *Paulison v. Halsey*, 38 N. J. L. 488.

The plaintiff in an action referred by consent to referees to hear and determine pursuant to a statute should not be allowed to discontinue his suit after proceeding part way with the reference, unless for very cogent reasons, such, perhaps, as would invalidate the report of the referees when made. *Pollock v. Hall*, 4 Dall. 222, 1 L. ed. 809.

If according to one court, it be conceded that an actual submission of a controversy to arbitration operates as a discontinuance of a pending suit between the parties, involving the same controversy, a mere agreement to arbitrate in the future does not have that effect. *Lafin v. Chicago, W. & N. R. Co.* 34 Fed. 859.

A submission of a pending action to arbitration, although good for a plea in abatement, is waived by pleading and going to trial on the merits. *Bowen v. Lazalere*, 44 Mo. 383.

An action referred by consent and order of court to arbitrators, under the Pennsylvania statute, may not be discontinued, but must stand until the coming in of the award. *Horn v. Roberts*, 1 Ashm. (Pa.) 45.

On the other hand, a submission to arbitration under a statute of Missouri, of the subject-matter of a pending action to recover a debt, is held to be in effect an agreement to dismiss the suit. *Bowen v. Lazalere*, supra.

A statutory arbitration providing for judgment on the award, ending in an award actually carried into judgment, operates to terminate a pending litigation over the same subject-matter. *Dunn v. Sutliff*, 1 Mich. 24; *Vanderhoof v. Dean*, 1 Mich. 463; *Callanan v. Port Huron & N. W. R. Co.* 61 Mich. 15, 27 N. W. 718.

If the terms of the submission of the subject-matter of a pending litigation are such as to call for further proceedings in the action or suit on the coming in of an award, for example, for entering a judgment on the award, then certainly the agreement will not work a discontinuance. *Emerson v. Wadman*, 122 Mass. 384; *Callanan v. Port Huron & N. W. R. Co.* 61 Mich. 15, 27 N. W. 718; *Bank of Monroe v. Widner*, 11 Paige, 529, 43 Am. Dec. 768; *Friedrich v. Fergen*, 15 S. D. 541, 91 N. W. 328; *Rogers v. Nall*, 6 Humph. 28.

In several cases a general submission to arbitration of the subject-matter of a pending action or suit, containing no stipulation for the entry of a judgment on the award, or other specific reservation for keeping alive the litigation, is held to work a discontinuance. *Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 399; *People ex rel. Van Cortlandt v. Onondaga Common Pleas*, 1 Wend. 314; *Larkin v. Robins*, 2 Wend. 505; *Towns v. Wilcox*, 12 Wend. 503; *Wells v. Lain*, 15 Wend. 99; *Bank of Monroe v. Widner*, 11 Paige, 529, 43 Am. Dec. 768; *McNulty v. Solley*, 95 N. Y. 242; *Rogers v. Nall*, 6 Humph. 28; *Jones*

v. Thomas, 120 Wis. 274, 97 N. W. 950; Travelers' Ins. Co. v. Pierce Engine Co. 141 Wis. 103, 123 N. W. 643.

The submission of the subject-matter of a pending suit, or one which has gone into judgment, but is still the subject of a contest on appeal or otherwise, to arbitrators to determine what should justly be rendered to the judgment creditor, nothing appearing in the submission to the contrary, *ipso facto* disposes of the litigation or judgment. Jones v. Thomas, 120 Wis. 274, 97 N. W. 950.

A mere submission of the subject-matter of a pending action to arbitration, not culminating in an award, although operating as a discontinuance, does not constitute a good plea in bar. Smith v. Barse, 2 Hill, 387.

While it ends the action it does not extinguish the cause, or raise any bar to a new suit after the submission is revoked. Muckey v. Pierce, 3 Wis. 307.

A mere unexecuted agreement to submit a pending cause to arbitration is at most a consent to discontinue, leaving it open to the plaintiff to commence his action anew if no award is made on the submission and the arbitration fails. But a legal submission to arbitration, and a valid award pursuant to the submission, may be pleaded in bar of the further maintenance of a pending suit for the same matter, unless the litigants have stipulated that judgment may be entered in such suit in conformity to the award, because, by the making of the award, the original cause of action is gone, and the party is left to his remedy on the award instead. Wells v. Lain, 15 Wend. 99.

On the failure of an arbitration, the original cause of action still subsists. Ross v. Nesbit, 7 Ill. 252.

A suit is discontinued by an unreserved general submission of the controversy involved in it to arbitration, because the parties have selected another tribunal to try their cause. Larkin v. Robbins, 2 Wend. 505.

And the parties having chosen another forum to determine their controversy, the court in which their action was pending will proceed no farther in the case, but will leave the litigants to the tribunal they have created for themselves. Muckey v. Pierce, *supra*.

Under a common-law submission to arbitration, the award gave the party in whose favor it was a cause of action, and, if the submission was of a controversy in a pending action, the cause of action merged in the award, hence the action was discontinued by the submission, and judgment in it could be entered on the award. Camp v. Root, 18 Johns. 22.

For it is a general rule that a cause of action that arises out of a controversy submitted to arbitration is merged and extinguished in the award. Houston & T. C. R. Co. v. Newman, 2 Tex. App. Civ. Cas. (Willson) 303.
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IX. Arbitrations of present disputes.

After a specific dispute has actually arisen, it is always competent for the disputants to submit it to arbitration, and their agreements to do so are valid. Bauer v. Samson Lodge, K. P. 102 Ind. 262, 1 N. E. 571; Cushing v. Babcock, 38 Me. 452; Phoenix Pottery Co. v. Griffin, 16 Phila. 569; Saengerbund v. Dunn, 41 Tex. Civ. App. 376, 92 S. W. 429; Pacaud v. Waite, 218 Ill. 138, 2 L.R.A. (N.S.) 672, 75 N. E. 779.

There is, in the view of the court in Supreme Council, O. C. F. v. Forsinger, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129, an obvious distinction between cases where an agreement that the decision of designated persons shall be conclusive is made after a dispute has actually arisen, and cases where it is made before any controversy exists.

Although in any specific case persons may make a judicial tribunal for themselves by a submission to arbitration, their power to do so is hedged about by the most cautious rules. Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665.

An agreement in writing by a widow and the heirs of a landed proprietor who died intestate, for a partition of the lands of the estate, is a valid common-law submission, and the award of the arbitrators, if not vitiated by fraud or mistake, is binding when clearly expressed. Casstevens v. Casstevens, 227 Ill. 547, 118 Am. St. Rep. 291, 81 N. E. 709.

Although a fire insurance policy contains no provision for an arbitration of the amount of a loss, still, if the policy holder enters into a submission of that question after opportunity to examine the policy, he will be bound by any award made. Wheeler v. Watertown F. Ins. Co. 131 Mass. 1.

X. Ousters of jurisdiction of courts.

a. Surrenders of right to sue.

A covenant never to sue for an existing demand is construed to be an entire release of the demand itself, since he who is divested of all power to enforce a right in a court of justice, where alone rights can be enforced, is in effect stripped of all right whatever. Contee v. Dawson, 2 Bland, Ch. 264.

It is a release by implication or in effect, to avoid circuitry of action; but if it is only a covenant not to sue for a limited time, it is no bar to an action, and an agreement to refer to arbitration, with a stipulation not to bring an action pending the arbitration, amounts to nothing more than a covenant to forbear suit for a limited time. Condon v. South Side R. Co. 14 Gratt. 302.

The law, and not a private contract, prescribes the remedy of the contracting person. Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me 70.

And after a contract has been broken,

the remedy is regulated by law. *Hall v. Peoples Mut. F. Ins. Co.* 6 Gray, 185.

None may barter away his life, freedom, or substantial rights. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 385, reversing 30 Wis. 496, 11 Am. Rep. 580.

One may waive many of his legal rights, but individuals cannot exact a surrender of jurisdiction on the part of courts, nor constrain judges to accept a release from responsibility imposed on them for public purposes by the law of the land. *Horton v. Stanley*, 1 Miles (Pa.) 418.

A person may waive any legal right, unless such waiver injuriously affects another person, or is forbidden by law, or is opposed to public policy. *Levy v. Magnolia Lodge*, 1 O. O. F. 110 Cal. 297, 42 Pac. 887; *Robinson v. Templar Lodge*, No. 17 I. O. O. F. 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170.

While, as a general rule, there is the utmost freedom of action allowed in contracting, the power to contract is not unlimited, but subject to some restrictions placed upon it by legislation, public policy, and the nature of things. None can make a binding contract in violation of law or public policy. *Sternaman v. Metropolitan L. Ins. Co.* 170 N. Y. 13, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763.

One of the fundamental and essential constitutional rights of the citizen is the right to appeal to a court of justice for a redress of his grievances, and one of the chief ends of government is to secure this right to the citizen. *Western Assur. Co. v. Decker*, 39 C. C. A. 383, 98 Fed. 381.

The right to sue cannot be affected by custom; a custom that one having a claim for money due him on contract may not pursue the usual remedies given by law is invalid. The policy of the law is to open freely the courts to those who seek money due them on contract, and who so asserts that the right to invoke the aid of the courts has been curtailed must show a clear agreement abridging that right. *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571.

All contracts and stipulations in the nature of contracts by which the right to resort to a judicial forum for the settlement of a controversy is absolutely surrendered in advance, or by which rights of action are rendered, when left intact, unenforceable through the ordinary and established tribunals of the country, are invalid and without binding force. The courts refuse to sustain them; the parties are free to treat them as nullities. *Mexborough v. Bower*, 7 Beav. 127, 2 Mor. Min. Rep. 92, affirmed in 2 L. T. 205; *Stone v. Dennis*, 3 Port. (Ala.) 231; *Bozeman v. Gilbert*, 1 Ala. 90; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510; *Supreme Council, O. C. F. v. Forsinger*, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129; *Ross v. Conwell*, 7 Ind. App. 375, 34 N. E. 752; *Voluntary Relief Dept. v. Spencer*, 17 Ind. 47 L.R.A. (N.S.)

App. 123, 46 N. E. 477; *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739; *Hager v. Shuck*, 120 Ky. 574, 87 S. W. 300; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Mittenthal v. Mascagni*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Gasser v. Sun Fire Office*, 42 Minn. 315 44 N. W. 252; *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351; *Fidelity & C. Co. v. Crays*, 76 Minn. 450, 79 N. W. 531; *Hartford F. Ins. Co. v. Hon*, 66 Neb. 555, 60 L.R.A. 436, 103 Am. St. Rep. 725, 92 N. W. 746; *Smith v. Compton*, 20 Barb. 262; *Sanford v. Commercial Travelers' Mut. Acci. Asso.* 147 N. Y. 326, 41 N. E. 694; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577; *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387; *Corbin v. Adams*, 76 Va. 58; *Kinney v. Baltimore & O. Employers' Relief Asso.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8.

All such contracts and stipulations are void as contrary to public policy. *Stone v. Dennis*, 3 Port. (Ala.) 231; *Bank of State v. Martin*, 4 Ala. 615; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Hager v. Shuck*, 120 Ky. 574, 87 S. W. 300; *Smith v. Compton*, 20 Barb. 262.

It is unnecessary, said Lord Chelmsford in his judgment in *Scott v. Liverpool*, 3 DeG. & J. 334, to enter in detail into all the cases upon the effect of agreements to refer, or the jurisdiction of courts of law and equity; . . . [they] merely establish the proposition that if I covenant with A to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, the latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals.

The right of one to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of individuals however expressed. *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351; *Fidelity & C. Co. v. Crays*, 76 Minn. 450, 79 N. W. 531.

Public policy is opposed to enforcing any agreement which supersedes the law and deprives the individual of the protection which it was designed and framed to afford. *Sanford v. Commercial Travelers' Mut. Acci. Asso.* 147 N. Y. 326, 41 N. E. 694.

None can be bound to deprive himself of his constitutional right to have his

cause tried in a court of law or equity. *Ball v. Doud*, 26 Or. 14, 37 Pac. 70.

No one, by agreeing to refer, can deprive himself of his right to apply to a court of equity. *Kinney v. Baltimore & O. Employees' Relief Asso.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8.

Broadly speaking, one cannot by contract bargain away his right to try his case before the courts. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739.

There is no exception to the rule that no one can by contract wholly deprive himself of his right to resort to the courts of the country to settle his controversies. *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 390, 71 N. W. 363.

The right of free access to the courts is inalienable. *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089.

The courts will not enforce or sanction an agreement which deprives the subject or citizen of that recourse to their jurisdiction which has been considered a right inalienable even by the concurrent will of both parties to the compact. *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746.

The supreme court of Ohio has declared the courts of that state to have been created by the Constitution, to inhere in the body politic as an integral and necessary part of the system of government, to be always open, to afford a remedy by due course of law to every person for an injury done him in his land, goods, person, or reputation; and that it is not competent for anyone, by contract or otherwise, to deprive himself of their protection, for the right to appeal to the courts for the redress of wrongs is one which in its nature is inalienable and cannot be thrown off or bargained away. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577.

A rule which makes a decision of a committee final and conclusive upon all parties without exception or appeal, and which attempts to cut off the right to resort to the courts, is void. *Voluntary Relief Dept. v. Spencer*, 17 Ind. App. 123, 46 N. E. 477.

An agreement in a contract that the parties shall not avail themselves of their right to appeal to the courts to settle their controversies, but shall submit them to private arbitration, will not be enforced, because it is such an utter abnegation of one's legal rights as should not be permitted. *Mittenthal v. Mascagni*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425.

After a right has accrued or an obligation has been incurred, one may waive or decline to enforce his rights, or by contract bind himself to submit the matter to arbitration, but he cannot bind himself by 47 L.R.A. (N.S.)

contract in advance to renounce his right to appeal to the courts to redress his wrongs. *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089.

While in a given case, where the circumstances and the effect of the act are known, one may waive his right to appeal to the courts, it is against public policy for him to bar himself in advance from resorting to the courts for some future controversy of which he could have no knowledge at the time he acted. *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387.

The right of parties to revoke an agreement to submit a controversy to arbitration, and appeal to the courts for redress, is one which cannot be abridged by an agreement made before anyone can possibly know what will be the nature of the controversy. *Supreme Council, O. C. F. v. Forsinger*, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129.

Persons have no more right to stipulate against resorting to the courts for their remedies in given cases, than they have to provide for remedies prohibited by law. *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70.

The courts will enforce contracts to arbitrate disputes and make the decisions of the arbitrators final, where the contracting parties make it clearly apparent that such was their intention; but whenever they leave it doubtful whether such a method of settling a dispute was intended to be left to the final decision of arbitrators, the courts will construe the contract so as to favor the right to resort to them in the usual manner for redress. *VanHorne v. Watrous*, 10 Wash. 525, 39 Pac. 136.

An agreement between two railway corporations, confirmed by act of Parliament making its stipulations obligatory on both, providing, *inter alia*, that all differences between them as to its true meaning or effect, or the mode of carrying it into operation, should be referred to arbitration in terms of the Scotland railway clauses consolidation act of 1845 (8 & 9 Vict. chap. 33, § 119), ousts the courts of jurisdiction by force of the legislative will in the promises, and makes arbitration compulsory. *Caledonian R. Co. v. Greenock & W. B. R. Co.* L. R. 2 H. L. Sc. App. Cas. 347.

The reason an agreement to submit to arbitration was revocable at common law was not that arbitration was not favored as a means of ending litigation, nor that a consideration was lacking, but because of the principle of law that parties could not by agreement oust the courts of the jurisdiction assigned to them by law, and could not debar themselves from appealing to the law and the tribunals of the land; but that principle is abrogated when a statute sanctions such agreements and regulates the procedure under them, and gives effect to awards. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

b. Discriminations among courts.

No one can bind himself in advance by any agreement which may be specifically enforced, to forfeit his rights at all times and on all occasions whenever the case may be presented, and everyone is entitled to resort to all the courts of the county, and to invoke the protection which all the laws or all those courts may afford him. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, reversing 30 Wis. 496, 11 Am. Rep. 580; *Phoenix Pottery Co. v. Griffin*, 10 Phila. 569.

Every stipulation in a private contract discriminating between the different courts of the country is generally esteemed to be contrary to public policy and void. *Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508, *State ex rel. Watkins v. North. American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172; *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174; *Hall v. People's Mut. Ins. Co.* 6 Gray, 185; *Sanford v. Commercial Travelers' Mut. Acci. Assn.* 147 N. Y. 326, 41 N. E. 694.

Thus, a stipulation in an insurance contract that no suit at law or in equity should be brought on it except in the circuit court of the United States is clearly an invalid attempt to oust all state courts of their jurisdiction. *Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508.

And a stipulation in such a contract ousting all courts except those that sit in the county where the home office of the insurer is located, of jurisdiction in suits and actions on the policy, is without binding force upon the policy holder. *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174; *Hall v. People's Mut. Ins. Co.* 6 Gray, 185.

A clause in an accident insurance policy requiring any action that may be brought upon it to be referred, on demand of the insurer, for trial, to a referee to be appointed by the court to hear and determine, is void as an attempt to limit the court having cognizance of the action in exercising its lawful jurisdiction, and, also, as an attempt to nullify the constitutional provisions securing the right of trial by jury. *Sanford v. Commercial Travelers' Mut. Acci. Assn.* 147 N. Y. 326, 41 N. E. 694.

A clause in a corporate charter stipulating in advance for the submission to a statutory arbitration in the home jurisdiction, of any dispute that may afterward arise between the corporation and any of its members, and providing that the award of the arbitrators shall be absolutely binding, does not oust a local court of jurisdiction to entertain and grant appropriate relief in a proceeding by a stockholder to obtain an inspection of the corporate books and papers; and if it was designed to have such an effect, it would be void. *State ex rel. Watkins v. North American Land* 47 L.R.A.(N.S.)

& *Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

In *Darling v. Protective Assur. Soc.* 71 Misc. 113, 127 N. Y. Supp. 486, the court expressed the opinion that a provision in a policy of insurance that any suits or actions upon causes arising out of or under such policy should be brought and tried in a named city was invalid and unconstitutional, as it deprived the policy holder of certain constitutional and statutory rights; but the provision was held, in any event, to have been waived when the insurer appeared and went to trial without invoking it against the jurisdiction of the trial court.

Some exceptions to the general rule just stated appear in the decisions and may be appropriately noted here.

A stipulation in a fire insurance contract, requiring any action upon it to be brought and tried in a designated county of the state, was held in *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28, 30 N. Y. Supp. 668, neither to oust the courts of jurisdiction nor to be against public policy, and therefore a contract which the parties might lawfully make, and which the courts would respect.

One reason assigned for this conclusion was that the supreme court of the state of New York, which has jurisdiction of such an action, and administers justice in the county named in the contract, is the same court that has general jurisdiction both in law and equity in every other county of the state, so that the place of trial of an action is a mere matter of convenience.

Although native subjects cannot by private contract divest the King's courts of their jurisdiction to decide their controversies, and although, too, actions on contracts are transitory and follow the persons of contractors, nevertheless foreign seamen who ship in a foreign port for service under a foreign master on a foreign ship, and stipulate in the articles that they will not institute any suit against the master, or cite him before any judge or magistrate in any country foreign to them, but will abide by the Maritime Code of their own country and the adjudication of their own courts, are effectually bound by their agreement, and cannot in England maintain an action against the master for wages, notwithstanding the ship and cargo were confiscated in an English port and the voyage in consequence ended. *Gienar v. Meyer*, 2 H. Bl. 603, 3 Revised Rep. 520.

An agreement by a judgment creditor upon a valuable consideration, to bring no action against the judgment debtor upon such judgment in the state of New York, but only in Russia, if at all, is valid, open to no objection on the score of public policy, or of ousting the courts of jurisdiction. *Gitler v. Russian Co.* 124 App. Div. 273, 108 N. Y. Supp. 793.

This conclusion was reached by reasoning that, inasmuch as promises to forbear to prosecute particular claims, and stipula-

tions not to appeal appealable cases, are good, and the right of a judgment creditor to release or discharge the judgment is unquestionable, his right to surrender any particular remedy for enforcing it or any particular method of obtaining satisfaction was equally beyond denial.

The case of *Wilson v. Central Ins. Co.* 135 App. Div. 649, 119 N. Y. Supp. 955, was brought by a British subject upon an accident policy issued in England by a British corporation, and was held to be controlled by English law. The policy forbade suit to be maintained upon it to recover promised indemnity, if brought after the lapse of stated times, unless an arbitration should be had either by agreement or under the British arbitration acts. The policy also made this provision a condition precedent to any action to recover on the policy. The assured was injured while traveling in the United States, and was in correspondence with the insurer over the question of adjustment and settlement of his claim. The suit was not begun within the time limit, but it was shown that the insurer had refused to arbitrate, and it was contended that this refusal was a waiver of the condition precedent. Inasmuch as, in this state of affairs, a compulsory arbitration might have been had by the insured's initiative under the British statutes, and was not resorted to, it was held, by a divided court (three to two), that the condition precedent had neither been met or waived, and a judgment in favor of the assured was reversed.

c. Direct ousters.

Again and again both in England and the United States, it has been decided in a very great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreements of individuals made in advance; that private persons are incompetent to make any such binding contracts; and that all such contracts are illegal and void.

The following authorities will be found to sustain the above statement:

U. S.—*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Trott v. City Ins. Co.* 1 Cliff. 439, Fed. Cas. No. 14,189; *Tobey v. Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065; *Yeomans v. Girard F. & M. Ins. Co.* Fed. Cas. No. 18,136; *Knoche v. Chicago, M. & St. P. R. Co.* 34 Fed. 471; *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 520; *Grievance Committee v. Brown*, 61 Fed. 541; *Harrison v. German-American F. Ins. Co.* 67 Fed. 577; *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508; *Mitchell v. Dougherty*, 33 C. C. A. 205, 62 U. S. App. 443, 90 Fed. 639; *Western Assur. Co. v. Decker*, 39 C. C. A. 383, 98 Fed. 381; *Dickson Mfg. Co. v. American Locomotive Co.* 119 Fed. 488.

Ala.—*Stone v. Dennis*, 3 Port. (Ala.) 231; *Bozeman v. Gilbert*, 1 Ala. 90; *Bank of* 47 L.R.A. (N.S.)

State v. Martin, 4 Ala. 615; *Meaher v. Cox*, 37 Ala. 201; *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447.

Cal.—*Loup v. California Southern R. Co.* 63 Cal. 97; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839.

Conn.—*Chamberlain v. Connecticut Cent. R. Co.* 54 Conn. 472, 9 Atl. 244; *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356.

Del.—*Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233; *Crumlish v. Wilmington & W. R. Co.* 5 Del. Ch. 270.

D. of C.—*Campbell v. American Popular L. Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591.

Ill.—*Frink v. Ryan*, 4 Ill. 322; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Waugh v. Schlenk*, 23 Ill. App. 433; *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510; *Crilly v. Philip Rinn Co.* 135 Ill. App. 198.

Ind.—*Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571; *Supreme Council, O. C. F. v. Forsinger*, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129; *Ross v. Conwell*, 7 Ind. App. 375, 34 N. E. 752; *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543; *Maitland v. Reed*, 37 Ind. App. 469, 77 N. E. 290; *Supreme Council, C. B. L. v. Grove*, 176 Ind. 356, 36 L.R.A. (N.S.) 913, 96 N. E. 159.

Kan.—*Walker v. German Ins. Co.* 51 Kan. 725, 33 Pac. 597; *Supreme Lodge, O. S. F. v. Raymond*, 57 Kan. 647, 49 L.R.A. 373, 47 Pac. 533; *Cupples v. Alamo Irrig. & Mfg. Co.* 7 Kan. App. 692, 51 Pac. 920.

Ky.—*Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739; *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 105 Am. St. Rev. 218, 76 S. W. 22; *Hager v. Shuck*, 120 Ky. 574, 87 S. W. 300; *Ison v. Wright*, 21 Ky. L. Rep. 1368, 55 S. W. 202.

La.—*State ex rel. Watkins v. North American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

Me.—*Hill v. More*, 40 Me. 515; *Stephenson v. Piscataqua, F. & M. Ins. Co.* 54 Me. 70; *Hobbs v. Manhattan Ins. Co.* 56 Me. 417, 96 Am. Dec. 472; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037.

Md.—*Contee v. Dawson*, 2 Bland, Ch. 264.

Mass.—*Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *White v. Middlesex R. Co.* 135 Mass. 216; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Mittenthal v. Mascagni*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314, 71 N. E. 567; *White v. Abbott*, 188 Mass. 99, 74 N. E. 305; *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1,

17 L.R.A.(N.S.) 714, 79 N. E. 802; *Bauer v. International Waste Co.* 201 Mass. 197, 87 N. E. 637.

Mich.—*Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055.

Minn.—*Gasser v. Sun Fire Office.* 42 Minn. 315, 44 N. W. 252; *Whitney v. National Masonic Acci. Assn.* 52 Minn. 378, 54 N. W. 184; *Fidelity & C. Co. v. Eickhoff.* 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351; *Fidelity & C. Co. v. Crays.* 76 Minn. 450, 70 N. W. 531.

Mo.—*First Nat. Bank v. White.* 220 Mo. 717, 132 Am. St. Rep. 612, 120 S. W. 36, 16 Ann. Cas. 889; *State ex rel. Kennedy v. Union Merchants' Exch.* 2 Mo. App. 96; *Bales v. Gilbert.* 84 Mo. App. 675; *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684.

Mont.—*Randall v. American F. Ins. Co.* 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953; *Wortman v. Montana C. R. Co.* 22 Mont. 266, 56 Pac. 316.

Neb.—*German-American Ins. Co. v. Etherton.* 25 Neb. 505, 41 N. W. 406; *Home F. Ins. Co. v. Bean.* 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907; *National Masonic Acci. Assn. v. Burr.* 44 Neb. 256, 62 N. W. 466; *Insurance Co. of N. A. v. Bachler.* 44 Neb. 549, 62 N. W. 911; *Schrandt v. Young.* 62 Neb. 254, 86 N. W. 1085; *Hartford F. Ins. Co. v. Hon.* 66 Neb. 555, 60 L.R.A. 436, 103 Am. St. Rep. 725, 92 N. W. 746; *Phoenix Ins. Co. v. Zlotky.* 66 Neb. 584, 92 N. W. 736; *Havens v. Robertson.* 75 Neb. 205, 106 N. W. 335.

N. H.—*Leach v. Republic F. Ins. Co.* 58 N. H. 245.

N. Y.—*Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Seward v. Rochester.* 109 N. Y. 164, 16 N. E. 348; *Sanford v. Commercial Travelers' Mut. Acci. Assn.* 147 N. Y. 326, 41 N. E. 694; *National Contracting Co. v. Hudson River Water Power Co.* 170 N. Y. 439, 63 N. E. 450; *Smith v. Compton.* 20 Barb. 262; *Gibbs v. Continental Ins. Co.* 13 Hun. 611; *Keeffe v. National Acci. Soc.* 4 App. Div. 392, 38 N. Y. Supp. 854; *Wyckoff v. Woarms.* 118 App. Div. 699, 103 N. Y. Supp. 650; *Gitler v. Russian Co.* 124 App. Div. 273, 108 N. Y. Supp. 793; *Heath v. New York Gold Exch.* 38 How. Pr. 170, 7 Abb. Pr. N. S. 256; *Gay v. Lathrop.* 6 N. Y. St. R. 603; *Baldwin v. Fraternal Acci. Assn.* 21 Misc. 124, 46 N. Y. Supp. 1016.

N. C.—*Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477.

Ohio.—*Baltimore & O. R. Co. v. Stankard.* 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577; *Myers v. Jenkins.* 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089; *Tilden v. Bernard.* 12 Ohio C. C. N. S. 193.

Or.—*Ball v. Doud.* 26 Or. 14, 37 Pac. 70.

Pa.—*Gray v. Wilson.* 4 Watts. 39; *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Horton v. Stanley.* 1 Miles (Pa.) 418; *Phoenix Pottery Co. v. Griffin.* 16 Phila. 569.

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R. I.—*Pepin v. Societe St. Jean Baptiste.* 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387; *Grady v. Home.* F. & M. Ins. Co. 27 R. I. 435, 4 L.R.A.(N.S.) 288, 63 Atl. 173. S. C.—*Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

Tex.—*Scottish Union & Nat. Ins. Co. v. Clancy.* 71 Tex. 5, 8 S. W. 630; *Florida Athletic Club v. Hope Lumber Co.* 18 Tex. Civ. App. 161, 44 S. W. 10.

Va.—*Corbin v. Adams.* 76 Va. 58.

W. Va.—*Kinney v. Baltimore & O. Employers' Relief Assn.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8; *Turner v. Stewart.* 51 W. Va. 493, 41 S. E. 924.

Wis.—*Fox v. Masons' Fraternal Acci. Assn.* 96 Wis. 390, 71 N. W. 363.

The English decisions are in accord.

Courts of law may not be ousted of their jurisdiction by private agreements of individuals. *Horton v. Sayer.* 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 28, 7 Week. Rep. 735.

There is no doubt of the general principle, said the lord chancellor in *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746, that parties cannot by contract oust the ordinary courts of their jurisdiction.

Any agreement to withdraw from the ordinary tribunals of the country any controversy that may in the future arise between private persons is without validity. *Lee v. Page.* 7 Jur. N. S. 768, 30 L. J. Ch. N. S. 857, 9 Week. Rep. 754.

A mere covenant between individuals to refer to arbitration will not oust the courts of law of their jurisdiction. *Reeves v. White.* 21 L. J. Q. B. N. S. 169, 17 Q. B. 995, 16 Jur. 637, 16 J. P. 118.

If there is any one thing better established than another, said Sir W. Page Wood, V. C., in *Cooke v. Cooke*, L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480, 15 Week. Rep. 981, it is that the jurisdiction of one of the higher courts, if it exists, cannot be ousted except by express enactment.

A plea that the parties to an action have agreed to arbitrate the controversy, and have stipulated that no suit or action shall be brought until after an arbitration and an award, is conceded to be bad, if the effect of the agreement and stipulation is to prevent the parties from seeking redress in the courts. *Yeomans v. Girard.* F. & M. Ins. Co. Fed. Cas. No. 18,136.

There is no authority for holding that those who have agreed to arbitrate have thereby precluded themselves from resorting to a court of justice. *McGunn v. Hanlin.* 29 Mich. 476.

The legislature alone has power to deprive the citizen of his right to legal redress. *State ex rel. Kennedy v. Union Merchants' Exch.* 2 Mo. App. 96.

To create a judicial tribunal is a function of the sovereign power. *Austin v. Searing.* 16 N. Y. 112, 69 Am. Dec. 665.

Individuals and corporations are powerless to create judicial tribunals for the final and conclusive settlement of contro-

versies. *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571.

Stipulations in contracts which provide for arbitrations of controversies expected to arise under them, and which have the effect of ousting the jurisdiction of the courts, are against the policy of the common law. *Hurst v. Litchfield*, 39 N. Y. 377.

All agreements of which the object is to oust courts of their jurisdiction are contrary to public policy and void. *First Nat. Bank v. White*, 220 Mo. 717, 132 Am. St. Rep. 612, 120 S. W. 36, 16 Ann. Cas. 889; *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477.

The courts are so jealous of their jurisdiction that they do not allow parties to oust it by agreement. *Yeomans v. Girard F. & M. Ins. Co.* supra.

They guard against any contract innovations upon their jurisdiction with a jealous eye. *First Nat. Bank v. White*, supra.

No consent of parties can confer power on a court to adjudicate their rights where the law has not conferred it, hence no agreement of parties can deprive courts of their jurisdiction conferred by law when either seeks judicial aid. *Waugh v. Schlenk*, 23 Ill. App. 433; *Hobbs v. Manhattan Ins. Co.* 56 Me. 417, 56 Am. Dec. 472.

The first is a well-settled maxim of the law, and the second follows from the same course of reasoning. *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 185.

Jurisdiction can be neither conferred nor taken away from the courts by contract, although in some cases one may be estopped by his contract from invoking the jurisdiction of a court in his behalf. *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089.

d. All-embracing agreements.

A general agreement in or collateral to a contract to submit to arbitration any and all controversies that shall arise between the parties, empowering the arbitrators finally and conclusively to decide the entire dispute and every question of law or fact in the proceeding, to the utter exclusion of the courts, is voidable at will, with or without reason or excuse, by either party; and if either party chooses to ignore, rescind, or repudiate altogether his agreement to refer and to resort directly to the courts to enforce his rights or redress his wrongs, he is at perfect liberty to do so, and will not incur any penalty for his default, or encounter the slightest obstacle to the recovery of a judgment, or impediment to the progress of his suit.

According to Lord Kenyon, in the leading case of *Thompson v. Charnock*, 8 T. R. 139 (and his statement was quoted with approval in *Frink v. Ryan*, 4 Ill. 322), it has been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction.

A clause in an agreement to submit to 47 L.R.A.(N.S.)

arbitration the question whether or not the contract has been violated is void. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

So is an agreement to arbitrate, expressly empowering the arbitrators to hear the parties and determine whether or not they have violated their contract, and if so, what damage either has sustained, and making the decision of a majority of the arbitrators final and binding on both parties. *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115.

They are void for attempting to oust altogether the courts of jurisdiction over the entire subject-matter. *Bauer v. International Waste Co.* 201 Mass. 197, 87 N. E. 637.

Any agreement which ousts the courts of jurisdiction of its entire subject-matter, and creates the sole and only remedy open to the parties, is void. *Baldwin v. Fraternal Acci. Asso.* 21 Misc. 124, 46 N. Y. Supp. 1016.

Apparently the courts have never otherwise decided. In a few instances jurists may have expressed doubts as to whether the doctrine was entirely sound in all its length and breadth, but they have always admitted it to be the established law. That doctrine may be accepted as irreversibly settled, and it has been applied to all classes of contracts.

By far the more numerous cases in which the doctrine has been considered or referred to and sustained when the particular contract came within its requirements, or conceded when it did not directly apply to the arbitration provision before the court in the particular case, have arisen in litigations over policies of insurance. In such cases it is held or admitted that a clause in a policy which provides for submitting to arbitration not merely a difference between the insurer and assured over the amount of a loss or damage sustained by the latter, for which he demands indemnity, but every difference, of whatever nature, that shall arise between the underwriter and policy holder, including the liability of the former to pay any insurance at all, or any clause similar in substance and effect, is a nullity; and usually it is said to be void because it is an attempt to oust the courts of their jurisdiction, and hence is contrary to public policy. *Trott v. City Ins. Co.* 1 Cliff. 439, Fed. Cas. No. 14,189; *Yeomans v. Girard F. & M. Ins. Co.* Fed. Cas. No. 18,136; *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 520; *Jefferson F. Ins. Co. v. Bier & Sage*, 183 Fed. 588; *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co.* 66 Cal. 253, 5 Pac. 232; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Prader v. National Masonic Acci. Asso.* 95 Iowa, 149, 63 N. W. 601; *Walker v. German Ins. Co.* 51 Kan. 725, 33 Pac. 597; *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Dunton v. Westchester F. Ins.*

Co. 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; McNeess v. Southern Ins. Co. 61 Mo. App. 335; Stevens v. Norwich Union F. Ins. Co. 120 Mo. App. 88, 96 S. W. 684; Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456, 135 S. W. 964; German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Sanford v. Commercial Travelers' Mut. Acci. Asso. 147 N. Y. 326, 41 N. E. 694; Keffe v. National Acci. Soc. 4 App. Div. 392, 38 N. Y. Supp. 854; Baldwin v. Fraternal Acci. Asso. 21 Misc. 124, 46 N. Y. Supp. 1016; Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387; Fox v. Masons' Fraternal Acci. Asso. 96 Wis. 390, 71 N. W. 363.

Contracts requiring every matter in difference arising between the parties, and every question of liability upon them, to be submitted to arbitration, are illegal and void. *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 520.

When an agreement to arbitrate includes the whole subject-matter of difference, so that the right of the party to resort to the courts of his country for the determination of his suit or claim is absolutely and effectually waived, it is against public policy and void. *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447.

An agreement to submit a possible controversy to arbitration, made before any controversy has arisen, if it involves the determination of the right of recovery both as to law and facts, is void because it tends to oust the courts of their jurisdiction, and substitutes a contract tribunal in the stead of the one provided by law for the trial of lawsuits. *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22.

It was said by the court in *Jefferson F. Ins. Co. v. Bier & Sage*, 183 Fed. 588, in holding void a clause in an insurance policy providing that in the event of any misunderstanding as to the meaning of the contract or the operations under it, the same should be settled equitably rather than legally, and all differences should be referred to arbitration, the decision of the arbitrators to be final, and that the right of appeal to a court of law or equity from such decision was waived, that "a more complete ouster of courts from all jurisdiction could not well be formulated."

A provision in a policy of insurance against accidents, in which the insurer engages to pay the insured a stated sum of money weekly for a limited number of weeks in case of an injury by external, violent, and accidental means, which incapacitates him from business, providing in broad terms that should a claim arise and be disputed, it shall be referred to three arbitrators of special qualifications, chosen in the usual way, whose award shall be final and conclusive, and that no suit shall be brought upon any disputed claim before 47 L.R.A.(N.S.)

an arbitration is complete, inasmuch as it requires the submission of the entire controversy over both law and facts, is void, and therefore no bar to an action. *Whitney v. National Masonic Acci. Asso.* 52 Minn. 378, 54 N. W. 184.

It was contended in *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192, that a clause in a marine insurance policy respecting adjustment of losses and the submission to arbitration of disputes over them affected the right rather than the remedy of the assured, and was valid and binding as a condition precedent to any action on the contract, so that it was incumbent on the assured to show at least an offer to adjust the claim in the mode prescribed before there could be any recovery. The court replied that "the invalidity of the condition requiring the assured to submit the question of loss to arbitration seemed to have been settled, and upon grounds of public policy which the contract of the parties could not control;" but, citing some recent English cases, added, these decisions might "possibly lead to some revision and qualification of the doctrine as heretofore understood."

The court in *Edwards v. Abercayron Mut. Ship. Ins. Soc. L. R. 1 Q. B. Div. 563*, 34 L. T. N. S. 457, reversing 44 L. J. Q. B. N. S. 67, 23 Week. Rep. 304, held that a rule of a mutual insurance company, making a part of a marine policy which in effect conferred upon a committee power not only to decide what the amount of a loss might have been, but whether or not the society was liable for the loss at all, and then provided that no policy holder should be allowed to bring or have any action, suit, proceeding, or other remedy upon the policy for any claim under it, did not and could not oust the court of jurisdiction, for it was not permissible by private contract to stipulate away the right to resort to the established courts of the country. The case of *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746, which, in the view of the court below, and one dissenting judge in review, was esteemed to sanction a contrary doctrine, at least, in application to the facts in the case at bar, was distinguished and limited by Mr. Justice Brett, who said: The true limitation of *Scott v. Avery*, supra, seems to me to be that which was expressed in it: and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it which imposes as a condition precedent to the maintenance of a suit or action for a breach of it, settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind which do not go to the root of the action, i. e., which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular fact has been settled by arbitration; but a stipulation in a contract which in terms would submit every

dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained, but gives at most a right of action for not submitting to arbitration, and for damages, probably nominal. The rule is founded on public policy. It in no way prevents parties from referring to arbitration disputes which have arisen, but it does prevent them from establishing, as it were, before they dispute, a private tribunal which may, from ignorance, do what the invented tribunal here did, viz.: act in contravention, and insist on acting in contravention, of the most elementary principle of the administration of justice.

Although the cases respecting insurance policies with agreements to arbitrate outnumber those concerned with other contracts, the latter are in full accord with the former as to the prevalence and application of the doctrine above stated. They all hold it to be settled law that agreements to arbitrate everything in dispute, and taking away from the courts jurisdiction over any controversy, are nullities. *Knoche v. Chicago, M. & St. P. R. Co.* 34 Fed. 471; *Mitchell v. Dougherty*, 33 C. C. A. 205, 62 U. S. App. 443, 90 Fed. 639; *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787; *Bozeman v. Gilbert*, 1 Ala. 90; *Loup v. California Southern R. Co.* 63 Cal. 97; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233; *Leonard v. House*, 15 Ga. 473; *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269; *Cupples v. Alamo Irrig. & Mfg. Co.* 7 Kan. App. 602, 51 Pac. 920; *Hill v. More*, 40 Me. 515; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *Wortman v. Montana C. R. Co.* 22 Mont. 266, 56 Pac. 316; *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458; *March v. Eastern R. Co.* 40 N. H. 548, 77 Am. Dec. 732; *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348, affirming 39 Hun, 44; *National Contracting Co. v. Hudson River Water Power Co.* 192 N. Y. 209, 84 N. E. 965, reversing 118 App. Div. 665, 103 N. Y. Supp. 641; *Wyckoff v. Woarms*, 118 App. Div. 699, 103 N. Y. Supp. 650; *Heath v. New York Gold Exch.* 38 How. Pr. 170, 7 Abb. Pr. N. S. 256; *Gay v. Lathrop*, 6 N. Y. S. R. 603; *Tilden v. Bernard*, 12 Ohio C. C. N. S. 193; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Gray v. Wilson*, 4 Watts, 39; *Snodgrass v. Gavit*, 28 Pa. 221; *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452; *Kinney v. Baltimore & O. Employees' Relief Asso.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8; *Baer's Sons Grocer Co. v. Cutting Fruit Packing Co.* 42 W. Va. 359, 26 S. E. 191.

Although the parties to a contract may stipulate to set aside the rules of evidence established by law, and provide that the estimate, computation, or appraisal of

a third person whom they have selected shall be exclusively received to prove the extent or character of the performance of the contract and the sum to be paid for it, yet the law forbids them to waive in advance all rights of action respecting any dispute that may arise, and completely to abrogate the authority conferred upon the courts. *Mitchell v. Dougherty*, 33 C. C. A. 205, 62 U. S. App. 443, 90 Fed. 639.

A provision in a construction contract, designating a person to decide every question which may arise between the contracting parties relative to its execution, and making that decision final and binding upon both, is invalid, as an agreement in advance of any controversy to submit questions to the decision of a private individual, and as a renunciation of the right to appeal to the courts for the redress of wrongs. *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510.

It is, according to the court in *Wortman v. Montana C. R. Co.* 22 Mont. 266, 56 Pac. 316, now the well-settled doctrine, by the great weight of authority, that parties cannot stipulate beforehand to submit their rights generally to the judgment of a designated third person for final determination. The effect of such a stipulation is to oust the courts of their jurisdiction, and to restrict the parties from enforcing their rights under the contract by the usual legal proceedings in the ordinary tribunals.

The law is abundantly well established. said the court in *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684, that stipulations in contracts for the submission of matters pertaining to a contemplated controversy, that is, the right of action itself, and all matters incident thereto, to arbitration, are void as against public policy, as tending to oust the courts of their rightful jurisdiction.

It was said in *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037, to be a "proposition of paramount importance, which has undoubtedly been regarded as settled by judicial authority ever since the days of Lord Coke," that a general stipulation contained in a contract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount which may be recovered on the contract will not be sanctioned or enforced so as to divest the courts of their jurisdiction.

The question as to how far courts will be governed by a provision in a contract requiring controversies arising as to the rights and liabilities of parties under it to be submitted to arbitration, said the court in *Randall v. American F. Ins. Co.* 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953, has engaged the profound consideration of both American and English courts of last resort; and the conclusion reached and probably settled beyond all further controversy is that a provision in a contract requiring all differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitri-

tration will not be allowed to interfere with or bar the litigation of such controversies when brought into court.

This passage was quoted by the court in *Wortman v. Montana C. R. Co.* 22 Mont. 266, 56 Pac. 316, in association with the statement: "There is some conflict of authority upon this subject in the reported cases, but we do not think the question open to discussion in this state."

The case of *Thompson v. Charnock*, 8 T. R. 139, which probably has been cited more frequently than any other decision, except, perhaps, *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746, on the validity of agreements to arbitrate, and their efficiency in forestalling litigation, was an action of covenant on a charter party for a ship to freight from London to the Cape of Good Hope and Bengal, and return, which contained a clause agreeing that in case any difference should arise between the parties touching the contract or anything relating to it, the controversy should be settled and adjusted by three arbitrators chosen after the usual manner; and it was pleaded that while the defendant had ever been willing and ready and had offered to go to an arbitration, the plaintiffs had always refused to do so. The court held that the plea could not be supported. The opinion of the chief justice, Lord Kenyon, as reported, is very brief. He merely said: It is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction.

If parties make an arbitration agreement which has the effect to oust the courts of jurisdiction, it is held to be invalid, said the court in *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356; but immediately added—although more recent decisions question whether this doctrine is sound in principle.

If two persons enter into a contract for a breach of which in any particular an action lies, said Lord Coleridge, in *Scott v. Avery*, supra, they cannot make it a binding term that in such an event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests upon a satisfactory principle or not may well be questioned, he added, but it has been so long settled that it cannot be disturbed.

Perhaps, said Morton, J., in delivering the opinion of the court in *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115, if the question were a new one no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction. But the law is settled otherwise in this state.

In *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250, Allen, J., decided 47 L.R.A. (N.S.)

delivering the opinion of the court, remarked that it appeared to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration will not oust a court of law or equity of jurisdiction. He proceeded, however, to say that when parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand and the parties be made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend, he continued, that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration. But the rule that a general covenant to submit any differences that may arise in the performance of a contract or under an executory agreement is a nullity is too well established to be now questioned.

In *Fox v. Hempfield R. Co.* 3 Wall. Jr. 243, Fed. Cas. No. 5,010, Grier, J., expressed the opinion that it was doubtful whether there was any sufficient foundation, either in policy or principle, for the ancient and theretofore unquestioned doctrine that persons cannot bind themselves by contract not to resort to courts of law or equity.

The common-law doctrine that a provision in an ordinary contract requiring all differences between the parties touching their rights and liabilities under it to be submitted to arbiters, whose decision or award is to be conclusive and final, will not be allowed to bar the litigation of such differences in the courts of the land, is, in the opinion of the court in *Cotter v. Grand Lodge*, A. O. U. W. 23 Mont. 82, 57 Pac. 650, an anomaly, and inconsistent with the right freely to contract; and if it were not so firmly and well-nigh universally established, the court apprehended that it would be overturned, as resting on no solid foundation.

The principle upon which rests the doctrine that agreements referring all disputes and difficulties that may arise under a contract to arbitration are against the policy of the law, and void for tending to oust the courts of their jurisdiction, is that wherever a cause of action exists a right of action in a court of law is an incident to and inseparable from it, even by agreement of the parties. *Condon v. South Side R. Co.* 14 Gratt. 302.

The case of *Condon v. South Side R. Co.* supra, was mildly criticized by Brannon, J., in delivering the opinion of the court in *Kinney v. Baltimore & O. Employees' Relief Assn.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8. After stating the accepted common-

law doctrines concerning agreements to arbitrate, and confessing the same feeling that they were unreasonable that was manifested in the case cited, he said: In that case, the court drew a distinction, clear in words, but not in principle, that parties might by contract lawfully make the decision of arbitrators, or of any third person, a condition to a right of action, and that such then was a part of the cause of action, and until made the court would be without jurisdiction.

The courts are prone to call such agreements void. The characterization is wanting in strict accuracy. It has occasionally been held that notwithstanding an agreement to arbitrate provides for a submission of all the matters in controversy to the final decision of arbitrators, if the parties fully carry it out, and the arbitrators make a final, certain, complete, and honest award upon all matters submitted, pursuant to the terms of the submission, the parties will be bound. *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486; *Williams v. Branning Mfg. Co.* 153 N. C. 7, 31 L.R.A.(N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

The validity of an agreement in writing under seal to refer to arbitration all the differences of the parties "as to any transaction or otherwise," whether between themselves individually or between either of them and any firm to which the other may have belonged, was upheld, so far as to sustain an action for and a recovery of substantial damages for revoking it without justifying cause, in the case of *Pond v. Harris*, 113 Mass. 114.

The court in *Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96, reversed a decree of the circuit court, annulling an award for alleged misconduct of the arbitrators, and held the complainants bound by it, and, thus in effect upheld the validity of a fully executed submission of "all demands, suits, claims, causes of action, controversies, and disputes between the parties."

A provision in a contract that any claim arising under it shall, if required by the party against whom it is preferred, be referred to arbitration, though broad enough to be construed as requiring every question of liability to be submitted, will not be thus construed, because to so construe it would render the provision illegal; therefore it will be held to provide simply for a reference to determine the amount of a loss or damage. *Smith v. Preferred Masonic Mut. Acci. Assn.* 51 Fed. 520.

e. Independent executory agreements.

Throughout the United States, the British United Kingdom, and in Canada, it is everywhere agreed that an executory agreement to refer a controversy, actual or anticipated, to arbitrators to be chosen in the future, whether wholly separate and distinct from or incidental and collateral to another contract, creating neither expressly

nor by necessary implication a condition precedent to maintaining a suit or action before an award, will not be allowed to oust the courts of their jurisdiction, or be permitted to be or recognized as a defense to legal proceedings instituted by a party to the agreement who may have ignored, revoked, or repudiated it, but that jurisdiction will be taken and the controversy will be adjudicated just as if the arbitration compact had never come into existence.

U. S.—*Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363; (*The Excelsior*) (*Potomac S. B. Co. v. Baker Salvage Co.*) 123 U. S. 40, 31 L. ed. 75, 8 Sup. Ct. Rep. 33; *Tobey v. Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065; *Schollenberger v. Phoenix Ins. Co.* 5 W. N. C. 366, Fed. Cas. No. 12,476; *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513; *Yeomans v. Girard F. & M. Ins. Co. Fed. Cas. No. 18,136*; *Crossley v. Connecticut F. Ins. Co.* 27 Fed. 30; *Lafin v. Chicago, W. & N. R. Co.* 34 Fed. 859; *Hudmon v. Cuyas*, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355; *Grievance Committee v. Brown*, 61 Fed. 541; *Mutual F. Ins. Co. v. Alvord*, 9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752; *Harrison v. German-American F. Ins. Co.* 67 Fed. 577; *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787; *Dickson Mfg. Co. v. American Locomotive Co.* 119 Fed. 488; *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 92 C. C. A. 162, 166 Fed. 398; *Jefferson F. Ins. Co. v. Bier & Sage*, 183 Fed. 588.

Ala.—*Stone v. Dennis*, 3 Port. (Ala.) 231; *Bank of State v. Martin*, 4 Ala. 615; *Meaher v. Cox*, 37 Ala. 201; *Wright v. Evans*, 53 Ala. 103; *Mason v. Bullock*, 6 Ala. App. 141, 60 So. 432.

Cal.—*Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Loup v. California Southern R. Co.* 63 Cal. 97; *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; *Greiss v. State Invest. & Ins. Co.* 98 Cal. 241, 33 Pac. 195.

Ga.—*Leonard v. House*, 15 Ga. 473; *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638.

Haw.—*Hind v. Low*, 14 Haw. 438.

Ill.—*Frink v. Ryan*, 4 Ill. 322; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598, 18 N. E. 804; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Waugh v. Schlenk*, 23 Ill. App. 433; *Farmers' Mut. F. & Lighting Ins. Co. v. Lecro*, 91 Ill. App. 41; *Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510; *Crilly v. Philip Rinn Co.* 135 Ill. App. 198.

Ind.—*Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Bauer v. Samson Lodge*, K. P. 102 Ind. 262, 1 N. E. 571; *Supreme Council, O. C. F. v. Forsinger*, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129; *Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848; *Voluntary Relief Dept. v. Spencer*, 17 Ind. App.

- 123, 46 N. E. 477; Munk v. Kanzler, 26 Ind. App. 105, 58 N. E. 543; Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 390.
- Iowa.—Gere v. Council Bluffs Ins. Co. 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159; Zalesky v. Home Ins. Co. 102 Iowa, 613, 71 N. W. 566; Read v. State Ins. Co. 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 666; Barry v. Farmers' Mut. Hail Asso. 114 Iowa, 186, 88 N. W. 290.
- Kan.—Continental Ins. Co. v. Wilson, 45 Kan. 250, 23 Am. St. Rep. 720, 25 Pac. 629; Supreme Lodge, O. S. F. v. Raymond, 57 Kan. 647, 49 L.R.A. 373, 47 Pac. 533.
- Ky.—Peters v. Craig, 6 Dana, 307; Gore v. Chadwick, 6 Dana, 477; Hartford F. Ins. Co. v. Bourbon County Ct. 115 Ky. 109, 72 S. W. 739; Gaither v. Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2; Ison v. Wright, 21 Ky. L. Rep. 1368, 55 S. W. 202.
- Me.—Robinson v. Georges Ins. Co. 17 Me. 131, 35 Am. Dec. 239; Perry v. Cobb, 88 Me. 435, 49 L.R.A. 389, 34 Atl. 278; Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; Dunton v. Westchester F. Ins. Co. 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.
- Md.—Contee v. Dawson, 2 Bland. Ch. 264; Allegre v. Maryland Ins. Co. 6 Harr. & J. 408, 14 Am. Dec. 289.
- Mass.—Cavanagh v. Dooley, 6 Allen, 66; Rowe v. Williams, 97 Mass. 163; Pearl v. Harris, 121 Mass. 390; Vass v. Wales, 129 Mass. 38; Reed v. Washington F. & M. Ins. Co. 138 Mass. 572; Clement v. British American Ins. Co. 141 Mass. 298, 5 N. E. 847; Lewis v. Brotherhood Acci. Co. 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802; Bauer v. International Waste Co. 201 Mass. 197, 87 N. E. 637.
- Mich.—McGunn v. Hanlin, 29 Mich. 476; Callanan v. Port Huron & N. W. R. Co. 61 Mich. 15, 27 N. W. 718; Nurney v. Fireman's Fund Ins. Co. 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; Chadwick v. Phoenix Acci. & Sick Ben. Asso. 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170.
- Minn.—Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252; Whitney v. National Masonic Acci. Asso. 52 Minn. 378, 54 N. W. 184.
- Mo.—Bowen v. Lazalere, 44 Mo. 383.
- Mont.—Randall v. American F. Ins. Co. 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953.
- Neb.—Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 53 Am. St. Rep. 321, 66 N. W. 278; Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085.
- N. H.—Smith v. Boston, C. & M. R. Co. 38 N. H. 458; March v. Eastern R. Co. 40 N. H. 548, 77 Am. Dec. 732.
- N. J.—Paulison v. Halsey, 38 N. J. L. 488; State, Knaus, Prosecutor, v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237.
- N. Y.—Smith v. Barse, 2 Hill, 387; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Hurst v. Litchfield, 39 N. Y. 377; Binasse v. Paige, 1 Keyes, 87, 1 Abb. App. Dec. 138; Smith v. Compton, 20 Barb. 262; Sinclair v. Tallmadge, 35 Barb. 602; Gibbs v. Continental Ins. Co. 13 Hun, 611; Keeffe 47 L.R.A.(N.S.)
- v. National Acci. Soc. 4 App. Div. 392, 38 N. Y. Supp. 854.
- N. C.—Swaim v. Swaim, 14 N. C. (3 Dev. L.) 24; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831.
- Ohio.—Dayton & U. R. Co. v. Pittsburgh, C. C. & St. L. R. Co. 6 Ohio C. C. N. S. 537, 25 Ohio C. C. 705, affirmed in 67 Ohio St. 523, 67 N. E. 1100; Tilden v. Bernard, 12 Ohio C. C. N. S. 193, 31 Ohio. C. C. 255.
- Pa.—Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; Carr v. Raleigh, 2 Phila. 242. S. C.—Percival v. Herbemont, McMull. L. 59.
- Tenn.—Cole Mfg. Co. v. Collier, 91 Tenn. 525, 30 Am. St. Rep. 898, 19 S. W. 872.
- Tex.—Florida Athletic Club v. Hope Lumber Co. 18 Tex. Civ. App. 161, 44 S. W. 10.
- Vt.—Welch v. Miller, 70 Vt. 108, 39 Atl. 749.
- Va.—Kidwell v. Baltimore & O. R. Co. 11 Gratt. 676; Condon v. South Side R. Co. 14 Gratt. 302; Baltimore & O. R. Co. v. Polly, 14 Gratt. 447; Corbin v. Adams, 76 Va. 58; Rison v. Moon, 91 Va. 384, 22 S. E. 165.
- W. Va.—Kinney v. Baltimore & O. Employees' Relief Asso. 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924; Lawson v. Williamson Coal & Coke Co. 61 W. Va. 669, 57 S. E. 258.
- Wis.—Oakwood Retreat Asso. v. Rathborne, 65 Wis. 177, 26 N. W. 742.
- Eng.—Harris v. Reynolds, 7 Q. B. 71, 14 L. J. Q. B. N. S. 241, 9 Jur. 808; Lees v. Laforest, 14 Beav. 250; Roper v. London, 1 El. & El. 825, 28 L. J. Q. B. N. S. 290, 5 Jur. N. S. 491, 7 Week. Rep. 441; Horton v. Sayer, 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 28, 7 Week. Rep. 735; Thompson v. Charnock, 8 T. R. 139; Mitchell v. Harris, 4 Bro. Ch. 311, 2 Ves. Jr. 129; Street v. Rigby, 6 Ves. Jr. 815; Kill v. Hollister, 1 Wils. 129; Dawson v. Fitzgerald, L. R. 1 Exch. Div. 257, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773; Cooke v. Cooke, L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480, 15 Week. Rep. 981; Edwards v. Aberayron Mut. Ship Ins. Soc. L. R. 1 Q. B. Div. 563, 34 L. T. N. S. 457.
- Can.—Griggs v. Billington, 27 U. C. Q. B. 520.
- This has frequently been decided and now seems to be the settled law, said the court in Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54.
- "It is well settled in this commonwealth," said the court in Reed v. Washington F. & M. Ins. Co. 138 Mass. 572.
- It has long been settled, said Sir John Romilly, M. R., in giving judgment in Lees v. Laforest, 14 Beav. 250, that an offer to refer to arbitration agreed upon is no bar to a suit.
- It was declared in Perry v. Cobb, 88 Me. 435, 49 L.R.A. 389, 34 Atl. 278, nearly a score of years ago, to have been settled law

in the state of Maine for more than a quarter of a century that an arbitration clause in a contract is ineffectual to oust the courts of jurisdiction.

The authorities upon this point seemed to the court in *Frink v. Ryan*, 4 Ill. 322, to be conclusive.

The stated proposition was said by the court in *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278, to have been repeatedly held, and it was admitted by the court in *Campbell v. American Popular L. Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591, that it was "not to be denied."

So long as an agreement to arbitrate remains executory, and is not carried through to an award, it is no bar to an action or suit. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447; *Corbin v. Adams*, 76 Va. 58; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

A simple agreement to fix the compensation for services contemplated to an unknown extent by arbitration after they shall have been rendered will not bar an action to recover their value. *Bank of State v. Martin*, 4 Ala. 615.

The court in *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572, after saying it was well settled that agreements to arbitrate would not be enforced in equity nor upheld to bar suits and actions, continued: The reason generally given is that such an agreement affects the remedy, and, if enforced, would oust the courts of their jurisdiction. Another reason is, that a submission to arbitration is a power, and revocable at any time before it is fully executed by an award made. A party will not be compelled to center into a submission which he can forthwith revoke; and the bringing of an action amounts to a revocation.

Stipulations in a contract assuming to divest the courts of justice of their ordinary jurisdiction are repugnant to the rest of the contract. *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70.

To enforce provisions in a contract requiring disputes that shall arise respecting the rights and liabilities of the parties under it to be submitted to arbitration would be, in the opinion of the court in *Randall v. American F. Ins. Co.* 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953, to allow people to barter away the jurisdiction of the courts to determine their rights and redress their wrongs; hence, they are disregarded, as against public policy.

Arbitrations as a means of peaceful and expeditious settlement of controversies are enforced only where they have been executed, or where the agreement to arbitrate does not attempt to oust the courts of their jurisdiction. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 730.

An executory agreement to arbitrate is merely an accord without satisfaction. *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749.

As specific performance of a contract to arbitrate cannot be enforced, parties must be allowed to bring their disputes before 47 L.R.A. (N.S.).

the proper tribunals of the country. *Contee v. Dawson*, 2 Bland, Ch. 264.

In occasional instances legislation has been enacted declaring void provisions in contracts by which it is sought to oust the courts of jurisdiction. A statute of Montana (Civ. Code 1895, § 2245) is to this effect. *Wortman v. Montana C. R. Co.* 22 Mont. 266, 56 Pac. 316; *Cotter v. Grand Lodge*, A. O. U. W. 23 Mont. 82, 57 Pac. 650.

And in South Dakota, a statute (Comp. Laws, § 3582) has provided that "every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals . . . is void."

f. The applications of the doctrines.

There have been many decisions cited in this note *ubi supra et infra* in which application of the doctrines just set forth has been made in concrete cases, but it will suffice at this point to cite a few illustrative ones, showing the great variety of circumstances in which agreements to arbitrate were disregarded in ensuing litigations.

In *Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363, and *The Excelsior*, 123 U. S. 40, 31 L. ed. 75, executory oral agreements between the masters of stranded vessels and the salvors, to submit to arbitration the question of compensation for the work of saving the ships, and their cargoes, if not agreed upon, were held no bar to suits for salvage brought in the usual way before a court of admiralty.

The decision in the latter case followed the judgment of Sir James Hannen in *The Raibey*, L. R. 10 Prob. Div. 114, 54 L. J. Prob. N. S. 65, 53 L. T. N. S. 56, 33 Week. Rep. 938, 5 Asp. Mar. L. Cas. 473.

In *Robinson v. Georges Ins. Co.* 17 Me. 131, 35 Am. Dec. 239, and *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 408, 14 Am. Dec. 289 (actions arising on policies of marine insurance), and in *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252 (an action on a fire insurance policy), simple and general provisions for referring claims for losses to arbitration were held no bar to actions to recover insurance.

It is not competent for the parties to a fire insurance contract, after stipulating for a determination by arbitrators of the amount of loss and the value of the insured property as a condition precedent to an action on the policy, to go further in the stipulation, and empower the arbitrators to decide also the question of the ownership of the insured property, since that question goes directly and solely to the policy holder's cause of action and the insurer's liability on the policy, and wreeds jurisdiction from the courts. *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037.

When a provision in a fire insurance policy for an arbitration of the amount of

any loss if the parties differ concerning it is collateral to the main contract of the insurer to pay absolutely, within a stated time, the actual cash value of the insured property if injured or destroyed by fire, although it expressly forbids any action at law or suit in equity to be maintained upon the policy for the recovery of a loss until after an award by the arbitrators, it constitutes no defense or bar to the policy holders' action against the underwriter without an arbitration or offer to arbitrate. *Gibbs v. Continental Ins. Co.* 13 Hun, 611.

A provision in an accident insurance policy that in case the insurer and assured or beneficiary disagree as to the liability of the insurer, such liability and the amount of it shall be determined by arbitration is void. *Baldwin v. Fraternal Acci. Asso.* 21 Misc. 124, 46 N. Y. Supp. 1016.

A clause in an accident insurance policy providing that if the underwriter and the insured or beneficiary shall disagree concerning the insurer's liability under the contract, all concur that the policy has been issued upon the express condition that such liability and the amount thereof shall be determined by arbitration, the arbitrators to have certain stated qualifications and be selected in a prescribed way, and that the underwriter's liability shall depend upon the arbitrators' award, and legal proceedings against it shall await the arbitration unless it refuses to arbitrate, is void as an attempt to oust the courts of their jurisdiction. *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802.

An agreement with respect of arbitration, contained in a contract in which one party undertakes to pay the other a definite sum of money upon a named contingency, which is expressed in such general terms that it must be construed as comprehending the whole matter of any claim which may be disputed, including both the law and the facts of the controversy, without any indication to limit the arbitration to the determination of any particular fact or amount, is void as an attempt to oust the courts of their jurisdiction. *Whitney v. National Masonic Acci. Asso.* 52 Minn. 378, 54 N. W. 184.

A stipulation in an insurance contract against accidental injuries and death, to the effect that all questions respecting the liability of the insurer should be settled by arbitration, at the option of the insurer, and that no suit should be brought against the insurer on the contract except to enforce an award, unless it should have refused to arbitrate, is void as an attempt to oust the courts of their jurisdiction and to deprive the assured of the right to resort to them to enforce legal rights. *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 390, 71 N. W. 363.

In *Harris v. Reynolds*, 7 Q. B. 71, 14 L. J. Q. B. N. S. 241, 9 Jur. 808, a plea in bar to an action for goods sold and delivered and on an account stated, alleging that the parties had, before suit, submitted

their differences to arbitration, promised to fulfil the award, and that the arbitration was still pending undetermined, was held bad because the pendency of an arbitration is no answer to an action to recover a debt.

A like decision was made in *Ison v. Wright*, 21 Ky. L. Rep. 1368, 55 S. W. 202, holding that a stipulation in a contract calling for a delivery of several thousand logs at a stated price, payable in proportion to the number of logs delivered, providing that should the parties disagree over any part of the contract, they each select an arbitrator and the two an umpire, the award to be final, constituted no bar to an action to recover the price of logs delivered.

A mere submission to arbitration without an award has been held no bar to a suit by a principal to compel his factor to account. *Carr v. Raleigh*, 2 Phila. 242.

A plea in an action for an assault and battery, that since the beginning of the action the parties had submitted in writing all the matters of contest involved in the suit to arbitrators, who had not heard the evidence or made an award, is bad on demurrer. *Gore v. Chadwick*, 6 Dana, 477.

When a contract between a railroad company and partnership for the setting up and operating of stone crushing works to supply ballast for the construction and repair of sections of the railroad and the furnishing of the output for such purposes provides for the decisions of the chief engineer of the road to be final and conclusive in any disputes which may arise between the parties relative to or touching the contract, and for a waiver by each party of any right of action, suit or remedy at law by virtue of the covenants to the end that the decision of the engineer shall, in the nature of an award, be final and conclusive on the rights and claims of the parties, it will not be construed as intending that the engineer, as an arbiter, should determine the question whether or not there had been a breach by either party of a material part of the contract, and, if so, that he should assess the damages occasioned by such breach, because, if such had been contemplated by the parties and embraced by the provision for reference, neither party would be bound by the award, inasmuch as the questions involved are such as can only be determined by a court of competent jurisdiction. *El Paso & S. W. R. Co. v. Eichel*, — Tex. Civ. App. —, 130 S. W. 922.

An agreement between a corporation and its servants that none of the latter shall be dismissed except for some cause, to be determined by arbitration, is not binding upon a receiver of the former, subsequently appointed, because it hampers the court in administering the receivership. *Grievance Committee v. Brown*, 61 Fed. 541.

An agreement by a person upon entering the service of a railroad company as a passenger conductor to deposit and leave, while his employment continued, a sum of money, which, both principal and interest,

was to be forfeited upon the arbitrary decision of the president of the company if he failed fully to perform his assigned duties, or violated any rule of the company, was held, in *White v. Middlesex R. Co.* 135 Mass. 216, to be void as an attempt to oust the courts entirely of jurisdiction over the question whether the company was entitled to keep all or any of the money as liquidated damages for a breach of the employment contract.

An agreement in articles of copartnership to refer to arbitration any dispute arising between the partners cannot be pleaded in abatement or in bar of an action at law or a suit in equity, instituted for the purpose of having the same matter determined. *Frink v. Ryan*, 4 Ill. 322.

It is no defense to an action to recover a reasonable compensation for professional services rendered that the parties had agreed to arbitrate all matters relating to fees for such services, and that no arbitration had taken place. *Gaither v. Dougherty*, 18 Ky. L. Rep. 709, 38 S. W. 2.

A parol submission to arbitration of a question as to what compensation a painter should receive for portraits painted and delivered without any agreement to be bound by the arbitrators' award is no defense to an action to recover the price or value of the work, brought before any award was made. *Peters v. Craig*, 6 Dana, 307.

A clause in a contract for the professional services of an architect, providing that any dispute regarding its provisions, or any question arising under it, or respecting the value of work done, in case of abandonment, shall be submitted to arbitration, was deemed by the court in *Tilden v. Bernard*, 12 Ohio C. C. N. S. 193, 31 Ohio C. C. 255, to be so general in terms as to be invalid; but, if valid, inoperative at the election of either party; and, in any event, no bar to bringing and maintaining an action on the contract itself.

A provision in a deed from a father to his son, in consideration of the grantee's covenant to support the grantor for life, that, if a controversy shall arise, the parties or either of them may submit it to the arbitration of an arbiter, to be mutually chosen, is void as a defense to a writ of entry to obtain possession of the premises conveyed for a breach of the covenant. *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354.

If a tenant covenants to cultivate the demised land in a husbandlike manner, and also covenants that any dispute arising in respect thereof shall be referred to arbitration, an action may nevertheless be maintained by the landlord without arbitrating where the first covenant has been broken. *Tredwen v. Holman*, 1 Hurlst. & C. 79, 31 L. J. Exch. N. S. 389, 8 Jur. N. S. 1080, 6 L. T. N. S. 127, 10 Week. Rep. 652.

An action by a lessor against the lessee, to recover damages for the breach of a covenant in the lease to keep and encourage on the demised premises only such a number of hares and rabbits as would not be sufficient to injure the crops and vegetation, 47 L.R.A. (N.S.)

and in case the animals should damage the crops, to pay a fair and reasonable compensation, cannot be defeated by a plea that by the terms of such lease such fair and reasonable compensation was, in case of difference, to be referred to arbitrators and an umpire, because the provision for arbitration is an independent and collateral agreement, and not a condition precedent to the cause of action. *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773.

An agreement in a coal mining case that any difference, controversy, doubt, or question that should arise between lessor and lessee during or after the term, concerning any covenant, clause, or provision in the indenture, should be referred to and finally determined, settled, and ended by two indifferent arbitrators, chosen in a prescribed manner, and within a stated time, does not create a condition precedent to suit, and therefore constitutes an ineffectual plea to an action by the lessor to recover from the lessee upon his covenant to pay at a specified rate for coals taken out of the mine. The plea is bad because the agreement to arbitrate is absolute in terms to oust the superior courts of their jurisdiction and hence is void. *Horton v. Sayer*, 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 28, 7 Week. Rep. 735.

An executory agreement in a lease for years that in case a dispute shall arise between the lessor and lessee as to whether or not certain repairs which the lessor was bound to make to the demised premises were sufficient, it should be decided by an umpire, is no bar to the tenant's subsequent action for damages on account of the inadequacy of the repairing, because the agreement is invalid, as an attempt at ousting the courts of their jurisdiction. *Vass v. Wales*, 129 Mass. 38.

A stipulation in a lease of a hotel that if at any time the landlord and tenant shall disagree respecting the rights and duties of both or either, or as to the meaning, construction, or effect of the lease or any clause in it, every dispute shall be referred to two arbiters, neither of kin to landlord or tenant, and one named by each, followed by a covenant to abide by and perform any award rendered by the arbiters, does not bar either landlord or tenant from resorting to the courts without arbitrating. *Lawrence v. White*, 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 Ann. Cas. 1097. The court noted that the lease did not make arbitration a condition precedent to the right to sue, nor make submission the only mode available for ascertaining the damages or fixing the liability, but, that the action was brought by the landlord to recover rent reserved in the lease, and the tenant claimed an allowance because the state had enacted a prohibitory liquor law after the lease was made, which closed the barroom of the hotel, and that it appeared that another part of the lease provided that nothing in it should deprive or be construed to deprive the lessor of his right to resort

to the courts to enforce any of his legal rights, or take away from him any statutory or common-law remedy for the collection of rent or of damages for breaches of covenants contained in the instrument.

A provision in a contract leasing the use of tools and machinery for a stated term of years, and granting the lessee a license to make and vend a patented machine in consideration of the payment of a royalty on sales, and entitling the lessor to terminate the contract upon giving thirty days' written notice in case the licensee fails to meet his engagements, that "in case of a difference of opinion between the parties as to whether there has been such a failure as will warrant the giving of such notice, it is hereby agreed to submit that question to arbitration, and to abide the result of the decision," is void as an attempt to oust the courts of their jurisdiction. *Wood v. Humphrey*, 114 Mass. 185.

A savings bank cannot, by contract with its depositor, make its officers or others the final arbiters of the question whether or not a bank book has been lost or destroyed, for that would oust the courts of their jurisdiction. *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314, 71 N. E. 567.

A by-law of a trade or produce exchange, compelling all members to submit their business controversies to arbitration, under penalty of suspension or expulsion, is unreasonable and void. *State ex rel. Kennedy v. Union Merchants Exch.* 2 Mo. App. 96.

A stipulation in a contract for building a section of a railroad to refer any disputes that may arise between the contractors and the company respecting the meaning, construction, and interpretation of the language of the contract and the sufficiency of the work done in performing it, and the price to be paid to the chief engineer, for arbitrament and final decision, goes to the foundation of the contractors' right of action, and operates to oust the courts of jurisdiction, and is therefore void, as against the policy of the law. *Loup v. California Southern R. Co.* 63 Cal. 97.

An action by a contractor to recover his compensation for building a bridge, under a contract for its construction providing for the payment at the outset of a stated sum of money, and a further payment, upon its completion, of "whatever the bridge should be reasonably worth," or its value assessed by two persons named, is not barred by a neglect or refusal to procure an assessment of the bridge's value from the appraisers named. *Leonard v. House*, 15 Ga. 473.

It is not competent for the parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of one named in it, upon a dispute which may afterwards arise, shall be final and conclusive. Hence a provision in a building contract which assumes to make final and conclusive the decision of a person named in it upon disputes or controversies that shall arise under it is void. 47 L.R.A.(N.S.)

Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 290.

A stipulation in a construction contract that certain named persons shall make estimates of the quality, character, and value of the work done in performing it, which shall be final and conclusive, without further recourse or appeal, is void for attempting to oust the courts of jurisdiction by depriving the contractor of his right to seek legal redress for wrongs, or to recover money due him. *Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153.

It is no defense to an action of replevin to recover possession of live stock, upon the ground of breaches by defendant of the contract of agistment under which he held the animals, that provisions in the contract looking to an arbitration of the amount of compensation due on the contract were not complied with before suit was brought, because the doctrine prevails in Nebraska that such contracts tend to oust the courts of jurisdiction, and hence will not be enforced. *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085.

An agreement or bond to submit to arbitration may be the ground of a suit, but it will not deprive either party of his remedy in the courts, nor oust them of their jurisdiction over the subject of dispute. *Percival v. Herbemont*, McMull. L. 59.

This case was cited in *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452, as having laid down in very broad language a general rule that a suit might be brought in disregard of any sort of an agreement to arbitrate; but it was there said first that the terms of the agreement involved in that case were too indefinite to be enforced, and second, that the case was no longer authority in South Carolina against the rule that an agreement to arbitrate a particular question of fact, making the determination of that fact a prerequisite to a suit, would, if not complied with or avoided, bar the action.

The established rule that no agreement of private persons can oust the jurisdiction of the courts has, by the decisions following *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746, rendered in Canada, been modified so that it is now recognized that when a contract makes arbitration a condition precedent to the bringing of an action upon it, resort must be had to arbitration before a suit can be maintained. *Griggs v. Billington*, 27 U. C. Q. B. 520.

Whatever may be the rule elsewhere, it is now firmly established doctrine in Nebraska, according to the court in *National Masonic Accl. Asso. v. Burr*, 44 Neb. 256, 62 N. W. 466, that notwithstanding the parties to a contract provide that if a dispute arises between them, such dispute shall be submitted to arbitration, a refusal to arbitrate or no arbitration is no defense to an action brought on such contract by one of the parties to it, because the effect of such agreement is to oust the courts of

their legitimate jurisdiction, and it is therefore contrary to public policy and void.

The passage expressing this view was quoted and its doctrine approved and again applied in *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911.

XI. Arbitration agreements in courts of equity.

a. Specific performance.

The jurisdiction of courts of equity to decree the specific performance of agreements is very old and rests upon the ground that the remedies at law are inadequate. *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

But a mere agreement to decide a controversy by arbitration cannot be enforced either at law or in equity. *Bozeman v. Gilbert*, 1 Ala. 90.

The courts will not compel persons to appoint arbitrators, nor will they otherwise enforce agreements by which persons undertake, with respect of matters to arise in the future, to close the doors of the courts against themselves. *Saint v. Martel*, 127 La. 73, 53 So. 432.

Invariably a court of equity declines either to appoint an arbitrator or a substitute for one, or to compel the appointment of arbitrators by the parties to an agreement to submit a controversy to arbitration, where one party refused to perform the agreement either by naming an arbitrator himself or by consenting to one nominated by the other party, and the latter brought his bill to obtain a specific performance of the agreement. *Agar v. Macklew*, 2 Sim. & Stu. 418, 4 L. J. Ch. 16; *Cheslyn v. Dalby*, 2 Younge & C. Exch. 170; *Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293; *Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723; *Saint v. Martel*, 127 La. 73, 53 So. 432; *Biddle v. Ramsey*, 52 Mo. 153; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Copper v. Wells*, 1 N. J. Eq. 10; *McKibbin v. Brown*, 14 N. J. Eq. 13, affirmed in 15 N. J. Eq. 498; *Corbin v. Adams*, 76 Va. 58.

A court of equity will not, on a bill to enforce an agreement to arbitrate, substitute a master in chancery for the arbitrators. *Agar v. Macklew*, 2 Sim. & Stu. 418, 4 L. J. Ch. 16.

Consistently courts of equity will always refuse to compel arbitrators who have been named and agreed upon to proceed with the arbitration and make an award on the matter submitted. *Crawshaw v. Collins*, 1 Swanst. 40, 1 Wils. ch. 31; *McGunn v. Hanlin*, 29 Mich. 476; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Conner v. Drake*, 1 Ohio St. 166.

When by the terms of an agreement a valuation is to be made by arbitrators named by the parties, and the arbitrators refuse to act, or cannot agree either on the valuation or the appointment of an umpire, chancery will neither designate an

umpire nor make the valuation. *McKibbin v. Brown*, 14 N. J. Eq. 13, affirmed in 15 N. J. Eq. 498.

Arbitrators cannot be compelled by mandamus to proceed with an arbitration and to make an award where one of the parties has revoked his submission notwithstanding he had covenanted to pay any award made against him, given security to perform his covenant, and expressly stipulated that the submission should be irrevocable. *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

Under a statutory arbitration in California the arbitrators may be compelled by the court to make an award. *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855.

A court of equity never decrees the specific performance of an agreement to arbitrate. It will not entertain a bill praying such a decree.

Eng.—*South Wales R. Co. v. Wythes*, 5 De G. M. & G. 880, 24 L. J. Ch. N. S. 87, 3 Week. Rep. 133, 3 Eq. Rep. 153; *Darbey v. Whitaker*, 4 Drew. 134, 5 Week. Rep. 772; *Morse v. Merest*, 6 Madd. Ch. 26, 22 Revised Rep. 226; *Wilks v. Davis*, 3 Meriv. 507; *Agar v. Macklew*, 2 Sim. & Stu. 418, 4 L. J. Ch. 16; *Crawshaw v. Collins*, 1 Swanst. 40, 1 Wils. Ch. 31; *Cooth v. Jackson*, 6 Ves. Jr. 34; *Street v. Rigby*, 6 Ves. Jr. 815; *Milnes v. Gery*, 14 Ves. Jr. 400, 9 Revised Rep. 307, 6 Eng. Rul. Cas. 684; *Waters v. Taylor*, 15 Ves. Jr. 24, 13 Revised Rep. 91; *Blundell v. Brettargh*, 17 Ves. Jr. 241; *Gourlay v. Somerset*, 19 Ves. Jr. 429, 13 Revised Rep. 234; *Cheslyn v. Dalby*, 2 Younge & C. Exch. 170.

U. S.—*Tobey v. Bristol County*, 3 Story. 800, Fed. Cas. No. 14,065; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309.

Ala.—*Bozeman v. Gilbert*, 1 Ala. 90; *Caldwell v. Caldwell*, 157 Ala. 119, 47 So. 268.

Cal.—*California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839.

Conn.—*Meeker v. Meeker*, 16 Conn. 403. Ill.—*Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293.

Iowa.—*Kennedy v. Monarch Mfg. Co.* 123 Iowa, 344, 98 N. W. 796.

La.—*Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723; *Gauche v. Metropolitan Bldg. Co.* 125 La. 530, 51 So. 578; *Saint v. Martel*, 127 La. 73, 53 So. 432.

Md.—*Contee v. Dawson*, 2 Bland, Ch. 264; *Griffith v. Frederick County Bank*, 6 Gill & J. 424.

Mass.—*Noyes v. Marsh*, 123 Mass. 286; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572.

Mich.—*McGunn v. Hanlin*, 29 Mich. 476.

Mo.—*Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkles*, 58 Mo. 202; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69; *Black v. Rogers*, 75 Mo. 441; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Bales v. Gilbert*, 84 Mo. App. 675.

N. H.—*Smith v. Boston, C. & M. R. Co.*

36 N. H. 458; March v. Eastern R. Co. 40 N. H. 548, 77 Am. Dec. 732.

N. J.—Copper v. Wells, 1 N. J. Eq. 10. N. Y.—Robinson v. Ketteltas, 4 Edw. Ch. 67; Greason v. Keteltas, 17 N. Y. 491; Hurst v. Litchfield, 39 N. Y. 377; Smith v. St. Philip's Church, 107 N. Y. 610, 14 N. E. 825; People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630; Smith v. Compton, 20 Barb. 262; Van Beuren v. Wotherpoon, 12 App. Div. 421, 42 N. Y. Supp. 404; Johnson v. Conger, 14 Abb. Pr. 195; Dunnell v. Keteltas, 16 Abb. Pr. 205.

Ohio.—Conner v. Drake, 1 Ohio St. 166. R. I.—Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304; Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387.

Va.—Smallwood v. Mercer, 1 Wash. (Va.) 290; Baker v. Glass, 6 Munf. 212; Corbin v. Adams, 76 Va. 58; Rison v. Moon, 91 Va. 384, 22 S. E. 165.

W. Va.—Kinney v. Baltimore & O. Employes' Relief Asso. 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8.

Wis.—Hopkins v. Gilman, 22 Wis. 476; Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

No case has been cited by counsel, or has fallen within the scope of my researches, said Story, J., in Tobey v. Bristol County, 3 Story, 800, Fed. Cas. No. 14,065, in which an agreement to refer to arbitration has ever been specifically enforced in equity.

There is no instance, observed the lord chancellor, in Blundell v. Brettargh, 17 Ves. Jr. 241, where the medium of arbitration or umpirage resorted to for settling the terms of a contract having failed, this court has assumed jurisdiction to determine that though there is no contract at law, there is a contract in equity, and this court will specifically execute that contract to which the parties never assented.

There is considerable weight as evidence of what the law is, remarked Lord Eldon, in Street v. Rigby, 6 Ves. Jr. 815, in the circumstance that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; or that any discussion upon it has taken place in experience for the last twenty-five years.

I consider it to be quite settled, said the chancellor in Agar v. Macklew, 2 Sim. & Stu. 418, 4 L. J. Ch. 16, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration.

When a contract provides for an arbitration or appraisal to be made by unnamed disinterested persons, to be chosen in the future, no precedent has been shown for exercising the powers of chancery to compel specific performance. Meeker v. Meeker, 16 Conn. 403.

Although courts of equity will decree the specific performance of reasonable covenants where substantial damages cannot be obtained in a court of law, yet no man, I apprehend, said Lord Eldon, in Tattersall v. Groote, 2 Bos. & P. 131, 14 Revised Rep. 47 L.R.A. (N.S.)

S, ever heard of a suit in equity to compel the specific performance of a covenant to refer disputes to arbitration.

This case was limited and distinguished in Belfield v. Bourne [1894] 1 Ch. 521, 63 L. J. Ch. N. S. 104, 69 L. T. N. S. 786, 8 Reports, 61, 42 Week. Rep. 189, after a practical means of compelling specific performance of such contracts had been devised by legislation empowering the courts to stay proceedings in litigation between those who had agreed to arbitrate.

The court of chancery will never interfere to compel the specific performance of a contract unless it can itself if need be, execute the whole contract in the terms to which the whole parties specifically agreed. Gervais v. Edwards, 2 Drury & War. 80, 1 Connor & L. 242, 4 Ir. Eq. Rep. 555, 6 Eng. Rul. Cas. 648.

A court of chancery cannot decree the specific performance of a contract in which an essential feature is an agreement to arbitrate. Ibid.

Nor of one which is virtually an agreement to arbitrate the differences of the parties. Kennedy v. Monarch Mfg. Co. 123 Iowa, 344, 98 N. W. 796.

A court of equity cannot decree the specific performance of the condition of a bond to perform an award when in fact no award has been or can be made. Smallwood v. Mercer, 1 Wash. (Va.) 290.

A court of chancery has jurisdiction and the power to enforce an award of arbitrators appointed by the parties, but it is without authority to compel the carrying out of mere agreements to submit matters in controversy to arbitration. Caldwell v. Caldwell, 157 Ala. 119, 47 So. 268.

A contract between partners where by one has agreed to buy out the other and the latter has covenanted that in case he shall desire to retire during the former's life, to give notice to him to that effect, whereupon the former partner should, during the ensuing six months, have an option to repurchase the premises, good will, stock in trade, and certain outstandings upon a valuation by two appraisers respectively chosen and an umpire, is not such a contract as the courts, after a refusal by one party to proceed with the appraisement, and on a bill of equity, filed by the other, can specifically enforce. Vickers v. Vickers, L. R. 4 Eq. 529, 36 L. J. Ch. N. S. 946.

The specific performance of an agreement by persons interested in lands, commissioning named individuals to appraise the value thereof, will not be decreed by a court of equity from lack of power to enforce its mandate. Pillow v. Pillow, 3 Humph. 644.

The specific performance of an agreement in a lease to refer to arbitrators the question of what amount of rent shall be paid and accepted for part of the term cannot be decreed by a court of equity. Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304.

A court of chancery will never make a decree that it can see no way to enforce. Darbey v. Whitaker, 4 Drew. 134, 5 Week. Rep. 772.

There are two reasons for the refusal of courts of equity to decree specific performance of agreements to arbitrate. One is because the parties have a right to revoke the agreement, and the other is that it is against the policy of the courts to make decrees which they cannot enforce. *Greason v. Keteltas*, 17 N. Y. 491.

It would be idle to compel one to enter into an arbitration which he could forthwith revoke. *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387.

The specific performance of an arbitration agreement cannot be compelled in the face of a revocation by one of the parties to it, notwithstanding it had expressly been stipulated to be irrevocable. *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

The court, in *Robinson v. Georges Ins. Co.* 17 Me. 131, 35 Am. Dec. 239, thought a provision in a contract requiring the submission of disputes to arbitration, in its best form might be somewhat difficult to execute, because of the ease with which one party might object to arbitrators named by the other on alleged grounds of incompetence, prejudice, interest, lack of firmness, patience, intelligence, or integrity, etc.

In *Gray v. Wilson*, 4 Watts, 39, the court thought it possible that special cases might exist where a court of equity would deem it expedient to hold parties to a tribunal constituted by themselves; but said, generally speaking, stipulations to this effect were "of no avail and amount only to an empty name."

The argument that the doctrine that courts of equity will not enforce the performance of agreements to arbitrate rested upon no solid or satisfactory foundation was met and replied to by Story, J., in *Tobey v. Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065, as follows: If, said he, this were admitted to be true, I do not know that any judge would now deem it correct or safe to depart from the doctrine, as he must content himself upon this as many other occasions to administer the established law and walk in the footsteps of his predecessors. But, in truth, he continued, I do not see how the doctrine could have been otherwise settled. . . . First . . . a court of equity ought not to compel a party to submit the decision of his rights to a tribunal which confessedly does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice. . . . Arbitrators at common law possess no authority whatever even to administer an oath or to compel the attendance of witnesses. They cannot compel the production of documents and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity to administer either in complicated cases. . . . In the second place, it is an established 47 L.R.A. (N.S.)

principle of courts of equity never to enforce the specific performance of any agreement where it would be a vain and imperfect act, or where a specific performance is, from the very nature and character of the agreement, impracticable or inequitable to be enforced. . . . How, he asked, can a court of equity compel the respective parties to name arbitrators? and, *a fortiori*, how can it compel the parties mutually to select arbitrators, since each must in such a case agree to all the arbitrators? . . . If an arbitrator is named by one party, how is the court to ascertain, if the other party objects to him, whether he is right or wrong in his objection? . . . If one party names an arbitrator not agreed to by the other, how is the court to find out what are his reasons for refusing? If one party names an arbitrator whom the other deems incompetent, how is the court to decide upon the question of his competency?

b. Sales at prices to be fixed by arbitrators.

In general (there are a few decisions to the contrary), it is held that an agreement for the sale and purchase of property—it matters not whether real or personal—at a price left to be determined by third persons, if wholly unperformed and while the status of vendor and vendee remains unchanged, is imperfect and incomplete until the price has been fixed in the manner provided; and, if either party to it should refuse to name or agree to appraisers to fix the price, or if the persons named for that purpose should fail to agree upon a price, the contract would lapse. A court of equity cannot enforce such a contract by either determining the price to be paid or appointing commissioners or a master in chancery to do so. *Collins v. Collins*, 26 Beav. 308, 28 L. J. Ch. N. S. 184, 5 Jur. N. S. 30, 7 Week. Rep. 115; *Darbey v. Whitaker*, 4 Drew 134, 5 Week. Rep. 772; *Morse v. Merest*, 6 Madd. Ch. 26, 22 Revised Rep. 226; *Wilks v. Davis*, 3 Meriv. 507; *Cooth v. Jackson*, 6 Ves. Jr. 34; *Milnes v. Gery*, 14 Ves. Jr. 400, 9 Revised Rep. 307, 6 Eng. Rul. Cas. 684; *Blundell v. Brettargh*, 17 Ves. Jur. 232; *King v. Howard*, 27 Mo. 21; *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkle*, 58 Mo. 202; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 89; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4; *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

An agreement whereby the interest of one of the parties in certain real estate should be valued by appraisers selected as arbitrators customarily are cannot be specifically enforced where one of the parties refuses to select an appraiser. *King v. Howard*, 27 Mo. 21.

Although a court of chancery has in certain circumstances of hardship assumed a power of fixing the price which should be paid where property has been sold under a written agreement that the price was to be determined by arbitration, and the arbi-

trators have failed or refused to act, yet, it is said, no adjudication has been made where the court has gone to the length of decreeing relief in the form of specific performance. *Griffith v. Frederick County Bank*, 6 Gill & J. 424.

An agreement to sell land in which the necessary ingredients of the vendor's right to sell and the price to be paid are left open questions to be settled by an arbitration which never takes place is incapable of specific enforcement by a court of equity. *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

A court of equity cannot decree specific performance of an agreement in a sale of land by which a house and lot were to be taken in part payment at a valuation to be appraised by two arbitrators, to be designated at a future time by the vendor and vendee. *Baker v. Glass*, 6 Munf. 212.

The court of chancery has no power to decree the specific performance of a contract of sale and purchase of a business, stock, assets, and good will at a price to be fixed by arbitration, unless the arbitrators have actually fixed the price. *Darbey v. Whitaker*, 4 Drew. 134, 5 Week. Rep. 772.

Where parties to the sale and purchase under a decree of court to settle an estate of a brewery and its appurtenances and outfit have each named an appraiser or arbitrator with power to choose an umpire if they disagree, to determine the purchase price to be paid, and the persons chosen are unable to agree upon either the price or an umpire, a court of equity has no power or authority to intervene and name an umpire. *Collins v. Collins*, 26 Beav. 306. 28 L. J. Ch. N. S. 184, 5 Jur. N. S. 30, 7 Week. Rep. 115.

Chancery will not entertain a bill praying a decree specifically to perform a contract entered into for the purpose of preventing inundations by a stream separating the estates of the contractors, providing for changes in the channel, the construction of a dam, and exchanges of varying pieces of land along the banks, and by the terms of which any damages resulting from the works should be compensated for by a transfer of land equivalent in value, to be ascertained, determined, and set off by arbitrators mutually chosen. *Gervais v. Edwards*, 2 Drury & War. 80, 1 Connor & L. 242, 4 Ir. Eq. Rep. 555, 6 Eng. Rul. Cas. 648.

An agreement authorized by statute, whereby, at the expiration of a certain period, a municipal corporation has the right to take over, own, and operate the works, buildings, franchises, mains, camps, and entire plant of a gaslight corporation at a valuation and price to be fixed and determined by three arbitrators or appraisers chosen in the customary manner, and payable to the gaslight company, is an agreement simply to purchase property at figures to be set by third persons, and hence one which cannot be enforced specifically when the gaslight company refuses to unite in the selection of the arbitrators, 47 L.R.A. (N.S.)

through commissioners judicially appointed. *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69.

A bill in equity for the specific performance of a contract whereby one party covenants that if the other purchases certain shares of stock in an industrial corporation from a third person, he shall be employed by the corporation at a stated annual salary and if not so employed, the purchased stock shall be taken up by the first party at a fair price, which, if the parties cannot agree, shall be determined by arbitration, will not lie, because, if the contract should be deemed not void, as against public policy, there is apparently an adequate remedy at law for its breach, and an arbitration cannot be specifically decreed. *Noyes v. Marsh*, 123 Mass. 286.

An agreement between two persons who built a mill at their joint expense, that one of them should convey to the other his title and interest on payment of the sum it had cost him, to be ascertained and determined by four persons named, was brought before the court in *Norfleet v. Southall*, 7 N. C. (3 Murph.) 189, by a bill praying a decree for specific performance. The court denied relief on the ground of want of power to force the arbitrators to act, and that it could not proceed to act instead and decree a conveyance for the sum it should determine was the cost of defendant's share in the mill, because so to do would be to enforce a contract the parties had not made.

To the general rule that the specific performance of an agreement to arbitrate cannot be enforced, an exception arises where the essence of the contract before the court does not consist in the fixing of an amount by arbitrators, but in the fixing of a value merely subsidiary or incidental to the main agreement, which may be performed and enforced otherwise than by arbitration. *Black v. Rogers*, 75 Mo. 441.

If the sum one party is to pay for conveyance of land before he is entitled to have a deed under a contract cannot be ascertained by arbitration in the mode contemplated by the parties, and this state of things is not the fault of him who demands the conveyance, the result is that such sum must be paid as is just and reasonable in the circumstances, and as the arbitrators ought to have awarded. *Phippen v. Stickney*, 3 Met. 384.

When as an incident to a compromise and settlement of a dispute over a boundary line between adjoining landowners a strip is to be taken and paid for by one to the other at a valuation to be fixed by arbitrators, and one party declines to unite in the selection of the arbitrators, a court of equity will intervene and determine the value of such strip, and decree its payment. *Black v. Rogers*, supra.

Equity will decree the specific performance of a contract for the sale and purchase at a fixed and stated price of an estate and fixtures notwithstanding a further provision in it by which the vendor is to transfer and the vendee to take, incident-

ally, certain furniture at a valuation to be ascertained and declared by appraisers mutually chosen, and who were never selected. *Richardson v. Smith*, L. R. 5 Ch. 648, 19 Week. Rep. 81, 39 L. J. Ch. N. S. 877.

This, said Lord Chancellor Hatherley, is an attempt to push the doctrine of *Milnes v. Gery*, 14 Ves. Jr. 400, 9 Revised Rep. 307, 6 Eng. Rul. Cas. 684, which certainly has already been carried quite far enough, to an extent utterly unwarrantable, and which, if it were permitted, would induce vendors desirous of escaping from their contracts to introduce a clause for the valuation of some minor part of the subject-matter of the contract about which the parties were dealing, framed in such a mode that they might in any moment escape from the performance of the main subject of the contract simply by setting up an act of their own wrong of the purchaser and refusing to appoint a valuer upon these very subordinate matters which might be included in their agreement.

c. Applications of agreement breakers for affirmative relief.

Although a court of equity never decrees the specific performance of contracts to submit controversies to arbitration, and recognizes the general right of any party to them to decline to perform them, and to seek his redress in the courts, it will, as a rule, refuse to grant affirmative relief to a litigant who has wantonly broken his covenant to arbitrate. *Cheslyn v. Dalby*, 2 Younge & C. Exch. 170; *Harcourt v. Ramsbottom*, 1 Jac. & W. 505; *Pope v. Duncannon*, 9 Sim. 177, 2 Jur. 178.

A court of equity, neither fraud nor misconduct being charged, will not interfere to prevent an arbitration of differences, under the rules of a board of trade and exchange between members buying and selling grain, when they have expressly contracted to submit to such arbitrations. *C. H. Albers Commission Co. v. Spencer*, 205 Mo. 105, 11 L.R.A.(N.S.) 1003, 103 S. W. 523.

The beneficiary of a railroad mortgage executed to a trustee who is in possession of the mortgaged property and operating the road under a lease from the mortgagor, after instigating a foreclosure suit for its sole benefit, cannot, when the defendant in turn invokes the jurisdiction of the court in which the action is pending, to determine all the equities between the parties, be heard to object that such lease provides for an arbitration of differences between the parties, and restricts the defendant to that remedy alone. *Chamberlain v. Connecticut C. R. Co.* 54 Conn. 472, 9 Atl. 244.

An assignment or assignments by an inventor of a machine, and sundry improvements thereon, under an agreement by the assignee to pay royalties and furnish the means to patent the new devices, and to put the machine and its improvements upon the market, and by the inventor to de-

vote his time and talents to perfecting the machine, with provisions looking to reassignment should the assignee fail to fulfil his engagements, and then providing that any difference that may arise between the parties shall be submitted to three arbitrators, chosen as usual, whose findings shall be accepted as final and conclusive of any disputes submitted, will not be annulled, nor will a reassignment be decreed by a court of equity at the suit of the inventor, especially where the complaint does not show a refusal or a waiver on the part of defendant to arbitrate differences as the contract provided. *Lasar v. Baldridge*, 32 Mo. App. 362.

The real decision in the case was that the suit sought to enforce a forfeiture for the breach of a condition subsequent,—an enterprise to which equity would not extend aid, and the opinion respecting the arbitration was little more than a *dictum*.

In *Harcourt v. Ramsbottom*, 1 Jac. & W. 505, Lord Eldon refused an injunction to restrain a sale of estates pursuant to an arbitrator's award, made after the arbitration had proceeded and then been formally revoked by deed of the party who applied for the injunction. Although it was contended to sustain the award that the submission had been made a rule of court, and hence was irrevocable, his Lordship ignored that point and put his decision upon the broad ground of a want of equity,—that the applicant did not come into court with "clean hands," whether he had or had not a legal right to revoke, whether his revocation was or was not effectual, and whether the award after revocation was valid or invalid.

The court of chancery in *Pope v. Duncannon*, 9 Sim. 177, 2 Jur. 178, refused to restrain the commissioners of woods and forests from acting upon an award fixing the price of a wharf on the Thames which they had been empowered by statute and had agreed with the complainant to purchase at a valuation to be set by three referees or any two of them, to round out the site for the new Houses of Parliament, and upon the possession of which they had entered at the outset, where the sole ground of the application to enjoin was that the complainant had revoked the authority of the arbitrators before they made an award, the vice chancellor being of the opinion that while the right to revoke was unquestionable, a court of equity would not interfere unless just and reasonable ground for revoking was shown.

A clause in a railway lease by a city in which the municipality covenanted *inter alia* to expend a certain sum of money in the purchase of terminal facilities, whereby both parties agreed that all questions of difference between them relating to the construction of the contract, or otherwise referring to their rights, shall, on either's written demand, be submitted to arbitration, is valid, so far at least, that a court of equity will not interfere to enjoin an arbitration demanded pursuant to its require-

ments. *Cincinnati v. Cincinnati Southern R. Co.* 6 Ohio C. C. 247, 3 Ohio C. D. 438, affirmed in 52 Ohio St. 637, 44 N. E. 1132.

A clause in a coal-mining lease providing for the submission to arbitrators, to be mutually chosen, of any dispute which may arise between the parties, growing out of the lease, with which the lessees have offered to comply and the lessors have refused to conform, affords the former no ground of support for a suit in equity to prevent or set aside a forfeiture of the lease for the asserted nonpayment of rents or royalties reserved in it until an arbitration shall have been had. *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News, 169.

The rule denying affirmative relief in equity to a suitor who may have violated his agreement to arbitrate his dispute with his adversary is not a hard and fast one. It has been decided that notwithstanding a litigant had consented to refer a cause to arbitration by rule of court, and made the usual stipulation to bring no action or suit at law or in equity, he might, in a proper case, have the aid of a discovery in equity if, without the evidence sought, it would not be safe for him to proceed to trial. *Grimstone v. Bell*, 4 Taunt 254.

Nor does the rule deprive a court of equity of its jurisdiction to entertain a bill by such a litigant, if it chooses to hear his cause.

To a bill of discovery of frauds in the breach of covenants in articles of copartnership, filed in chancery in aid of an action at law on covenant, a plea by the defendant that the articles stipulated for a reference to arbitrators of all disputes between the partners was held bad in *Mitchell v. Harris*, 2 Ves. Jr. 129, 4 Bro. Ch. 311, because the complainant was entitled to the discovery whether or not he could maintain his action or be forced to arbitrate. In the cases at law, said Lord Chancellor Loughborough, in thus ruling, scarce a single *dictum* or even a hint occurs where an agreement of this nature has been set up as a bar to the action.

Though a litigant may be answerable in a court of law for applying to chancery for relief from an award made upon a rule of court, yet equity has jurisdiction in its discretion to entertain the bill, and therefore a bill in such a case is not demurrable. *Burton v. Petrie*, cited in *Lonsdale v. Littledale*, 2 Ves. Jr. 453.

d. When equity intervenes.

The general rule that an agreement to submit a controversy to arbitration cannot be specifically enforced in equity does not prevent the enforcement of a contract containing a stipulation for the arbitration of minor questions of detail auxiliary to the principal subject-matter, and which has been partly performed so as to benefit one party, and to subject the other to expense. *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309.

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Although a court of equity will never decree the specific performance of an agreement to arbitrate, it will, in cases unnumbered, grant equitable relief to a party sustaining injury by its breach.

It will, in a proper case, retain jurisdiction of a suit brought to obtain such a decree, in order to grant such relief as may be appropriate in the circumstances to the injured party. *Hopkins v. Gilman*, 22 Wis. 476.

And when a contract containing a provision for an incidental arbitration has been partly performed, and is no longer executory, and the arbitration cannot, for some reason not to be obviated, be carried out, the courts take jurisdiction and give the relief contemplated by an award. *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

If any term not of the essence of a contract that is in all other respects complete is left to others than the parties to determine, and they neglect or refuse to act, the court will take jurisdiction and decree appropriate relief to enforce the contract. *Dunnell v. Keteltas*, 16 Abb. Pr. 205.

In *Biddle v. Ramsey*, 52 Mo. 153, *Sherwood, J.*, writing for the court, said: The only question in this case necessary for solution is not . . . whether an agreement to arbitrate can be the subject of a decree for specific performance, nor whether, . . . the court can substitute itself in place of the arbitrators, because the authorities to the contrary are unbroken in their uniformity on both these points; but whether the plaintiff, on the facts stated, is absolutely remediless in this action.

A court of chancery is very cautious in granting relief in cases of agreements to sell property at a valuation to be fixed by a third person's appraisement, even after such person has made his appraisal; but it has enforced such contracts in many instances. *Meeker v. Meeker*, 16 Conn. 403.

Although a court of equity cannot compel a vendor of land who contracted to sell it at a price fixed by an appraisal of its value by three persons named in the contract of sale, to sell it at a price fixed in any other manner, yet by its decree it may restrain such vendor from preventing the persons named as appraisers from valuing the property, and it may also compel him to afford the appraisers access to the land for the purpose of making their valuation. *Morse v. Merest*, 6 Madd. Ch. 26, 22 Revised Rep. 226.

While a court of equity will not specifically enforce a contract for arbitration by compelling the appointment of arbitrators, or by compelling the arbitrators to act when appointed, still, when the rights of parties depend upon an appraisal of property, and the method of appraising it provided in the contract has failed through no fault of the party seeking relief, the courts, both of equity and of law, will take jurisdiction, hear evidence, and make an appraisement to prevent a failure of justice. *Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293.

Where an executory contract has been

partly performed, and the parties cannot be restored to their previous status, and it contains a provision for an arbitration to fix a price, value, or amount of damages subsidiary to the main contract, which, for one or another or more reasons, cannot be carried out, the court will take upon itself the duty of deciding the matter which was to have been submitted to the arbitrators. *Cooke v. Miller*, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30.

A court of equity will take jurisdiction and enforce a contract to convey an interest in real estate although the parties agreed that the consideration should be determined by arbitrators, since the contract of the parties can be carried into execution by ascertaining the price payable in another way. *Conner v. Drake*, 1 Ohio St. 166.

A covenant in a contract of two persons to exchange possession and ownership of their respective lots of land for the payment by the owner of the less valuable piece to the other party of the difference in value between the two tracts, as ascertained by mutually chosen arbitrators, after measuring the areas and appraising the values of both parcels, and awarding the sum to be paid, although valid and irrevocable by either party without the other's consent, is nevertheless invalidated and revoked by operation of law when the award has been annulled by a court of chancery because founded on illegal evidence and tainted by the bias and prejudice of the arbitrators, so that thereafter a court of equity has jurisdiction to decree confirmation of the exchange, determine the difference in worth of the respective lands, and render a money judgment. *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696.

An agreement settling a disputed title to land, by the terms of which title was vested in one party, and a part of the land was by him conveyed to the other, with an option to the latter to purchase some of the rest at its market value, to be determined by arbitrators is not a mere executory agreement to submit to arbitration which either party is at liberty to rescind, and which the courts will not specifically enforce, but a partly executed contract from which neither may withdraw, with an incidental compact to fix a price through arbitration, and when the arbitration fails, the courts will take jurisdiction, hear evidence, and fix the price to be paid. *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

A mortgage given to secure a present loan of money and also a past indebtedness of the mortgagor to the mortgagee, the latter to be ascertained, computed, and fixed by the award of an arbitrator named to take and state the account, will be enforced in the court of chancery, and where the mortgagor has refused to join in the arbitration or to agree upon a new arbitrator in case of the death or refusal to act of the chosen one, will proceed to take and state the account and determine the amount of 47 L.R.A. (N.S.)

the indebtedness through a master in chancery. *Cheeslyn v. Dalby*, 2 Young & C. Exch. 170.

Where an agreement of the stockholders of a private corporation provided, in the event of the death of the holder of the larger number of shares, the survivors shall have for a stated time an option to buy such shares from his estate at par, plus a proportionate part of the surplus, and contains a clause for submitting to arbitration any controversy or difference of opinion that might afterwards arise between the signatories or their representatives, concluding with a statement that neither side should be entitled to maintain an action at law or suit in equity until the matter in dispute should have been first referred to and been decided by the arbitrators, and then only upon their award, explicitly declaring such arbitration and award a condition precedent to the right to maintain any action or suit, the provisions respecting arbitration and award constitute no bar to the prosecution of a suit by surviving stockholders against the representatives of the deceased stockholder, to compel a specific performance of the contract for the sale and transfer of the stock after they had tendered the supposed price, and offered to arbitrate any difference of opinion concerning the amount payable. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

When the parties to a litigation which has proceeded to a judgment agree to submit to arbitration the amount justly due the judgment creditor, and, by necessary implication, or explicitly stipulate, that the judgment shall remain in abeyance, awaiting the decision of the arbitrators, and be discharged upon the payment of the award made by them, a court of equity has and will exercise jurisdiction to prevent the inequitable enforcement of the judgment pending the arbitration, or after an award to any extent beyond the sum awarded. *Jones v. Thomas*, 120 Wis. 274, 97 N. W. 950.

A court of equity will, by an appropriate remedy, decree to either party to a lease the benefits of a clause providing for an arbitration to fix the value of property, although it cannot decree specific performance of the agreement to arbitrate. *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825; *Van Beuren v. Wotherspoon*, 12 App. Div. 421, 42 N. Y. Supp. 404.

A court of equity has jurisdiction to do either directly or by a master in chancery what appraisers or arbitrators could have done under a clause in a lease providing for a submission to determine the amount of rent payable for the latter part of a term of years, when it is shown that the arbitration has in fact failed. *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304.

A provision in a lease of land for a long term of years by which, after the expiration of a limited term, the value of the premises is to be appraised by arbitrators and further rent fixed at a percentage of

the determined value, although valid and binding, does not operate to prevent a court of equity from entertaining jurisdiction of a bill by the landlord to determine the value of the premises and to fix the rent payable, and to decree the appropriate relief, where the proceedings for arbitrament have failed without fault of the complainant, and after every effort on his part to bring them to a successful issue. *Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293.

If a lease of land for a term of years contains clauses providing for a renewal of the term, or, in the alternative, for the payment at the end of the term, by the lessor, of the value of a building to be erected by the lessees at an appraised value, fixed and determined, if not agreed upon, by arbitrators, upon a failure of the contemplated arbitration and appraisal after every proper and reasonable effort has been made to bring it about, equity will, at the instance of the lessees, take jurisdiction to determine the value of the building and to decree appropriate relief, according to the spirit of the contract. *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161.

A court of equity has no power to decree the specific performance of an agreement in a lease whereby, on the surrender of the demised premises, arbitrators or assessors are to be chosen by the parties to determine the value of the improvements made during the term by the lessee, and for which the lessor covenanted to pay, or, in case the lease is renewed, to fix a reasonable and proper rent for the renewed term, if either party has refused to name an appraiser; but the court in such a case will take jurisdiction to decree an accounting as to the improvements and their value, and the sum to be paid on their account, and grant the proper relief. *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkleo*, 58 Mo. 202.

An agreement in a lease for a term of years that it shall be renewable at the end of the term demised for a further term of the same length, provided the lessee gives written notice a stated time before the end of the first term, of his wish to renew, upon the same terms, covenants, and conditions, except that the rental shall be a certain per centum of the value of the premises, as estimated by disinterested local freeholders appointed after the usual manner in which arbitrators are chosen,—is valid and binding; and although the arbitration feature of it cannot be specifically enforced where the lessor refuses to act, yet, as all the substantial terms of the contract to renew were agreed upon, equity will afford the lessee such remedies as the nature of the case calls for, and not permit the lessor to take advantage of his own wrong to gain and hold property which the lessee has put upon the premises upon the faith that the contract to renew would be performed. *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429. *Bales v. Gilbert*, 84 Mo. App. 675, is to the same effect.

Equity will take jurisdiction and decree just compensation to a lessee who contract-

ed in a lease for years to erect on the demised premises a water power factory and equip it with machinery to stand pledged as security for rent, where the lessor in turn covenanted to make due compensation at the expiration of the lease for the improvements and equipment at a valuation to be fixed by mutually chosen appraisers, and then refused to join in a submission. *Copper v. Wells*, 1 N. J. Eq. 10.

A court of equity has power and jurisdiction to ascertain the value of buildings erected by a tenant for years, and to direct the payment for them out of the landowner's estate, where the lease provided for such payment at the end of the term, according to a value to be appraised by arbitrators mutually chosen, and the landowner had refused to unite in selecting the arbitrators. *Robinson v. Kettletas*, 4 Edw. Ch. 87.

A provision in a lease for twenty-one years that, at the expiration of the term, the value of the building erected upon the demised premises pursuant to a covenant of the lessee should be ascertained by appraisers selected as usually arbitrators are, and if the lessor did not, within a stated time, pay the lessee the award, the lease should stand renewed for another term of the same length at such a rental as should be either agreed upon or fixed by arbitrators chosen in the same way, although not specifically enforceable by a court of equity, does not divest the courts of jurisdiction to grant appropriate relief in a litigation between the parties. *Greacon v. Keteltas*, 17 N. Y. 491.

Where a lease of lands for years provides that on the expiration of the term it shall be renewed at a rental agreed upon, or, if not fixed by arbitration, if an arbitration fails by the refusal of the arbitrators to act, a court of equity will intervene and decree appropriate relief. *Van Beuren v. Wotherspoon*, 12 App. Div. 421, 42 N. Y. Supp. 404.

When a lease for years provides that at the expiration of the term the lessor shall either renew it upon certain stated terms, or pay for any buildings erected during the term by the lessee, conformably to provisions in the lease, on the demised premises, at a valuation to be fixed and determined by arbitrators, if not agreed upon, and an arbitration fails, the courts will take jurisdiction and determine the value and adjudge the sum payable for the buildings, although they cannot compel the carrying out of the arbitration agreement. *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. 491.

A court of equity can compel a landlord specifically to perform an absolute covenant to renew a lease, and, although in such covenant the rent is to be fixed by an arbitration, and the landlord cannot be compelled to submit to an arbitration, yet, if he refuses to arbitrate, the court will take jurisdiction and determine what is a fair, reasonable, and just rent for

the renewed term. *Johnson v. Conger*, 14 Abb. Pr. 195.

Under a lease providing for the payment by the lessor when the term shall have expired, for the buildings on the demised premises, built by the lessee, at a price to be fixed by three arbitrators or appraisers, chosen in the usual manner, and where the lessor resumed possession at the end of the lease, a court of equity, where the prescribed method has failed, will take jurisdiction of a bill by the lessee, and determine itself the value, and decree payment by the lessor for such buildings. *Cooke v. Miller*, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30.

A provision in a mining lease that any dispute, doubt, or question arising between the lessor and lessees, either on the construction of the instrument or respecting any matter or thing arising out of or connected with the demise or any of the covenants, conditions, stipulations, or provisions contained in the indenture, should be referred to two indifferent arbitrators, one named by each disputant, and the submission to be made a rule of the court of Queen's bench, coupled with a prohibition against the bringing or maintaining of any suit at law or in equity, save where a refusal to arbitrate had occurred, affords the lessees no defense to a bill by the lessor for an injunction against acting contrary to the covenants in the lease. *Mexborough v. Bower*, 7 Beav. 127, 2 Mor. Min. Rep. 92, affirmed in 2 L. T. 205.

The specific performance of an agreement to grant a lease, where the agreement was complete, was decreed in equity in *Gourlay v. Somerset*, 19 Ves. Jr. 429, 13 Revised Rep. 234, notwithstanding a clause in it that the lease should contain all such usual and proper conditions, reservations, and agreements as a certain third person should judge reasonable and proper, or, if he was dead, some other competent person, to be mutually agreed upon, should so judge, upon the ground that the reference clause was incidental and collateral to the main contract, and a court of equity was the final arbiter of the propriety of the conditions, reservations, etc., whether the referee did or did not act.

A provision in a contract for the sale of timber lands for an appraisal and estimate of the quantity of merchantable pine timber growing thereon as a basis for fixing the purchase price does not oust a court of equity of its jurisdiction in a suit to cancel the sale and restrain an action at law for the price on the ground of fraud. *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465.

An action to enjoin interference with the use and operation of a railroad, grounded on a contract between two corporations, granting a perpetual license during the corporate existence, is maintainable in a court of equity notwithstanding a provision in the contract for submitting disputes between the two corporations to arbitration. *Dayton & U. R. Co. v. Pittsburgh, C. C.* 47 L.R.A. (N.S.)

& *St. L. R. Co.* 6 Ohio C. C. N. S. 537, 25 Ohio C. C. 705, affirmed in 67 Ohio St. 523, 67 N. E. 1100.

An operating agreement or lease between two railroad corporations, containing stipulations for the arbitration of differences between the parties, even if valid and binding upon the signatories, as conditions precedent to an action by either, does not bar the stockholders of either from seeking relief against one or both by a suit in equity. *March v. Eastern R. Co.* 40 N. H. 548, 77 Am. Dec. 732.

In *Joseph Crossfield & Sons v. Manchester Ship Canal Co.* [1904] 2 Ch. 123, 73 L. J. Ch. N. S. 345, 52 Week. Rep. 635, 90 L. T. N. S. 557, 20 Times L. R. 371, there was involved the binding force of a general provision in the private act organizing the canal company for an arbitration of differences between the company and a municipal corporation on its route, acting for traders and manufacturers and the general public in the vicinity, entitled to use the canal for transportation and traffic. The canal company having failed to complete its works by the date set for opening, entered into agreements for extensions, giving free tolls to the traders and manufacturers; but again failing to finish in the extended time, made new compacts with the municipality, and afterwards, before the final completion of the works, assumed to charge tolls to patrons. The plaintiffs, suing in behalf of themselves and others similarly situated, and joining the municipality, brought suit in chancery, praying equitable relief. Upon the coming on of the case for trial, the company made the preliminary objection, which it had not raised in pleading, that the jurisdiction of the court had been ousted by the arbitration clause of the act organizing it; but, after little or no argument on the point, the objection was overruled and the trial proceeded to a judgment for the plaintiffs. This the court of appeal, by the concurrence of Vaughan-Williams and Sterling, L. J. J., reversed on the ground that the arbitration clause was a bar; but Cozens-Hardy, L. J., dissented, in an opinion to the effect that while this was so as to the municipality, it did not affect the traders and manufacturers who included and were represented by the plaintiffs. This dissenting opinion was adopted on further appeal when the decision of the majority was reversed, in [1905] A. C. 421, 74 L. J. Ch. N. S. 637, 69 J. P. 441, 93 L. T. N. S. 141, 21 Times L. R. 689, 54 Week. Rep. 172.

A clause in a contract of sale of a business, good will, and stock of merchandise, for the arbitration of any differences which may arise between buyer and seller, does not oust a court of equity of its jurisdiction to grant an injunction against a breach of the seller's covenant not to engage in the same business in the same city. *Richardson v. Emmert*, 44 Kan. 262, 24 Pac. 478.

A clause in a contract by which one party covenanted to transfer to the other such improvements and inventions relating to

machines, tools, etc., manufactured by such other, and any letters patent of the United States obtained for the same, providing that in case the parties should disagree on any matters set forth in such contract, each and every of their disputes should be referred to three arbitrators chosen in the usual way, whose award, or that of a majority, should be binding and strictly carried out, affords no ground for denying relief by a bill in equity to compel a specific performance of the covenant to transfer the improvements, inventions, and patents after a refusal to keep and perform it. *Woonsocket Mach. & Press Co. v. Miller*, 18 R. I. 657, 29 Atl. 838.

The specific performance of a separation between husband and wife, complete on its face, and made in compromise and settlement of a pending contested divorce suit, was decreed in chancery in *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8, notwithstanding it contained a provision for the arbitration of any differences that might arise in carrying it out, because it was considered that the provision might never come into play, and the agreement had in part been performed.

A declaration and direction in a last will and testament that if, at any time after the death of the testator, any dispute, doubt, or question shall arise touching the will, its construction or meaning, it shall be referred to and settled by two persons named as arbitrators, or the survivor of them, whose award shall be binding and conclusive, coupled with a prohibition against resort to the courts by any legatee under penalty of forfeiture of his legacy, is ineffectual to bar or abate a suit in equity by a legatee upon well-founded grounds to obtain proper and appropriate relief in a controversy relating to the estate. *Contee v. Dawson*, 2 Bland, Ch. 264.

A provision in a last will and testament, directing testator's executors to sell the residue and remainder of his estate and use the proceeds to make up to his devisees any shortages in land devised by him, and requiring, in case such proceeds prove insufficient for that purpose, contributions from the devisees who get the full devises to those whose lands run short, and concluding with an instruction to forestall disputes and difficulties by the selection in a prescribed way of arbitrators to determine values and deficiencies, whose awards shall bind the executors and devisees in both classes, does not, where some of the parties in interest are infants, constitute a mode of settlement which either divests the chancellor of his jurisdiction on the premises, or amounts to a condition precedent to a suit in chancery to obtain the appropriate relief. *McClanahan v. Kennedy*, 1 J. J. Marsh. 332.

Where an agreement to settle a contest over a last will and testament contains provisions by which the payments to be made by the proponents of the instrument to the contestants are dependent upon the

value of certain lands of which the testator died seised, to be ascertained and determined by three arbitrators, chosen in the usual way, the award of a majority being final, and two of the arbitrators unite in a written report, agreeing upon the value of such lands, a bill of equity lies to compel specific performance of the agreement of settlement. *Hoste v. Dalton*, 137 Mich. 522, 100 N. W. 750.

Although the official report of the case of *Hoste v. Dalton*, supra, styles the litigation a bill "to compel specific performance of an agreement to arbitrate," wherein a decree for complainants was affirmed, the report itself shows that the characterization of the controversy is inaccurate. The agreement there decreed to be specifically performed was one to settle a will contest in which the proponents had undertaken to pay the contestants certain sums, depending for amounts upon the value of some lands of which the testator died seised. The parties had agreed that such value should be determined by three arbitrators, chosen in the usual way, and to accept the award of a majority of them. The arbitration part of the settlement was fully executed, and two of the arbitrators made a report in writing, agreeing upon the value of the lands.

An agreement in a contract to refer certain matters to arbitration necessarily looks to the performance of the contract and its affirmance; hence, has no force to obstruct or defeat a suit brought to annul the contract, or one depending upon the disaffirmance of the contract. *Bannister v. Read*, 6 Ill. 92.

When an agreement containing an arbitration provision is impeached on equitable grounds as not the real and true contract of the parties, there is jurisdiction to interfere by an injunction to restrain arbitration proceedings under it until the merits of the impeachment shall have been determined, despite the parliamentary legislation anent arbitration. *Kitta v. Moore*, [1895] 1 Q. B. 253, 64 L. J. Ch. N. S. 152, 12 Reports, 43, 71 L. T. N. S. 676, 43 Week. Rep. 84, distinguishing *North London R. Co. v. Great Northern R. Co.* L. R. 11 Q. B. Div. 30, 52 L. J. Q. B. N. S. 380, 48 L. T. N. S. 695, 31 Week. Rep. 490, where the agreement was not questioned.

XII. Arbitration agreements between partners.

Notwithstanding partners may have stipulated in their articles of copartnership to submit to arbitration their disputes and differences, their agreement in no wise interferes with the jurisdiction of a court of equity to entertain a bill to dissolve the partnership, or to decree a dissolution of the firm, an accounting by its members, and a distribution of its assets. *Meaher v. Cox*, 37 Ala. 201; *Hind v. Low*, 14 Haw. 438; *McGunn v. Hanlin*, 29 Mich. 476;

Hurst v. Litchfield, 30 N. Y. 377; Page v. Vankirk, 1 Brewst. (Pa.) 282.

According to Mason, J., who delivered the opinion of the court in Hurst v. Litchfield, *supra*, clauses in articles of copartnership for the arbitration of differences arising between partners never deprive a partner of his action, either at law or in equity, to enforce his rights.

A provision in articles of copartnership for a renewal and payment of their proportion of the joint stock to such partners as do not agree to continue, based upon an inventory and appraisement to be made by two persons selected by the opposing parties and a disinterested umpire, is no hindrance to a suit in chancery for a dissolution and accounting. *De Pusey v. Du Pont*, 1 Del. Ch. 82.

A covenant in articles of copartnership that, in case any difference should arise between the partners relating to their business or to any provision in such articles, they will refer it to arbitration, does not divest a court of chancery of jurisdiction of a bill by one partner against the other to discover and have relief from frauds, impositions, and concealments. *Wellington v. Mackintosh*, 2 Atk. 569.

An agreement to submit disputes of partners to arbitration, containing no covenant to refrain from bringing suits at law or in equity, but providing for making the submission a rule of a court of common law, affords no ground for a plea in bar of a suit in equity praying a discovery and receivership, where the bill was filed before a rule of court was entered, though after arbitrators had been named. *Cooke v. Cooke*, L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480, 15 Week. Rep. 981.

Lord Chancellor Eldon, in ruling in *Street v. Rigby*, 6 Ves. Jr. 815, that an agreement in partnership articles to refer all disputes to arbitration would not oust chancery of jurisdiction to decree discovery and relief upon a bill filed after dissolution, said: Courts of law are ready enough to say the agreement of the parties shall not oust their jurisdiction, though they permit it to oust the jurisdiction of courts of equity. But they enforce the agreement not as agreement, but by granting an attachment for breach of the rule. It is dealing a little imperiously to say that an agreement which, made out of court, would not bar an action, if made in court, shall bar a bill.

The case is the same after a partnership has been dissolved. The jurisdiction of a court of equity to settle the partnership accounts and distribute the assets of the firm is wholly unaffected by a clause in the articles of copartnership providing for a settlement of disputes between the partners by arbitration. *Waugh v. Schlenck*, 23 Ill. App. 433; *Pearl v. Harris*, 121 Mass. 390.

A bill in equity between former partners, praying a discovery and relief, is not met by a plea that the articles of copartnership contained an agreement to refer all dis-

putes to arbitration. *Street v. Rigby*, *supra*.

A provision in articles of copartnership that all disputes between the partners should be submitted to arbitration, and until such an arbitration had taken place neither partner should be at liberty to sue the other, either at law or in equity, with respect of the partnership affairs, does not prevent, hinder, or affect a bill for an account filed by one partner against the other after a voluntary and unconditional dissolution of the firm. *Lee v. Page*, 7 Jur. N. S. 768, 30 L. J. Ch. N. S. 857, 9 Week. Rep. 754.

A provision in articles of copartnership that if, at any time during the continuance of the firm or after its dissolution, any variance, dispute, doubt, or question should arise or happen between the partners or their legal representatives about or over the partnership affairs or any covenant between them, it should be referred to arbitration after the usual method, and the award accepted, does not apply to a claim by the administratrix of a deceased partner for the return of a sum of money paid by her intestate to the surviving partner on the formation of the firm for an interest in the business. *Tattersall v. Groote*, 2 Bos. & P. 131, 14 Revised Rep. 8.

A contrary opinion was entertained by the court in *Dimsdale v. Robertson*, 2 Jones & L. 58, 7 Ir. Eq. Rep. 536, a case sometimes cited as overruling *Tattersall v. Groote*, *supra*.

The latter decision has not commanded the approval of English jurists.

In *Cooke v. Cooke*, *supra*, Vice Chancellor Sir W. Page Wood referred to it as follows: In that instance Lord St. Leonards, after reviewing the authorities on the subject, arrived at a conclusion apparently at variance with them. In the view which I have taken of this case, it is unnecessary for me to consider the propriety of his decision; but I cannot forbear remarking that the circumstances upon which Lord St. Leonards relied as giving greater effect to the agreement to refer in that case, namely, the power to make the submission a rule of court and the legislative authority given to arbitrators of examining witnesses on oath, hardly appear sufficient to distinguish the case from others in which these conditions are not found, because these provisions are mere directions as to the mode in which the reference is to be conducted, or means for enabling the parties to give greater efficacy to it by suing out attachment for disobedience, and do not operate until the case has been withdrawn from the action of the regular tribunals.—a withdrawal which, according to the earlier decisions, the parties have no power to effect.

Tattersall v. Groote, *supra*, has, however, been shorn of its authority through subsequent legislation. It was explained and distinguished in *Belfield v. Bourne* [1894] 1 Ch. 521, 63 L. J. Ch. N. S. 104, 69 L. T. N. S. 786, 8 Reports, 61, 42 Week. Rep.

189, wherein it was held that under the recent English statutes (the arbitration act of 1889 [52 & 53 Vict. chap. 49] § 4, and the partnership act of 1890 [53 & 54 Vict. chap. 39] § 40), whenever partnership articles provide for an arbitration, the arbitrators have the power to award a dissolution and fix its terms, including, if it is proper, a return of the premium which was paid by one partner to the other on entering the firm. This being so, the court will, on due application, stay the proceedings in a suit to dissolve a partnership and to recover back a premium paid, although the arbitration clause in the articles did not in set terms specifically provide for a reference of the question of return of premium.

A provision in articles of copartnership for a reference to arbitration of all disputes growing out of the transactions of the firm has no application to a suit brought after the dissolution of the partnership by the death of one of the partners, by his administrator to obtain an accounting, final settlement, and liquidation of the partnership affairs, and a distribution of its assets. *Gallier v. Walsh*, 1 Rob. (La.) 226.

In the early English case of *Halfhide v. Fenning*, 2 Bro. Ch. 336, 2 Dick. 702, decided long before the enactment by Parliament of the legislation empowering courts, in their discretion, to stay proceedings in suits and actions where the litigants had previously agreed to arbitrate their disputes, a member of a partnership brought his bill against the other surviving partners and the representatives of the deceased partners, praying a discovery of money and other partnership transactions and equitable relief, to which the defendants pleaded that, by the articles of copartnership, it had been stipulated that all differences which might arise between the partners should be referred to arbitration, and that the matters in controversy in the suit had not been so referred.

Sir Lloyd Kenyon, then master of the rolls, held this plea good, but his decision has not been approved.

In *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746, Lord Chancellor Cranworth referred to it as one that "cannot be relied upon, because it has been universally treated as having proceeded upon an erroneous principle."

In the reprint of English reports (vol. 29 [Ch'y. Bk. 9] p. 188), a footnote to the decision condemns it as universally held to be against the law and practice of the English courts, and credits Lord Eldon with calling it "a singular case in direct opposition to Lord Hardwicke's decision in *Wellington v. Mackintosh*, 2 Atk. 569," and one which, "besides, has since been repeatedly overruled."

An agreement for the dissolution of a copartnership, providing that all errors, omissions, and mistakes in the accounts of the partners shall be subject to correction, and that disagreements concerning

these, if they arise, shall be referred to the arbitrament and award of certain persons named as arbiters, does not bar the jurisdiction of the courts to grant proper relief where a controversy ensues when no arbitration has taken place. *Frink v. Ryan*, 4 Ill. 322.

A submission to arbitration and an award of the arbitrators upon the matters submitted upon the dissolution of a copartnership, settling the partnership accounts, does not deprive a court of equity of jurisdiction of a subsequent suit between the partners for a further accounting and settlement of partnership matters not submitted to the arbitrators nor included in the arbitration, because mistakenly supposed at the time to relate to property of a third party. *Evans v. Clapp*, 123 Mass. 166, 25 Am. Rep. 52.

That an agreement for the dissolution of a partnership and a transfer to the continuing partners of debts due the firm, with power irrevocable to collect them without interference from the retiring partner, contains a provision looking to the arbitration of disputes, and that, notwithstanding such provision, the retiring partner brought suit to establish the personal liability of the continuing partners for a debt extended and enlarged upon security taken in their own names, neither afford the latter a defense to the suit nor constitute a reason for denying costs to the retiring partner, where he had expressly refused to arbitrate. *Lees v. Laforest*, 14 Beav. 250.

An agreement between partners by which one binds himself to buy, and the other to sell, the latter's share in the partnership on its termination, at a valuation to be made by two appraisers, one appointed by each partner, is one which the court will carry into effect by having the requisite valuation made under its direction, in case the contemplated appointments or appraisement fails, because the fixing of the value is merely an incident to a contract complete in the main features. *Dinham v. Bradford*, L. R. 5 Ch. 519.

All this does not imply that courts of equity utterly disregard arbitration agreements of partners who seek their aid in their controversies with their fellows in the firm.

In several cases and in certain circumstances, the courts have refused to grant equitable relief to partners who have not carried out their agreements to arbitrate.

In *Pearl v. Harris*, 121 Mass. 390, the court, while taking jurisdiction of a suit in equity to compel an accounting of partners after a dissolution of the partnership, notwithstanding an entire failure to resort to an arbitration as provided in the partnership articles, nevertheless explicitly left it an open question whether or not the court, in such a case, was at liberty to decline jurisdiction until there had been an arbitration and award, or at least an honest and earnest effort by the complainant to procure such.

In *Waters v. Taylor*, 15 Ves. Jr. 10, 2

Ves. & B. 299, 13 Revised Rep. 91, the joint owners of a theater having fallen out, one filed a bill for a specific performance of their several agreements, the foreclosure of a mortgage on the other's share, and prayed the defendant's removal from the management, an injunction against his taking the receipts, and the appointment of a receiver and manager by the court. The agreements contained carefully elaborated provisions for an arbitration of differences, but none had taken place. Lord Eldon, having his usual doubts and difficulties, compromised in such wise that the litigants suspended hostilities and resorted to arbitration, and later, when the case came up again, his Lordship said: Whatever may be the law of this court as to the capacity of parties by stipulation to deprive themselves of the right to resort to a court of justice in the first instance, and taking the law to be that a man cannot bind himself to forbear to come here until an arbitration has been had, in almost every line of this deed of 1803, upon which the suit is instituted, the parties have expressed the greatest anxiety to keep out of court, if they could in any manner arrange their disputes by arbitration. Accordingly, I thought it within the scope of my discretion to give the recommendation that has been given in every case where it was proposed to make this court the manager of any joint concern, giving the parties the opportunity of preserving themselves from the ruin that must be the necessary consequence of an active interference of the court. That led to the arbitration.

A party to a suit to dissolve a partnership and for an accounting, who enters into an agreement with his adversary, for the purpose of ending the litigation and settling their differences, for an arbitration of the matters in dispute, which provides, *inter alia*, for the payment to him by the other for his interest in the firm such a sum of money as the arbitrators shall decide it to be worth, and award him, cannot maintain an action to recover the value of his interest in the business, when the arbitration fails by the inability of the arbitrators to agree either upon an umpire or an award. *Altman v. Altman*, 5 Daly, 436.

An agreement on dissolving a partnership, whereby one partner conveys his share of the joint assets to the other, who in turn assumes payment of the firm debts, and both submit to named referees to decide how much each shall pay the other to equalize their accounts, is not like an agreement to arbitrate present or future disputes, but rather is analogous to stipulating in a contract of sale or service that the sum to be paid for property transferred, materials furnished, or labor performed under the contract shall be fixed by third persons, thus becoming an integral part of the contract, which cannot be revoked or avoided without rescinding the entire contract, unless it proves impossible to get a decision from the referees. *Haley v. Belamy*, 137 Mass. 357.
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XIII. *Controversies beyond the scope of arbitration agreements.*

In litigations that ensue between persons who have agreed to an arbitration of their differences, whether as a condition precedent to suit or otherwise, over issues not within the scope of the agreement to arbitrate, the courts do not recognize the failure or refusal to arbitrate as affording any defense or impediment to recovery.

There are numerous examples of this in the reports.

An unexecuted agreement between the parties to a building contract, to submit to arbitration a dispute that has arisen between them over the question of responsibility for the fall of the unfinished structure at the time of a freshet, cannot be pleaded as a defense to an action for damages for a breach of the construction contract. *Savage v. Glenn*, 10 Or. 440.

A provision in a building contract, for the arbitration of any dispute arising respecting the value of extra work done or contracted work omitted, without a condition precedent to an action, does not bar the contractor's suit to recover a balance of the contract price, with compensation for extra work performed. *Sinclair v. Tallmadge*, 35 Barb. 602.

A clause in a building contract giving the owner the privilege of making changes, additions, and alterations during the progress of the work, as he may wish, the cost and expense of which should be determined by the architect, whose decision in all cases affecting the contract should be final and binding upon both parties, does not affect the contractor's right to file a mechanics' lien under a statute, nor render nugatory a lien filed without arbitrating. *Kreilich v. Klein*, 10 Phila. 486.

An agreement between the parties to a building contract made after work under it had been for some time in progress, and was still uncompleted, and when a dispute arose to submit to arbitration their differences, pursuant to which the contractor is allowed to and does finish the construction, broken by the contractor's withdrawal from the submission, is no obstacle or bar to his subsequent suit to enforce mechanics' liens and recover the compensation due him for work and materials. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

A clause in a building contract providing that, in case of difference between the contractor and owner, the written award of a designated arbitrator in all matters connected with the works or the execution of them, or the value of extra work or reductions, should be final and conclusive as far as the law permits, and a condition precedent to any proceeding whatever at law or in equity respecting anything which could or might be the subject of such an award, is no obstacle to an action by the owner against the contractor for damages for not completing the structures and leaving the buildings unfinished. *Mansfield v. Doolin*, Ir. Rep. 4 C. L. 17.

Arbitrators of differences respecting quantities and quality of work, arising during the progress of performing a construction contract, are not empowered to decide as to the interpretation of the contract after it has been executed, so that their decision shall be a condition precedent to the contractor's right to bring suit. *Derby Deak Co. v. Connors Bros. Constr. Co.* 204 Mass. 461, 90 N. E. 543.

An arbitration is unnecessary as a preliminary to an action to recover a compensation definitely fixed by a contract, and made payable at a certain time by its terms, for work admittedly performed as agreed, since there can be no differences upon these points to arbitrate. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 19 Nev. 121, 7 Pac. 271.

A stipulation in a subcontract for railroad construction, that all matters in dispute between the contractor and subcontractor as to any matter connected with, or growing out of, the contract, should be submitted to and decided upon by the chief engineer and the consulting engineers of the railroad, is no bar to an action by the subcontractor to recover from the contractor compensation for work done under the contract, and extra to it, and for damages for detentions and delays. *Hart v. Lauman*, 29 Barb. 410.

A stipulation in a construction contract, providing for a reference to an arbitrator named therein in case of disputes, to determine the several kinds of work performed in carrying out the contract, and the compensation to be paid for it at the rates stated in such contract, whose decision should be final and conclusive without appeal, does not apply in an action to recover damages for refusal to allow the contract to be completed. *Lauman v. Young*, 31 Pa. 306.

The contract involved in *National Contracting Co. v. Hudson River Water Power Co.* 170 N. Y. 439, 63 N. E. 450, reversing 67 App. Div. 620, 73 N. Y. Supp. 1142, which affirmed 34 Misc. 652, 70 N. Y. Supp. 385, called for the construction of a dam across the Hudson river, and contained a clause providing that either or both of two named engineers or their successors should be referee in all cases to determine all questions that might in anywise arise under the contract, and the amount or the quantity of the contract work to be paid for, and to decide all questions which might arise relative to the fulfillment of the contract by the contractor, and that the findings, estimates, and decisions of such engineers, or either of them, should be final and conclusive. The action having been brought by the contractor to recover damages for sundry alleged breaches of the contract, the defendant pleaded in bar the plaintiff's failure to submit the subject-matter in dispute to the decision of the engineers. To this plea the plaintiff demurred as insufficient in law to be a defense. The court in the first instance, and again on appeal to the appellate division of the 47 L.R.A. (N.S.)

supreme court, sustained the demurrer on the ground that the agreement to refer to the engineers was one to submit all future controversies to their decision, and therefore an ineffectual attempt to oust the courts of jurisdiction, but on appeal to the court of appeals, that tribunal held that, while this was the seeming purpose of the first part of the reference clause, and if that stood alone would be its effect, still the additional and closing language qualified the first part so as to make it the function of the engineers merely to pass upon the quantity and quality of the work done and determine the amounts of payments, and, as thus construed, the clause was binding and created a lawful condition precedent to the action. It followed that the plea in bar was good, and that the courts below were in error in not overruling the demurrer.

When the case came to be heard upon the merits, inasmuch as it was undisputed that no reference to the engineers of the matter in dispute had been had or waived, the trial court felt constrained by this ruling to dismiss the complaint, and the ruling to that effect was affirmed by the appellate division of the supreme court (118 App. Div. 665, 103 N. Y. Supp. 641), with some modification.

In this condition the case reached the court of appeals again, and it was then decided that the former appeal had merely passed upon a question of pleading. The record on this appeal set forth the entire contract, and showed the plaintiff's claim to consist of two distinct parts,—one of which, the least important, was for a balance due for work done under the contract, and in respect of which the certificate of the engineer was, unless unreasonably withheld, a prerequisite to a recovery; but the other and chief claim was for damages for a breach of the whole contract in totally and radically changing the entire character of the work from solid masonry to an earth construction with a masonry core. In respect of this claim for damages, the court held the agreement to refer did not apply, and hence the engineers' estimate was not required. If the provision had been intended to apply in such a case, its effect would have been to withdraw the controversy from the courts, and submit it to private judgment, and in that case it would have been unenforceable. *National Contracting Co. v. Hudson River Water Power Co.* 192 N. Y. 209, 84 N. E. 965, reversing 118 App. Div. 665, 103 N. Y. Supp. 641.

An agreement in a contract of employment for a term of years, to make and superintend the work of machines, for the submission to arbitration of any dispute that should arise between employer and employee respecting the efficiency and sufficiency of machines made by the latter for the former, or the employee's full and proper performance of his engagements, where the right was given to the employer to recover damages and at his option, by notice,

to terminate the contract, does not constitute a condition precedent or any bar to an action without arbitrating by the employee against the employer to recover damages for a wrongful dismissal from the employment before the term had expired. *Griggs v. Billington*, 27 U. C. Q. B. 520.

A clause in a lease providing that any dispute arising during the term between the lessor and the lessee should be referred to three arbitrators chosen in a prescribed way, whose decision should be final and conclusive upon both parties, does not preclude either from resorting to the courts to determine which is liable for the cost of complying with a municipal order to curb and pave the sidewalk fronting the demised premises, where the tenant had covenanted in the lease to pay all taxes and assessments in addition to the rent reserved. *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569.

A claim by a street railway company for damages sustained, losses incurred, and expenditures made in consequence of false and fraudulent representations antecedent to the execution of a railway lease by a municipal corporation, respecting the condition of the leased line, does not fall within the purview or operation of a clause in such lease binding lessor and lessee to submit to arbitration all differences between them relating to the construction of the document or otherwise referring to rights under it, and hence an action to recover such claim may be maintained without a reference, or an offer to submit it to arbitration. But it is otherwise of a claim by the lessee of a breach of a covenant in the lease by the municipality, in that it failed to expend, pursuant to its obligation to provide adequate terminal facilities for the leased line, certain money provided for that purpose, because the latter claim is fairly covered by the arbitration provisions. *Cincinnati v. Cincinnati Southern R. Co.* 6 Ohio C. C. 247, 3 Ohio C. D. 438, affirmed in 52 Ohio St. 637, 44 N. E. 1132.

A provision in a bond secured by a mortgage on real property conditioned for the support of a man and his wife during the rest of their natural lives, for the performance of certain other specified things, that, should either party be dissatisfied with the fulfilment of the obligations, the matter shall be submitted to three named arbitrators, whose decision shall be final, cannot be invoked to defeat a foreclosure of the mortgage and restoration of the mortgaged premises by decree of a court of competent jurisdiction for a breach of the condition of the bond, where no submission took place. *Hill v. More*, 40 Me. 515.

A provision in a bill of sale that, in case any dispute shall arise between vendor and vendee respecting the interpretation or carrying out of the terms of the instrument, including the cost of materials, supplies, or product finished or in process, it shall be settled by arbitrators, whose decision shall be final, does not constitute a condition precedent to an action for the

price, where the dispute was over the right to include certain items of expense as elements in cost to vendor. *Dickson Mfg. Co. v. American Locomotive Co.* 119 Fed. 488.

A contract of employment between a planter and his overseer, made at the outset, providing that if either should become dissatisfied and wish to end the engagement, the latter should receive what two disinterested persons should award him, payable when the crop was sold, does not create a condition precedent to a suit by the overseer to recover compensation for his services, where the planter discharged him before the term of employment expired. *Gardner v. Williamson*, 5 Rich. L. 28.

A clause in a contract of sale of a stock of merchandise, business, and good will, containing a covenant by the seller not to embark again in the same business in the same city, that differences arising should be settled by arbitrators, whose decision should be accepted as final, provides only for an arbitration of differences relating to the inventory of stock, the articles sold, the money to be paid, and other matters of that kind, and does not apply to the covenant against future competition. *Richardson v. Emmert*, 44 Kan. 262, 24 Pac. 478.

The usual provisions in a building contract, that the owner may, at any time during the progress of the work, make alterations, additions, or omissions, the fair and reasonable values of which should be added to or deducted from the contract price, and, if disputed, should be determined by arbitration, the award to be binding, apply only to conditions arising during the progress of the work, and have no application whatever to or effect upon an action for damages for a breach of the contract upon the neglect or refusal of the owner to proceed with the work, or to allow the contractor to finish. *Boyd v. Meighan*, 48 N. J. L. 404, 4 Atl. 778.

XIV. Incidental arbitration agreements not made conditions precedent to suit.

It is an incident to every contract that a breach of it by one of the parties to it gives the other a cause of action enforceable in a court of law or equity. *Hartford F. Ins. Co. v. Hon*, 66 Neb. 555, 60 L.R.A. 436, 103 Am. St. Rep. 725, 92 N. W. 746.

And a clause in a contract, which is in substance an agreement to refer to arbitration causes of action arising upon other provisions of the contract, is an invalid attempt to oust the courts of their jurisdiction. *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802.

A provision in a contract merely incidental and collateral to it, and separate from and independent of it, for a submission to arbitration of any dispute that

may arise under it, although ignored or repudiated, will not prevent the maintenance of a suit or action on the principal contract.

And thus it has come to be generally the rule, both in England and the United States, that when a contract, whether of insurance or concerning some other subject, is not so drawn that no sum becomes payable by its terms until and unless it has been ascertained and awarded by arbitrators, so that an award is an essential and integral part of the contract, a provision in such contract for an arbitration of anticipated differences, which is neither expressly nor necessarily impliedly made a condition precedent to litigation, is a collateral and independent contract which need not be carried out before a resort is had to the courts to adjudicate a controversy that has arisen out of the contract. *Kill v. Hollister*, 1 Wils. 129; *Roper v. London*, 1 El. & El. 825, 28 L. J. Q. B. N. S. 260, 5 Jur. N. S. 491, 7 Week. Rep. 441; *Cooke v. Cooke*, L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480, 15 Week. Rep. 981; *Horton v. Sayer*, 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 28, 7 Week. Rep. 735; *Hamilton v. Home Ins. Co.* 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. Rep. 133; *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513; *Croccley v. Connecticut F. Ins. Co.* 27 Fed. 30; *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 520; *Mutual F. Ins. Co. v. Alvord*, 9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752; *Dickson Mfg. Co. v. American Locomotive Co.* 119 Fed. 488; *Stone v. Dennis*, 3 Port. (Ala.) 231; *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; *Hind v. Low*, 14 Haw. 438; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598, 18 N. E. 804; *Chicago Sanitary Dist. v. McMahon & M. Co.* 110 Ill. App. 510; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848; *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543; *Gere v. Council Bluffs Ins. Co.* 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159; *Lesure Lumber Co. v. Mutual F. Ins. Co.* 101 Iowa, 514, 70 N. W. 761; *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *George Dee & Sons Co. v. Key City F. Ins. Co.* 104 Iowa, 167, 73 N. W. 594; *Barry v. Farmers' Mut. Hall Asso.* 114 Iowa, 186, 86 N. W. 290; *Isen v. Wright*, 21 Ky. L. Rep. 1368, 55 S. W. 202; *Robinson v. Georges Ins. Co.* 17 Me. 131, 35 Am. Dec. 239; *Fisher v. Merchants Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Cavanagh v. Dooley*, 6 Allen, 66; *Bauer v. International Waste Co.* 201 Mass. 197, 87 N. E. 637; *McGunn v. Hanlin*, 20 Mich. 476; *Chadwick v. Phoenix Acci. & Sick Ben. Asso.* 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Whitney v. National Masonic Acci. Asso.* 52 Minn. 47 L.R.A.(N.S.)

387, 54 N. W. 184; *March v. Eastern R. Co.* 40 N. H. 548, 77 Am. Dec. 732; *Hurst v. Litchfield*, 39 N. Y. 377; *Binasse v. Paige*, 1 Keyes, 87, 1 Abb. App. Dec. 138; *Sinclair v. Tallmadge*, 35 Barb. 602; *Tilden v. Bernard*, 12 Ohio C. C. N. S. 193, 31 Ohio C. C. 255; *Cole Mfg. Co. v. Collier*, 91 Tenn. 525, 30 Am. St. Rep. 898, 19 S. W. 672; *Florida Athletic Club v. Hope Lumber Co.* 18 Tex. Civ. App. 161, 44 S. W. 10; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Lawson v. Williamson Coal & Coke Co.* 61 W. Va. 669, 57 S. E. 258; *Oakwood Retreat Asso. v. Rathborne*, 65 Wis. 177, 26 N. W. 742; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

In such cases it is left optional with the parties to proceed to arbitrate, and each is at liberty to decline to do so without affecting his right of action. *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720, 25 Pac. 629.

After the agreement to submit has been ignored or repudiated by a party, he may maintain his suit and establish his claim by other evidence than an award. *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.

Unless the agreement to arbitrate creates a condition precedent to suit, the jurisdiction of the court to entertain and adjudicate a suit is not ousted. *Griggs v. Billington*, 27 U. C. Q. B. 520.

A stipulation in a lease that any dispute arising between lessor and lessee shall be submitted to arbitrators, whose award shall be final, which neither limits the right of action to an amount found due by the arbitrators, nor makes such right conditional or dependent upon a submission or offer to submit to arbitration, is no bar to an action upon the other covenants in such lease. *Rowe v. Williams*, 97 Mass. 163.

When a provision in a fire insurance policy that, if any difference of opinion shall arise between insurer and insured as to the amount of a loss or damage insured against, the dispute shall be referred to arbitrators mutually chosen in a prescribed way, whose decision shall be final, is not incorporated with, but is independent of and distinct from, the underwriter's promise to pay a loss or damage within a stated time after receiving proofs in a designated form, and is unconnected with and engagement of the policy holder not to sue, it does not constitute a condition precedent to a right of action upon the policy, nor any bar to the policy holder's action to recover a loss. *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572.

The use of the phrase, "shall be referred to arbitrators," in a stipulation in a contract providing for an arbitration to fix the amount of damages in case of a breach, does not of itself make arbitration a condition precedent to an action to recover such damages. *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638.

Whether or not a provision in a build-

ing contract for a reference to arbitrators to be chosen in the usual way, of any differences that might arise between the parties respecting the quality of the work or materials, or of any other question relating to the contract, was to be deemed void as an attempt to oust the courts of their jurisdiction, the court in *Cole Mfg. Co. v. Collier*, 91 Tenn. 525, 30 Am. St. Rep. 898, 19 S. W. 672, declined to inquire, because it held the refusal or neglect to submit no defense to an action to recover the contract price, inasmuch as it had not been, even impliedly, made a condition precedent to suit that there should be an arbitration and award.

The court in *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055, expressed the opinion that those courts which had held not binding arbitration provisions in fire insurance policies, for ascertaining the amount of losses, had so decided upon the ground that they had not been made a condition precedent to bringing suit.

It was held in *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 50 L.R.A. 555, 71 Am. St. Rep. 736, 54 N. E. 545, that a provision for an arbitration to determine the amount of a loss in case the parties could not agree, contained in a fire insurance policy, could not operate to deprive the policy holder of his right of action to recover insurance, unless it was clearly made a condition precedent to the existence of such right.

That decision, however, was overruled in *Graham v. German-American Ins. Co.* 75 Ohio St. 374, 15 L.R.A.(N.S.) 1055, 79 N. E. 930, 9 Ann. Cas. 79, but upon grounds not necessarily destructive of the stated principle.

XV. Arbitrations of auxiliary and subsidiary questions.

a. In general.

Although persons are not allowed by their contracts to oust the courts of their jurisdiction over the subject-matter of such contracts, yet there is a general recognition of the validity, binding obligation, and irrevocability of covenants and clauses in contracts to submit to the determination and final decision of third persons, specific preliminary, minor, incidental, auxiliary, or collateral questions of fact not going to the root of the cause of action, which are intended simply as an aid and guide to the courts in any litigation that subsequently may ensue over the contract between the contracting parties, by settling in advance some particular fact, so as to furnish evidence of it at the trial which the litigants are not at liberty to dispute. Every such agreement may lawfully restrain or defer the right to sue upon the contract in which it is embodied, until the particular question or questions to which it relates shall have been settled in the manner provided. *Harrison v. German-* 47 L.R.A.(N.S.)

American F. Ins. Co. 67 Fed. 577; *Crumlish v. Wilmington & W. R. Co.* 5 Del. Ch. 270; *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Prader v. National Masonic Acci. Asso.* 95 Iowa, 149, 63 N. W. 601; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269; *Walker v. German Ins. Co.* 51 Kan. 725, 33 Pac. 597; *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Palmer v. Clark*, 106 Mass. 373; *Wood v. Humphrey*, 114 Mass. 185; *Mittenthal v. Mascagni*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Garr v. Gomez*, 9 Wend. 649; *Tilden v. Bernard*, 12 Ohio C. C. N. S. 193, 31 Ohio C. C. 255; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452; *Condon v. South Side R. Co.* 14 Gratt. 302; *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 390, 71 N. W. 363; *Montgomery v. American Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175.

Nothing inhibits parties to a contract from providing methods for ascertaining, or from constituting as they please, the cause of action which is to become the subject-matter of decision by the courts. *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746.

An agreement between a transportation company, and a mining company, laying down a formula for determining the amount payable by the latter as tolls for the carriage of its product to tide water, and providing for the payment of additional tolls in case of the enlargement of the carrier's way, at a rate to be determined, if not agreed upon, by an arbitration, is valid and binding. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

An agreement between a master and servant respecting the former's liability to the latter for an injury received in the service, which stipulates the submission to arbitration of the question of the extent of the injury and resulting disability, is valid when the fundamental question of the master's liability and the servant's right to recover for the injury is left open for judicial determination. *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 2 N. C. C. A. 834.

A contract of employment between master and servant to endure during the joint lives of both, providing, *inter alia*, that if the former, without adequate cause, should dismiss the latter, or of the latter, for an adequate cause, should quit the employment, then the master should pay annually to the servant a stated sum of money during the remainder of their joint lives, and that the adequacy of the cause of discharge or of resignation, as the case might be, should be determined by a referee named in the agreement, does not oust the courts of jurisdiction, and when the master dismissed the servant and refused to refer, as provided, the question of the sufficiency of his reasons for the act, he became liable

to pay the promised annuity, which the servant had a right to recover in the courts, since the arbitration and an award of adequacy were conditions precedent to relieving the master from his obligation to pay the stipulated annuity. *Lowndes v. Stamford*, 18 Q. B. 425, 21 L. J. Q. B. N. S. 321, 16 Jur. N. S. 903.

A reference of a collateral fact, or the submission of a particular question forming only a link in a chain of evidence, is not calculated to put an end to the controversy, but to substitute the judgment of the referee in place of the evidence on that incidental or collateral matter, leaving the main controversy open. *Garr v. Gomez*, 9 Wend. 649.

An agreement upon good consideration by competent persons, making a third person the exclusive and final judge in a matter, where it was plainly considered difficult to attain entire accuracy, will be sustained by the courts. *Palmer v. Clark*, 106 Mass. 373.

A distinction is justly made, said Senator Seward in *Garr v. Gomez*, supra, between the reference of a collateral or incidental matter of appraisal or calculation, the decision of which is conclusive of nothing as to the rights of the parties except the mere appraisal or statement, and a submission of matters in controversy for final determination.

This distinction has been more fully stated in several later cases.

In the one class,—executory agreements for arbitration which oust the courts of their jurisdiction and hence are not allowed as bars to actions,—the parties undertake by an independent contract to provide for an adjustment of all their disputes and differences by arbitration, to the exclusion of the courts; while in the other case,—those which are sustained,—the parties merely provide in the same contract that gives the right and creates the liability, that the right shall be qualified and dependent upon, and the liability be conditioned on, the ascertainment and determination of certain facts or amounts before a cause of action shall accrue as conditions precedent to maintaining any action. *Dela-ware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

The passage in the opinion in the case just cited, in which the distinction noted was stated, was quoted and approved in *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54.

In *Hudson v. McCartney*, 33 Wis. 345, the New York decision just cited was referred to, and the opinion in it amended as one drawing a clear and accurate distinction between those covenants for submission and conditions precedent in their nature, which oust the courts of jurisdiction or bar actions, and those which do not, and as to which a remedy may be had to recover damages.

The distinction was restated in *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348, 47 L.R.A. (N.S.)

and, in association with the restatement, the court there said:

The distinction between executory agreements of arbitration which oust the courts of jurisdiction, and, therefore, are rejected as a bar, and those which are sustained as the sole remedy between the parties, is carefully drawn and fully discussed in *Dela-ware & H. Canal Co. v. Pennsylvania Coal Co.*, supra.

To that authority and its statement of the distinction nothing for any present purpose needs to be added.

The distinction was again noticed in *National Contracting Co. v. Hudson River Water Power Co.* 170 N. Y. 439, 63 N. E. 450, reversing, 67 App. Div. 620, 73 N. Y. Supp. 1142, which had affirmed 34 Misc. 652, 70 N. Y. Supp. 585, where the question was whether an arbitration clause in the contract involved came "within the rule which nullifies contracts ousting the courts of their jurisdiction, or within another and equally well established rule, that parties may covenant that no right of action shall accrue until a third person has performed specific acts, or determined certain differences between them." The line of demarcation between the two classes of cases, said the court, is clear and distinct. The difficulty, if any, lies in the application to particular facts of a clearly defined rule.

b. Prices, values, damages, amounts payable, quantities, qualities, etc.

1. Features.

Agreements in or separate from contracts leaving to the decisions of third persons questions of price, value, amounts, quantities or qualities strictly speaking, are not submissions to arbitration; neither are such third persons properly called arbitrators. Some of these so-called arbitrations are mere appraisements, others have some, many or nearly all, of the characteristics of arbitrations. All of them in one or more particulars differ from arbitrations.

The distinction has been noticed in many cases. *Collins v. Collins*, 26 Beav. 306, 28 L. J. Ch. N. S. 184, 5 Jur. N. S. 30, 7 Week. Rep. 115; *Toledo S. Co. v. Zenith Transp. Co.* 106 C. C. A. 501, 184 Fed. 391; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269; *Palmer v. Clark*, 106 Mass. 373; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Stout v. Phoenix Assur. Co.* 65 N. J. Eq. 566, 56 Atl. 691; *Flint v. Pearce*, 11 R. I. 576.

Thus, a proceeding to appraise a loss under a fire insurance policy is no arbitration in the accepted legal sense of the word. *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209,

10 So. 297; *Stout v. Phoenix Assur. Co.* 65 N. J. Eq. 566, 56 Atl. 691.

Neither is a reference to third persons to fix the price to be paid upon a sale of lands. *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Garred v. Macey*, 10 Mo. 161.

Neither is a reference to a third person to determine a difference in value between two slaves exchanged. *Curry v. Lackey*, 35 Mo. 389.

There is this distinction between an arbitration in the proper sense of the term, and an appraisal or valuation, that the latter precludes or prevents disputes from arising, while the former settles controversies after they have arisen. *Collins v. Collins*, 26 Beav. 306, 28 L. J. Ch. N. S. 184, 5 Jur. N. S. 307, 7 Week. Rep. 115.

If one to whom a submission is made is restricted to a simple appraisal of value, he is expected to act on his own knowledge and judgment, and neither the testimony of witnesses nor the statements and arguments of parties and counsel are contemplated. *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

As the court in *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696, pointed out, a fixing of values, appraisal of loss, etc., is a mere incident, and not the substance of a contract, serving rather the office of evidence than to determine rights, and aids, rather than supersedes, the courts in deciding controversies.

An agreement to submit to the decision of others a question involving only calculation or appraisal or the fixing of values, or the like, or something merely ministerial in character, does not constitute an arbitration under the strict rules of the common law. *Toledo S. S. Co. v. Zenith Transp. Co.* 106 C. C. A. 501, 184 Fed. 391.

An agreement in a sale of forest lands, providing for an appraisal and estimate by third persons, of the amount of merchantable pine timber growing on the lands, to determine and fix the purchase price, cannot properly be construed as a submission to arbitration. *Noble v. Grandin*, *supra*.

Although an appraisal of property the subject of a contract of sale, by indifferent third persons, selected as arbitrators are usually chosen, to determine a controversy, has characteristics of an award, it is not an award in the sense that an action may be maintained upon it. *Garred v. Macey*, *supra*.

A stipulation in a construction contract for a valuation or appraisal by a person named, and not invested with any judicial powers, does not amount to a submission to arbitration. *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630, 3 C. L. R. 409, 24 L. J. C. P. N. S. 60, 1 Jur. N. S. 211, 3 Week. Rep. 179.

One designated in an agreement between two other persons, to measure and certify the quantity of work which one of them has undertaken to do for the other, is not an arbitrator in the strict sense of the 47 L.R.A.(N.S.)

term. *Mills v. Bayley*, 2 Hurlst. & C. 36, 32 L. J. Exch. N. S. 179, 9 Jur. N. S. 499, 8 L. T. N. S. 392, 11 Week. Rep. 598.

2. Validity.

All agreements to submit to the judgment and decision of third persons, as prerequisites to litigations, questions that relate merely to prices, values, sums recoverable, amounts of losses or damages payable, quantities, or quality,—all of which come under the category of auxiliary, collateral, and incidental issues,—are considered not to oust the courts of their jurisdiction, and when not waived or abrogated, are respected and enforced judicially as valid and effectual. *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102.

That contracting persons may stipulate that the amount due to one of them from the other, under the contract, shall be ascertained by third persons, is, according to the court in *McNees v. Southern Ins. Co.* 69 Mo. App. 232, perhaps nowhere denied.

An agreement that values shall be fixed by arbitration is a contract only for a mode of ascertaining an amount which may come to be in dispute. *Bales v. Gilbert*, 84 Mo. App. 675.

A stipulation in a contract for constructing a railroad, which does not attempt to exclude the jurisdiction of the courts, but simply makes the enforcement of the company's obligation to pay for the work depend upon the settlement and ascertainment by a third person of the sum due, is valid. *Loup v. California Southern R. Co.* 63 Cal. 97.

The parties to a construction contract are free to make the decision of an arbitrator in the adjustment of differences as the work progresses, as to the quantity and quality of the work, final. *Derby Desk Co. v. Conners Bros. Constr. Co.* 204 Mass. 461, 90 N. E. 543.

A stipulation in a contract that the classification, quantity, or quality of work done, or things furnished in performing it, shall be left to the judgment and decision of a third person, whose estimate shall be final, is valid, and will be enforced in the courts. *Chapman v. Kansas City, C. & S. R. Co.* 114 Mo. 542, 21 S. W. 858.

An agreement to submit to arbitration the question of what sum, if any, is due and owing by an alleged debtor of a defendant sued for money due the plaintiffs and served with attachment, garnishment, or trustee process, with covenants mutually to abide the award, is valid and binding. *Woods v. Rice*, 45 Met. 481.

A provision in a contract for the sale of a large number of mules at stated prices, the animals to be of certain sizes, ages, and possessed of certain qualities, and the damages for failure to come up to the standards set being a fixed sum the head, for an arbitration of differences, should such arise between buyer and seller, is valid, and an

agreement which the courts will recognize and enforce. *Alford v. Tiblier*, 1 *McGloin* (La.) 151.

When, by the terms of a contract, a certain mode of ascertaining the quantity or measurement of the amount of a piece of work done in performing it is fixed upon by the parties as the rule of evidence, the plaintiff in an action on such contract has no right to resort to another method of proof until he has shown that, after proper exertions on his part, his attempts to procure the prescribed kind were ineffectual. *Wilson v. York & M. R. Co.* 11 *Gill & J.* 58.

The class of contracts which provide that the value of certain property, the amount of a loss sustained, the quantity, quality, character, and worth of work performed on improvements, and other similar matters, shall be determined by a certain person or persons named or selected after a manner prescribed in the contract, whose decision shall be final, is lawful, for they do not oust the courts of jurisdiction over the subject-matter, but only provide a reasonable and speedy mode of fixing definitely some fact, usually of a complex or abstruse nature, which it is difficult to establish by evidence, leaving the parties, after such fact has been determined, to seek the remedies of courts of justice in litigating such differences as may still exist. *Baltimore & O. R. Co. v. Stankard*, 56 *Ohio St.* 224, 49 *L.R.A.* 381, 60 *Am. St. Rep.* 745, 46 *N. E.* 577.

A provision in a contract between a private and a municipal corporation, for the transfer by the former to the latter of waterworks, for serving a district only partly within the city limits, by which the municipality covenanted to pay on or before a named date such compensation for the water rights and property, if any, as should be fixed by arbitrators consisting of the mayor and two other designated city officers, whose award, when and if approved by the common council, should be final and conclusive, is valid and binding, and precludes the private corporation from maintaining any action to recover the value of the franchises and property transferred without resorting to the arbitration provided for, although a time limit named in the contract for action by the municipal authorities may have expired. *Lidgerwood Park Waterworks Co. v. Spokane*, 19 *Wash.* 365, 53 *Pac.* 352.

A stipulation in a contract relating to supplying water to a city and its inhabitants, between a municipality and a public service corporation, by which, as differences arise, the rates to be paid by consumers of water for water used are to be fixed and determined by arbitration, at the average prices paid for water in other cities of the United States having efficient waterworks operated by private companies, does not provide a proper method of ascertaining the reasonable and just compensation for the contemplated service, and, while not impossible to perform, is so impracticable, indefinite, and unreasonable that it ought not to, 47 *L.R.A.* (N.S.)

and will not, be sustained and enforced in the courts. *Des Moines v. Des Moines Waterworks Co.* 95 *Iowa*, 348, 64 *N. W.* 269.

There is a distinction between a clause in a construction contract providing for a certificate of an architect under whose superintendence the work is to be executed, as to the amount of work done from time to time as it progresses, and stipulating the payments to be made by the owner, and one in such a contract providing that any dispute that shall arise between the owner and contractor as to the full compliance by the latter of everything to be performed under the contract shall be referred to the architect as sole arbiter, and that his decision shall be final. In the former case, the procurement of the architect's certificate is a condition precedent to the right to sue on the contract, but in the latter case, the courts are not ousted of jurisdiction. *Florida Athletic Club v. Hope Lumber Co.* 18 *Tex. Civ. App.* 161, 44 *S. W.* 10.

Referring to the contention of counsel for a contractor to build a railway bridge, that the final estimates of the engineer made pursuant to the terms of the contract were inconclusive, because the provisions of the contract in that behalf were against the policy of the common law, and tended to exclude the jurisdiction of the courts invested by the government with the means and power to consider and decide all legal controversies, the Virginia court of appeals, by Moncure, J., in *Kidwell v. Baltimore & O. R. Co.* 11 *Gratt.* 676, said: The doctrine relied on refers to agreements to refer disputes to arbitration, such as stipulations usually inserted in articles of partnership, that controversies between the partners, shall be referred to arbitrators named in the articles or to be named by the respective partners. It may well be questioned whether the provisions of construction contracts for the final estimates come within the influence of the doctrine. They seem to stand on higher ground than mere agreements for future reference, and to be substantial and irrevocable parts of the contracts in which they are embodied. The question thus suggested the court found it unnecessary to decide, because in that case the contractor not only made no attempt to revoke the engineer's authority, or objection to his making the final estimates, but he appeared, presented his claims, and was heard fully in the matter, and the engineer rendered a fair decision, which was deemed conclusive.

A common clause in building and construction contracts is one which reserves to the owner or employing party the right, during the progress of the work, to change the plans and specifications in such wise as to omit some features or add others, or both, and which provides for deductions from or increases in the contract price proportionate and equal to the value of the omitted or extra work and materials, as fixed and certified by the architect or en-

gineer in charge of the work, or other persons designated or unnamed.

The parties are competent to make contracts with provisions of this sort in them, and when they do are bound. Such contracts do not oust the courts of jurisdiction, but, like similar provisions in other contracts to fix by appraisement prices or values for property sold, sums payable for losses sustained, or damages incurred, are considered valid and as merely disposing of auxiliary, collateral, and incidental issues. *Connors v. United States*, 130 Fed. 609, affirmed in 72 C. C. A. 272, 141 Fed. 16; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Davison v. East Whittier Land & Water Co.* 153 Cal. 81, 96 Pac. 88; *Weggner v. Greenstine*, 114 Mich. 310, 72 N. W. 170; *Wyckoff v. Woarms*, 118 App. Div. 699, 103 N. Y. Supp. 650; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Myers v. St. Andrews & Q. R. Co.* 10 N. B. 577.

A stipulation in a construction contract making an architect, engineer, inspector, or other person in charge of the work an arbitrator of the quantity and quality of the work and materials, and of the compensation to be paid for the same, is valid and obligatory. *Guild v. Andrews*, 70 C. C. A. 49, 137 Fed. 369.

Such stipulations are not naked agreements to submit differences to arbitration, nor are they collateral independent contracts, but, on the contrary, they are of the very essence of the main contracts, not revocable, and must be complied with, or adequately excused as conditions precedent to suit. *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 93 C. C. A. 162, 166 Fed. 398.

The exceptions to and limitations of the rule that arbitration agreements taking away the jurisdiction of the courts are void, according to the court in *Jefferson F. Ins. Co. v. Bierce*, 183 Fed. 588, do not go beyond cases where the advance agreement was (1) to submit to general arbitration specific questions of fact, the determination of which is a condition precedent to any legal action, or (2) to submit to a supervising umpire or technical expert, or one who is both, questions of fact arising under his supervision or pertaining to his specialty, and such questions of construction or of law as are incidental to the controversy which may arise upon such subject.

3. Prices and values in sales.

The principle set forth at the beginning of this division has often been applied in actions to recover the purchase price or value of property sold under a contract by which such price or value was to be fixed and determined by the appraisement and award of third persons. *Humaston v. American Teleg. Co.* 20 Wall. 20, 22 L. ed. 279; *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513; *Knoche v. Chicago, M. & St. P. R. Co.* 34 Fed. 471; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Jones* 47 L.R.A.(N.S.)

v. Brown, 171 Mass. 318, 50 N. E. 648; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Orne v. Sullivan*, 3 How. (Miss.) 161, 34 Am. Dec. 74; *Bales v. Gilbert*, 84 Mo. App. 675; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Gourlay v. Somerset*, 19 Ves. Jr. 429; *Cooper v. Shuttleworth*, 25 L. J. Exch. N. S. 114.

The legal rules governing contracts for arbitration in respect of their validity and the proceedings under them do not apply to contracts for sale of property at a price to be paid equal to a valuation determined by the appraisement of third persons. *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839.

When such is the contract the vendor may not ignore its stipulations and sue for purchase money, without at least making an earnest effort to procure an award. *Knoche v. Chicago, M. & St. P. R. Co.* 34 Fed. 471.

Ordinarily, when there is no reference to, or decision by the appraisers fixing, the price or value of the subject of sale and purchase under such a contract, there is lacking an essential element to complete it, so long as it remains wholly executory, and the sale utterly fails. *Bales v. Gilbert*, 84 Mo. App. 675.

When there is an agreement that the price of an estate shall be fixed by arbitrators, and they do not fix it, there is no contract, as the price is of the essence of a contract of sale, and the court cannot make a contract where there is none. *Gourlay v. Somerset*, 19 Ves. Jr. 429.

The court will neither undertake to force the appraisers to decide upon a price, nor decide for them. If they fail to fix the price, the sale must also fail, unless there has been a part performance of the contract, or circumstances exist that make it inequitable not to enforce it. *Dunnell v. Keteltas*, 16 Abb. Pr. 205.

An agreement between two persons respecting a sum to be paid by one to the other for personal property belonging to the latter, or work done by him for the former, to be fixed and awarded by appraisers or arbitrators mutually chosen, does not cast a legal obligation upon him who is expected to pay that his nominee shall act and make an award, nor charge him with a liability if the reference fails by the nonaction of the arbitrator or appraiser he has named. *Cooper v. Shuttleworth*, 25 L. J. Exch. N. S. 114.

An agreement whereby one entering the employment of another gives an option to the master to purchase devices and inventions invented and perfected in the course of such employment, at a price to be fixed, if not agreed upon, by arbitrators chosen in the usual way, is valid and effective to prevent the employee from retaining or recovering back his inventions and devices without proceeding with the arbitration. *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513.

A provision in an agreement by stockholders of a private corporation, for the

control and management of its affairs, which provides, *inter alia*, for sales of shares of deceased and retiring shareholders to the surviving and persisting ones, for an arbitration of any controversy or differences of opinion that shall arise, coupled with a prohibition of actions at law or suits in equity, except upon awards of the arbitrators, and an explicit declaration making an arbitration and award a condition precedent to the right to sue, is only valid in respect of disputes concerning the price to be paid for the transfer of shares *inter sese*, as to all else it is an attempt to oust the courts of jurisdiction. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

4. Damages.

A clause, provision, or covenant in a contract, which does not assume in any way to oust the courts of their jurisdiction, but leaves to judicial determination the general question of a breach of the contract or the liability of a party to it to pay the other an amount which may be due by its terms, and simply provides that, as a preliminary to any suit or action, the extent or amount of damages recoverable shall be first ascertained and determined by the arbitrator or appraisal of third persons, is almost universally held valid and binding, and is respected and enforced in the courts.

The more numerous and the most conspicuous cases in which this doctrine has been recognized and frequently applied have arisen on policies of insurance. *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. 347; *Wallace v. German-American Ins. Co.* 4 McCrary, 123, 41 Fed. 742; *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447; *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Southern Home Ins. Co. v. Faulkner*, 57 Fla. 194, 131 Am. St. Rep. 1098, 49 So. 542; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70; *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572; *Soars v. Home Ins. Co.* 140 Mass. 343, 5 N. E. 149; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *McNees v. Southern Ins. Co.* 61 Mo. App. 335; *Stout v. Phoenix Assur. Co.* 65 N. J. Eq. 566, 56 Atl. 691; *Townsend v. Greenwich Ins. Co.* 86 App. Div. 323, 83 N. Y. Supp. 909, affirmed in 178 N. Y. 634, 71 N. E. 1140; *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C. 28, 10 S. E. 1057; *Herndon v. Imperial F. Ins. Co.* 107 N. C. 183, 12 S. E. 126; *Grady v. Home F. & M. Ins. Co.* 27 R. I. 435, 4 L.R.A.(N.S.) 288, 63 Atl. 173; *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; *Scottish Union & Nat. Ins. Co. v.* 47 L.R.A.(N.S.)

Clancy, 71 Tex. 5, 8 S. W. 630; *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422.

The doctrine, however, is one of general application to contracts of all classes. *Fox v. Hempfield R. Co.* 3 Wall. Jr. 243, Fed. Cas. No. 5,010; *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Wood v. Humphrey*, 114 Mass. 185; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *Tilden v. Bernard*, 12 Ohio C. C. N. S. 193, 31 Ohio C. D. 255; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577; *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569; *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452; *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630, 3 C. L. R. 409, 24 L. J. C. P. N. S. 60, 1 Jur. N. S. 211, 3 Week. Rep. 179.

While parties may impose as a condition precedent to applications to the courts, that they shall first have settled by an agreed mode the amount to be recovered, they cannot entirely close the access to the courts of law. *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70; *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.

It seems to be generally held, according to the court in *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119, that a stipulation in a fire insurance contract, that the question of the insurer's liability shall be determined by arbitration, is contrary to public policy and void; but it is otherwise as to the ascertainment of the amount of a loss. There is neither repugnancy nor inconsistency in leaving the former question to the courts when the liability is disputed, and at the same time providing that the amount of the recovery shall be settled by arbitration.

The clauses found in the greater number of fire insurance policies for an arbitration or appraisement of the amount of a loss or damage concerning which the parties differ, as a prerequisite to any suit or action by the policy holder against the insurer to recover a loss or damage, are in general upheld as valid and binding, although in some cases they have been held invalid, in others limited and circumscribed in effect, and in all not allowed to oust the courts of their jurisdiction to adjudicate the insurer's liability, according to the court in *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041.

In *Mansfield v. Doolin*, Ir. Rep. 4 C. L. 17, Chief Justice Whiteside quoted and adopted the language of Baron Martin in *Elliott v. Royal Exch. Assur. Co.* L. R. 2 Exch. 237, 36 L. J. Exch. N. S. 129, 16 L. T. N. S. 399, 15 Week. Rep. 907, eulogizing it as good sense, and pointedly distinguishing the case at bar, which arose on a building contract, and was brought by an owner against a contractor for abandoning the works and

leaving the building unfinished, from the cited case, brought to recover fire insurance. The passage in point in Baron Martin's judgment, read: In construing the contract, we must consider its nature. It is a policy of assurance; and it is well known to everyone that in such a contract there is constantly a dispute as to the value of articles for which compensation is claimed. It is equally well known that this is a question which a jury cannot try; and that if the matter be allowed to go into court, the parties, after incurring all that expense, may have to go to arbitration. Therefore, assuming the parties to be aware of this, it is the part of wise men to agree that the question of value shall be determined at the outset.

It is not unlawful for parties to impose upon themselves a condition precedent to an action respecting the mode of settling the amount of damages, or the time of payment, or any matters of that sort which do not go to the root of the action. *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Wood v. Humphrey*, 114 Mass. 185.

When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld. *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115.

It is competent for parties contracting to agree that disputes over accounts involving the examination of books, the value of articles, or the extent of damages, shall be settled by arbitration, and, if they do so, the courts will hold the agreement binding. *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569.

An agreement upon a mode of settling any particular issue of fact that may arise under a contract, such as a controversy over a question of quality of goods, or the amount of a loss or damage, is valid, because it leaves open for the decision of the courts the question of ultimate liability. *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

A provision in a lease of land reserving to the landlord a right to sell the premises, and *ipso facto* terminate the lease upon the payment of the tenant's damages, some specifically mentioned and the rest to be ascertained by arbitration, is valid and binding, and the tenant cannot be made to surrender his possession except upon the payment of his damages, either agreed upon or awarded by the arbitrators. *Abeel v. Hubbell*, 52 Mich. 37, 17 N. W. 231.

5. Payments contingent on awards.

All agreements in contracts for the payment of sums of money upon the sole contingency that the amounts to be paid shall be finally determined by third persons, leaving open the general question of the liability to pay the sums thus fixed, are valid and binding, and upheld and enforced in the courts. *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 55 Am. St. Rep. 47 L.R.A.(N.S.)

231, 40 N. E. 1110, 41 N. E. 848; *Leasure Lumber Co. v. Mutual F. Ins. Co.* 101 Iowa, 514, 70 N. W. 761; *George Dee & Sons Co. v. Key City F. Ins. Co.* 104 Iowa, 167, 73 N. W. 594.

The courts make a distinction between an agreement which refers to arbitration the extent or amount of damages to be recovered, but leaves the parties free to have determined by the courts the right to recover or the liability to pay such damages, and an agreement which refers to arbitrators the authority to decide the right of one party to recover, and the liability of the other to pay, damages. *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447.

"The distinction between the two cases is marked and well defined." *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

The doctrine stated in *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55, distinguishing between valid and invalid agreements for arbitration, that while parties may impose, as a condition precedent to application to the courts, that they shall first have settled by an agreed mode the amount to be recovered, they cannot entirely close access to the courts of law, was declared in *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282, to have become so universally recognized by the courts that it is unnecessary to refer to further authorities in its support.

If a contract involving the payment of a sum of money specifies a mode which is essential for ascertaining the amount, the contract is conditional until such amount is ascertained, and becomes absolute only when it has been determined. *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4.

One who covenants that the maker of a promissory note will pay his indebtedness upon it by delivering mules according to the terms of an award to be afterward made by arbitrators, and who did not sign or indorse the note or become otherwise bound by it, incurs no liability upon his covenant, where no arbitration takes place and the agreement to arbitrate is revoked. *Shell v. Asher*, 31 Ky. L. Rep. 566, 102 S. W. 879.

When a party covenants to pay for work contracted to be done such a sum, and that only, as a third person named and mutually agreed upon shall award, the other party can maintain no action against him to recover compensation for such work, without procuring such an award. *Reynolds v. Caldwell*, 51 Pa. 298.

When the parties to a contract agree in it that money shall be paid by one to the other when a third person named in it, or persons to be named in a prescribed manner, shall have determined the sum, a cause of action to recover the money does not arise until the person or persons have fixed the amount, unless something has occurred operating as a waiver of the condition

precedent, or to excuse performance of it, or unless, with fair and reasonable effort, the condition cannot be performed. *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422.

It is now too well settled in this state to be questioned, said the court in *Del Genovese v. Third Ave. R. Co.* 13 App. Div. 412, 43 N. Y. Supp. 8, that where the parties have selected an arbitrator to determine the questions that arise during the performance of the contract, and upon whose certificate the payments are to be made, and the contract provides that his certificate shall be binding, his decision is a condition precedent to the right of either party to recover under the contract.

6. Rents, improvements, etc., in landlord and tenant agreements.

The doctrines just stated have been applied in several litigations between landlords and tenants, where leases have had provisions for determining by arbitrations or appraisements rents payable, the values of improvements added to the demised premises by the lessees to be paid for by the lessors, the repairs to be made to put the premises in, or restore them to, good condition, and similar clauses and covenants.

All such provisions are valid and binding, and, if so expressed, constitute conditions precedent to suits and actions based on the leases and relations of the landlords and tenants. *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Abeal v. Hubbell*, 52 Mich. 37, 17 N. W. 231; *Donnell v. Lee*, 58 Mo. App. 288; *Atterbury v. Columbia College*, 66 Misc. 273, 123 N. Y. Supp. 25; *Abbot v. Shepherd*, 4 Phila. 90; *Flint v. Pearce*, 11 R. I. 576; *Hopkins v. Gilman*, 22 Wis. 476.

A submission to arbitration of a dispute between landlord and tenant respecting the shares of crops to which each is entitled is valid. *Donnell v. Lee*, 58 Mo. App. 288.

An agreement in a lease giving the landlord an option to renew repeatedly for stated terms, at rentals equal to certain percentages of the value of the demised premises as determined by the appraisal of arbitrators chosen in the usual way, or else to pay the value ascertained in the same manner, of any improvements made by the tenant when the original or any renewed term expires, although incapable of being specifically enforced by a decree of a court of equity, nevertheless, if broken by the landlord by refusal to arbitrate, and either to renew the lease or pay for the improvements, affords the tenant a good cause of action, and a court will take or retain jurisdiction of his suit, determine by evidence for itself the value of his improvement, and render judgment for the amount against the landlord. *Hopkins v. Gilman*, 22 Wis. 476.

If a tenant covenants to cultivate the

demised land in a husbandlike manner, or in default to pay such damages as shall be ascertained and awarded by an arbitrator, no action will lie until the arbitrator has acted. *Tredwen v. Holman*, 1 Hurlst. & C. 79, 31 L. J. Exch. N. S. 398, 8 Jur. N. S. 1080, 6 L. T. N. S. 127, 10 Week. Rep. 652.

A landlord who, by a lease in writing, lets a furnished house to a tenant covenanting therein to surrender possession at the end of the term, of the house and furniture in good order, and to make good and pay for loss, damage, or breakage, if any, such a sum of money as, if in dispute, shall be settled and awarded by two impartial appraisers, cannot maintain an action against the tenant to recover for loss, damage, or breakage of the contents of the house, without first procuring a valuation in the manner provided, and an award fixing the amount. *Babbage v. Coulburn*, L. R. 9. Q. B. Div. 235, 51 L. J. Q. B. N. S. 638, 46 L. T. N. S. 283, 30 Week. Rep. 950.

XVI. Arbitrations as conditions precedent to litigation.

It is a well-settled principle of law that when, by his contract, one charges himself with an obligation possible to be performed, he must make it good, unless the act of God, the law, or the obligee renders performance impossible. *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228.

A lawful and possible condition precedent for a right of action dependent upon it to arise generally must be strictly performed, however unreasonable it may appear. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

One who omits, without justification, to resort to a remedy provided him for a particular grievance by his contract, cannot maintain an action on that contract for that grievance. *Levy v. Order of Iron Hall*, 67 N. H. 593, 38 Atl. 18.

They who agree by the terms of their contract, upon an arbitrator to construe the contract and fix and determine obligations under it, must seek their remedies according to the terms of such contract, and those terms will be enforced in all cases where no fraud, bad faith, or mistake appears. *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300.

Although by private contract the courts cannot be ousted of their jurisdiction, still any person competent to contract may covenant that no right of action shall accrue to him against the covenantee until after a third person shall have decided a matter of difference if one arises between the two. *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 308, 2 Jur. N. S. 815, 4 Week. Rep. 746, 8 Exch. 487.

If two persons choose to agree that neither of them shall have any right of action under an agreement, until a third person has given his decision upon the mat-

ter in question, their agreement is binding. *London Tramways Co. v. Bailey*, L. R. 3 Q. B. Div. 217, 37 L. T. N. S. 499, 26 Week. Rep. 494, 47 L. J. Mag. Cas. N. S. 3.

A stipulation in a contract making the submission of disputes or controversies arising under it, to the determination of a person named in it, a condition precedent to an action upon it, is valid. *Maitland v. Reed*, 37 Ind. App. 469, 77 N. E. 290.

One may lawfully covenant that no right of action shall accrue till third persons have determined any differences that may arise between him and another, or determined the measure of the liability of the one or the other and the sum to which either shall be entitled. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

When parties in the same agreement which creates a liability and gives a right qualify the right by providing that before a cause of action shall accrue, certain facts shall be determined or certain amounts and values be ascertained, they thereby create, either in terms or by necessary implication, a condition precedent to an action on the agreement. *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Altman v. Altman*, 5 Daly, 436; *Gaither v. Dougherty*, 18 Ky. L. Rep. 709, 38 S. W. 2.

A stipulation in a contract, which is simply a declaration as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case disputes shall arise over certain matters involved in the contract, is one which the contracting persons have a right to make, and is perfectly valid and binding. *Denver, S. P. & P. R. Co. v. Riley*, 7 Colo. 494, 4 Pac. 785; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627.

A condition in a contract to refer any question which may arise out of it will be, if so stated, a condition precedent to the right to sue on the contract. *Roper v. Lendon*, 1 El. & El. 825, 28 L. J. Q. B. N. S. 260, 5 Jur. N. S. 491, 7 Week. Rep. 441; *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282.

A clause in a contract in which the parties agree that the decision of an arbitrator named shall be final and conclusive in any dispute between them, and whereby they waive any action, suit, or other remedy at law, binds both, and prevents either from maintaining an action upon the contract. *Irwin v. Shultz*, 46 Pa. 74.

If one makes a contract, he must abide by it before he can recover upon it. *Williams v. Chicago, S. F. & C. R. Co.* 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

And if an award by outsiders is made a condition precedent to an action on a contract, it must be alleged and proved, unless it has been waived or is wrongfully withheld. *Ibid.*

If a contract provides that no action shall be maintained upon it until after an award by arbitrators, the award is a con-

dition precedent to the right of action. *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543.

If the provisions of a contract are in such terms as to make a reference to arbitration a condition precedent to an action or suit upon such contract, no action or suit upon the contract may be maintained, unless the condition has been fulfilled or is adequately excused. *Burke v. Dittus*, 8 Cal. App. 175, 96 Pac. 330, *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458.

When a contract makes the submission to arbitration of a dispute arising under it a condition precedent to an action, it must be shown that such condition was fulfilled before suit was brought, or that an adequate and valid excuse existed for not fulfilling it. *Maitland v. Reed*, 37 Ind. App. 469, 77 N. E. 290.

When the parties to a contract stipulate in it that the decision of some particular question or questions arising under it, by arbitrators or others, shall be a condition precedent to any action upon the contract, such a decision becomes an integral part of the cause of action, and until it is rendered and the cause of action thereby is made complete, the courts have no jurisdiction, and hence cannot be said to be ousted of jurisdiction by the contract. *Condon v. South Side R. Co.* 14 Gratt. 302.

When an agreement to arbitrate a particular question is an integral part of the contract in which it appears, and not merely collateral thereto, it must be regarded as effectual and as binding as all other parts of the contract, and the whole must stand or fall together. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

Every possible condition upon which money is to become payable must be performed, or performance must be dispensed with on sufficient grounds, before the money is demandable in an action. *French v. Campbell*, 2 H. Bl. 178.

Contracting persons may fix on any mode they think fit to liquidate damages in their own nature unliquidated, and when they do fix upon a particular method of liquidating such damages, no recovery can be had until the prescribed way has been pursued, unless some valid excuse for not following it exists. *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co.* 66 Cal. 253, 5 Pac. 232.

If, in their contract, persons fix on a certain mode by which an amount to be paid shall be ascertained, one who seeks to enforce the agreement is bound to prove that he has done everything he could do to carry it into effect. He cannot compel the payment of a sum which he claims to be due by the terms of the contract, unless he procures the kind of evidence required by such contract, or shows an adequate excuse for his inability to do so. *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142; *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep.

945; *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513; *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447; *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627; *Campbell v. American Popular L. Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591; *McNees v. Southern Ins. Co.* 69 Mo. App. 232; *Wyckoff v. Woarms*, 118 App. Div. 699, 103 N. Y. Supp. 650; *Davenport v. Long Island Ins. Co.* 10 Daly, 535; *Graham v. German American Ins. Co.* 75 Ohio St. 374, 15 L.R.A.(N.S.) 1055, 79 N. E. 930, 9 Ann. Cas. 79; *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

If an original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. *Elliott v. Royal Exch. Assur. Co.* L. R. 2 Exch. 245, 36 L. J. Exch. N. S. 129, 16 L. T. N. S. 399, 15 Week. Rep. 907; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 260, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773; *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. 347.

When, in contemplation of law, a promise in a contract is not to pay a definite sum, nor even to pay such damages as the promisee may sustain in stated contingencies, but only such sum as arbitrators shall award or determine to be the amount of damages, an award is an essential element in the cause of action to recover upon the promise, and must be made before any action will lie. *Carroll v. Girard F. Ins. Co.* 72 Cal. 297, 13 Pac. 863.

While a stipulation that no suit or action shall be prosecuted for the subject-matter of a contract generally is void, it is not invalid when merely restrictive of such right until a preliminary reference has ascertained the amount of damages. *Key-stone Constructing & Engineering Co. v. Bethlehem Consol. Water Co.* 9 North. Co. Rep. 25.

It is undoubtedly true that parties may by agreement impose a condition precedent with respect of the mode of settling the amount of damages, or the time for payment, or any matters of that sort which do not go to the root of the action. *Hill v. More*, 40 Me. 515.

When, by the terms of a contract, the amount due from one to the other contractor is to be fixed by the award of arbitrators, he who claims a payment should show that he has been awarded it, or else has been prevented from obtaining an award by something affording him a legitimate excuse for not having it. *McNees v. Southern Ins. Co.* 69 Mo. App. 232.

Neither because an agreement to arbitrate affects the remedy and, if enforced, ousts courts of their jurisdiction, nor be-

cause it is a power and hence revocable before it is executed,—the two chief reasons for holding that submissions do not bar suits and actions,—is a reason that applies in an action on a promise to pay an award, since such a promise is conditioned upon the making of an award. Hence, when an appraisal of values, or an award of an amount of damages, is made a condition precedent to an action on the contract providing therefor, the agreement is not that a cause of action be referred, but that a cause of action shall arise upon the appraisal or award, which is thus made preliminary to, in aid of, and a condition precedent to, the ensuing action. *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572.

A provision for the payment of money in a contract of indemnity against loss or damage from specified causes in certain contingencies, providing for the submission to arbitration of not the cause of action, but of the amount to be paid when disputed, thus leaving the right of action intact and capable of judicial enforcement if necessary, is upheld and enforced by the law as a reasonable stipulation tending to the peace and repose of society, and furnishing an amicable method of estimating or ascertaining the amount of damage, which might otherwise become the subject of controversy and litigation. *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684.

A stipulation in a contract for submitting to arbitration the question of the amount payable under it, and making such submission a condition precedent to an action, does not attempt to deprive the courts of their jurisdiction, but only provides a reasonable method of estimating or ascertaining the amount of damages, and leaves the general question of liability to pay such damages for judicial determination. The effect of such a stipulation is not to refer a cause of action, but to provide simply that a cause of action shall accrue as soon as, and not before, the amount to be paid has been determined by the arbitrators. *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.

These doctrines have more frequently than in any other class of cases been recognized, and often have been applied, in actions brought to recover insurance on policies providing for arbitrations to determine the amounts of losses, and forbidding suits or actions to recover for such losses to be maintained until the arbitrators shall have acted and declared the amounts of losses. *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975; *Lesure Lumber Co. v. Mutual F. Ins. Co.* 101 Iowa, 514, 70 N. W. 761; *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566; *Liverpool & L. & G. Ins. Co. v. Hall*, 1 Kan. App. 18, 41 Pac. 65; *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739; *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171

Mass. 433, 50 N. E. 943; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; Kersey v. Phenix Ins. Co. 135 Mich. 10, 97 N. W. 57; Carp v. Queen Ins. Co. 104 Mo. App. 502, 79 S. W. 757; Stevens v. Norwich Union F. Ins. Co. 120 Mo. App. 88, 98 S. W. 684; Gibbs v. Continental Ins. Co. 13 Hun, 611; Davenport v. Long Island Ins. Co., 10 Daly, 535; Pioneer Mfg. Co. v. Phenix Assur Co. 106 N. C. 28, 10 S. E. 1057; Herndon v. Imperial F. Ins. Co. 107 N. C. 183, 12 S. E. 126; Phenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Grady v. Home F. & M. Ins. Co. 27 R. I. 435, 4 L.R.A. (N.S.) 288, 63 Atl. 173; Palatine Ins. Co. v. Morton-Scott-Robertson Co. 106 Tenn. 558, 61 S. W. 787.

That is, the doctrines apply where there has been no overruling legislation. Zalesky v. Home Ins. Co. 102 Iowa, 613, 71 N. W. 566; Hartford F. Ins. Co. v. Bourbon County Ct. 115 Ky. 109, 72 S. W. 739.

And provided always the condition precedent has neither been waived nor the fulfillment of it adequately excused. Lamson Consol. Store Service Co. v. Prudential F. Ins. Co. 171 Mass. 433, 50 N. E. 943; Davenport v. Long Island Ins. Co. 10 Daly, 535; Phenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Grady v. Home F. & M. Ins. Co. 27 R. I. 435, 4 L.R.A. (N.S.) 288, 63 Atl. 173; Palatine Ins. Co. v. Morton-Scott-Robertson Co. 106 Tenn. 558, 61 S. W. 787.

The courts in the several jurisdictions, with only one or two exceptions, throughout the United States, hold that when legislation has worked no change of rule, a clause in a policy of insurance which in substance requires differences arising between the insurer and the assured over the amount of any loss or damage for which indemnity is claimed under the policy to be referred to arbitration, makes the award final and conclusive as to figures, leaves open to judicial determination the general question of the insurer's liability on the policy, and forbids the assured to maintain any action at law, suit in equity, or other legal proceeding to recover on the policy for a loss or damage until he shall have first proceeded to arbitration and procured an award fixing the amount, is valid and binding, and creates, if not waived or excused from performance, a condition precedent to the recovery of insurance, which effectively bars any resort to the courts by the policy holder to recover indemnity on the policy.

U. S.—Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; Hamilton v. Home Ins. Co. 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. Rep. 133; Yeomans v. Girard F. & M. Ins. Co. 5 Ins. L. J. 858, Fed. Cas. No. 18,136; Mutual F. Ins. Co. v. Alvord, 9 C. C. A. 623, 21 U. S. App. 228, 61 Fed. 752; Kahnweiler v. Phenix Ins. Co. 57 Fed. 562.*

*This decision was reversed in 14 C. C. A. 485, 32 U. S. App. 230, 67 Fed. 483, on the ground that the arbitration clause in the policy had been waived by implication of 47 L.R.A. (N.S.)

Ala.—Western Assur. Co. v. Hall, 112 Ala. 318, 20 So. 447.

Cal.—Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co. 66 Cal. 253, 5 Pac. 232; Adams v. South British & Nat. F. & M. Ins. Cos. 70 Cal. 198, 11 Pac. 627; Carroll v. Girard F. Ins. Co. 72 Cal. 297, 13 Pac. 863.

Fla.—Hanover F. Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297; Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 131 Am. St. Rep. 1098, 49 So. 542.

Ill.—Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408; Niagara F. Ins. Co. v. Bishop, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; Phenix Ins. Co. v. Lorton, 109 Ill. App. 63; Concordia F. Ins. Co. v. Bowen, 121 Ill. App. 35.

Ind.—Vernon Ins. & T. Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Manchester F. Assur. Co. v. Koerner, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848; Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Prudential Ins. Co. v. Meyers, 15 Ind. App. 339, 44 N. E. 55.

Iowa—Zalesky v. Home Ins. Co. 102 Iowa, 613, 71 N. W. 566; George Dee & Sons Co. v. Key City F. Ins. Co. 104 Iowa, 167, 73 N. W. 594; Westhauer Bros. v. German American Ins. Co. 113 Iowa, 726, 84 N. W. 717.

Kan.—Liverpool & L. & G. Ins. Co. v. Hall, 1 Kan. App. 18, 41 Pac. 65.

Ky.—Hartford F. Ins. Co. v. Bourbon County Ct. 115 Ky. 109, 72 S. W. 739; Continental Ins. Co. v. Vallandigham, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22.

Me.—Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; Dunton v. Westchester F. Ins. Co. 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037.

Md.—Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13; Connecticut F. Ins. Co. v. Cohen, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675.

Mass.—Reed v. Washington F. & M. Ins. Co. 138 Mass. 572; Hutchinson v. Liverpool & L. & G. Ins. Co. 153 Mass. 143, 10 L.R.A. 558, 26 N. E. 439; Lamson Consol. Store Service Co. v. Prudential F. Ins. Co. 171 Mass. 433, 50 N. E. 943.

Mich.—Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; Morley v. Liverpool & L. & G. Ins. Co. 85 Mich. 210, 48 N. W. 502; National Home Bldg. & L. Asso. v. Dwelling House Ins. Co. 106 Mich. 236, 64 N. W. 21; Baumgarth v. Firemans' Fund Ins. Co. 152 Mich. 479, 116 N. W. 449; Allen v. Patrons' Mut. F. Ins. Co. 165 Mich. 18, 130 N. W. 196.

Minn.—Mosness v. German-American Ins. Co. 50 Minn. 341, 52 N. W. 932; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.

Mo.—Murphy v. Northern British & M. Co. 61 Mo. App. 323; McNees v. Southern

law. A writ of certiorari was refused in 163 U. S. 691, 41 L. ed. 311, 16 Sup. Ct. Rep. 1202.

Ins. Co. 61 Mo. App. 335, on a subsequent appeal, 69 Mo. App. 232; *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 N. W. 684.

N. J.—*Wolff v. Liverpool & L. & G. Ins. Co.* 50 N. J. L. 453, 14 Atl. 561.

N. Y.—*Silver v. Western Assur. Co.* 164 N. Y. 381, 58 N. E. 284; *Williams v. German Ins. Co.* 90 App. Div. 413, 86 N. Y. Supp. 98; *Davenport v. Long Island Ins. Co.* 10 Daly, 535; *Yendel v. Western Assur. Co.* 21 Misc. 348, 47 N. Y. Supp. 141.

N. C.—*Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C. 28, 10 S. E. 1057; *Hernndon v. Imperial F. Ins. Co.* 107 N. C. 183, 12 S. E. 126; *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477.

N. D.—*Leu v. Commercial Mut. F. Ins. Co.* 15 N. D. 360, 107 N. W. 59.

Ohio.—*Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805; *Graham v. German American Ins. Co.* 75 Ohio St. 374, 15 L.R.A. (N.S.) 1055, 73 N. E. 930, 9 Ann. (as. 79); *Fire Asso. v. Appel*, 76 Ohio St. 1, 80 N. E. 952; *Hamilton v. Firemans' Ins. Co.* 4 Ohio St. & C. P. Dec. 407; *Cincinnati Coffin Co. v. Home Ins. Co.* 8 Ohio Dec. Reprint, 422.

R. I.—*Grady v. Home F. & M. Ins. Co.* 27 R. I. 435, 4 L.R.A. (N.S.) 288, 63 Atl. 173.

Tenn.—*Palatine Ins. Co. v. Morton-Scott-Robertson Co.* 106 Tenn. 558, 61 S. W. 787.

Tex.—*Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. 630; *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119; *American F. Ins. Co. v. Stuart*, — Tex. Civ. App. —, 38 S. W. 395.

Wis.—*Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422; *Montgomery v. American Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175.

The recognition and application of these doctrines merely exemplify the general rule requiring courts to interpret and give effect to contracts according to the clear intent of those who make them as expressed in the writings they have deliberately executed. *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055.

The case of *Kill v. Hollister*, 1 Wils. 129, decided in 1746, was an action on a policy of insurance containing a clause that, in case of any loss, a dispute about the policy should be referred to arbitration, and, no arbitration having been had, the point was raised and reserved for consideration on the trial, whether the action was well laid before a reference had occurred, and by the whole court it was decided that if there had been an arbitration depending or determined, it might have been a bar, but the agreement of the parties could not oust the court of its jurisdiction, hence the action was well brought, and the plaintiff was entitled to judgment.

It has been settled in England by the decision of the House of Lords in the famous case of *Scott v. Avery*, 5 H. L. Cas. 47 L.R.A. (N.S.)

811, 25 L. J. Exch. N. S. 308, 2 Jur. N. S. 815, 4 Week. Rep. 746, that when a policy of insurance provides for an arbitration to determine the amount of a loss or damage, limits the insurer's liability to such sum as shall be fixed by the award, and forbids any action to be maintained by the policy holder to recover on the policy for a loss or damage until an arbitration has taken place and an award been made, no cause of action accrues or can arise until the arbitration has been had and the award made as contemplated.

The policy in that case was one of marine insurance, conditioned that the sum payable to the assured in case of loss should be first ascertained by a committee, and then, if a difference arose between the committee and the assured, relative to the settling of any loss or to a claim for average, or to any other matter respecting the insurance, such difference should be referred to arbitration, and the assured, if he refused to accept the amount settled by the committee, should not be entitled to maintain any action at law or suit in equity on the policy until after an arbitration, and then only for such sum as the arbitrators might award him.

Following that decision, it has several times been decided, and may now be regarded as settled law in Great Britain, that provisions in fire insurance policies which in substance provide that when losses occur and insurance is claimed under the policy, and differences concerning the amount of loss or damage shall arise between insurer and assured, such differences shall be referred to arbitrators chosen in the customary way to determine such amount, and that the policy holder shall not be entitled to maintain any action at law or suit in equity to recover for a loss until he has proceeded to an arbitration and procured an award fixing the sum due from the insurer, are valid and binding, and create conditions precedent to maintaining actions or suits to recover insurance. *Elliott v. Royal Exch. Assur. Co.* L. R. 2 Exch. 237, 36 L. J. Exch. N. S. 129, 16 L. T. N. S. 399, 15 Week. Rep. 907; *Viney v. Bignold*, L. R. 20 Q. B. Div. 172, 57 L. J. Q. B. N. S. 82, 58 L. T. N. S. 26, 36 Week. Rep. 479; *Caledonian Ins. Co. v. Gilmour* [1893] A. C. 85, 1 Reports, 110, 57 J. P. 228, reversing 18 Sc. Seas. Cas. 4th series, 1219; *Spurrier v. LaClosche* [1902] A. C. 446, 71 L. J. P. C. N. S. 101, 51 Week. Rep. 1, 86 L. T. N. S. 631, 18 Times L. R. 606.

In the Dominion of Canada, of course, the English decisions just cited have been followed. *Guerin v. Manchester F. Assur. Co.* 29 Can. S. C. 139; *Nolan v. Ocean Acci. & Guarantee Corp.* 5 Ont. L. Rep. 544; *Pharand v. Lancashire Ins. Co.* Rap. Jud. Quebec 18 C. S. 35.

In *Scott v. Mercantile Acci. & Guarantee Ins. Co.* 66 L. T. N. S. 811, a policy insuring against losses by burglary or theft in

the holder's shop provided that, if any dispute should arise between the insurer and insured respecting any claim for insurance, it should be referred to arbitration, and the insurer should not be liable to pay unless and until its liability and the amount thereof should have been determined by the arbitrators, whose award should be a condition precedent to any liability or any right of action to recover such claim, and that only the award should be sued on; and Lord Esher, M. R., held that the case was governed by the decision in *Scott v. Avery*, supra, and that arbitration was a condition precedent to the plaintiff's right of action.

Chief Justice Strong, of the Canadian supreme court, in his opinion, sustaining the defeat of a fire insurance policy holder who had not procured an arbitration and an award before suing for a loss, in the case of *Guerin v. Manchester F. Assur. Co.* 29 Can. S. C. 139, said: The arbitration clause . . . provides that no action should be maintainable until after an award had been obtained . . . fixing the amount of the claim. The court of review considered this provision void, as tending to oust the jurisdiction of the courts of law, and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established courts of justice is null, but nevertheless, in the case of *Scott v. Avery*, supra, the House of Lords determined that a clause of this nature almost in the same words as that before us, making an award a condition precedent, was perfectly valid, and that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though, of course, not a binding authority on the courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should be first determined by arbitration.

It was admitted in the case of *Providence-Washington Ins. Co. v. Wolf*, 168 Ind. 690, 120 Am. St. Rep. 395, 80 N. E. 28, that the provisions of the policy respecting proofs of loss and arbitration of the amount of loss were conditions precedent to suit, and no question was made as to their validity. The controversy was over the question whether or not compliance with the conditions had been waived or excused.

A declaration in express terms, that a reference to arbitration to determine the amount of a loss under a fire insurance policy as therein provided shall be a condition precedent to any right of action in law or in equity to recover such loss, as effectually creates a condition precedent to

an action upon the policy as does the use of the words more commonly employed to such end, viz., that no action shall be brought until or unless the sum has been ascertained by arbitration. *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171 Mass. 433, 50 N. E. 94.

A clause in a fire insurance policy requiring an arbitration in case differences should arise over the amount of a loss, and providing that no suit should be brought until after an award, when coupled with another provision limiting to one year the time for bringing suit, was held void in *Leach v. Republic F. Ins. Co.* 58 N. H. 245, the court saying: Whatever construction may be placed on such an agreement it defeats itself. Either party is at liberty to defeat the arbitration by refusing to join in the choice of arbitrators, by revocation after choice, and in various ways by preventing an award within the year. If the differences are not on the question of loss, there can be no arbitration and award, and consequently no suit. Such a condition providing no certain and fixed mode of securing arbitration is an attempt to oust the court of its jurisdiction, and is void.

A policy insuring against accidental injury or death in such sum by way of compensation as should appear just and reasonable, to be ascertained and determined in case of difference by an arbitrator to be named by the secretary of the master of the rolls, whose award should be final and might be made a rule of court, created a condition precedent to bringing an action for an injury within the terms of the policy. *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782, 31 L. J. Q. B. N. S. 17, 8 Jur. N. S. 506, 5 L. T. N. S. 550, following *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 308, 2 Jur. N. S. 815, 4 Week. Rep. 746.

When the only undertaking of an insurer in a marine insurance policy is to pay the insured according to an adjustment by a professional average-stater, or, in case either party is dissatisfied with such an adjustment, then to pay an award of arbitrators, then no action on the policy to recover insurance can be maintained until there has been an adjustment, and if that is unacceptable, an arbitration and an award. *Wright v. Ward*, 24 L. T. N. S. 439, 20 Week. Rep. 21, 1 Asp. Mar. L. Cas. 25.

If a policy of insurance makes the certificate of certain persons to the character and amount of loss of the policy a condition precedent to payment of the insurance, the policy holder must procure such certificate before he can maintain an action against the insurer to recover on the policy, and it is no answer to the failure to procure the certificate to say that it was arbitrarily withheld. *Worsley v. Wood*, 6 T. R. 710, 2 H. Bl. 574, 3 Revised Rep. 323.

It has been said of this decision that it has never been called in question either in the United States or in England. *Camp-*

bell v. American Popular L. Ins. Co. 1 MacArth. 246, 29 Am. Rep. 591.

If a policy of fire insurance stipulates for an appraisal by arbitrators of the amount of a loss in case the parties disagree, but contains no stipulation that an award shall precede the right to sue upon the policy, the clause providing for an arbitration is not a condition precedent to suit, and a policy holder need not show that he has performed or offered to perform the stipulation or that compliance with it has been waived, in order to maintain his action. *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 13 N. W. 252.

The clause in the standard fire insurance policy provided for by statute in New Hampshire, requiring an arbitration of the amount of a loss concerning which the parties differ, and making the written award of the arbitrators, after due notice and hearing, final and conclusive, is not a condition precedent to the right of the policy holder to sue on the policy to recover for a loss. *Franklin v. New Hampshire F. Ins. Co.* 70 N. H. 251, 47 Atl. 91.

A clause in a fire insurance policy requiring the submission to arbitration of differences over the amount of a loss, and making an award a prerequisite to an action on the policy, which prescribes neither the number of arbitrators nor any method for choosing them, will not be construed to create a condition precedent to a policy holder's action to recover for a loss. *Mark v. National F. Ins. Co.* 24 Hun, 565.

A provision in a fire insurance policy for an arbitration or appraisal of a loss or damage by arbitrators or appraisers to be mutually chosen, but in number not specified, nor by any method indicated, although making an award a condition precedent to suit, is nevertheless no bar to an action when ignored, because it is vague and indefinite in terms, and leaves in either party the power to defeat any submission to arbitration by declining to assent to the number of arbitrators proposed, or the mode of selecting them suggested. *Ætna Ins. Co. v. McLead*, 57 Kan. 95, 57 Am. St. Rep. 320, 45 Pac. 73.

If a provision in a contract for an arbitration as a condition precedent to the right to sue upon it is recognized as valid by the law of the state where the contract was made, and where the subject-matter of it was at all times situated, and where the cause of action upon it arose, it will be deemed valid in another state where an action upon it is brought, regardless of the local law upon the subject as respects domestic contracts. *Smith v. California Ins. Co.* 87 Me. 190, 32 Atl. 872.

From the doctrine just stated the courts of Nebraska totally dissent. They have repeatedly decided that a provision in a fire insurance policy forbidding any suit or action against the insurer to recover for a loss, to be sustained in any court of law or chancery until after an award of arbitrators shall have been obtained by

the policy holder, determining the amount of his loss, is void, because the effect of it is to oust the courts of their legitimate jurisdiction. *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278; *Hartford F. Ins. Co. v. Hon*, 66 Neb. 555, 60 L.R.A. 436, 103 Am. St. Rep. 725, 92 N. W. 746; *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N. W. 736.

Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in the state of Nebraska, declared the court in *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085, that a provision in a contract requiring arbitration, whether of all disputes arising under the contract or only of the amount of loss or damage sustained by the parties to it, will not be enforced, and that refusal to arbitrate, or no arbitration, is not available to the parties in an action growing out of the contract.

The court reaffirmed this doctrine after an extended discussion of cases and principles in *Hartford F. Ins. Co. v. Hon*, 66 Neb. 555, 60 L.R.A. 436, 103 Am. St. Rep. 725, 92 N. W. 746, saying: The doctrine has been assumed to be firmly established in the body of our law; but because of the very earnest and able manner in which the doctrine has been challenged by counsel . . . and the authorities cited from various courts entitled to fair consideration, we have seen fit to re-examine the question; but we cannot, on principle, see any valid reason why a doctrine which has stood for many years, and which has become a rule of property, should now be abandoned.

In giving its adhesion to the same doctrine, the court in *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N. W. 736, said: There is no better reason for upholding a contract that in advance ousts the jurisdiction of a court of law from finding the amount of damage in a dispute between assured and insurer, than there would be for upholding contracts ousting the jurisdiction of the courts on any other question that might arise between them; and whenever we say that the jurisdiction of courts may be contracted away in advance on any question, we open a leak in the dyke of constitutional guaranties which might some day carry all away.

It is a rule too well established in this state to require any further examination. said the court in *Havens v. Robertson*, 75 Neb. 205, 106 N. W. 335, that an unexecuted agreement to arbitrate will not be recognized or enforced in this jurisdiction.

The doctrine prevailing in Pennsylvania, that arbitration agreements resting upon no specific valuable consideration and wholly unperformed, where an arbitrator or arbitrators are unnamed and undesig-

nated, are revocable at will by either party, and may be ignored by either with impunity, (*vide* Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; Johnson v. Andreas, 5 Phila. 8; Kreilich v. Klein, 10 Phila. 486; Phoenix Pottery Co. v. Griffin, 16 Phila. 569; McQuaide v. Pennsylvania R. Co. 6 Pa. Dist. R. 391; Acme Coal Co. v. Stroud, 5 Lack. Leg. News, 169), has put the Pennsylvania courts out of harmony with the courts of the other states of the United States (except Nebraska), in respect of the force and effect of arbitration clauses customarily found in fire insurance policies.

The ordinary condition in a fire insurance policy for an appraisal of loss where the insurer and insured do not agree upon the amount is, in substance, only an agreement to refer a prospective controversy to arbitrators chosen in the future, and therefore revocable, and as much so by the insurer as by the policy holder. Penn Plate Glass Co. v. Spring Garden Ins. Co. 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138.

A clause in a policy of fire insurance, providing for an ascertainment or estimate of the amount of loss to be made by the insurer and insured, or, in case they differ, by appraisers or arbitrators mutually chosen, being revocable, does not bind the assured, and his action to recover a loss is maintainable without previous compliance with its terms. Rice v. Palatine Ins. Co. 17 Pa. Super. Ct. 261.

A general agreement in a fire insurance policy for a reference to arbitrators or appraisers to be mutually chosen, to determine the amount of a loss upon which the parties differ, is revocable by the policy holder, and he may ignore it in suing on the policy to recover for a loss. Seibel v. Firemen's Ins. Co. 24 Pa. Super. Ct. 154.

The circumstance that a provision in a fire insurance policy for the arbitration of disputes subsequently arising over losses claimed, by an arbitrator or appraisers not named, but to be mutually chosen, is united to a stipulation that no suit at law or in equity shall be maintainable on the policy to recover any loss until after an award has been made, does not prevent the agreement to refer being revocable, nor any the more operate to oust the jurisdiction of the courts of an action on the policy to recover a loss. Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589.

A clause in a fire insurance policy providing for an appointment of appraisers to ascertain the amount of loss in case of disagreement is merely an agreement to refer to persons to be selected at a future time a prospective difference, and hence is revocable, and the failure of a policy holder to comply with it affords the insurer no defense to his action on the policy to recover a loss. Yost v. McKee, 179 Pa. 381, 57 Am. St. Rep. 604, 36 Atl. 317; Needy v. German-American Ins. Co. 197 Pa. 460, 47 Atl. 739. "Further consideration of this branch of 47 L.R.A. (N.S.)

the insurer's contention," said the court in Yost v. McKee, supra, "is deemed unnecessary, because the cases cited* furnish a sufficient answer to it."

There is a report in 1 W. N. C. 352, of Flaherty v. Germania Ins. Co., republished in 7 Ins. L. J. 226, in which it is stated that the policy contained the usual clause for arbitration in case any dispute should arise as to the amount of the loss, and that there was no such reference before the suit was brought; and the decision was that the arbitration clause barred a recovery at law without proving a demand for an arbitration by the insured and a refusal or neglect or an express waiver. Concerning this report the supreme court afterward said in Wright v. Susquehanna Mut. F. Ins. Co. 110 Pa. 29, 20 Atl. 716: "The condition of the policy was not given in that case, and as reported it is of very little value, . . . for the reason that we are left in considerable doubt as to what the case really was."

In Seibel v. Lebanon Mut. Ins. Co. 16 Lanc. L. Rev. 356, the court of common pleas of Lancaster county held the plaintiff could not recover for a fire loss, for two reasons: First, because he had omitted on demand to comply with the terms of the policy requiring him to exhibit his account books, bills, invoices, and other documents; and, second, because he had failed to procure an appraisal of the amount of loss under the usual arbitration clause found in fire insurance policies. Each of such requirements was construed to be a condition precedent to the maintaining of any suit or action on the policy to recover a loss.

The judgment in that case was affirmed by the supreme court in 197 Pa. 106, 46 Atl. 851, but the only ground considered there was the first. The effect of the appraisal clause upon the litigation was not discussed.

And in the case of the same policy holder against another insurer to recover a loss sustained in the same fire, where the policy contained similar provisions, this ground was deemed the only support of the judgment, and the decision respecting the effect of the arbitration or appraisal clause was the other way. See Seibel v. Firemen's Ins. Co. 24 Pa. Super. Ct. 154.

Building and construction contracts are as common as insurance policies, and have given rise to almost or quite as much litigation. They usually contain one or more clauses providing for references to third persons, often named or specifically designated, —architects, engineers, or others,—of questions coming up between the contractors and owners concerning quantities of work accomplished, qualities of workmanship and materials, amounts and values of extra work required or specified work canceled, sums payable, times of payment, etc., and they

* Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589.

usually provide that the procurement of the referees' decisions, awards, or certificates shall be prerequisites and conditions precedent to maintaining actions at law or suits in equity upon them.

The doctrines set forth supra are recognized as applying to, and frequently have been decisive of, lawsuits brought upon such contracts. *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; *Fox v. Railroad Co.* 3 Wall. Jr. 243, Fed. Cas. No. 5,010; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627; *Wegener v. Greenstine*, 114 Mich. 310, 72 N. W. 170; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Reynolds v. Caldwell*, 51 Pa. 298; *O'Reilly v. Kerns*, 52 Pa. 214; *Howard v. Allegheny Valley R. Co.* 69 Pa. 489; *Quigley v. De Haas*, 82 Pa. 267; *Hartup v. Pittsburgh*, 97 Pa. 107; *Hostetter v. Pittsburgh*, 107 Pa. 419; *Conneaut Lake Agricultural Asso. v. Pittsburgh Surety Co.* 225 Pa. 592, 74 Atl. 620; *Westwood v. Secretary of State*, 7 L. T. N. S. 736, 11 Week. Rep. 261, 1 New. Reports, 262; *Scott v. Liverpool*, 3 DeG. & J. 334, 28 L. J. Ch. N. S. 230, 5 Jur. N. S. 104, 7 Week. Rep. 153.

An agreement between a subcontractor and a contractor for the construction of a railroad section, wherein it is covenanted that the decision of the chief engineer of the road should be final and conclusive respecting the quantity of work done and its value, and that any right of action, suit, or suits, or other remedy at law is waived, is valid, and if it is not waived, or its performance prevented, is one with which the subcontractor is bound to comply fully before he can maintain an action to recover his compensation. *Reynolds v. Caldwell*, 51 Pa. 298.

If a construction contract provides that in case it shall be terminated before it is completely performed, the contractor shall be paid for the work he has done only such sum, and no more, as a person named as arbitrator shall award him, then, in the event contemplated occurring, no cause of action accrues to the contractor until the arbitrator has made him an award, and he cannot maintain an action without procuring such an award. *Scott v. Liverpool*, 3 DeG. & J. 334, 28 L. J. Ch. N. S. 230, 5 Jur. N. S. 104, 7 Week. Rep. 153.

A provision in a railroad construction contract, that any dispute or difficulty relative to the performance of the work under the contract, or respecting other work, or the value of extra work, between the contractor and engineer, shall be referred to the arbitration of two practical engineers mutually chosen, and an umpire if necessary, whose award shall be binding and conclusive, creates a condition precedent, with which the contractor is bound to comply before he can maintain an action to recover compensation for extra work, notwithstanding the silence of the contract as to any prohibition against suit or action before an arbitration. *Myers v. St. Andrews & Q. R. Co.* 10 N. B. 577.
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The court in *O'Reilly v. Kerns*, 52 Pa. 214, considered it unnecessary to cite authorities for what it deemed so well settled as that where, in a contract between a railroad or canal company and contractors, or in one between principal and subcontractors, it is agreed that, to prevent disputes, the engineer of the work shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under the contract, his decision is final and conclusive.

A statute of Idaho (Rev. Stat. § 3229) providing that every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void, was construed in *Huber v. St. Joseph's Hospital*, 11 Idaho, 631, 83 Pac. 768, to render nugatory a provision in a building contract that disagreements between contractor and owner regarding the value of work added or omitted, or respecting extensions of time, or as to amount of loss or damage to either, should be referred to three disinterested arbitrators, the decision of any two of which should be final and binding.

"We do not hold," said the court in so deciding, "that a valid contract to arbitrate could not be made, but that such stipulation cannot make the award of the arbitrators final."

When a contract stipulates, either in terms or by necessary implication, for an arbitration of a dispute arising under it as a condition precedent to the right to sue upon it, no suit may be maintained unless the plaintiff has made every reasonable effort to comply with the condition. *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513.

Agreements to arbitrate differences arising under the contracts in which they are embodied may be made conditions precedent to suits and actions upon such contracts, either by explicit language to that end, or, when not so stated, by implication of law. It is not essential to their efficiency that they be created conditions precedent in express terms. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Davison v. East Whittier Land & W. Co.* 153 Cal. 81, 98 Pac. 88; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *George Dee & Sons Co. v. Key City F. Ins. Co.* 104 Iowa, 167, 73 N. W. 594; *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037; *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

When the agreement is that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring of an award as a condition precedent to an action is clearly implied. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

If it appears from the express terms, or by necessary implication, of a stipulation in a contract to submit a question of the amount of damage or some similar fact to arbitration, that the parties intended to make such submission a condition precedent to an action on the contract, the courts will uphold and enforce the stipulation, and rule that no action can be maintained without proof that the plaintiff fulfilled the condition, or made every reasonable effort to do so. *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A. (N.S.) 1058, 71 Atl. 1037.

When two adjoining landowners agree that a party wall built by one of them shall be in part paid for by the other when he uses it, at a valuation to be determined by arbitrators, an action by the former to recover of the latter his share of the expense is premature, if brought before there have been an arbitration and award as provided for, unless they have been prevented by the action of the defendant. *Thorndike v. Wells Memorial Asso.* 146 Mass. 619, 16 N. E. 747.

A clause in a lease providing for an appraisalment at the end of the term, of the value of buildings erected by the lessee upon the leased premises during the term, and the payment by the lessor of the appraised sum as purchase price, imposes upon the lessee the duty of doing all in his power to procure the appointment of appraisers and an award from them, before he can maintain an action to recover the value of such building from the lessor. *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89.

A contract between a firm of individuals engaged in the business of towing and wrecking, and two marine insurance companies, whereby the former undertook, in consideration of the payment of a stated sum of money as compensation, to raise and float into dry dock for repairs a schooner which had sunk through a collision with a pier while they were towing it, and which the companies had insured to the owners' stipulation for a submission, on completion of the salvage, to arbitrators chosen in the customary way, of questions of responsibility for the disaster and liability for the expense of salvage and repairs, is one upon which the salvors are absolutely precluded from recovering without an arbitration and award, although a submission did not take place, through the refusal of the companies to name an arbitrator, and the acquiescence of the firm in such refusal, before suit. *Calvin v. Provincial Ins. Co.* 27 U. C. Q. B. 403.

It is necessary implication from the language of a fire insurance policy providing for an arbitration of the amount of loss or damage when the insurer and insured are unable to agree upon it, that such loss shall be payable sixty days after it has been determined by arbitration, and that it shall not be payable until the same time has elapsed after the award of the appraisers, that a submission and award, unless 47 L.R.A. (N.S.)

waived, prevented, or excused, is a condition precedent to an action on the policy to recover a loss. *George Dee & Sons Co. v. Key City F. Ins. Co.* 104 Iowa, 167, 73 N. W. 594.

An agreement to submit to arbitration a particular question of fact that may arise under a contract which makes the determination of such issue, either expressly or by necessary implication, a condition precedent to an action on the contract, gives ground for a defense in bar of such action when the plaintiff, without good excuse, has failed to arbitrate. *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

A distinction has been noted in respect of contracts providing for arbitrations or appraisals, and forbidding suits before awards, by which two classes of cases are recognized. The terms of the contracts may, on the one hand, create a condition precedent to the right to sue at all, or, on the other, simply bar a recovery. If the contract is in the former class, the courts, to a greater or less extent, are ousted of jurisdiction, and the suitor, under penalty of not stating a cause of action, is bound absolutely to plead and prove affirmatively that he met and performed the precedent condition. If the contract is in the latter class, for example, if arbitration and award are only made to follow a request, written or oral, the failure of it is a matter of defense to be pleaded and proved in order to defeat a recovery. *Concordia F. Ins. Co. v. Bowen*, 121 Ill. App. 35.

The questions to be considered where contracts containing clauses providing for submissions to arbitration are involved are whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. The questions must be determined in each case by construing the particular contract and the intention of the parties, to be collected from its language. *Collins v. Locke*. L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 293, 28 Week. Rep. 189.

A provision in a contract for the determination by arbitration of such preliminary matters as may give rise to disputes between the parties may make such determination a condition precedent to the maintenance of an action upon the contract, or it may be simply a collateral and independent agreement having no such effect. *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282; *Grady v. Home F. & M. Ins. Co.* 27 R. I. 435, 4 L.R.A. (N.S.) 288, 63 Atl. 173.

The line of demarcation in the cases wherein provisions for arbitration in insurance policies have been upheld on the one hand, or nullified on the other, according to the court in *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739, is between those in which the thing to be submitted is an undetermined fact to be ascertained as a condition precedent to an action upon a recognized legal liability,

and those where the fact is already established and the question of liability is to be submitted. In the former case the agreement to arbitrate is valid, and in the latter void.

The principle governing cases arising on insurance contracts that contain arbitration clauses is this: If there is a covenant to pay the amount of the loss, with a collateral provision that such amount shall be ascertained by arbitration, then arbitration is not a condition precedent to an action on the covenant; but if it has been agreed that a liability shall arise only after the amount has been adjusted by arbitration, then such an adjustment is a condition precedent to the right to recover. *Viney v. Bignold*, L. R. 20 Q. B. Div. 172, 57 L. J. Q. B. N. S. 82, 58 L. T. N. S. 26, 36 Week. Rep. 479.

If a liability to pay has arisen on a contract of insurance by the occurrence of a loss, no words of the parties, or of either of them, can prevent a court from giving appropriate relief. *Nolan v. Ocean Acci. & Guarantee Corp.* 5 Ont. L. Rep. 544.

If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. *Elliott v. Royal Exchange Assur. Co.* L. R. 2 Exch. 245, 36 L. J. Exch. N. S. 129, 16 L. T. N. S. 399, 15 Week. Rep. 907; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 260, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773; *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. 347.

A stipulation in an insurance policy for a reference to arbitration of differences over the amount of a loss or damage does not bar the assured of his right of action, unless it amounts to a condition precedent to suit, or makes the reference the only mode of ascertaining the amount of damages, or the only way of fixing the liability of the insurer. *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638.

When a stipulation for an arbitration follows an express promise to pay in a contract, it is collateral and independent. *Dickson Mfg. Co. v. American Locomotive Co.* 119 Fed. 488.

When a stipulation in a contract to refer any disputes to arbitration is distinct and collateral to the main engagement, it is not a condition precedent to an action on the contract. *Griggs v. Billington*, 27 U. C. Q. B. 520.

If the stipulation is clearly collateral to and independent of the other provisions in the contract, it never creates a condition precedent to an action on the contract, even when so expressed. *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 92 C. C. A. 162, 166 Fed. 398.

When a stipulation to arbitrate in a contract to pay money upon a stated contingency is collateral to such contract, that is, where the contract is not simply to pay an

award, the right of action to recover the money is not suspended pending a submission and arbitration, notwithstanding a provision coupled with it, that no suit or action shall be brought until an award has been made. *Schollenberger v. Phoenix Ins. Co.* 5 W. N. C. 366, Fed. Cas. No. 12,476.

When an insurer undertakes in the policy, upon the happening of the contingency insured against, to pay a fixed, definite, and stated sum, a provision in the contract that no suit or proceeding at law or in equity shall be brought to recover that sum, unless the same has first been referred to arbitration, is nugatory, and is no bar to an action on the policy. *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; *Whitney v. National Masonic Acci. Asso.* 52 Minn. 378, 54 N. W. 184.

An undertaking by an underwriter in a policy of fire insurance absolutely to make good to the insured all such immediate loss or damage as shall happen by fire to the insured property, to be estimated according to the actual cash value of such property at the time of the loss, and to be paid in a stated time after the receipt of the required proofs, has the effect of making a provision in the policy providing for an arbitration of the amount of a loss upon request, when not agreed upon, and forbidding the maintenance of any suit or action to recover a loss until after an award, a collateral and independent contract. *Gibbs v. Continental Ins. Co.* 13 Hun, 611.

A condition in a policy of fire insurance merely setting out that, in case any difference or dispute shall arise between the insurer and insured touching any loss or damage or otherwise in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, chosen respectively by the parties, and they in turn at the outset selecting a third arbitrator, the award of any two to be conclusive, where the policy expressly stipulates for payment of the amount of every loss without discount immediately after it shall have been established to the satisfaction of the insurer, is a mere collateral agreement to the promise to pay, and hence a failure to comply with it does not oust the courts of jurisdiction, and constitutes no defense to an action on the policy to recover a loss. *Roper v. Lendon*, 1 El. & El. 825, 28 L. J. Q. B. N. S. 260, 5 Jur. N. S. 491, 7 Week. Rep. 441.

Notwithstanding a contract embodies a provision for an arbitration of all future disputes between the parties to it, concerning it or its subject-matter, prescribes the method of choosing the arbitrators, makes their award final, and forbids either to maintain an action against the other on such contract without arbitrating the dispute, one of them may maintain an action on a plain, distinct, independent, and unqualified covenant in the contract of the other to do a particular thing. *Horton v.*

Sayer, 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 23, 7 Week. Rep. 735, distinguishing *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746.

If the clause in a fire insurance policy providing for an appraisal of the loss does not make an appraisal, either in terms or by implication, a condition precedent to an action or suit on the policy, then the policy holder need not comply with it before suing to recover insurance, especially if the insurer took no step to procure, and did not even request, an appraisal. *Manchester F. Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722.

If a construction contract provides absolutely for paying the contractor a definite price for work done, or the value of such work as measured, he may, when the contract is ended by the completion of the work, or the act of the other party, ignore a clause in it for a reference of disputes and differences to a named arbitrator, and bring his action in the ordinary courts to recover such price or value. *Scott v. Liverpool*, 3 DeG. & J. 334, 28 L. J. Ch. N. S. 236, 5 Jur. N. S. 105, 7 Week. Rep. 153.

When in a contract one party covenants without limitation to pay the other such just and fair compensation for any damage as he may sustain by the execution of the contract, and not merely such sum as arbitrators may award, a stipulation for an appraisal by impartial arbitrators is collateral and incidental, and does not constitute a condition precedent to an action to recover such damages. *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348, affirming 39 Hun, 44.

A stipulation in a contract for superintending the building and subsequent operations of two sawmills, providing that, if a disagreement arises between the contracting persons respecting the settlement of accounts for expenditures in erecting and completing the mills, or in case either shall become dissatisfied with the other, the matter in difference shall be submitted to two arbitrators and an umpire, coupled with an agreement by each party to forfeit a definite sum of money if he fails or refuses to proceed with the arbitration, is no bar to an action or suit by the party in default. *Stone v. Dennis*, 3 Port. (Ala.) 231.

When a contract provides that, in case any party to it shall break or fail to perform any of the covenants or agreements in it, he shall and will well and truly pay unto each of the other parties to such contract the definite sum of £1,000 sterling as and for liquidated damages for the breach or nonperformance, a clause in the contract providing for a submission to arbitration of disputes which might arise between the parties to it is a collateral and independent agreement, and a failure to arbitrate is no defense to an action for a breach of the contract, notwithstanding the arbitration cause provides that the award shall 47 L.R.A.(N.S.)

be conclusive, and that none of the parties shall be entitled to begin or maintain any action or suit in respect of matters submitted to the arbitrators, except for the amount or sums awarded, or otherwise in accord with the terms and conditions of the award as to acts or deeds to be done or executed. *Collins v. Locke*, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 293, 28 Week. Rep. 189.

An agreement to pay a stated sum of money for building a house according to certain specifications, any disagreement with regard to settlement to be left to disinterested persons mutually selected, whose decision shall be final, does not constitute a legal defense to the contractor's action to recover such sum after completing the work. *Cavanagh v. Dooley*, 6 Allen, 66.

"I take the law as settled by the highest authority,—the House of Lords," said Jessel, M. R., in giving judgment in *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773, against the efficacy of a plea of no arbitration where one had been agreed to, that "there are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under § 11 of the common-law procedure act 1854, to stay the action till there has been an arbitration, in which case a judge has power to prevent the case going to a jury, if the arbitration can be fairly enforced."

This statement has won the approval of the Supreme Court of the United States. *Hamilton v. Home Ins. Co.* 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. Rep. 133.

The distinctions which sometimes are drawn between "arbitration" and "appraisal" and between "disagreement" and "differences," in litigations over the recovery of losses upon fire insurance policies, are not very material to an inquiry as to whether an award or appraisal was a condition precedent to an action in a given case. *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805.

If an agreement to arbitrate contained in a contract is not void as contrary to the policy of the law as an attempt to oust the courts of jurisdiction, or to prohibit the parties from bringing suit, the whole doctrine respecting it, according to the court in *White v. Middlesex R. Co.* 135 Mass. 216, amounts to this, that courts will not specifically enforce the agreement, but will treat it as valid either as a condition precedent or an independent stipula-

tion, according to the construction given to the contract.

It seems, said the court in *White v. Middlesex R. Co.* supra, to be the doctrine of the English courts that agreements prohibiting a party from bringing an action, or purporting to oust the courts entirely of their jurisdiction, are void; that in contracts in which it is a condition precedent to the right to maintain an action that there shall first be a reference and an award, no action can be maintained until this condition has been complied with, unless, indeed, it becomes impossible to comply with it; but if the stipulation to refer to arbitration is collateral to the other stipulations of the contract, an action can be maintained upon the contract without a reference.

XVII. The Pennsylvania doctrine.

It is the rule in Pennsylvania that when the persons making an executory contract stipulate in it that all disputes and differences between them, present or prospective, in reference to such contract or any sum payable under it, shall be submitted to the arbitrament of a named individual, or specifically designated persons, they are effectually bound irrevocably by that stipulation, and precluded from seeking redress elsewhere until the arbiter or arbiters agreed upon have rendered an award or otherwise been discharged. *Snodgrass v. Gavit*, 28 Pa. 221; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; *Page v. Vankirk*, 1 Brewst. (Pa.) 282; *Kreilich v. Klein*, 10 Phila. 486; *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569; *Acme Coal Co. v. Stroud*, 5 Lack Leg. News, 169; *Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co.* 9 North. Cb. Rep. 25.

If parties in their contract name a person to settle disputes that may arise out of it, the courts as a rule will sustain the agreement, because in such cases there is an actual submission to a chosen arbitrator. *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569.

Inasmuch as a stipulation in a building contract providing that all matters in dispute arising in the course of performing it shall be referred to a designated arbitrator whose decision shall be final is not revocable, the arbitrator, after making an award not coextensive with the submission, may reopen the case, hear the parties further, and make a final and complete award that will be binding upon the parties. *Frederick v. Margwarth*, 221 Pa. 418, 18 L.R.A.(N.S.) 1246, 70 Atl. 797.

But it is also an established rule in Pennsylvania that an executory agreement or a provision in an executory contract not supported by a good and valuable consideration beyond mere mutual covenants to abide by an award for submitting a controversy to a person or set of persons unnamed and not specifically designated, but left to be selected in the future by the mutual choice and assent of the parties, has no binding 47 L.R.A.(N.S.)

force, and may be revoked or ignored at will by either party; and, if litigation ensues over the subject-matter without an arbitration having taken place, will be disregarded by the courts and not allowed to impede or defeat the suit. *Snodgrass v. Gavit*, 28 Pa. 221; *Page v. Vankirk*, 1 Brewst. (Pa.) 282; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; *Johnson v. Address*, 5 Phila. 8; *Kreilich v. Klein*, 10 Phila. 486; *Phoenix Pottery Co. v. Griffin*, 16 Phila. 569; *McQuaide v. Pennsylvania R. Co.* 6 Pa. Dist. 391.

A covenant in a deed by a landowner to a railroad company of a strip of land for a right of way, wherein the grantee promised to pay the grantor such reasonable damages as a jury of three disinterested persons should award, being a mere agreement to submit to arbitrators selected in the future, and not named, is revocable and leaves the grantor free to resort to the courts to recover his damages; and particularly so after he has offered, and the railroad company has refused to make, the reference. *McQuaide v. Pennsylvania R. Co.* 6 Pa. Dist. R. 391.

That is to say, in Pennsylvania, the courts make a distinction between agreements for a general reference to arbitration, and designating a particular individual or tribunal to arbitrate. The former may be waived or revoked, and is no obstacle to a suit or action for the same matter; the latter is irrevocable, and until the designated arbiter or arbiters have decided, no right of action arises which can be enforced at law or in equity. *Page v. Vankirk*, 1 Brewst. (Pa.) 282; *Kreilich v. Klein*, 10 Phila. 486.

There is some support to the Pennsylvania doctrine of the binding and irrevocable character of arbitration agreements which name an arbitrator or arbitrators.

In *Brown v. Overbury*, 11 Exch. N. S. 715, 25 L. J. Exch. N. S. 169, 4 Week. Rep. 252, and in *Gorham v. Boulton*, 6 U. C. Q. B. O. S. 321, suits against stakeholders by owners of horses finishing first in horse races, to recover the stakes, failed where, in the one case, the stewards have evenly divided as to the winning horse, and in the other they disqualified for foul riding the animal first under the wire.

In a note to the report of the first of these cases the reporter said: The distinction seems to be between a stipulation that a decision or certificate by arbitrators or others named or designated by the parties shall be a condition precedent to the right of action, and a condition that existing or future rights of action shall be submitted to arbitration, and not to the regularly constituted tribunals; the former being valid, the latter void.

The Wisconsin supreme court in *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422, declared itself unable to see any substantial ground for the distinction made in Pennsylvania respecting the binding obligation or revoca-

bility of provisions in contracts for arbitration of controversies that might arise under them where, on the one hand, a person or persons were named in the contract to arbitrate, and, on the other, where the arbiter or arbiters were not named, but were to be thereafter mutually chosen by the parties.

The Pennsylvania doctrine respecting the revocability and ineffectiveness of general submissions to unnamed arbitrators (at least, in so far as they are not made conditions precedent to suit), is not usually questioned.

In *Campbell v. American Popular L. Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591, the court thought it could not be denied that a mere agreement that any future differences growing out of a contract should be decided by arbitrators or referees thereafter to be chosen will not be allowed by the courts to oust their jurisdiction.

It has been repeatedly held, according to the court in *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278, that a stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or to a particular tribunal, but to one or more persons, to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject-matter of the controversy.

In jurisdictions outside of Pennsylvania, when a distinction is made between agreements to arbitrate that are revocable at will and no bars to actions, and those which are binding contracts, enforced in the courts, it is made to depend upon whether or not they stipulated for an award as a condition precedent to any suit or action, and not at all upon the circumstance that an arbitrator or arbitrators were named or left to be chosen later.

It seems to be conceded that the Pennsylvania courts are not in harmony with the weight of authority in holding that stipulations in contracts made conditions precedent to suit, for submitting to unnamed and undesignated arbitrators, to be mutually chosen in the future, questions arising out of the contract upon which the parties to it shall differ, may be ignored by either of them without affecting his right of action or subsequent proceedings in the court. *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News, 169.

In Scotland, as in Pennsylvania, it is a rule of law that an agreement to refer to arbitration which does not name or specifically designate an arbitrator or referees is of no binding force, and will not be recognized in the courts. *Tancred v. Steel Co.* L. R. 15 App. Cas. 125, 62 L. T. N. S. 738.

In that case the rule was applied to a provision in a Scottish contract to supply all, save a stated quantity and kind of the steel needed to build a bridge across the Frith of Forth, to the effect that any question that might arise as to the meaning

or intent of the contract should be settled, in case of difference, by the engineer for the time being, whose decision should bind both parties.

This rule of Scotch law is held by the British House of Lords as not governing in cases where the contracts make arbitrations conditions precedent to the accrual of causes of action founded in such contracts. *Caledonian Ins. Co. v. Gilmour* [1893] A. C. 85, 1 Reports, 110, 57 J. P. 228, reversing, 18 Sc. Sess. Cas. 4th series, 1219.

An agreement between an English firm and a Scotch partnership for delivery by the former to the latter of a patented machine for drying distillery grains, and for the packing and shipment f. o. b. by the latter to the former of dried grains, which concludes with a provision that any dispute that shall arise out of the contract shall be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way, is governed by the law of England, where the arbitration provision is valid and binding, and bars a suit, and not by Scotch law, which makes it nugatory for not naming the arbiters. *Hamlyn v. Talisker Distillery* [1894] A. C. 202, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540, reversing, 21 Sc. Sess. Cas. 4th series, 204.

The court in *Mitchell v. Dougherty*, 33 C. C. A. 205, 62 U. S. App. 443, 90 Fed. 639, thought it would be difficult to deduce from the decisions in Pennsylvania any distinctly established rule upon the subject of the binding effect of stipulations in contracts waiving or holding in abeyance suits and actions at law upon disputes arising in executing the contract until determined by some selected arbiter or arbiters.

XVIII. Rescission of arbitration agreements.

a. General right of revocation.

Every naked authority, until an act is done under it, may be countermanded by him who conferred it. *Tyson v. Robinson*, 25 N. C. (3 Ired. L.) 333.

All authority is in its nature revocable. *Rochester v. Whitehouse*, 15 N. H. 468.

All submissions to arbitration fall within this rule. *Rogers v. Nall*, 6 Humph. 29.

For a submission to arbitration is a mere authority. *Smith v. Compton*, 20 Barb. 262.

It is therefore revocable in its nature. *King v. Howard*, 27 Mo. 21.

The power of arbitrators is, like a power of attorney, a mere authority, and hence revocable. *Dixon v. Morehead, Addison*, (Pa.) 216.

Some of the cases, according to the court in *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696, put the rule allowing either party to revoke a common-law agreement to arbitrate a dispute upon the ground that a contract whereby the courts may be ousted of jurisdiction is repugnant to the provision implied in every contract that it

validity and effect shall be determined by the courts and the law of the land; but whether predicated on this idea or on the notion that such an agreement is opposed to public policy, the principle is universally recognized that such general submissions are revocable.

An ordinary common-law submission to arbitration, voluntarily entered into, and not made a rule of court, may be revoked and annulled by either party to it at his own will and pleasure at any time before an award is made.

Eng.—Vynior's Case, 8 Coke, 81b, 3 Eng. Rul. Cas. 357; Clapham v. Higham, 1 Bing. 87, 7 J. B. Moore, 703, 1 L. J. C. P. 5; Green v. Pole, 6 Bing. 443, 4 Moore & P. 198, 8 L. J. C. P. 149, 31 Revised Rep. 463; Mills v. Bayley, 2 Hurlst & C. 36, 32 L. J. Exch. N. S. 179, 9 Jur. N. S. 499, 8 L. T. N. S. 392, 11 Week. Rep. 598; Greenwood v. Misdale, 1 M'Clel. & Y. 276; King v. Joseph, 5 Taunt. 452; Fraser v. Ehrenspurger, L. R. 12 Q. B. Div. 310, 53 L. J. Q. B. N. S. 73, 49 L. T. N. S. 646, 32 Week. Rep. 240; Reg. v. Hardey, 19 L. J. Q. B. N. S. 196, 14 Q. B. 529, 14 Jur. 649.

U. S.—Oregon & W. Mortg. Sav. Bank v. American Mortg. Co. 35 Fed. 22; Grievance Committee v. Brown, 61 Fed. 541; Memphis Trust Co. v. Brown-Ketchum Iron Works, 92 C. C. A. 162, 166 Fed. 398.

Ala.—Mason v. Bullock, 6 Ala. App. 141, 60 So. 432.

Cal.—Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932; California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855.

Del.—Randel v. Chesapeake & D. Canal Co. 1 Harr. (Del.) 233; Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Ga.—Leonard v. House, 15 Ga. 473; Davis v. Maxwell, 27 Ga. 368; Cherry v. Smith, 51 Ga. 558; Parsons v. Ambros, 121 Ga. 98, 48 S. E. 696; Harrell v. Terrell, 125 Ga. 379, 54 S. E. 116.

Ill.—Frink v. Ryan, 4 Ill. 322; Paulsen v. Manake, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; Crilly v. Philip Rinn Co. 135 Ill. App. 198.

Ind.—Shroyer v. Bash, 57 Ind. 349; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114.

Iowa.—Harrison v. Hartford F. Ins. Co. 112 Iowa, 77, 83 N. W. 820.

Ky.—Peters v. Craig, 6 Dana, 307.

Me.—Brown v. Leavitt, 26 Me. 251; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; Dunton v. Westchester F. Ins. Co. 104 Me. 372, 20 L.R.A. (N.S.) 1059, 71 Atl. 1037.

Mass.—Boston & L. R. Corp. v. Nashua & L. R. Corp. 139 Mass. 463, 31 N. E. 751.

Mich.—Nurney v. Fireman's Fund Ins. Co. 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465.

Minn.—Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259; Minneapolis & St. L. R. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.

Miss.—Jones v. Harris, 59 Miss. 214.

Mo.—King v. Howard, 27 Mo. 21; Donnell v. Lee, 58 Mo. App. 288.
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Neb.—Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 53 Am. St. Rep. 521, 68 N. W. 278; Butler v. Greene, 49 Neb. 280, 68 N. W. 496.

N. H.—Hunt v. Wilson, 6 N. H. 36; Varney v. Brewster, 14 N. H. 49; Rochester v. Whitehouse, 15 N. H. 468; Wright v. Cobleigh, 21 N. H. 339; Dexter v. Young, 40 N. H. 130; Dinsmore v. Hanson, 48 N. H. 413; Franklin v. New Hampshire F. Ins. Co. 70 N. H. 251, 47 Atl. 91.

N. J.—State, Knaus, Prosecutor, v. Jenkins, 40 N. J. L. 238, 29 Am. Rep. 237.

N. Y.—Allen v. Watson, 16 Johns. 205; Frets v. Frets, 1 Cow. 335; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Greason v. Keteltas, 17 N. Y. 491; Wood v. Lafayette, 46 N. Y. 484; People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630; Thomas W. Finucane Co. v. Board of Education, 190 N. Y. 76, 82 N. E. 737; Smith v. Compton, 20 Barb. 262; Morton v. Cameron, 3 Robt. 189; Pizzini v. Hutchins, 70 Misc. 94, 127 N. Y. Supp. 1043.

N. C.—Tyson v. Robinson, 25 N. C. (3 Ired. L.) 333; Williams v. Branning Mfg. Co. 153 N. C. 7, 31 L.R.A. (N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

Ohio.—Western Female Seminary v. Blair, 1 Disney (Ohio) 370; State v. Jackson, 36 Ohio St. 281; Tilden v. Bernard, 12 Ohio C. C. N. S. 193, 31 Ohio C. C. 255.

Or.—Ball v. Doud, 26 Or. 14, 37 Pac. 70. Pa.—Dixon v. Morehead, Addison (Pa.) 210; Gray v. Wilson, 4 Watts, 39; Power v. Power, 7 Watts, 205; McGheehan v. Duffield, 5 Pa. 497; Wilson v. Young, 9 Pa. 101; Coleman v. Grubb, 23 Pa. 393; Paist v. Caldwell, 75 Pa. 161; Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80; McKenna v. Lyle, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777; Yost v. McKee, 179 Pa. 381, 57 Am. St. Rep. 604, 36 Atl. 317; Wood v. Finn, 1 Clark (Pa.) 396; Johnson v. Andreas, 5 Phila. 8; Farel v. Roberts, 11 Pa. Co. Ct. 58; Everhart v. Flynn, 6 Pa. Dist. R. 131; McQuaide v. Pennsylvania R. Co. 6 Pa. Dist. R. 391; Horne v. Welsh, 35 Pa. Super. Ct. 569; Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co. 9 North. Co. Rep. 25.

R. I.—Sherman v. Cobb, 15 R. I. 570, 10 Atl. 591; Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387.

S. C.—Jones v. Enoree Power Co. 92 S. C. 263, 75 S. E. 452.

S. D.—Friedrich v. Fergen, 15 S. D. 541, 91 N. W. 328.

Tenn.—Rogers v. Nall, 6 Humph. 29; Key v. Norrod, 124 Tenn. 146, 136 S. W. 991.

Tex.—Saengerbund v. Dunn, 41 Tex. Civ. App. 376, 92 S. W. 429.

Vt.—Hathaway v. Strong, 2 Tyler (Vt.) 105; Aspinwall v. Tousey, 2 Tyler (Vt.) 328; Marsh v. Packer, 20 Vt. 198; Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; Mead v. Owen, 83 Vt. 132, 74 Atl. 1058.

Va.—Long v. Long, 5 Call (Va.) 431; Rison v. Moon, 91 Va. 384, 22 S. E. 165.

Wash.—McCann v. Alaska Lumber Co. 71 Wash. 331, 43 L.R.A. (N.S.) 711, 128 Pac. 663.

W. Va.—Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924.

Can.—Ruthven v. Rossin, 8 Grant, Ch. (U. C.) 370.

Of this doctrine there is said to be no doubt. Hunt v. Wilson, 6 N. H. 36; State, Knaus, Prosecutor, v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237.

That it is beyond doubt or question. McGhehen v. Duffield, 5 Pa. 497.

It is declared to be well settled and universally recognized. Jones v. Harris, 59 Miss. 214.

To have been recognized from the earliest times. Horne v. Welsh, 35 Pa. Super. Ct. 569.

To be too well established and recognized by early and late English cases and by the statutes and decisions in New York to admit of dispute. People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

The authorities which sustain the doctrine are said to be so familiar that no discussion of it is necessary. McKenna v. Lyle, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777.

An agreement of submission, said the court in People ex rel. Union Ins. Co. v. Nash, supra, is executory until the controversy is completely ended, . . . and not till then can it be said that it has been executed and passed beyond the power of the parties to withdraw from or break.

Until the ultimate stage of an agreement to arbitrate has been reached, every article of the agreement which relates to the future conduct of the parties lies in the region of promise, said the court in People ex rel. Union Ins. Co. v. Nash, supra, and that promises can be and are broken, regardless of their weight or the consequences, is as proverbial as it is certain.

A court has no power to take away the right of a party to revoke a submission to arbitration. People ex rel. Union Ins. Co. v. Nash, 13 N. Y. Civ. Proc. Rep. 301.

No particular form of words is required to revoke a submission to arbitration, provided the intention to do so is made clear. Call v. Hagar, 69 Me. 521.

To be effectual the revocation must be unequivocal. Bishop v. Valley Falls Mfg. Co. 78 S. C. 312, 58 S. E. 939.

If one attempts expressly to revoke his submission to arbitration, he can only effectuate his purpose by making his revocation explicit and unconditional. A declaration that he will not submit to the award unless certain evidence is received does not constitute a revocation. Goodwine v. Miller, 32 Ind. 419.

The revocation of a submission to arbitration when not implied by law must be express to be effective, and to be complete must be followed by notice to the arbitra-

tors before they make an award. Williams v. Branning Mfg. Co. 153 N. C. 7, 31 L.R.A. (N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

A party who has informally revoked his submission to arbitration is powerless to disclaim and recall it after the other party has acquiesced and the arbitrator has refused to proceed. Hawley v. Hosage, 7 Vt. 237.

But a revocation is waived and annulled when the revoking party afterwards appears and participates in the proceedings before the arbitrators. Seely v. Pelton, 63 Ill. 101.

One of two parties on one side of an arbitration cannot revoke the submission alone without his colleague's consent and co-operation. Robertson v. M'Niel, 12 Wend. 578.

Unlike a mere agreement to submit existing or expected controversies to an arbitration, a contract between partners, on dissolving their partnership, that as soon as an accurate inventory, satisfactory to certain persons named as referees can be prepared, one partner shall convey to the other all his interest in the property, effects, and business of the firm, and the grantee shall assume and pay the firm debts, while each partner shall pay the other such sum as the referees, or a majority of them, shall require him to pay, is, after the satisfactory inventory and the prescribed conveyance have been made, the payment of the partnership liabilities assumed, and the arbitrators have heard all the evidence and arguments of both parties, and met to consult over the award, irrevocable. Halley v. Bellamy, 137 Mass. 357.

b. When stipulated to be irrevocable.

Back in the days of Lord Coke it was judicially proclaimed that "a man cannot by his act make such authority, power, or warrant not countermandable which is by the law and of its own nature countermandable." Vynior's Case, 8 Coke, 81b, 3 Eng. Rul. Cas. 357.

Often since then it has been held that one's power to revoke his voluntary common-law submission to an arbitration persists in unimpaired potency notwithstanding he may have expressly promised not to revoke the submission, and explicitly stipulated that it should be irrevocable. People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114; Jones v. Harris, 59 Miss. 214; Power v. Power, 7 Watts, 205; Bingham v. Guthrie, 19 Pa. 418; Erie v. Tracy, 2 Grant, Cas. 20; Nicholas v. Carr. 6 Luzerne Leg. Reg. 204; Friedrich v. Fergen, 15 S. D. 541, 91 N. W. 328; Aspinwall v. Tousey, 2 Tyler (Vt.) 328; Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11.

A provision in an agreement to arbitrate that the arbitrators may proceed *ex parte* if either party neglects to appear

does not make the submission irrevocable. *Boston & L. R. Corp. v. Nashua & L. R. Corp.* 139 Mass. 463, 31 N. E. 751.

A stipulation that an award shall be final and conclusive is no bar against reviewing it in court. *Horton v. Stanley*, 1 Miles (Pa.) 418.

c. Submissions made rules of court.

The only way to prevent a party who has submitted to an arbitration from revoking the arbitrator's authority after a hearing and before an award is by making the submission a rule of court. *Green v. Pole*, 6 Bing. 443, 4 Moore & P. 198, 8 L. J. C. P. 149, 31 Revised Rep. 463.

For a submission to arbitration, made a rule of court, is irrevocable without leave of the court. *Aston v. George*, 1 Chitty, 204, 2 Barn. & Ald. 395, 22 Revised Rep. 803; *Masterson v. Kidwell*, 2 Cranch, C. C. 669, Fed. Cas. No. 9,269; *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855; *Bray v. English*, 1 Conn. 498; *Cumberland v. North Yarmouth*, 4 Me. 459; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Phillips v. Shipley*, 1 Bland. Ch. 516; *Haskell v. Whitney*, 12 Mass. 47; *Dexter v. Young*, 40 N. H. 130; *Bickham v. Denny*, 1 N. J. L. 12; *Ferris v. Munn*, 22 N. J. L. 161; *Ivins v. Ivins*, 77 N. J. L. 368, 72 Atl. 94; *Tyson v. Robinson*, 25 N. C. (3 Ired. L.) 333; *White's Appeal*, 108 Pa. 473; *Zehner v. Lehigh Coal & Nav. Co.* 187 Pa. 487, 67 Am. St. Rep. 586, 41 Atl. 464; *Johnson v. Crawford*, 212 Pa. 502, 61 Atl. 1103; *White v. Davis*, 14 W. N. C. 59; *Grimm v. Sarmiento*, 2 Pa. Co. Ct. 484; *McCann v. Alaska Lumber Co.* 71 Wash. 331, 43 L.R.A. (N.S.) 711, 128 Pac. 663; *Riley v. Jarvis*, 43 W. Va. 43, 28 S. E. 366.

The submission certainly cannot be revoked after the arbitrators have met and begun the hearings. *Bickham v. Denny*, 1 N. J. L. 12.

But a submission agreed to be, but not actually, made a rule of court, may be revoked by either party to it any time prior to an award. *Huston v. Clark*, 12 Phila. 383.

Such a submission is revocable before the rule of court is made, but not afterwards. *Milne v. Gratrix*, 7 East, 608.

To be effective a revocation of a submission to arbitration must take place before the submission is made a rule of court; and in any event before an award is published. If either of these occurrences precedes the revocation, it is futile. *Ivins v. Ivins*, 77 N. J. L. 368, 72 Atl. 94.

The revocation of a submission to arbitration before it is made a rule of court is effectual to end it. *Clapham v. Higham*, 1 Bing. 87, 7 J. B. Moore, 403, 1 L. J. C. P. 5.

For a submission not made a rule of court, and until it is made a rule of court, is a mere authority and in its nature revocable. *Frets v. Frets*, 1 Cow. 335; *Frink v. Ryan*, 4 Ill. 322.

An agreement by the parties in several 47 L.R.A. (N.S.)

suits in equity to refer the controversies involved in all, and all incidental collateral questions, to the determination of three persons whose reports should be binding, without exception or appeal, ratified by the court in which the litigations were pending, cannot be revoked by one party without consent of the others. *Lewis's Appeal*, 91 Pa. 359; *McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190.

An agreement by the parties to a suit in equity, after issue joined, and pending a reference to an examiner, to submit the controversy to arbitration for final decision, where the court, upon their request, vacated the appointment of the examiner, is irrevocable. *White's Appeal*, 108 Pa. 473.

The mere fact, however, that a controversy is the subject of a pending action when the parties to it agree to submit it to an arbitration does not make it a submission by rule of court. *Minneapolis & St. L. R. Co. v. Cooper*, 59 Minn. 290, 61 N. W. 143.

In *O'Sullivan v. Hutchins*, cited in *Bignold v. Springfield*, 7 Clark & F. 85, differences had arisen between the litigants concerning an agreement for a demise of land, and they consented to refer them to arbitration. The submission was made a rule of the Irish court of chancery, pursuant to an act of the Irish Parliament (10 Wm. III. chap. 14). One of the parties attempted to revoke the submission, and wrote the arbitrator, withdrawing his authority, but the latter disregarded the notice and went on and made an award, which the Lord Chancellor refused to set aside, declaring that a submission made a rule of court could not be revoked by one of the parties. An appeal to the House of Lords was taken, but dismissed for want of jurisdiction.

From a reference by consent and request of both parties to a pending litigation ordered by the court under the Civil Procedure Code of Ceylon (§§ 676-691), for the determination of all matters in controversy in the suit, neither party has a right to withdraw and revoke the authority of the arbitrator, and the latter may proceed with the hearing and make a binding award. *Aitken v. Fernando*, 88 L. T. N. S. 179, 72 L. J. P. C. N. S. 63, [1903] R. C. 200, 19 Times L. R. 295.

The court of chancery is lacking in jurisdiction to enjoin the enforcement of an award by arbitrators not accused of corruption under a submission pursuant to the statute of 9 & 10 Wm. III. chap. 15, stipulated to be made a rule of court of the court of King's bench or other court of record, and whereby the parties covenanted to bring no action or suit in law or in equity to impeach the award. *Nichols v. Roe*, 3 Myl. & K. 431.

I lay out of my consideration, said Lord Eldon, in deciding *Harcourt v. Ramsbottom*, 1 Jac. & W. 505, what has been said about this submission having been made a rule of court. . . . If there has been such a rule, this court will say I will not

enter into the consideration whether you can revoke the authority or not, because if you have attempted to do so, you cannot do it without a contempt of court, and for the purposes of the present motion it is enough to say that if you have been guilty of a contempt, you cannot come here for relief; if you had submitted to the rule, I don't know whether you could have been compelled to perform the award, but you cannot come here to complain when, contrary to your engagement with the court, you have thought proper to violate the rule.

In *Hide v. Petit*, 1 Ch. Cas. 185, 2 Freem. Ch. 133, decided in 1670, and on the authority of *Norton v. Rowland*, July 8, 1664, cited in 1 Ch. Cas. 185, the judges were of the opinion that there could be no submission to an award in law or equity but what was revocable, and that nothing under a legislative power could make such a submission irrevocable which in its nature was revocable. But when a submission had been made by consent and an order of the court, it was in the quaint language of the time "an abuse to the court . . . to revoke it, for which the court might justly lay the party by the heels," and so in the cause an attachment against the revoking party was ordered.

Sir John Leach, V. C., expressed the opinion in *Haggett v. Welsh*, 1 Sim. 134, that a reference to arbitration under a rule of court might be revoked before an award was made, but that it was a high contempt of court to revoke it.

And it has been held in Georgia that an agreement to arbitrate the subject-matter of a pending litigation, if not a statutory one, is revocable even when ratified by an order of court. *Cherry v. Smith*, 51 Ga. 558.

If a submission made an order of court definitely limits the time within which the arbitrators must make their award, a continuation thereafter of the arbitration proceedings by consent of the parties becomes, in legal effect, a mere parol common-law submission, revocable by either party at will any time before an award is made. It is therefore no contempt of court for one without leave to revoke a submission under a rule of court after the expiration of time limited by the rule for the award to be made, notwithstanding his consent to go on with the arbitration, not, in such circumstances, can the revoking litigant be stayed from proceeding in the courts. *Ruthven v. Rossin*, 8 Grant, Ch. (U. C.) 370.

An arbitration made a rule of court may be revoked by leave of the court, which may be granted in a proper case and for reasonable cause, as, for example, where the arbitrator erroneously receives incompetent evidence, and is plainly going wrong in point of law. *East & West India Dock Co. v. Kirk*, L. R. 12 App. Cas. 738, 57 L. J. Q. B. N. S. 295, 58 L. J. N. S. 158.

A railway company which has taken possession of land for a right of way without the owner's consent, and then entered with him into an agreement submitting to arbitration the question of the amount of com-

pensation to be paid him for the land taken, should not, after the submission has been made a rule of court, be allowed to revoke the submission under the statute of William IV. (7 Wm. IV. chap. 3 § 29), on the simple contention that a sum larger than the company was willing to pay was likely to be awarded. *Great Western R. Co. v. Miller*, 12 U. C. Q. B. 654.

Where, under the bill of particulars in an action on the common counts for construction and repair work on roads, by a contractor, against a municipal corporation, no claim for damages is recoverable, and is waived in the case, the defendant will not be allowed to revoke a submission to arbitration ordered by the court, "subject to such points of law as shall properly arise on the pleadings and evidence," on the ground that the arbitrators were hearing and considering claims for damages. *Ross v. Bruce*, 21 U. C. C. P. 41.

d. Submissions of preliminary and collateral questions.

References in contracts to third persons to decide mere questions of value, price, amounts payable, damage, loss, quantity or quality, as prerequisites to lawsuits, are generally esteemed to be irrevocable, for the reason that they are not submissions to arbitration in the usual sense, and are considered valid and binding engagements. *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Palmer v. Clark*, 106 Mass. 373; *Butler v. Tucker*, 24 Wend. 447; *Atterbury v. Columbia College*, 66 Misc. 273, 123 N. Y. Supp. 25; *Ball v. Doud*, 26 Or. 14, 37 Pac. 70; *Abbot v. Shepherd*, 4 Phila. 90; *Flint v. Pearce*, 11 R. I. 576; *Jones v. Enoree Power Co.* 92 S. C. 283, 75 S. E. 452; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422.

An attempt to revoke the authority of a person designated to make an appraisal or valuation merely of an amount of damage, who is not expected or called upon to adjudicate any controversy, is wholly ineffectual. *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630, 3 C. L. R. 409, 24 L. J. C. P. N. S. 60, 1 Jur. N. S. 211, 3 Week. Rep. 179.

Neither party, without the consent of the other, may revoke the appointment of one designated in a contract between them to measure and certify the work which one of them has engaged to do for the other. *Mills v. Bayley*, 2 Hurlst & C. 36, 32 L. J. Exch. N. S. 179, 9 Jur. N. S. 499, 8 L. T. N. S. 392, 11 Week. Rep. 598.

When parties designate an umpire and agree to abide his decision, neither, without the other's consent, can withdraw the question of performance of a condition precedent from the common arbitrator in order to refer it to the decision of a jury. *Butler v. Tucker*, 24 Wend. 447.

While one may at will withdraw from his agreement to submit all matters of dispute to arbitration, he is bound by an agreement to submit a particular question to the judg-

ment of a third person, for the purpose of ascertaining some particular fact. *Ball v. Doud*, 26 Or. 14, 37 Pac. 70.

A valid agreement to arbitrate a particular preliminary or subsidiary issue, made by the parties a condition precedent to the right of action, is not revocable. *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

A few decisions are found to the contrary, rendered in cases where the parties had not expressly stipulated to refer as a condition precedent, or where the provision to refer was collateral and incidental to a positive obligation in the contract.

It was said, for instance, in *Morton v. Cameron*, 3 Robt. 189, that provisions in contracts for the appraisal of damages, or ascertaining values, are revocable by either party before they are executed, and except where, as in this case, there is an express promise to pay are not conclusive. In that there had been an award which was void, and the parties, lessor and lessee, had come into court.

Again, it was held in a case in Pennsylvania, that an agreement in a contract for the submission to arbitrators mutually to be chosen by the parties, of any certain question which may arise between them and grow out of the contract, is revocable, and does not oust the courts of jurisdiction to consider and decide such question. *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News, 169.

But that decision was an application of the doctrine prevailing in Pennsylvania alone of the states in the American Union, which holds nugatory all executory agreements without a valuable consideration, to submit controversies to unnamed persons to be selected in the future.

In New Hampshire, however, in a case where a debtor and his creditor had agreed to give and take in payment of the debt certain property at a valuation to be appraised by third persons named mutually, and the creditor revoked the appointment, it was held that although a contract referring to third persons the determination of the value of property is not technically a submission to arbitration, because there is no dispute or question of right between the parties, it is like unto a submission, in that the authority of the appraisers to act may at any time before they complete their appraisal be revoked by either party. *Rochester v. Whitehouse*, 15 N. H. 468. This agreement did not undertake to make the decision of the appraisers a condition precedent to litigation.

Although a covenant in a lease providing for a renewal of the term at such price or rate of rent as such two or three judicious persons as shall be agreed upon by the lessor and lessee shall judge and determine may, under the authority of *Flint v. Pearce*, 11 R. I. 576, be regarded as irrevocable, yet an agreement departing from the terms of the covenant in an important and material respect, submitting the question of rent for the renewed term to arbitration, must be regarded as a submission under a new and independent agreement, and not under 47 L.R.A. (N.S.)

the covenant, and therefore as revocable by either party at any time prior to an award. *Sherman v. Cobb*, 15 R. I. 570, 10 Atl. 591.

An agreement in a fire insurance policy for an appraisal or arbitration to determine an amount of a loss over which the parties differ is probably as revocable as other submissions are; but when a decision or award fixing the amount of the loss is expressly made a condition precedent to maintaining suit on the policy, the revocation is useless, because the condition remains after it as before. *Grady v. Home F. & M. Ins. Co.* 27 R. I. 435, 4 L.R.A. (N.S.) 288, 63 Atl. 173.

c. Revocability as affected by statute.

As a general rule, neither party to a submission under a statute regulating arbitrations is at liberty to revoke against the will of the other party and without the permission of a court. *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855; *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715, 49 Atl. 198; *Poppers v. Knight*, 69 Ill. App. 578; *Shroyer v. Bash*, 57 Ind. 349; *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114; *Holdridge v. Stowell*, 39 Minn. 360, 40 N. W. 259; *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370; *Carey v. Montgomery County*, 19 Ohio, 245; *Montgomery County v. Carey*, 1 Ohio St. 463; *Stiringer v. Toy*, 33 W. Va. 86, 10 S. E. 26; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

In West Virginia the statute (Code, chap. 108) making arbitrations irrevocable operates to prevent the revocation by consent of an arbitration of a controversy in litigation in a justice's court without the consent of the justice. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

The legislation in New York has not taken away altogether the common-law right to revoke submissions to arbitrations by the statutory regulations, but it has slightly curtailed that right. After all the hearings have been had, all the proofs presented, and all the arguments made, and the case is finally submitted to the arbitrators for their decision, it is too late to revoke the submission in New York. *Bank of Monroe v. Widner*, 11 Paige, 529, 43 Am. Dec. 768; *Heath v. Gold Exch.* 38 How. Pr. 170, 7 Abb. Pr. N. S. 256; *People ex rel. Union Ins. Co. v. Nash*, 13 N. Y. Civ. Proc. Rep. 301; *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737; *Re Gitt*, 140 App. Div. 382, 125 N. Y. Supp. 369; *Atterbury v. Columbia College*, 66 Misc. 273, 123 N. Y. Supp. 25.

A foreign statute making an arbitration not revocable without leave of court is, as applied to a contract and submission made in the state where the statute is in force, not to be regarded as contrary to public policy in the state of New York. *Pizzini v. Hutchins*, 70 Misc. 94, 127 N. Y. Supp. 1043.

In Pennsylvania the legislation in this respect appears to have been similar, and

much the same rule prevails as in New York. *Oxley v. Oldden*, 1 Dall. 430, 1 L. ed. 209; *Withers v. Haines*, 2 Pa. St. 435; *Horn v. Roberts*, 1 Ashm. (Pa.) 45.

It is too late to withdraw from a statutory arbitration in Pennsylvania and revoke the authority of the arbitrators after they have agreed upon their award, although not reduced to writing in final form. *Buckwalter v. Russell*, 119 Pa. 495, 13 Atl. 310.

It is certainly too late in Pennsylvania to withdraw from a submission after both sides have been fully heard and an award has been made which is ready for delivery. *Greenawalt v. Hamilton*, 4 Pennyp. 495.

There must be a clear legal right reserved to enable a person to revoke his submission to arbitration just as an award is about to be announced, and at a time when he is informed of the conclusion arrived at by the arbitrators. *Mitchell v. Newman*, 4 Pennyp. 443.

An act of assembly in 1705 in Pennsylvania provided for arbitrations by consent in open court by rule referring controversies to mutually chosen arbitrators whose award, according to the submission approved by the court and entered on the record, should have the effect of a verdict of a jury. It was construed to apply generally, and to embrace within its scope virtually every cause of action. The statute was peculiar to Pennsylvania, and hence it was said the learning of the English books did not aid directly in interpreting and applying it. *Horton v. Stanley*, 1 Miles (Pa.) 418.

f. Implied revocations.

Revocations of submissions to arbitration are express, or in fact; or else, implied, or in law. If express, they are made by a party, and to be effective must be in the same form and manner in which the submissions were made; that is, submissions by deed are to be revoked under seal; written submissions by writings; parol ones, orally. Implied revocations, or revocations in law, arise as the legal effect or necessary consequence of some intervening event, either providential or the result of an act or conduct of the party, necessarily terminating the arbitration. *Sutton v. Tyrell*, 10 Vt. 91.

The death of a party to an arbitration before an award is made revokes the submission. *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Power v. Power*, 7 Watts, 205; *Knipe v. Livingston*, 19 Montg. Co. L. Rep. 17.

The death of a party, or the marriage of a party, *feme sole*, to a submission, the death of an umpire, the lunacy of a party, or the utter destruction or final end of the subject-matter of the submitted controversy, operate to revoke submissions as a matter of law. *Sutton v. Tyrell*, supra.

The reference of a cause by rule of court is not revoked by the death of one of sev-

eral parties on the same side. *Freeborn v. Dehman*, 8 N. J. L. 116.

An irrevocable submission, that is, one upon consideration making a contract, and one made a rule of court, is not revoked by operation of law by the death of a party to it, when his representatives have voluntarily come into and participated in the proceedings before the arbitrators. *Grimm v. Sarmiento*, 2 Pa. Co. Ct. 484.

Most of the authorities hold that the bringing of an action or suit concerning the subject-matter of a controversy submitted to arbitration is, by implication of law, a revocation of the submission. *Mason v. Bullock*, 6 Ala. App. 141, 60 So. 432; *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; *Crilly v. Philip Rinn Co.* 135 Ill. App. 198; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 685; *Harrison v. Hartford F. Ins. Co.* 112 Iowa, 77, 83 N. W. 820; *Peters v. Craig*, 6 Dana, 307; *Bauer v. International Waste Co.* 201 Mass. 197, 87 N. E. 637; *Nurney v. Fireman's Fund Ins. Co.* 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350; *Needy v. German American Ins. Co.* 197 Pa. 460, 47 Atl. 739; *Knipe v. Livingston*, 19 Montg. Co. L. Rep. 17.

But in two cases in different jurisdictions there have been decisions directly to the contrary. *Sutton v. Tyrell*, 10 Vt. 91; *State, Knaus, Prosecutor, v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237.

In the New Jersey case, *Reed, J.*, who delivered the opinion of the court, said: The effect of bringing an action for the same subject-matter during the pendency of an arbitration has not had much judicial consideration. In *Peters v. Craig*, 6 Dana, 307, it was held that the bringing of the action operated of itself to revoke the submission. In *Sutton v. Tyrell*, supra, the opposite doctrine was announced. I think the latter case states the only conclusion that can be reached on principle.

The mere issuance and service of process giving no information respecting the cause of action or nature of the litigation begun, for commencing a civil action for the subject-matter of a pending arbitration, does not, in and of itself, terminate the authority of the arbitrators to make an award. *Williams v. Branning Mfg. Co.* 153 N. C. 7, 31 L.R.A.(N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

The bringing of an action by a member of a dissolved partnership upon an account assigned to him in the settlement of the partnership accounts and affairs, against one of his former partners, does not amount to a revocation of a submission to arbitration then pending between the same parties to liquidate and settle the affairs and accounts of another partnership. *Jones v. Harris*, 58 Miss. 293.

g. Revocation as affected by the consideration for the submission.

There is a limitation of the right to revoke a submission to arbitration in Penn-

sylvania, which, as stated by the courts of that state, is not recognized in other jurisdictions. It has been somewhat loosely said in some cases in that state that when an agreement to refer a question to arbitration is supported by a good consideration, it may not be revoked by a mere notice from one of the parties to it. *Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co.* 9 North. Co. Rep. 25.

And that it is settled there that a submission upon consideration is a contract, and not a naked authority, and therefore not revocable. *Grimm v. Sarmiento*, 2 Pa. Co. Ct. 484.

Such statements are not sufficiently qualified,—they are too broad. It is a recognized doctrine that the mutual promises of the parties to a submission to arbitration to abide by and perform the award constitute a sufficient consideration to support the contract. *Call v. Hager*, 69 Me. 521; *Pond v. Harris*, 113 Mass. 114; *Green-Shrier Co. v. State Realty & Mortg. Co.* 199 N. Y. 65, 92 N. E. 98, reversing 129 App. Div. 581, 114 N. Y. Supp. 49.

The circumstance that it turns out that one of the parties to the submission of a real controversy to arbitration derived no benefit whatever from the agreement to submit does not establish that the submission was without consideration, and hence not binding. *Green-Shrier Co. v. State Realty & Mortg. Co.* supra.

Either party to an arbitration may revoke the authority of an arbitrator notwithstanding the agreement to arbitrate is valid. *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055.

And mere agreements to refer to arbitrators to be chosen in the future, disputes anticipated, are held in Pennsylvania, as elsewhere, to be revocable at the will of either party to them. *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Yost v. McKee*, 179 Pa. 381, 57 Am. St. Rep. 604, 36 Atl. 317; *McQuaide v. Pennsylvania R. Co.* 6 Pa. Dist. R. 391; *Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co.* supra; *Farel v. Roberts*, 11 Pa. Co. Ct. 58; *Acme Coal Co. v. Stroud*, 5 Lack. Leg. News, 169.

As long as neither party to an agreement to arbitrate has given or relinquished anything,—while both remain in the same position that they occupied when they made the agreement,—either may refuse to comply with or proceed under it without subjecting himself to aught more than a liability to damages for the breach of his agreement to submit. *Johnson v. Andress*, 5 Phila. 8.

The common-law rule that either party has a right to revoke a submission to arbitration any time before an award is made applies, then, to some extent, in Pennsylvania, but only in cases where there is no other consideration than mutual covenants to abide the award to support the agreement. In that state when a submission is a part of a contract containing other terms

to be performed by the parties,—especially where those terms have been wholly or partly executed,—or where it partakes of the nature of a contract by which important rights reciprocally are gained and lost, and of which the submission is the moving consideration, the submission is not revocable. *Paist v. Caldwell*, 75 Pa. 161; *McKenna v. Lyle*, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777; *Zehner v. Lehigh Coal & Nav. Co.* 187 Pa. 487, 67 Am. St. Rep. 586, 41 Atl. 464; *McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190; *Johnson v. Crawford*, 212 Pa. 502, 61 Atl. 1103.

Where, by the submission, rights have accrued to either party, and neither can be restored to his former status, it cannot be revoked. *Everhart v. Flynn*, 6 Pa. Dist. R. 131.

The irrevocability of submissions to arbitrations when parts of agreements embodying other things to be done by the parties to them after such other things have been done, in whole or in part, has been recognized outside of Pennsylvania. *Harrison v. Hartford F. Ins. Co.* 112 Iowa, 77, 83 N. W. 820; *Guild v. Atchison, T. & S. F. R. Co.* 57 Kan. 70, 33 L.R.A. 77, 57 Am. St. Rep. 312, 45 Pac. 82.

An agreement between partners, submitting to arbitration matters in difference between them growing out of the partnership relation and transactions, which binds one to give the other sole possession of the books and papers of the firm, and provides that the latter shall liquidate the business, with full power to dispose of the assets and pay the debts of the firm, is supported by such a consideration as to make it irrevocable. *Mitchell v. Newman*, 4 Pennyp. 443.

A stipulation in a lease for years, giving the lessee the privilege of renewing for either of two additional terms at his election, at a rent that shall be fixed by arbitration, is irrevocable by the landlord, and precludes his maintaining suit to recover rent at the original rate after the first term has expired, and when the tenant was holding over. *Abbot v. Shepherd*, 4 Phila. 90.

A client may revoke a submission to arbitration of his cause, made by his attorney at law. *Wilson v. Young*, 9 Pa. 101; *Coleman v. Grubb*, 23 Pa. 393.

But not after gaining and accepting a benefit, advantage, or consideration for the submission. *Williams v. Tracey*, 95 Pa. 308.

An agreement between partners, submitting their partnership accounts to referees to settle all matters at variance between them, is revocable any time before an award is made, and by either partner. *Nicholas v. Carr*, 6 Luzerne Leg. Reg. 204.

But this is not so of an agreement in a pending suit in chancery to compel a settlement of partnership accounts, to discontinue the suit, and refer all matters in controversy in it to an umpire for final decision, with a provision for entering judg-

ment on his award. That is revocable by neither party against the other's will. *McGeheen v. Duffield*, 5 Pa. 497.

Elsewhere the courts appear to entertain different views.

In Mississippi it has been held that the right of a party to revoke a submission to arbitration before an award has been made is unaffected by the circumstance that there was a valuable consideration for the agreement to submit. *Jones v. Harris*, 59 Miss. 214.

In New York it has been declared that the character of the mandate to arbitrators selected to decide a controversy cannot be affected by the circumstances which were its producing cause, or which the execution of the agreement induced. *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

XIX. Breaches of agreements to arbitrate.

a. Revocation as a breach.

It is a breach of an agreement submitting a controversy to arbitration, and of the condition of a bond to abide by and perform an award, to revoke the authority of the arbitrators to act. *Vynior's Case*, 8 Coke, 81b, 3 Eng. Rul. Cas. 357; *Marsh v. Bulteel*, 5 Barn. & Ald. 507; *Warburton v. Storr*, 4 Barn. & C. 103, 6 Dowl. & R. 213, 3 L. J. K. B. 156; *Brown v. Tanner*, 1 Car. & P. 651, *McClel. & Y.* 464, 29 Revised Rep. 823; *Milne v. Gratrix*, 7 East, 608; *Newgate v. Degelder*, 2 Keble, 10, 1 Sid. 281; *King v. Joseph*, 5 Taunt. 452; *Wetmore v. Lyman*, 2 Root, 484; *Rowley v. Young*, 3 Day, 118; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233; *Frink v. Ryan*, 4 Ill. 322; *Brown v. Leavitt*, 26 Me. 251; *Call v. Hagar*, 69 Me. 621; *Weeks v. Trask*, 81 Me. 127, 2 L.R.A. 532, 16 Atl. 413; *Pond v. Harris*, 113 Mass. 114; *State, Knaus, Prosecutor, v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237; *Allen v. Watson*, 16 Johns. 205; *Frets v. Frets*, 1 Cow. 335; *Union Ins. Co. v. Central Trust Co.* 157 N. Y. 633, 44 L.R.A. 227, 52 N. E. 671; *Miller v. Junction Canal Co.* 53 Barb. 590; *Tyson v. Robinson*, 25 N. C. (3 Ired. L.) 338; *Aspinwall v. Tousey*, 2 Tyler (Vt.) 328; *Hawley v. Hodge*, 7 Vt. 237; *Craftsbury v. Hill*, 28 Vt. 763; *Mead v. Owen*, 83 Vt. 132, 74 Atl. 1058; *Condon v. South Side R. Co.* 14 Gratt. 302; *Kinney v. Baltimore & O. Employees' Relief Assn.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8; *Hatheway v. Cliff*, 7 N. B. 267.

The reason there is a breach of a bond to arbitrate when the obligor revokes is that where one covenants to do a certain thing, and afterwards by his own act disables himself from doing it, that is in itself a breach of his covenant. *Warburton v. Storr*, 4 Barn. & C. 103, 6 Dowl. & R. 213, 3 L. J. K. B. 156.

If one is injured by the revocation by another of his submission to an arbitration,

he has his remedy by action on the bond of submission or the covenant to refer. *Frink v. Ryan*, 4 Ill. 322.

If, in invoking the judicial determination of his rights, a party violates his contract, his opponent may have a remedy in some appropriate proceeding, but will not be permitted to plead such contract in bar of the suit. *Waugh v. Schlenk*, 23 Ill. App. 433.

The revocation of the authority of arbitrators to proceed with an arbitration constitutes, in legal effect, a breach of a covenant to pay whatever award the arbitrators might make. *Union Ins. Co. v. Central Trust Co.* 157 N. Y. 633, 44 L.R.A. 227, 52 N. E. 671.

By revoking a submission to arbitration one not only loses his right to have his controversy adjusted by the arbitrators, but makes himself liable for a breach of his agreement to submit. *State, Knaus, Prosecutor, v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237.

If one who has joined in a submission to arbitration revokes it, the other party is left to such legal remedies as may be available to protect or compensate him for the breach. *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

b. Remedy for breach.

Whenever there is a breach of an ordinary independent agreement to arbitrate, or of the condition of a bond to abide by and perform an award where an award is not made, the remedy of the offended party to the submission is an action for damages occasioned by the breach, just the same as is that of the injured party when the breach of any other contract occurs. *Vynior's Case*, 8 Coke, 81b, 3 Eng. Rul. Cas. 357; *Marsh v. Bulteel*, 5 Barn. & Ald. 507; *Warburton v. Storr*, 4 Barn. & C. 103, 6 Dowl. & R. 213, 3 L. J. K. B. 156; *Brown v. Tanner*, 1 Car. & P. 651, 1 *McClel. & Y.* 464, 29 Revised Rep. 823; *Milne v. Gratrix*, 7 East, 608; *Livingston v. Ralli*, 5 El. & Bl. 132, 24 L. J. Q. B. N. S. 129, 1 Jur. N. S. 594, 3 Week. Rep. 488; *King v. Joseph*, 5 Taunt. 452; *Perkins v. United States Electric Light Co.* 21 Blatchf. 308, 16 Fed. 513; *Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.* 35 Fed. 22; *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 93 C. C. A. 162, 166 Fed. 398; *Mason v. Bullock*, 6 Ala. App. 141, 60 So. 432; *Wetmore v. Lyman*, 2 Root, 484; *Rowley v. Young*, 3 Day, 118; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233; *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *King v. Howard*, 27 Mo. 21; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Sinclair v. Tallmadge*, 35 Barb. 602; *Miller v. Junction Canal Co.* 53 Barb. 590; *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831; *Scott v. Reedy*, 5 Ohio Dec. Reprint, 388; *Johnson v. Address*, 5 Phila. 8; *Grady v. Home F. & M. Ins. Co.* 27 R. I. 435, 4

L.R.A.(N.S.) 288, 63 Atl. 173; Percival v. Herbemont, 1 McMull. L. 59; Aspinwall v. Tousey, 2 Tyler (Vt.) 328; Hawley v. Hodge, 7 Vt. 237; Mead v. Owen, 83 Vt. 132, 74 Atl. 1058; Condon v. South Side R. Co. 14 Gratt. 302; Corbin v. Adams, 76 Va. 58; Rison v. Moon, 91 Va. 384, 22 S. E. 165; Kinney v. Baltimore & O. Employees' Relief Asso. 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Hathaway v. Cliff, 7 N. B. 267.

Any person may violate the most solemn contract he has made, and an agreement to arbitrate is no exception; but he thereby becomes responsible to the injured party for such violation. Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055.

If one covenants to perform an award, and an award is made, he cannot, by revoking the authority, escape from an action on the covenant. King v. Joseph, 5 Taunt. 452.

Although a bond given for the performance of an award contains no condition, the penalty is forfeited by the revocation of the submission, and an action upon it lies to recover actual damages. Frets v. Frets, 1 Cow. 335.

An action for a breach of an agreement to arbitrate cannot be maintained without proof that the defendant in some way revoked the submission. Ingraham v. Whitmore, 75 Ill. 24.

Whichever party to a submission, without right, revokes the authority of the arbitrators, or prevents them from acting, is liable to the other in an action for damages. Call v. Hagar, 69 Me. 521.

This is so even when the offending party is not bound under a penalty. Pond v. Harris, 113 Mass. 114.

An agreement to submit to arbitration, containing no covenant not to sue, or that the award shall be the foundation of a judgment, is a mere common-law compact, enforceable by action only if either party breaks it. McGunn v. Hanlin, 29 Mich. 476.

There may be cases, said the court in Adams v. Haigler, 123 Ga. 659, 51 S. E. 638, where one would be liable to an action for damages for failing to submit a controversy to arbitration after agreeing to do so, when the agreement could not be pleaded in bar of his action.

Though an agreement to refer has been considered no bar to an action upon the subject agreed to be referred, the language of courts and judges has always been, according to Lord Campbell's statement in Livingston v. Balli, 30 Eng. L. & Eq. Rep. 279, that if the party was dunnified by the refusal to refer, he might bring an action.

This statement was quoted with approval by the court in Hill v. More, 40 Me. 515.

In the opinion of the court in Kinney v. Baltimore & O. Employees' Relief Asso. 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8, it 47 L.R.A.(N.S.)

was said, *arguendo*, that seemingly an action at law will not lie for a refusal to nominate an arbitrator in pursuance of a covenant to refer, and for that *dictum* the case of Browning v. Wright, 2 Bos. & P. 13, 5 Revised Rep. 521, was cited as authority. The citation does not support the statement, and the case cited did not involve an arbitration at all, but a question concerning the construction and effect of a covenant of seisin in a deed of lands.

It has, however, been held, in harmony with the general trend of the authorities, and contrary to the *dictum* just referred to, that an action lies for the breach of a covenant to appoint an arbitrator under a clause in a lease of quarries for a term of years, providing that any difference that should arise during the term between lessor and lessee, as to the amount of rent, should be settled by arbitration, each party covenanting to appoint an arbitrator. Donegal v. Venner, 6 Ir. C. L. Rep. 504.

The court in Campbell v. American Popular L. Ins. Co. 1 MacArth. 246, 29 Am. Rep. 591, denied that a contract to arbitrate disputes that should afterwards arise, made in advance of any controversy in sight, was either contrary to public policy or void, notwithstanding it may have been intended to oust the courts of jurisdiction, since an action could be maintained for its breach, although probably only nominal damages could be recovered.

c. Damages.

The damages which a party to a submission is entitled to recover from his adversary who revoked it have been held to embrace the compensation of the arbitrators for services to the time of revocation, the fees of witnesses brought to testify before them, and reasonable charges of counsel in preparing for and attending the hearings. Miller v. Junction Canal Co. 53 Barb. 590.

The expenses necessarily incurred in preparing for trial before the arbitrators, loss of time in the hearings, reasonable payments to counsel for services, and proper expenditures to witnesses for attendance, are proper items of damage, recoverable for revoking a submission. Call v. Hagar, 69 Me. 521.

The injury one party sustains when the other unjustifiably revokes his agreement to submit to an arbitration matters in difference is the deprivation of his right to submit the controversy to the chosen tribunal; and the expenses to which he has been subjected in his necessary preparation for a trial before the arbitrators, his own loss of time, and his trouble in employing counsel, taking depositions, payments to witnesses and arbitrators, and disbursements of a similar nature, so far as he has lost their benefit by the act of his adversary, are all proper items of damage. Pond v. Harris, 113 Mass. 114.

A statute of New York (Code Civ. Proc. § 2384), providing that when a party to an

arbitration revokes his submission, whether made under statutory authority or otherwise, the other party may maintain an action against him and his sureties, if any, and upon any collateral instrument to recover costs, expenses, and damages accruing or incurred in preparing for and conducting the arbitration until it was revoked, has been construed as authorizing the appropriation of securities pledged by a surety to pay an award which the principal's revocation had rendered impossible, to the payment of such costs and damages, notwithstanding the arbitration agreement clearly provided that each party should pay his own costs and expenses, and not look to the others to be reimbursed. *Union Ins. Co. v. Central Trust Co.* 157 N. Y. 633, 44 L.R.A. 227, 52 N. E. 671.

The sum awarded is *prima facie* the measure of damages for the breach by revocation of the submission of a bond conditioned to abide by, obey, and perform an award. *Hatheway v. Cliff*, 7 N. B. 267.

An action is maintainable upon a bond given upon the submission of a controversy to arbitration, for a breach of its condition, but the penalty named in the obligation is not the measure of recovery as liquidated damages. *Blaisdell v. Blaisdell*, 14 N. H. 78.

The court, in *Bozeman v. Gilbert*, 1 Ala. 90, expressed doubts whether a bond with sufficiently large penalty to abide by an agreement to arbitrate would afford any security against a breach of the agreement, because of the difficulty of ascertaining what injury can accrue from a refusal to comply with such an engagement.

An action at law on an agreement to arbitrate affords no effectual redress for a refusal to refer, because it is not easy to show that any actual damage has been sustained by the refusal. *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458.

No more than nominal damages may be recovered for the breach of an executory agreement to arbitrate future disputes growing out of a contract where naught has been done to carry out the agreement to refer beyond a request by one party and a refusal by the other to submit a controversy afterwards made the ground of an action at law. *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787, affirmed in 43 C. C. A. 57, 102 Fed. 926.

A clause in a charter party providing that if any dispute arises between the owners and the charterers the matter in dispute shall be referred to arbitrators chosen in the usual way, whose decision shall be final and enforced by a rule of court, does not afford the charterers a cause of action against the owners to recover expenses of defending the latter's action for extra compensation for detaining the chartered vessel overtime, brought after such owner had repudiated the arbitration agreement. *Munson v. Straits of Dover S. S. Co.* 99 Fed. 787.

It is a singular circumstance, said 47 L.R.A. (N.S.)

Brown, D. J., in *Munson v. Straits of Dover S. S. Co.* supra, that while in many cases which have held an agreement to arbitrate prospective disputes no bar to an action, it is intimated that the aggrieved party may have an action for damages for a breach of the agreement to refer, that notwithstanding the frequent repetition of this intimation, no case is to be found in which, upon a mere refusal to arbitrate, and where no action had been taken by either party under the agreement to refer, beyond a mere request and refusal to submit, any damages have ever been recovered, or any other than nominal damages have ever been indicated as recoverable, because too loose, indefinite, and incapable of verification.

XX. Unperformed arbitration agreements.

a. Effect of refusal to perform.

The express refusal of one party to arbitrate differences as agreed absolves the other from any obligation on his part to carry out the arbitration agreement, and entitles the latter to treat it as abrogated, and to resort to the courts for the enforcement of his rights or the redress of his wrongs, as if no agreement to arbitrate had been made. *Humaston v. American Teleg. Co.* 20 Wall. 20, 22 L. ed. 279; *Green v. American Cotton Co.* 112 Fed. 743; *Bank of State v. Martin*, 4 Ala. 615; *Loup v. California Southern R. Co.* 63 Cal. 97; *Tubbs v. Deillo*, 19 Cal. App. 612, 127 Pac. 514; *Bannister v. Read*, 6 Ill. 92; *Orne v. Sullivan*, 3 How. (Miss.) 161, 34 Am. Dec. 74; *Johnson v. Phoenix Ins. Co.* 69 Mo. App. 226; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362, 4 N. E. 745; *Anderson v. Meislohn*, 12 Daly, 149; *Harlow v. Oregonian Pub. Co.* 53 Or. 272, 100 Pac. 7; *Penn Plate Glass Co. v. Spring Garden Ins. Co.* 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138; *McQuaide v. Pennsylvania R. Co.* 6 Pa. Dist. R. 391; *Corbin v. Adams*, 76 Va. 58; *Thomas v. Fredericksa*, 10 Q. B. 775, 16 L. J. Q. B. N. S. 393, 11 Jur. 942; *Livingston v. Ralli*, 5 El. & Bl. 132, 24 L. J. Q. B. N. S. 269, 1 Jur. N. S. 594, 3 Week. Rep. 488.

Thus, the refusal of the underwriter to join in an arbitration to appraise a loss or damage sustained by a policy holder, pursuant to a provision to that effect in the policy, made a condition precedent to suit, entitles the insured to bring an action at once to recover for his loss. *Johnson v. Phoenix Ins. Co.* 69 Mo. App. 226; *Penn Plate Glass Co. v. Spring Garden Ins. Co.* 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138.

One party to a contract cannot complain of the other until he has put the latter in default by both a substantial performance on his own part and a failure or refusal to perform on the other's part. *Loup v. California Southern R. Co.* 63 Cal. 97.

Although one party to a contract may

not alone rescind it, he may, nevertheless, by neglecting or refusing to perform it on his part put it in the power of the other party, where he is not also derelict, to avoid it or not, at his pleasure. The breach by one party may in such a case be treated by the other as an abandonment of the contract, authorizing him, if he so chooses, to disaffirm it and act as though it had never existed. *Bannister v. Read*, 6 Ill. 92.

When personal property is sold under an agreement whereby the price to be paid for it is to be fixed by arbitrators, the revocation by the vendee of the agreement to arbitrate entitles the vendor to recover the value of the property sold, as proved to the satisfaction of a jury. *Humaston v. American Teleg. Co.* 20 Wall. 20, 22 L. ed. 279.

The purchaser of a cargo of wheat imported from a foreign land under a contract containing a provision that any difference between buyer and seller should be left to arbitration in London of two corn factors, one chosen by each, with an umpire by them selected if they differed, who has accepted and paid for the wheat, and afterwards discovered a shortage in quantity, is entitled to maintain an action against the seller after his refusal to refer, for damages for a breach of the contract to arbitrate. *Livingston v. Ralli*, 5 El. & Bl. 132, 24 L. J. Q. B. N. S. 269, 1 Jur. N. S. 594, 3 Week. Rep. 488.

A contract to perform professional services, compensation for which, if not agreed upon, is to be fixed by arbitrators, authorizes those rendering the services to recover what they were worth when the other party refuses to arbitrate. *Bank of State v. Martin*, 4 Ala. 615.

When a building contract provides for the settlement by arbitration of any dispute that arises respecting the value of work added or omitted, and arbitrators are selected to carry out the provision, the refusal of the owner to consent to the hearing by the arbitrators of testimony of witnesses entitles the contractor to bring suit for his compensation without proceeding with the arbitration and procuring an award. *Anderson v. Meislahn*, 12 Daly, 149.

The owner of lands who has agreed with another person that the latter shall buy them at a price subsequently to be agreed upon, and in the meantime may improve them, and if a sale is not consummated the improvements shall be paid for by the owner at their value as appraised by disinterested arbitrators, mutually chosen, cannot, when the sale has fallen through, defeat the buyer's action to recover the value of such improvements by refusing to join in selecting arbitrators. *Orne v. Sullivan*, 3 How. (Mass.) 161, 34 Am. Dec. 74.

If, in an unsealed lease of lands with hunting and shooting rights, the lessee has covenanted to compensate the farm tenants of the lessor for damage done by the game to an amount fixed and awarded by appraisers, severally chosen, and refuses to join in the making of a valuation in the

manner agreed upon, the lessor, in an action setting forth the lease, agreements, covenants, and damages, and the appointment on his side of an appraiser, is entitled to a judgment notwithstanding a verdict of a jury, that he gave no notice of the appointment, since the lessee's refusal to appoint on his side made a notice immaterial. *Thomas v. Fredericks*, 10 Q. B. 775, 16 L. J. Q. B. N. S. 393, 11 Jur. 942.

The refusal of parties contesting a will to name arbitrators and proceed with an arbitration agreed upon to determine the claims of the legatees against the testator's estate, where the will was set aside by consent, pursuant to the submission, entitles the legatees to maintain a suit in equity to re-establish such will and to annul the agreement to arbitrate, and to a decree granting such relief. *Corbin v. Adams*, 76 Va. 58.

Inasmuch as either party to an agreement containing a provision for the arbitration of disputes under it has a legal right to come into a court of equity if he thinks fit when a controversy has arisen, the refusal of a suitor to arbitrate pursuant to such provision affords no reason for denying him costs after he has succeeded in the litigation. *Lees v. Laforest*, 14 Beav. 250.

On the other hand the unjustifiable refusal of a party to join in an arbitration made by the terms of his contract a condition precedent to any suit or action by him to recover on such contract effectually bars him from maintaining an action or suit for affirmative relief. This has frequently been held to be the case in actions by policy holders to recover insurance on policies containing the common provisions for preliminary appraisements of losses. In such cases refusal by the assured to unite in the appraisal is fatal to his action. *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. 630.

When a policy of fire insurance provides for an arbitration to determine the amount of a loss, if not agreed upon, an offer by the insurer's adjuster of a sum in settlement, and the insured's rejection of the offer, creates the condition which makes the arbitration clause operative. *Murphy v. Northern British & M. Co.* 61 Mo. App. 323; *McNees v. Southern Ins. Co.* 61 Mo. App. 335; *Dautel v. Pennsylvania F. Ins. Co.* 65 Mo. App. 44; *Hooker v. Phoenix Ins. Co.* 69 Mo. App. 141.

A provision in a contract of marine insurance to the effect that all average and abandonment claims shall be adjusted and settled conformably to the customs of Lloyd's or the Royal Exchange, but if the insurer or insured should be dissatisfied with the adjustment, they may refer the same to two professional average staters or other competent persons as arbitrators, the award to be final, and that no action at law should be brought until the referees or ar-

bitrators should have given their decision, creates a condition precedent to suit, and prevents the policy holder who has refused to arbitrate from maintaining an action to recover a loss insured against. *Tredwen v. Holman*, 1 Hurlst. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. N. S. 398, 6 L. T. N. S. 127, 10 Week. Rep. 652.

The court was of the opinion that the case was governed by the decision in *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 308, 2 Jur. N. S. 815, 4 Week. Rep. 746, and was distinguishable from the case of *Horton v. Sayer*, 4 Hurlst. & N. 643, 29 L. J. Exch. N. S. 28, 5 Jur. N. S. 989, 7 Week. Rep. 735.

In an action to recover for a partial loss on a policy of marine insurance containing a clause to the effect that every claim for a partial loss should be adjusted by an average stater, and if the underwriter should be dissatisfied with the adjustment, a reference to arbitrators should be had and their award should be final, a plea by defendant that while the claim sued for had been adjusted by an average stater, yet the defendant was dissatisfied and desired an arbitration, but the policy holder refused to join in one, is not so untenably bad as to warrant the court in summarily disallowing it, but the defendant should be given the opportunity to have its validity deliberately discussed and determined. *Johnson v. Hopper*, 4 Jur. N. S. 882.

A stipulation in a building contract that if any question arises regarding the quality or quantity of the work, it shall be referred to a named individual, whose decision shall be final and binding, prevents the recovery of a disputed claim which the claimant refused to submit to the arbiter. *Fulton v. Peters*, 137 Pa. 613, 20 Atl. 936.

A contractor to erect a building who has agreed in the contract that the value of extra work shall be computed by the architect and added to the contract price, and, if he dissents from the architect's figures, to submit to arbitration the question of such value, and be bound by the arbitrator's award, cannot maintain an action against the owner to recover a balance, including extra work, under such contract, after he has refused to proceed to an arbitration offered by the owner. *Weggner v. Greenstine*, 114 Mich. 310, 72 N. W. 170.

b. Effect of failure or neglect to arbitrate.

A refusal to carry out an agreement to arbitrate is seldom explicit, but is to be implied from a neglect or failure to perform it, which, legally, entails the same consequences and has the same effect as an express refusal.

A party to an arbitration agreement who unreasonably fails or neglects to perform it releases the other party from any obligation to comply with it, and affords him the right immediately to resort to litigation. *Burke v. Pierce*, 27 C. C. A. 462, 55 U. S. App. 59, 83 Fed. 95; *Scammon v. 47 L.R.A.(N.S.)*

Denio, 72 Cal. 393, 14 Pac. 98; *Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627; *Bannister v. Read*, 6 Ill. 92; *Richardson v. Emmert*, 44 Kan. 262, 24 Pac. 478; *Meyer v. Berlindi*, 53 Minn. 59, 54 N. W. 937; *Funsten v. Funsten Commission Co.* 67 Mo. App. 559; *Bales v. Gilbert*, 84 Mo. App. 675; *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737; *Gray v. Wilson*, 4 Watts, 39; *Cole Mfg. Co. v. Collier*, 91 Tenn. 525, 30 Am. St. Rep. 898, 91 S. W. 672; *McGill v. Proudfoot*, 4 U. C. Q. B. 33.

A mere offer by one party to a dispute that has arisen to arbitrate the controversy, not shown to have been accepted by the other, or followed by a submission and an award, is no defense to the latter's suit. *Funsten v. Funsten Commission Co.* 67 Mo. App. 559.

A clause in a lease with a covenant by the tenant to pay the landlord the sum requisite to put the leased property in as good condition and repair when surrendering it at the end as it was at the beginning of the term, agreeing to an arbitration in case the parties shall then disagree concerning the condition of the property and the sum to be paid by the tenant, if not acted upon, affords the tenant no defense to the landlord's action for damages for the breach of the tenant's covenant to surrender in good order and repair. *Burke v. Pierce*, 27 C. C. A. 462, 55 U. S. App. 59, 83 Fed. 95.

A clause in a lease providing that if the tenant shall be excluded during the term from the possession of the demised premises, or if either landlord or tenant should claim from the other damages by reason of anything arising out of the lease, the ascertainment and liquidation of the amount should be left to the decision of three impartial and judicious arbitrators, not carried into effect by a submission, or sought to be by either party, is no obstacle to the prosecution of a litigation by the landlord to collect rent claimed by him out of money realized by a sale on execution of the tenant's goods. *Gray v. Wilson*, 4 Watts, 39.

An agreement between a tenant of lands and his landlord, giving the former the privilege of removing at the end of the tenancy buildings erected by him on the demised premises, supplemented by an agreement between the landlord and the grantor of the land in the contract of sale whereby the latter covenanted to purchase such buildings at a price to be agreed upon between him and the tenant, and at a valuation by disinterested parties in case they should disagree, followed by an attornment, binds the new owner and the tenant, and when they cannot agree upon the value of such buildings, and an arbitration fails without any fault of the tenant, and after an honest effort on his part to have one take place, he may maintain an action to recover from the landowner the value of his improvements. *Bales v. Gilbert*, 84 Mo. App. 675.

A covenant in a lease of a gristmill to

the effect that the accidental destruction of the mill by fire in such circumstances as would entitle the lessor to recover insurance for the loss if insured, or as would entitle him to do so if insured when he has no insurance, shall require the lessor within a reasonable time to rebuild or repair, and entitle the lessee to a fair deduction and allowance of rent for the time the mill is unfit to work, to be ascertained and computed by two indifferent arbitrators, severally chosen, does not preclude the tenant, when sued by the landlord for rent while the mill was out of use as the result of a fire, when there has been no arbitration, from having a jury fix the deduction and allowance to which he may be entitled. *McGill v. Proudfoot*, 4 U. C. Q. B. 33.

It is not more the duty of one than the other of the parties to a building contract providing for an arbitration to appraise the value of work added or omitted in case a dispute arises to set on foot the arbitration proceedings, and when both ignore it and neither makes any effort to procure an arbitration, the lack of it is no bar to an action on the contract by either. *Williams v. Shields*, 16 Daly, 178, 9 N. Y. Supp. 502.

Under a clause in a contract respecting the manufacture of merchandise, providing for an arbitration of disputes and a prohibition of litigation, to the end that the secrecy of the processes, formulas, and inventions connected with the manufacture may be preserved, if valid, it is not more the duty of one than the other party to take the initiative in arbitration proceedings, and when neither party does so and no arbitration is resorted to the clause affords no defense to an action to recover damages for a breach of the contract. *Grant v. Pratt*, 110 App. Div. 867, 97 N. Y. Supp. 29, affirmed in 186 N. Y. 611, 79 N. E. 1106.

This has been extensively recognized in actions to recover insurance upon policies providing for preliminary appraisements of losses as conditions precedent to suit, where the insurers failed and neglected on their part to comply with the conditions. *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 408, 14 Am. Dec. 289; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675; *Home Ins. Co. v. M. Schiff's Sons*, 103 Md. 648, 64 Atl. 63; *Shawnee F. Ins. Co. v. Pontfield*, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835; *Brock v. Dwelling House Ins. Co.* 102 Mich. 583, 26 L.R.A. 623, 47 Am. St. Rep. 562, 61 N. W. 67; *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388; *Hooker v. Phoenix Ins. Co.* 69 Mo. App. 141; *Ball v. Royal Ins. Co.* 129 Mo. App. 34, 107 S. W. 1097; *Mark v. National F. Ins. Co.* 24 Hun, 565; *Schouweiler v. Merchants' Mut. Ins. Asso.* 11 S. D. 401, 78 N. W. 356; *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239.

If neither party to a contract of insurance attempts to comply with a provision in it that a disagreement over the amount

of a loss shall be submitted to arbitration, and no action on the policy shall be maintained until after full compliance with such provision, testimony by the policy holder that the underwriter's adjuster, in reply to his questions as to when a settlement would be made, stated the insurer would not pay until the assured went to court, and that the latter should go ahead and sue, is, if credited, sufficient, notwithstanding the adjuster's contradiction, to warrant the finding of fact that an arbitration and award as a necessary condition precedent to an action had been waived. *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388.

The election by an underwriter to repair or replace insured property damaged or destroyed by fire, pursuant to an option reserved in a fire insurance policy, renders nugatory and inoperative a clause in such policy providing for an arbitration of the amount of a loss, and forbidding an action to recover for it until after an award. *Wynkoop v. Niagara F. Ins. Co.* 91 N. Y. 478, 43 Am. Rep. 686.

If a policy of fire insurance limits the time absolutely within which an action upon it must be brought to be maintainable at all, and at the same time requires differences over the amount of a loss to be submitted to arbitration and an award to be obtained as a necessary prerequisite to any action or suit in law or equity upon the policy, the latter provision is so far controlled by the former that if, within the time limit, the policy holder is unable, without his own fault, to obtain the prescribed award, he may bring suit without it. *Mark v. National F. Ins. Co.* 24 Hun, 565.

And as in the case of a refusal to arbitrate, the failure or neglect, without a sufficient excuse, of a party to an agreement to arbitrate, made a condition precedent to suit to perform it, precludes his maintaining an action for the subject-matter to obtain affirmative relief.

For example, a policy holder is barred of his action on the policy to recover insurance where, by the terms of the contract, an appraisal of the loss by arbitrators is made a condition precedent to suit, and he has failed or neglected, without justification, to comply with the condition when it has not been waived. *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975; *Westenhaver Bros. v. German American Ins. Co.* 113 Iowa, 726, 84 N. W. 717; *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Shawnee F. Ins. Co. v. Pontfield*, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835; *Patrick v. Farmers' Ins. Co.* 43 N. H. 621, 80 Am. Dec. 197.

The weight of authority, it has been said, favors the validity of a condition precedent to suit in a fire insurance policy, and holds that an appraisal of the amount of a loss is a right which either party to the contract may demand of the other, and that

when such a demand has been made according to the terms of the policy by the insurer, no action by the assured is maintainable on the policy to recover insurance until the demand has been complied with and the appraisal made. *Liverpool & L. & G. Ins. Co. v. Hall*, 1 Kan. App. 18, 41 Pac. 65.

If a policy holder, without cause, neglects to have the amount due him for a loss under a fire insurance policy containing an absolute and mandatory requirement for determining its amount by arbitration in case of a disagreement, determined by arbitrators in the manner provided, he is in no position to maintain an action on the policy to recover his loss, since he cannot establish the insurer's liability without an award. *Murphy v. Northern British & M. Co.* 61 Mo. App. 323.

The mere selection of an appraiser and the joining in a submission by a policy holder to ascertain the amount of his loss under a provision for an appraisal in a fire insurance contract as a preliminary to any suit to recover for a loss, without further action on his part to carry through the appraisal, and where the insurer is not shown to have done ought to waive or defeat the appraisal, is not sufficient to enable the assured to maintain suit on the policy without having obtained an award. *Silver v. Western Assur. Co.* 164 N. Y. 381, 58 N. E. 284, reversing 33 App. Div. 450, 54 N. Y. Supp. 27.

It was, however, held in one case that the failure of the policy holder to fulfil a condition in a policy of marine insurance declaring him disentitled to maintain an action upon it to recover a loss of the insurer until after he should have offered to refer his claim, and if, without offering to refer, he should sue, the claim should stand discharged and the insurer be exempted from liability, could only operate to obstruct or bar the policy holder's suit to recover a loss when the defendant specifically claimed the benefit of the condition, and set up the plaintiff's failure to comply with it as a defense. *Dyer v. Piscataqua F. & M. Ins. Co.* 53 Me. 118.

An insurance contract which provides that if the assured is not satisfied with the award of the directors of the insurer the question shall be submitted to referees, or the suffering party may bring an action, gives the policy holder an option to arbitrate or sue; and if he elects to sue without offering to arbitrate, the objection that he does not show a waiver by the insurer of the condition for arbitration has no force. *Winn v. Farmers' Mut. F. Ins. Co.* 83 Mo. App. 123.

A landlord in a lease for years allowing the tenant the privilege of renewing at his option for either of two stated additional terms at a rental for the extended term to be fixed by an arbitration cannot, after the first term has expired and the tenant has held over, maintain an action to recover rent at the old rate without offering to ar-

bitrate, or showing any excuse for not doing so. *Abbot v. Shepherd*, 4 Phila. 90.

An agreement between riparian landowners by which the upper granted to the lower proprietor the right and privilege of erecting a dam of such height as he chose across the stream, and the latter in turn covenanted to pay the former such damages as arbitrators chosen in the usual manner should award him, as a consequence of the construction of the dam, which is construed as by necessary implication to constitute such an award a condition precedent to an action to recover such damages, is irrevocable, and a failure to resort to the arbitration provided for, or to procure an award from the arbitrators, without adequate excuse, precludes the upper proprietor from maintaining an action in the courts to recover such damages as he sustained by the construction of the dam. *Jones v. Enoree Power Co.* 92 S. C. 263, 75 S. E. 452.

Although a failure to resort to an arbitrator agreed upon in a construction contract, to pass upon the quality or sufficiency of performance of work done under it, may be excused, neither party is at liberty arbitrarily to ignore or annul the stipulation for arbitrament, and resort in the first instance to the courts of law. *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627.

The performance of a contract for an arbitration agreed to be a condition precedent to an action may, like other contracts, be excused for adequate reasons, or prevented by the conduct of one of the parties, and in either event the failure to perform will be no bar to an action by the party excused or prevented from performing. *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102.

c. Omission to make written request when request in writing is prescribed.

If a contract contains a provision like that, for example, occasionally found in policies of insurance, for an arbitration to determine a matter in difference that may arise between the contracting parties, such as, for instance, a difference between insurer and insured respecting the amount of a loss or damage sustained by the latter, and such provision expressly makes the arbitration contingent upon a request in writing, made by one or the other party to the contract, then, according to a number of decisions, the arbitration clause remains dormant and inoperative until one or the other of the parties makes a request in writing for the arbitration contemplated; and if neither does so, either is at liberty to treat the provision as waived, and pursue the ordinary remedies open to him in a court of justice, as if the provision had been formally abrogated. *German-American Ins. Co. v. Steiger*, 109 Ill. 254; *Garretson v. Merchants' & Bankers' F. Ins. Co.* 114 Iowa, 17, 86 N. W. 32; *Walker v. German Ins. Co.* 51 Kan. 725, 33 Pac. 597; *Nurney v. Fireman's Fund Ins. Co.* 63 Mich. 633, 6

Am. St. Rep. 338, 30 N. W. 350; *Probst v. American Cent. Ins. Co.* 64 Mo. App. 408; *Randall v. American F. Ins. Co.* 10 Mont. 340, 24 *Am. St. Rep.* 50, 25 *Pac.* 953; *German Ins. Co. v. Everett*, 18 *Tex. Civ. App.* 514, 46 S. W. 95.

This is especially held to be so when the arbitration and an award are not made by the contract conditions precedent to maintaining an action or suit upon such contract. *Gere v. Council Bluffs Ins. Co.* 67 *Iowa*, 272, 23 N. W. 137, 25 N. W. 159.

In the absence of any provision creating a condition precedent to suit, such an arbitration clause is a mere declaration respecting what shall be deemed conclusive evidence of one of the facts. It only provides a mode of determining conclusively one of the facts. *Ibid.*

Many courts do not appear to consider a provision in the contract making an arbitration and award a condition precedent to maintaining suit upon it as qualifying in any respect the requirement of a request in writing as an essential prerequisite to vitalizing an arbitration clause contingent upon written request, but hold the clause dormant and inoperative until such request is made, notwithstanding a condition precedent clause is coupled with it. *Wallace v. German-American Ins. Co.* 4 *McCrary*, 123, 41 *Fed.* 742; *German-American Ins. Co. v. Etherton*, 25 *Neb.* 505, 41 N. W. 406; *Union Ins. Co. v. Barwick*, 36 *Neb.* 223, 54 N. W. 519; *Gibbs v. Continental Ins. Co.* 13 *Hun.* 611; *Mark v. National F. Ins. Co.* 24 *Hun.* 565; *Wright v. Susquehanna Mut. F. Ins. Co.* 110 *Pa.* 29, 20 *Atl.* 716.

One for whose benefit a clause in a contract is inserted, who would have the advantage of it, must bring himself within its terms. *Continental Ins. Co. v. Vallandingham*, 116 *Ky.* 287, 105 *Am. St. Rep.* 218, 76 S. W. 22.

When a clause in a fire insurance policy requires an appraisal of the amount of a loss to be made before suit shall be maintained, if demanded, the insured need not negative the condition or prove a compliance with it on his part; it is a matter of defense to his action to recover a loss. *Liverpool & L. & G. Ins. Co. v. Hall*, 1 *Kan. App.* 18, 41 *Pac.* 65.

The introduction in a stipulation for an appraisal of the amount of a loss in a fire insurance policy as a prerequisite to an action on the policy to recover for a loss, of the words, "at the written request of either party," materially changes its legal effect. For, if without such words the compliance with the stipulation would be a condition precedent to the right of action, their presence so modifies the clause that neither party is compelled to comply with it until and unless one of them makes the written request mentioned. *Davis v. Anchor Mut. F. Ins. Co.* 96 *Iowa*, 70, 64 N. W. 687.

The mere omission of an underwriter to request an arbitration of differences with the insured concerning the amount of a loss under a provision in a fire insurance policy

requiring a submission upon the written request of either party, and making an award a condition precedent to an action by the assured to recover a loss, does not give the right to an immediate action upon compliance with the other provisions and conditions of the policy, so as to start running the statute of limitations. *Hutchinson v. Liverpool & L. & G. Ins. Co.* 153 *Mass.* 143, 10 *L.R.A.* 558, 26 N. E. 439.

It is too late to avail an insurer sought by way of defense to an action on a fire insurance policy to recover for a loss insured against to demand an arbitration or appraisal of the amount of a loss after the lapse of a year, and the commencement of the suit, and when a prior attempt at arbitration had failed. *Davis v. Imperial Ins. Co.* 16 *Wash.* 241, 47 *Pac.* 439.

A provision in a fire insurance policy requiring differences concerning the amount of a loss between the insurer and insured to be submitted to arbitration at either's written request, and forbidding an action to recover a loss to be brought until after an award, may be waived orally. *Hutchinson v. Liverpool & L. & G. Ins. Co.* *supra*.

A joint demand by all the insurers in several insurance policies, upon the policy holder, to refer the question of the amount of a fire loss, as provided in such policies in varying and not always according language, to arbitration and appraisal, is insufficient to put him in default, so as to bar his action on one of such policies against a single insurer for noncompliance with a condition precedent to suit. *Palatine Ins. Co. v. Morton-Scott-Robertson Co.* 106 *Tenn.* 558, 61 S. W. 787.

The policy in *Randall v. American F. Ins. Co.* 10 *Mont.* 340, 24 *Am. St. Rep.* 50, 25 *Pac.* 953, contained a clause providing for an appraisal of loss or damage "upon the written request of either party," but did not, so far as the report discloses, make such an appraisal a condition precedent to the policy holder's action. The insured asserted and the insurer denied that appraisers had been chosen and had made an award, but the opinion disposes of the case on the theory that the appraisal had never been requested by the underwriter, and had failed without fault of the policy holder. An outline of the reasoning of Judge Harwood, who delivered the opinion of the court, will be appreciated. After an extended citation and review of the decisions, the learned judge proceeded to say: Without further reviewing authorities, we conclude from the number examined bearing upon this important subject that the tendency now is to construe the provision found in contracts like the one before us, providing for arbitration as to differences respecting the amount of loss or damage, to mean in contemplation of the parties that the party desiring arbitration shall request the same. In view of the numerous terms and conditions of the contract and the position occupied by the parties, we believe this is the manifest intention. Under the terms of the policy, when a loss occurs, the time

for payment is fixed. Notice and verified proofs of loss are required to be presented by the assured, with other conditions as to proofs and examinations if the insurer requests them. The proofs of loss certify under oath the amount of loss as claimed by the assured. The insurer may accept this estimate, or proceed to negotiate for an adjustment or "mutual agreement" with the assured as to the amount he will take in satisfaction of the contract, or may give notice . . . of intention to restore the property. All these alternatives for the insurer are provided in the policy, and . . . the assured must await the movements of the insurer upon some of these lines of action. The assured cannot know which will be adopted until notified by the insurer. The insurer may also, if a difference of opinion as to the fair amount of the loss is entertained, notify the assured thereof and request arbitration. The insurer has the amount of loss claimed by the assured stated under oath, and the suggestion of "differences" in that respect must come from the insurer, and such differences ought to be certain, and would probably involve the admission of liability to pay a stated amount, so that an issue would be stated to submit to arbitration. The insurer under such a contract is the only party who can effectually demand and bring about arbitration, or gain a defense by reason of the other party's default in failing to comply therewith. But if the assured fails to request arbitration, this deprives the insurer of no right whatever. If the insurer is deprived of the right of arbitration, it is by his own laches. Nor by demanding arbitration can the assured bring that remedy into action, for the insurer may simply ignore such demand and lose no defense thereby when the cause of action is taken into court. Therefore, under the peculiar conditions of the contract, it depends on the will of the insurer alone as to whether he will have arbitration or not. If he demands it in season . . . and the conditions exist . . . the assured must accede . . . for the courts will afford him no remedy until he submits to arbitration. But, on the other hand, if the insurer is unwilling to arbitrate, he may ignore the request of the assured, and, under such conditions to require the assured to make the request and plead and prove the fact is to require a vain and useless act, and the ceremony of proving it, which is always against the policy of the law.

An appeal from the decision of the Ontario Queen's bench in *Ulrich v. National Ins. Co.* 42 U. C. Q. B. 141, was dismissed in 4 Ont. App. Rep. 84, on the ground that the defendant company was not entitled to any benefit from an arbitration clause in the policy in suit, because, whether such clause was valid or invalid, there had been no breach of the agreement to submit the questions touching the loss or damage "at the written request of either party," for the company had never requested in writing an arbitration.

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The same view was taken by the court in *McIntyre v. National Ins. Co.* 5 Ont. App. Rep. 580, and in the latter case it was that although there had been a request in writing by the company for an arbitration, it was made too late to be of any use, and after the insured's right of action on the policy had become perfect.

d. Effect of phrase, "when appraisal has been required."

The courts have had occasion in actions to recover insurance brought on policies containing a clause providing for an arbitration or appraisal to determine the amount of a loss when the parties differed concerning its extent, and making the decision of the arbitrators or appraisers a condition precedent to any action or suit by the policy holder to recover on the policy for a loss insured against when an appraisement had been required, to consider the force and effect of the phrase, "when an appraisement has been required," where the action had been commenced without any previous reference to fix the amount of the loss, and the insurer had neither demanded nor requested an appraisement, and the policy did not, in express terms, require the insurer to request one in writing or otherwise.

The question which troubled the court in such a case was whether the phrase quoted had such a qualifying effect upon the condition precedent as to leave it inoperative in case the insurer failed or neglected to ask for an appraisement.

There are cases on both sides of this question.

It has been held in New York to be the duty of one whose property has been insured by the standard fire insurance policy of that state, when a loss insured against has occurred, to initiate an appraisal of its amount only when one has been required by the insurer. *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392.

In another New York case it has been held that a clause in a fire insurance policy requiring appraisers to be selected to ascertain the amount of a loss concerning which the parties differ, and making the loss not payable for sixty days after an award "when appraisal has been required," does not operate as a condition precedent to a policy holder's action unless the insurer has differed with him over the amount of loss, and required him to have it appraised. *Lawrence v. Niagara F. Ins. Co.* 2 App. Div. 267, 37 N. Y. Supp. 811.

It was contended in that case that the words "when an appraisal has been required," meant, when it had been required by the terms of the policy; but this contention, which was yielded to by the Ohio supreme court in the case of *Graham v. German American Ins. Co.* 75 Ohio St. 374, 15 L.R.A. (N.S.) 1055, 79 N. E. 930, 9 Ann. Cas. 79, was scouted by the New York tribunal. The construction placed by the

defendant upon the words, "when appraisal has been required," said the latter court, is strained and unnatural. It is contended that it means "when appraisal has been required by the terms of the policy." But why say this if appraisal always is required by the terms of the policy? The true construction is the obvious one; namely, that it means "required by either party." That is the ordinary sense of the words and expresses the plain intention of the parties. They clearly so understand it, for we find the agent threatening that unless the plaintiff should accept \$2,700 as a compromise, he would exhaust every condition of the policy and insist upon having an appraisal. It is conceded, however, that this threat was not carried out, and that the defendant never demanded an appraisal. The defendant's conduct throughout indicated that no appraisal was desired.

A decision in Michigan lends some support to the views entertained by the courts in New York.

When an appraisal of loss claimed under a fire insurance policy is, by its terms, only to take place when required, and losses are made payable sixty days after the receipt of due proofs, the insured is entitled to maintain his action without such an appraisal and award if the insurer does not require an appraisal until after many months have elapsed since proofs of loss were furnished. *National Home Bldg. & L. Asso. v. Dwelling House Ins. Co.* 106 Mich. 236, 64 N. W. 21.

The courts of Missouri and Ohio hold contrary doctrines to those of New York upon the question.

The phrase "when appraisal has been required" in a fire insurance policy providing for a determination of the amount of a loss by arbitrators in case of a disagreement, and that the loss shall not become payable for sixty days after an award "when appraisal has been required," is not equivalent to a stipulation making necessary, to vitalize the arbitration clause, a written request for an appraisal. *Murphy v. Northern British & M. Co.* 61 Mo. App. 323; *McNees v. Southern Ins. Co.* 69 Mo. App. 232.

It was held in *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 50 L.R.A. 555, 71 Am. St. Rep. 736, 54 N. E. 545, that stipulations in a fire insurance policy making a loss not payable until there elapsed a stated time after the receipt of proofs, including an award by appraisers "when appraisal has been required," and providing that no suit or action on the policy should be sustainable by the insured until after a full compliance by him with all the requirements of the policy, while they conferred upon each party a right to demand an appraisal, did not bind either unconditionally to a submission of the amount of a loss to the judgment of appraisers, but left it optional with insurer and insured alike to require, by demand on the other party, such a submission, so that if neither one should exercise the option by requesting

an appraisal, the right of the other to pursue his ordinary legal remedies would be unaffected.

But when the court next had occasion to take up the same question, it held that such stipulations imposed a duty on the policy holder where his loss was not total (total losses falling under a valid policy statute [Rev. Stat. § 3643]), in case of a disagreement respecting the amount of his loss, to procure an award, or show a legal excuse for not doing so, as a condition precedent to an action on the policy to recover a loss, and thereupon expressly overruled the former decision. *Graham v. German American Ins. Co.* supra.

In that case the ruling was that the phrase in the policy "when an appraisal has been required," making an award fixing the amount of a loss a condition precedent to any suit upon the contract to recover it, meant when it has been required by the terms of the policy in the circumstances, and not when it had been explicitly requested or demanded by the insurer. *Ibid.*

Before this later decision was rendered, the circuit court held in *German Ins. Co. v. Kistner*, 26 Ohio C. C. 569, that under a policy containing such provisions no obligation rested on the assured to cause an appraisal of his loss to be made, or to procure an award before he brought his action, unless the insurer demanded it, and the omission of the latter to demand it was a waiver of the condition precedent.

The appeal from this decision was argued and decided at the same time with *Graham v. German-American Ins. Co.* supra, and, of course, resulted in a reversal.

The doctrine of the *Graham Case* was reaffirmed in *Fire Asso. of Philadelphia v. Appel*, 76 Ohio St. 1, 80 N. E. 952.

When a fire insurance policy provides that the sum the underwriter becomes liable to pay shall not be payable until a stated time has elapsed after an award by arbitrators of the amount of loss or damage where an appraisal has been required, or, that no suit shall be brought upon the policy until all its requirements shall have been complied with, an arbitration and award, if such have been required, are conditions precedent to an action upon the policy to recover insurance. *Southern Home Ins. Co. v. Faulkner*, 57 Fla. 194, 131 Am. St. Rep. 1098, 49 So. 542.

e. Effect of mere silence.

Unless it is in terms or by fair implication from the nature or language of a contract made a duty of the defendant to procure an award, the responsibility of obtaining it or of excusing its absence rests wholly on the plaintiff. *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458.

When, therefore, a policy of insurance provides absolutely for an arbitration or an appraisal to fix and determine the amount of any loss claimed by the policy holder and not agreed to by the insurer as

a condition precedent to maintaining any action or suit on the policy to recover insurance, and does not either expressly or by fair implication make such arbitration or appraisal to depend upon a request, written or oral, for it by the insurer, the mere silence and inaction of the insurer after receiving proofs of loss and questioning the extent of the damage, without more, does not amount to a refusal, neglect, or failure to arbitrate, nor absolve the policy holder from the duty of procuring an award before suing. *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055; *Murphy v. Northern British & M. Co.* 61 Mo. App. 323; *McNees v. Southern Ins. Co.* 61 Mo. App. 335.

The underwriter, according to the court in *Chippewa Lumber Co. v. Phenix Ins. Co.* supra, is in the position of a debtor; the policy holder, of a creditor. A debtor waives no right by his silence when he is not called upon to act. The defendant by letter promptly informed the plaintiff that it disputed the amount of the loss and demanded that it be estimated under the contract. Even if this letter was no demand for arbitration, it certainly constituted no waiver. In order to establish a waiver, the plaintiff should have moved on the receipt of this letter, and fastened upon the defendant some acts or conduct from which a waiver might naturally be inferred. It is silence against silence, and neither party is placed thereby in any other or different position from that in which he stood at the beginning.

The court distinguished its previous decision in *Nurney v. Fireman's Fund Ins. Co.* 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350, upon the ground that arbitration in that case depended upon a written request by either insurer or insured; and the omission for five months of negotiation of either to ask for it was a waiver, whereas in the present case, the agreement to arbitrate did not require any request to make it operative, and was never waived.

The court in *McNees v. Southern Ins. Co.* 69 Mo. App. 232, after giving its adhesion to the doctrine that a provision in a fire insurance policy requiring the amount of any loss or damage, if not agreed upon, to be determined by the award of arbitrators before the policy holder should be entitled to maintain an action to recover for such loss, created a condition precedent to an action upon the policy, and was not rendered inoperative by the mere omission of the underwriter to request an arbitration, except and unless the provisions respecting arbitration expressly required a demand or request by one of the parties to vivify them, cited as the single case holding a contrary doctrine which it had found.—*Kahnweiler v. Phenix Ins. Co.* 14 C. C. A. 485, 32 U. S. App. 230, 67 Fed. 483,—and criticized it by saying: "It overlooks decisions of the Supreme Court of the United States. The policy in that case did not contain the words found in this, 'if appraisal has been required,' and the case, therefore, stands 47 L.R.A. (N.S.)

out in full conflict with the authorities on the subject."

In *Millaudon v. Atlantic Ins. Co.* 8 La. 557, an action on a fire insurance policy to recover a total loss of a stock of merchandise, the defendant contended that the policy holder was bound, before instituting suit, to tender an arbitration pursuant to a provision of the policy so requiring, but the court was of opinion that when the claim was made by the assured for his loss, he would have been bound to arbitrate if the insurer had so demanded or offered to refer, but on its refusal to pay without availing itself of the right to arbitrate, the provision might well be deemed to have been waived, and the policy holder was at liberty to commence suit without a previous offer to arbitrate on his part.

It was contended in *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S. W. 837, that the provision for an arbitration, contained in the policy there involved, was a condition precedent, and that performance of it was required to be alleged in the petition; but the court held otherwise, saying: After proof of loss was made, it was the duty of the company to propose the arbitration if a difference existed as to the value of the property, and no averment or evidence of such proposal appears in the record.

It was said by the court in *Liverpool & L. & G. Ins. Co. v. Creighton*, 51 Ga. 95, that the report of the case of *Millaudon v. Atlantic Ins. Co.* supra, does not show what were the terms of the stipulation, or whether or not they amounted to a condition precedent. The statement is quite true; and it applies as well to the case of *Sun Mut. Ins. Co. v. Crist*, supra.

If, however, provisions in a policy of fire insurance, either in express language or by necessary implication, set a time limit within which an arbitration of the amount of loss must take place, and make such an arbitration the alternative, at the insurer's option, of other action by the insurer, then a duty rests upon the insurer to advise the policy holder of its election, and it is bound at least to demand an arbitration within such time limit, and if it fails or neglects to do so, the assured is at liberty to bring his action to recover insurance without arbitrating. *Zimeriski v. Ohio Farmers' Ins. Co.* 91 Mich. 600, 52 N. W. 55.

If a stipulation in a building contract that in case either owner or contractor shall be dissatisfied with the architect's estimate of the value of extra or omitted work and materials to be added to or deducted from the contract price, the dispute shall be submitted to arbitrators whose award shall be final and binding, can be regarded as a condition precedent to a recovery in an action on the contract by the contractor, it will only be so considered upon proof of the owner's dissatisfaction with his architect's estimates, and his demand for an arbitration as provided. If such proof be not made, the court is not

ousted of jurisdiction. *Conrad v. Humphrey*, 27 Ky. L. Rep. 4, 84 S. W. 313.

On the other hand, it has been held in a California case, that no recovery can be had for extra work and materials done and furnished under a building contract providing that claims for such work and materials shall be submitted to and determined by arbitration, where no request or offer has been made by the claimant to arbitrate. *Scammon v. Denio*, 72 Cal. 393, 14 Pac. 98.

XXI. Necessity for new arbitration after one fails.

The question how far a party to an arbitration agreement making an award a condition precedent to an action is bound to go in his efforts to procure the award before he is at liberty to abandon them, and resort to the courts, has given the judges considerable difficulty to answer. He is bound, of course, to make an earnest and honest attempt to procure an award, and to continue trying until convinced that it is unobtainable. But at what point he is warranted in concluding that an award cannot be had, and in ceasing to try for it further, and resorting to the courts without it, there appears to be no established rule for determining. That he cannot be kept out of court forever is generally conceded.

One can but marshal the cases with an approach to order, to speak for themselves on this point.

If an arbitrator or appraiser nominated by one party to a submission declines to act in harmony with his colleague in choosing an umpire or making an award, the remedy of the other party is to revoke the submission, and bring an action for the original cause. *Cooper v. Shuttleworth*, 25 L. J. Exch. N. S. 114.

When neither party to an arbitration agreement is in fault, and no award can be had from the arbitrators, no good reason exists why the parties should not be heard in a court of law. *Stone v. Dennis*, 3 Port. (Ala.) 231.

If a provision for an arbitration in a contract is collateral to the contract, and fails of accomplishment without fault of the parties, they are relegated to their legal rights independent of such provision. *Western. Assur Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48, 24 So. 936.

The disagreement of arbitrators chosen under the terms of a fire insurance policy to determine the amount of a loss over which the parties differ, and the failure of subsequent efforts to agree upon another set of arbitrators, where neither insured nor insurer acts in bad faith, relegates the parties to their legal rights, and entitles the policy holder to bring and maintain suit to recover his insurance. *Pretzfelder v. Merchants' Ins. Co.* 116 N. C. 491, 21 S. E. 302.

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a loss provided for in an insurance contract as a condition precedent to the insurer's liability fails without any fault of the insured, the failure is no impediment to his right to recover on the policy if he can maintain his suit on other grounds. *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675; *Home Ins. Co. v. M. Schiff's Sons*, 103 Md. 648, 64 Atl. 63; *Shawnee F. Ins. Co. v. Pontfield*, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835.

A new appraisal of a fire loss is not a prerequisite to a policy holder's action when the first fails without his fault and in consequence of the fault of the insurer. *Fire Asso. of Philadelphia v. Appel*, 76 Ohio St. 1, 80 N. E. 952.

If a plaintiff in an action on a contract has done everything in his power to procure an award fixing the amount to be paid by its terms, the act of one of the arbitrators, in refusing to join his associates in an award, does not operate to deprive him of his contract rights. *Phippen v. Stickney*, 3 Met. 384.

It is declared to be well-settled law in New Hampshire that either the refusal of an arbitrator to perform the duties necessary to carry out the agreement, or the withdrawal from the compact of either party before the award is published, renders the submission nugatory. *Franklin v. New Hampshire F. Ins. Co.* 70 N. H. 251, 47 Atl. 91.

When an arbitration of the amount of a fire loss fails because of the unjustifiable refusal of the arbitrator chosen by the insurer to join his colleague in selecting an umpire, and the policy holder notifies the underwriter of such fact and requests it to select a new arbitrator, its refusal to comply with such request is a waiver of the arbitration clause in the policy, and the assured is at liberty to bring his action without waiting for an award. *O'Rourke v. German Ins. Co.* 99 Minn. 293, 109 N. W. 401.

The refusal of the person designated to act as arbitrator in a matter in controversy between a contractor and a municipality, arising out of a contract for public work, containing no provision dealing with such a contingency, relegates the parties to their ordinary remedies in the courts. *Werneberg v. Pittsburg*, 210 Pa. 267, 59 Atl. 1000.

When an award is void, resort may be had to the original cause of action. *Morton v. Cameron*, 3 Robt. 189.

An invalid award of arbitrators to whom was referred, pursuant to the provisions of a fire insurance policy, the question of the amount of a loss, has no effect on the rights of either party. *Soars v. Home Ins. Co.* 140 Mass. 343, 5 N. E. 149.

The failure of an arbitration of the amount of a loss, provided for in an insurance contract, and made a condition precedent to the insurer's liability to pay, if caused by the fault of the policy holder, is a bar to an action on the policy. *Shawnee*

F. Ins. Co. v. Pontfield, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835.

When an arbitration provided for in a policy of fire insurance, and demanded by the policy holder, fails through the bad faith, obstructive delays, and unfair conduct of the underwriter, the insured is not bound to make any attempt to procure a new arbitration. Powers Dry Goods Co. v. Imperial F. Ins. Co. 48 Minn. 380, 51 N. W. 123.

If a contract provides for an arbitration to determine some fact or sum as a condition precedent to the maintenance of an action upon it by one party against the other, and a first attempt to arbitrate fails without fault of the party ultimately liable on the contract, the condition is not discharged, but the duty to proceed with an arbitration continues, and a second attempt must be made before the right to sue will be unobstructed. Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89.

When an arbitration to determine the amount of a loss made a condition precedent to the right to sue in a policy of fire insurance fails by the inability of the arbitrators selected by the parties to unite upon the choice of a third, and the insurer has been guilty of no breach of faith, and has done nothing to frustrate the arbitration, it is the duty of the policy holder to proceed with a new arbitration, to obtain an award as a basis for his action. Westenhaver Bros. v. German-American Ins. Co. 113 Iowa, 726, 84 N. W. 717.

If a fire insurance policy provides for an arbitration to determine the amount of a loss under the policy in case the parties to it are unable to agree upon the figures, and makes the written award of a majority of the arbitrators conclusive as to amount, and a condition precedent to an action on the policy to recover a loss, the fact that an arbitration has been had and an award has been made which is vitiated and invalidated by the misconduct of the arbitrators fails either to satisfy or avoid the condition precedent, but leaves it incumbent upon the policy holder to prove that he has done all in his power to procure a new submission followed by an honest award, in order to maintain his suit. Fisher v. Merchants' Ins. Co. 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282.

Under such a provision, if an award is set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement to arbitrate remains in force, and a new submission, unless one has become impossible, must still be made, and, unless waived, is a condition precedent to a right of action on the policy. Ibid.

If a fire insurance policy provides for an arbitration to fix the amount of loss or damage, as a condition precedent to a suit upon it against the underwriter, a mere attempt by the insured to fulfil the condition by nominating an arbitrator upon his part, who refuses to serve for any reason not attributable to the insurer, does not satisfy the condition, but the obligation

persists for the policy holder to proceed to a new appraisal and obtain an award before he can maintain an action. Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13.

When a policy of fire insurance, as an integral part of the contract, provides for an arbitration to determine the amount of a loss or damage in case of a dispute, and for an award by the arbitrators as a condition precedent to the policy holder's right of action upon the policy, and an arbitration has been had and an award made which has been set aside and annulled for misconduct of the arbitrators, if the underwriter did not participate in such misconduct, and was free from fault in the premises, it still remains the duty of the insured to procure a new arbitration and award, if possible, before he will be entitled to maintain an action to recover his loss, unless the underwriter waives a further arbitration. Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.

When an arbitration to determine the amount of a fire loss has been had pursuant to a requirement in a fire insurance policy making an award by arbitrators a condition precedent to a right of action upon the policy, and such award has been set aside for misconduct in the arbitrators, even though not participated in by the underwriter, and although the latter was free from fault in the premises, yet, if the insurer neither asks for nor suggests a new arbitration, but, on the contrary, insists upon the validity of the award made, and explicitly refuses to settle on any other basis, it impliedly waives a further arbitration, and the policy holder is left at liberty to pursue his legal remedies in the courts. Ibid.

After a policy holder has been defeated in an action on a fire insurance policy to recover a total loss, on the ground of a failure to comply with the arbitration clause, which the contract made a condition precedent to suit, he is still entitled to demand an arbitration as provided by the policy, and if the insurer then refuses to join in such arbitration, the assured is at liberty to sue again, and is entitled to maintain his action. Schrepfer v. Rockford Ins. Co. 77 Minn. 291, 79 N. W. 1005, rehearing denied in 79 N. W. 1026.

After a policy holder has revoked his agreement to arbitrate a fire loss, where the policy creates such an arbitration a condition precedent to an action, he cannot put himself in a position to maintain a suit to recover a loss by making a new offer to arbitrate a long time after the state of the insured property has been so changed by his acts that the facts existing at the time of the loss are no longer ascertainable. Morly v. Liverpool & L. & G. Ins. Co. 85 Mich. 210, 48 N. W. 502.

Commenting upon the fact that decisions are to be found which hold that the failure of an award not due to the fault of either party to a fire insurance contract operated to prevent the assured from maintaining

an action upon the policy, notwithstanding he had done all in his power to promote the arbitration and procure an award, the court in *Bernhard v. Rochester German Ins. Co.* 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 298, said: This unsatisfactory position has, however, been very generally repudiated, and it has been held either that upon the failure of the arbitrators to return an award, the assured need go no further and may sue, or that the right to sue arises only upon his failure to secure an award after he has taken all reasonable and proper steps to accomplish that result, whether through an original submission or another or others. The reason underlying . . . is . . . that a claimant under a policy ought not to be tied up forever without his fault and against his will by an ineffectual arbitration.

XXII. Duty to act in good faith.

As a general rule, one cannot insist upon a condition precedent when he has himself defeated a strict performance. *Butler v. Tucker*, 24 Wend. 447.

To hinder an award in any essential part is to defeat any valid award. *Quimby v. Melvin*, 28 N. H. 250.

It is a good excuse for not performing a condition precedent that the other party prevented performance. *Fire Asso. of Philadelphia v. Appel*, 76 Ohio St. 1, 80 N. E. 952.

One who, by his own act or neglect, prevents the performance by the other party of a condition precedent in a contract between them, to the latter's action upon it, excuses such performance, and the latter may recover as if he had performed. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

An arbitration will not be enforced at the instance of one who has wilfully violated the contract providing for it, who is a wrongdoer, and who, by his wrong, changes the *status quo* of the parties or the matter in dispute. *Winsor v. German Sav. & L. Soc.* 31 Wash. 365, 72 Pac. 66.

If one who is sued has, by his own act or neglect, prevented his adversary from performing a condition precedent, he cannot take advantage of his own wrong, and the averment and proof of his conduct will have the same effect upon the right of action as an award or decision according to the terms of an agreement to arbitrate. *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458.

He who relies upon an agreement in a contract to submit disputes arising under it to arbitrators mutually chosen, whose decision shall be final, to defeat his adversary's action on such contract, must show that he has offered to join in, and taken on his part all necessary steps to procure, an arbitration, and that it is his opponent's fault that one has not taken place. *Snodgrass v. Gavit*, 28 Pa. 221.

Both parties to an arbitration agreement rest under a duty to act in good faith in carrying it out. Each owes it to the other to

make a fair effort to accomplish the object of the agreement. *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48, 24 So. 936; *Bernhard v. Rochester German Ins. Co.* 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 298; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *Shawnee F. Ins. Co. v. Pontfield*, 110 Md. 353, 132 Am. St. Rep. 449, 72 Atl. 835; *Powers Dry Goods Co. v. Imperial F. Ins. Co.* 48 Minn. 380, 51 N. W. 123; *Biddle v. Ramsey*, 52 Mo. 153; *Carp v. Queen Ins. Co.* 104 Mo. App. 502, 79 S. W. 757; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.* 130 N. Y. 488, 29 N. E. 844; *Bradshaw v. Agricultural Ins. Co.* 137 N. Y. 137, 32 N. E. 1055.

If either party to such an agreement acts in bad faith, so as to defeat the real object of it, his conduct absolves the other from complying with it. *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48, 24 So. 936; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.* 130 N. Y. 488, 29 N. E. 844; *Bradshaw v. Agricultural Ins. Co.* 137 N. Y. 137, 32 N. E. 1055; *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477; *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392; *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354, 20 S. E. 477.

If either party intentionally prevents or unreasonably delays the stipulated method of adjusting the rights of the parties, the failure of the arbitration will afford him no defense to an action subsequently brought. *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665.

The fraud, duplicity, or other misconduct of one party to an agreement to arbitrate a question of amounts or values, in preventing the appointment of impartial arbitrators, or in so controlling the choice of an umpire by the arbitrator he selected in such a manner as to obtain a third arbitrator already biased in his favor, or in preventing the arbitrators from agreeing upon an award, is such bad faith on his part as will entitle the other party to abandon the arbitration and appeal at once directly to the courts for the enforcement and protection of his rights, and to recover his claims under the contract. *Powers Dry Goods Co. v. Imperial F. Ins. Co.* 48 Minn. 380, 51 N. W. 123; *Biddle v. Ramsey*, 52 Mo. 153.

All the authorities agree, according to the court in *Bernhard v. Rochester German Ins. Co.* 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 298, that, notwithstanding stipulations in a fire insurance policy making a loss not payable until sixty days after an award, where an appraisal shall be required, and forbidding suit on the policy until after compliance with all its requirements, an award, where a submission is required, is not a prerequisite to the maintenance of an action. The duty of the parties is to act in good faith and make a fair effort to carry out the provisions and accomplish

their object. Failure on the plaintiff's part to perform this duty will bar his action; a like failure on the defendant's part will absolve the assured from compliance, and justify suit without an award. So far the authorities are, we believe, agreed. . . . The only difference between them is merely as to what shall be deemed a fair effort to secure the award.

These principles have frequently been applied in actions by policy holders to recover insurance on policies providing for arbitrations to determine the amounts of losses as a condition precedent to litigation, where the arbitrations had fallen through and bad faith was imputed to the insurer.

The law is well settled, it is said, that if the failure of the arbitration is the fault of the insurer, then an arbitration is not a prerequisite to the right of the insured to sue on the policy for his insurance. *Fowble v. Phoenix Ins. Co.* 106 Mo. App. 527, 81 S. W. 485.

The failure of an arbitration to determine the amount of a fire loss as a condition precedent to suit, in consequence of bad faith and perverse conduct of the insurer, dispenses with any necessity of the insured's procuring an award before bringing suit in order to recover. *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041.

A refusal by the underwriter to proceed to an arbitration of the amount of a loss, except under such conditions as clothe the arbitrators with powers and charge them with duties very considerably beyond those conferred and prescribed in the policy, absolves the assured from any obligation on his part to proceed with an arbitration before he brings suit upon the policy. *Summerfield v. North British & M. Ins. Co.* 462 Fed. 249.

The bad faith of an underwriter in obstructing, unreasonably delaying, or refusing to proceed with, an arbitration provided for in a fire insurance policy, after a demand for one by the policy holder, warrants the latter in bringing suit to recover upon the policy for a fire loss, and precludes the former from setting up the want of an arbitration and award as a defense to the action. *Powers Dry Goods Co. v. Imperial F. Ins. Co.* 48 Minn. 380, 51 N. W. 123.

If, after a loss occurs, the insurer and insured differ regarding its amount, and the policy provides for an arbitration and award as a condition precedent to an action, and thereupon each party proposes an arbitration, but coupled with conditions which neither will accept, the conduct of the underwriter in proceeding to trial in the policy holder's action upon the theory that the duty of carrying into effect the arbitration was not so much the insured's as the insurer's operates to relieve the policy holder of the necessity of procuring an award in order to maintain his action. *Swearinger v. Pacific F. Ins. Co.* 66 Mo. App. 90.

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that the amount of a loss be arbitrated and fixed by the award as a condition precedent to a suit on the policy, cannot be used as a means to baffle the policy holder, and to postpone indefinitely his right to sue. If the underwriter acts in bad faith, and seeks to use the arbitration clause to delay payment, it absolves the insured from the duty of complying with it, and leaves him at liberty to pursue his legal remedies. *Carp v. Queen Ins. Co.* 104 Mo. App. 502, 79 S. W. 757.

The arbitrary position assumed by an insurer, that unless the insured will accept in full a stated sum for his loss, it will not settle at all, dispenses with the necessity for the policy holder to comply with a provision in a fire insurance policy for arbitrating the amount of a loss as a condition precedent to an action on the policy. *Cullen v. Insurance Co. of N. A.* 126 Mo. App. 412, 104 S. W. 117.

A clause in a fire insurance policy requiring an arbitration to determine the amount of any loss in case the parties differ and are unable to agree upon it after proofs have been furnished requires, to make it operative as a condition precedent to the policy holder's action on the policy, an honest effort in good faith by the insurer to agree with him on the amount; if the insurer arbitrarily differs with the assured and makes no effort whatever to agree with him, but demands an appraisal in the first instance, the insured is warranted in bringing suit at once. *Boyle v. Hamburg-Bremen F. Ins. Co.* 169 Pa. 349, 32 Atl. 553; *Moyer v. Sun Ins. Office*, 176 Pa. 579, 53 Am. St. Rep. 690, 35 Atl. 221.

A fire insurance company, by disclaiming any intention to admit a legal liability and expressly reserving that question for later settlement, in calling on the policy holder to furnish additional information supplementing the proofs of loss already transmitted, and following it up by another call for still more information, and then ignoring the policy holder's request for a definite statement regarding its intention to pay his claims, justifies the policy holder, after a reasonable time during which no request to arbitrate is made, in bringing suit to recover his loss, upon the assumption that the company denies all liability upon the policy and waives arbitration as an idle ceremony, notwithstanding a provision in the policy requiring an arbitration where the parties differ as to the amount of a loss, and a submission and award as a condition precedent to the maintenance of an action. *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171 Mass. 433, 50 N. E. 943.

Conduct in an insurer in demanding an arbitration or an appraisal of the amount of loss under the provisions of a fire insurance policy, or in refusing to agree upon competent and impartial arbitrators, or in delaying adjustment and the arbitration with the design of coercing the policy holder into accepting less than his honest due, constitutes such bad faith as absolves the as-

sured from complying with the arbitration condition before resorting to the courts. *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L.R.A. 405, 62 N. W. 422.

The trend of the authorities, according to the court in *Fowble v. Phoenix Ins. Co.* 106 Mo. App. 527, 81 S. W. 485, is to establish the proposition that if the arbitrator selected by the assured suggests the names of worthy, competent, and unprejudiced persons residing near the scene of the loss for umpire, and the other arbitrator capriciously refuses to accept any of them, refusing to name anyone on his part in the vicinity of the loss, and insists on someone at a distance, the assured may begin his action without arbitration.

When one clause in a fire insurance policy provides that in case of loss an estimate shall be made by the insurer and insured, and another clause provides that in case they differ the subject shall be referred to appraisers, the remedies are successive, and neither party can insist upon the second who has not shown a willingness and readiness to enter upon the first. *Boyle v. Hamburg-Bremen F. Ins. Co.* 169 Pa. 349, 32 Atl. 553; *Moyer v. Sun Ins. Office*, 176 Pa. 579, 53 Am. St. Rep. 690, 35 Atl. 221.

When an agreement to appraise a fire loss has been entered into between an insurer and insured, both are bound to act in good faith, and if there is no evidence of the insurer's bad faith, either in carrying out or of purpose to defeat the agreement, the insured is not justified in abandoning the proceedings and resorting to an action. *Williams v. German Ins. Co.* 90 App. Div. 413, 86 N. Y. Supp. 98.

XXIII. Necessity for an actual controversy.

A reference to arbitration occurs only where there is a matter in controversy between two or more persons. *Curry v. Lackey*, 35 Mo. 389.

Inasmuch as an agreement to arbitrate, or a clause in a contract providing for an arbitration, necessarily presupposes a difference or matter in dispute to be settled by the decision of the arbitrators, it is everywhere held that, unless a difference or dispute to be arbitrated arises within the terms of the agreement between the parties, the provision for an arbitration is inoperative, and need not be complied with before a resort to the courts, even though an award is made a condition precedent to an action or suit.

The principle has been applied in several actions to recover insurance brought by policy holders on policies containing clauses providing for arbitrations to determine amounts of losses in case differences should arise between the insurer and insured as to the extent of the loss or damage, where there had been no submission made to arbitrators or appraisers to ascertain amounts and award the sums payable.

In such cases the courts have held arbitrations unnecessary, because no dispute

had arisen over amounts and there was nothing to arbitrate. *Hanover F. Ins. Co. v. Harper*, 77 Ill. App. 463; *Bergman v. Commercial Union Ins. Co.* 12 Ky L. Rep. 942; *Insurance Co. of N. A. v. Forwood*, 13 Ky. L. Rep. 261; *Kelly v. Liverpool & L. & G. Ins. Co.* 94 Minn. 141, 110 Am. St. Rep. 351, 102 N. W. 380; *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *American F. Ins. Co. v. Stuart*, — Tex. Civ. App. —, 38 S. W. 395.

To entitle an insurer to bar a recovery for a fire loss sued for by a holder of a fire insurance policy containing a clause providing for an ascertainment or estimate of the amount of loss to be made by the insurer and insured, or, in case they do not agree, by appraisers or arbitrators mutually chosen, on the ground that no submission or offer to submit was made before suit, assuming such clause to be binding on the policy holder, and not revocable by him at will, as the rule is in Pennsylvania, the insurer is called upon to show that it made an honest effort and failed to agree with the insured as to the amount of loss, before the obligation of the latter to refer would arise. *Rice v. Palatine Ins. Co.* 17 Pa. Super. Ct. 261.

A condition in a fire insurance policy making an appraisal by arbitrators of the amount of a loss necessary where the parties disagree and one requests it in writing, and an award by them a prerequisite to any suit on the policy to recover a loss, if not waived by an omission of the insurer to make a written request, can have no effect where no dispute over the amount of loss arises and in cases where the insurer denies absolutely liability to pay any loss whatever. *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N. W. 504; *Bailey v. Aetna Ins. Co.* 77 Wis. 336, 46 N. W. 440.

A provision in a fire insurance policy, that the amount of sound value and damage to property insured when a loss insured against occurs may be ascertained and determined by mutual agreement of the insurer and insured, or, on their failing to agree, by arbitrators chosen in the customary way, whose award should be a condition precedent to an action by the policy holder to recover a loss, remains dormant and inoperative as long as the insurer does not question the amount claimed by the insured, nor make the slightest effort to come to an agreement with him on the amount if that be questioned. *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122.

A provision in a fire insurance policy, that no suit or action against the underwriter to recover any claim by virtue of it shall be sustainable in any court of law until after an award shall have been obtained from arbitrators fixing the amount, must be read and construed in connection with the provision for the submission to arbitration of differences arising over the amount of a loss or damage claimed under the policy, and if the latter provision is waived

or never becomes operative, the former, being dependent upon it, falls with it, and creates no bar to an action by the policy holder to recover on the policy for a loss. *Nurney v. Fireman's Fund Ins. Co.* 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350.

An arbitration to fix the amount of a fire loss need not be had preliminary to a policy holder's action to recover insurance, where it is conceded that the insured property was totally destroyed by fire, and was worth, when destroyed, very much more than the sum for which it was insured. *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755, rehearing denied in 50 Kan. 453, 31 Pac. 1070.

Such an arbitration is not necessary where it is undisputed that the amount of the loss exceeded the whole insurance. *Hobson v. Queen Ins. Co.* 2 Ohio N. P. 296, 2 Ohio S. & C. P. Dec. 475.

When, by the terms of a fire insurance policy, an arbitration is to be had of the amount of a loss in case the parties disagree, as a necessary preliminary to an action to recover for such loss, to bar the action when an arbitration has not taken place, it must affirmatively appear that the parties actually disagreed as to the amount of loss; it is not enough that it does not appear that they mutually agreed upon such amount. *Fletcher v. German-American Ins. Co.* 79 Minn. 337, 82 N. W. 647.

A covenant in a fire insurance policy providing for a submission to arbitration only in the event of disputes arising over the amount of a loss after proofs of loss and damage have been furnished in due form is dormant until the proofs are rendered, and if these are never furnished, does not become operative at all. *Bowes v. National Ins. Co.* 20 N. B. 437.

An action by a policy holder to recover for a fire loss is maintainable without an arbitration where no dispute respecting amount of loss arose between the parties within the time limit fixed in the contract. *Hayes v. Milford Mut. F. Ins. Co.* 170 Mass. 492, 49 N. E. 754.

A dispute between insurer and insured as to whether or not additional insurance had been taken on the same property, in violation of the terms of a fire insurance policy, does not constitute a difference respecting the amount of the loss, which calls the arbitration clause into play, because the real contention of the underwriter is not what amount it should pay the policy holder, but whether it should pay him anything at all. *Nelson v. Atlanta Home Ins. Co.* 120 N. C. 302, 27 S. E. 38.

A provision in a fire insurance policy for an arbitration in case of a disagreement as to the amount of valuation, in whole or in part, of the insured property damaged or destroyed, has no application to a controversy of the validity of the claim at all, in consequence of the alleged lapse of the policy. *Hogadone v. Grange Mut. F. Ins. Co.* 133 Mich. 339, 94 N. W. 1045.

The legitimate object of provisions in fire insurance policies looking to an arbit-

ration or appraisal of an amount of a loss as to which the parties differ, as a prerequisite of legal proceedings by the policy holder against the insurer to recover it, has been declared to be the furnishing of an easy tribunal to settle, without the delay and expense of a litigation, a real difference of estimate and opinion between insurer and insured, and it has been said that until a real difference has arisen out of an honest effort to come to an agreement, there is neither an occasion nor authority for appraisal and arbitration. *Hickerson v. German American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041.

A suit in equity by the equitable assignee of a policy of marine insurance held as collateral pledge for a loan of money, resisted upon the main ground that the condition of the insured vessel was materially misrepresented in the application for the policy in such a respect as to avoid the policy, does not present such a dispute as to require an arbitration and an award as a condition precedent to maintaining the suit, under a clause in the contract calling for an arbitration of matters in dispute as a prerequisite to any proceeding at law or in equity, since the controversy is over a pure question of law, which only a court can adjudicate. *Alexander v. Campbell*, 27 L. T. N. S. 25, 41 L. J. Ch. N. S. 478, 1 Asp. Mar. L. Cas. 373, 447.

It was the view taken in *McNees v. Southern Ins. Co.* 61 Mo. App. 335, that the cases in which courts had sustained actions by policy holders to recover fire losses under fire insurance policies providing for arbitrations to determine the amounts of such losses as conditions precedent to suit, where no submission or award had been made, were in one or another of three classes, to wit: First, where the provision for arbitration required it only upon the written request of a party; second, where the insurer and insured had agreed upon the amount of loss; and, third, where the underwriter absolutely and unqualifiedly denied all liability upon the policy. In the first class, it was held necessary for the underwriter to make a written request for an arbitration if one was wanted; in the second class there was no dispute to refer; and in the third class, when liability is totally denied, there is nothing to arbitrate.

Actions on policies of insurance are not the only ones in which the stated principle of no dispute, no arbitration, has been applied. It has governed in several cases which have arisen between contractors and owners upon building and construction contracts. And the principle has been applied also in litigations growing out of contracts of a different character.

A clause in a building contract providing for a reference to arbitration of any dispute which shall arise touching the completion, construction, or acceptance of the building, or the value of extra work, ceases to be operative when the completed building is turned over to the owner and ac-

cepted by him unconditionally. *Burke v. Dittus*, 8 Cal. App. 175, 96 Pac. 330.

A clause in a building contract calling for the erection of several shops, providing that, should any dispute arise respecting the true value of any extra or omitted work, the same should be valued by two competent persons and an umpire chosen as arbitrators usually are, is without effect upon an action by the contractor against the owner after substantially performing the contract, to recover the final instalment of the contract price and compensation as well for extra work done, where the dispute is not over the value of the alleged extra work, but whether any work extra to the contract for which the owner was liable was done at all. *Sinclair v. Tallmadge*, 35 Barb. 602.

When no dispute arises between the parties to a construction contract, in relation to the value of the work done under it, a provision in it for an arbitration to determine such value in case the parties cannot agree is inoperative, and affords no ground for objecting that an action for such value cannot be maintained because no arbitration has taken place. *Hurst v. Litchfield*, 39 N. Y. 377.

A provision in a contract for the construction of a mining tunnel, that any question that shall arise between the parties to it, either in respect of when the mine shall have been drained and payments for ore extracted shall commence, or in respect of the amount of money at any time due or payable from one to the other party, shall be referred to arbitrators, whose decision shall be final, does not apply or affect an action to recover the agreed price of the construction, where there is no dispute as to the length of the tunnel, or the completion of the work in accord with the specifications, and the sums payable and times of payment are stated in the contract. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 19 Nev. 121, 7 Pac. 271.

An agreement between adjoining land-owners whose premises are divided by a party wall, whereby one is entitled to the use of an entrance, hallway, elevator, and stairway upon the other's property for access to his own, containing a provision for the arbitration of questions of the value of the use of the party wall, or any other disagreement between the parties, the award or decision of the arbitrators to be final and binding, does not require a request or demand for an arbitration to be made, or a resort to arbitration, when the entrance, hallway, stairway, and elevator are closed or threatened to be, before the injured or aggrieved party is at liberty to seek the aid of a court of equity to restrain the invasion of, and to preserve his rights in, the premises. *Windsor v. German Sav. & L. Soc.* 31 Wash. 365, 72 Pac. 66.

The court in *Fravert v. Fesler*, 11 Colo. App. 387, 53 Pac. 288, refused to consider the effect of the presence in a contract of a stipulation to submit differences to arbitration, which did not expressly make such

submission a condition precedent to an action, or in a case where the agreement was not of such a nature that a submission of some question was necessary to fix a liability, because it was of the opinion that, in the case at bar, no difference had arisen to call the arbitration agreement to life,—there being simply a failure of one party to pay the other an undisputed sum due.

XXIV. *Waivers.*

An agreement making an arbitration and award a condition precedent to maintaining an action at law or suit in equity may be waived. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

Any person may waive a formal condition inserted in a contract for his benefit. *Fravert v. Fesler*, 11 Colo. App. 387, 53 Pac. 288.

A clause in a fire insurance policy providing for an arbitration or appraisal of the loss or damage as a condition precedent to a suit by the policy holder to recover insurance is inserted wholly for the protection of the insurer. *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218, 76 S. W. 22.

Hence, compliance with such a clause may be waived by the insurer. *Western Underwriters Asso. v. Hankins*, 221 Ill. 304, 77 N. E. 447; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848; *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* 171 Mass. 433, 50 N. E. 943; *Swearinger v. Pacific F. Ins. Co.* 66 Mo. App. 90; *Hooker v. Phoenix Ins. Co.* 69 Mo. App. 141; *Vining v. Franklin F. Ins. Co.* 89 Mo. App. 311; *Ball v. Royal Ins. Co.* 129 Mo. App. 34, 107 S. W. 1097; *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392; *Norris v. Equitable Fire Asso.* 19 S. D. 114, 102 N. W. 306; *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531; *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119; *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239; *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. 945; *Tilley v. Connecticut F. Ins. Co.* 86 Va. 811, 11 S. E. 120.

The same rule applies to other kinds of insurance policies. *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192; *Gnau v. Masons' Fraternal Acci. Asso.* 109 Mich. 527, 67 N. W. 546.

While there is some conflict in the authorities as to when provisions to arbitrate are merely optional or conditions precedent to an action, they are all agreed, according to the court in *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848, that, whether the one or the other, they may be waived.

Such waivers need not be expressed in terms; they may be implied from the acts,

omissions, or conduct of the insurer. *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192; *Gnau v. Masons Fraternal Acci. Asso.* 109 Mich. 527, 67 N. W. 546; *Hooker v. Phenix Ins. Co.* 69 Mo. App. 141; *Ball v. Royal Ins. Co.* 129 Mo. App. 34, 107 S. W. 1097; *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392; *Norris v. Equitable Fire Asso.* 19 S. D. 114, 102 N. W. 306; *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531; *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 30 L.R.A. 172, 33 S. W. 1041; *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119; *Northern Assur Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239; *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. 945; *Tilley v. Connecticut F. Ins. Co.* 86 Va. 811, 11 S. E. 120; *Bowes v. National Ins. Co.* 20 N. B. 437.

This is especially true of stipulations in contracts for appraisal of damages or arbitrations of amounts, made operative only by some affirmative action of one of the parties, as, for example, a request or demand in writing. *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

The same doctrine applies respecting similar clauses in other contracts. *Fravert v. Feiler*, 11 Colo. App. 387, 53 Pac. 288; *Meyer v. Berlandi*, 53 Minn. 59, 54 N. W. 937; *Sinclair v. Tallmadge*, 35 Barb. 602; *Brush-Swan Electric Light Co. v. Brush Electric Co.* 41 Fed. 163; *Hamelin v. Bannerman*, 31 Can. S. C. 534.

The rejection by a purchaser of goods tendered in performance of a contract of sale, without asking for an arbitration as provided in it, where it is further provided that a final rejection by the arbitrators of such goods shall cancel the contract without damage to either party, has, when the seller acquiesces in the rejection, the same effect as if there had been an arbitration and a rejection by award, and puts an end to the contract free from claims of damage. *Baer's Sons Grocer Co. v. Cutting Fruit Packing Co.* 42 W. Va. 359, 26 S. E. 191.

A provision in a marine insurance policy, requiring any dispute or difference relating to a loss claimed under it that shall arise between the underwriters and ship-owners, to be submitted to arbitrators as a condition precedent to an action on the policy to recover a loss, is waived and rendered nugatory when the insurer takes possession of the insured vessel and proceeds to repair it, although refusing to accept an abandonment. *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192.

A demand by an insurer of an appraisal of the amount of a loss claimed under a fire insurance policy is a waiver of other defenses going to the question of the liability of the insurer on the policy. *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041. 47 L.R.A. (N.S.)

An abandonment of an appraisement of loss by an insurer after requesting it, pursuant to a clause in a fire insurance contract, is a waiver of the condition, and excuses the insured from proceeding with it. *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239.

A request for an arbitration or an offer to arbitrate made by a policy holder when he and the underwriter's adjuster differ over the amount of a loss, and its rejection, or neglect and failure by the insurer to unite in an arbitration, amount to a waiver of the provisions of a fire insurance policy making an arbitration and award a condition precedent to an action. *Hooker v. Phenix Ins. Co.* 69 Mo. App. 141; *Ball v. Royal Ins. Co.* 129 Mo. App. 34, 107 S. W. 1097.

A clause in a fire insurance policy, requiring, in case the parties disagree, an arbitration or appraisal of the amount of a loss or damage in connection with, and as a part of, the proofs of loss required from the assured, followed by a provision that the loss shall not be payable until a stated time has elapsed after satisfactory proofs, including an appraisement, if one has been required, have been received by the insurer, is waived when the insurer accepts the proofs of loss tendered without any appraisement, unconditionally, and does not insist upon, or even request, any appraisement. *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. 945.

An insurer waives the provision in a fire insurance policy requiring an appraisement of the amount of loss as a condition precedent to an action on the policy, where the policy also requires suit to be brought within one year or be barred, if it fails to request an appraisement during such year, but delays the policy holder with other objections until it has almost expired, in a case where the value of the property destroyed plainly greatly exceeded the whole amount of the insurance. *Tilley v. Connecticut F. Ins. Co.* 86 Va. 811, 11 S. E. 120.

When a provision in a fire insurance policy for an arbitration of any dispute arising over the amount of any loss or damage is so involved in, and contingent upon, other provisions in the contract respecting proof and adjustment of loss, that it does not stand alone, a waiver of the other provisions is a waiver of the right to have an arbitration. *Bowes v. National Ins. Co.* 20 N. B. 437.

Under a statute authorizing the organization and operation of mutual benefit associations to insure against loss by fire, lightning, and tornadoes, which makes it the duty of a policy holder to notify the secretary of his loss, and then of such secretary to ascertain and adjust such loss within thirty days, and if he cannot do so, to appoint a disinterested committee of members to do it, and, following the failure of such committee to agree with the insurer, provides for a submission to arbitrators to be mutually chosen, it is competent for

such an association to waive the statutory requirements, and it does waive them, if, when a claim is made by a policy holder, the secretary fails to offer to adjust it, fails to name any committee to do it, and fails to ask the assured to join in an arbitration; or, in other words, the obligation rests upon the insurer to take the initiative to procure an adjustment of the amount of a claim in the mode prescribed by the statute. *Norris v. Equitable Fire Asso.* 19 S. D. 114, 102 N. W. 306; *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531.

A provision for an arbitration to determine the question of the solvency of one of the parties in a contract which the other party is at liberty to abrogate in case insolvency is established, is impliedly waived by renewing such contract after insolvency takes place and becomes known. *Brush-Swan Electric Light Co. v. Brush Electric Co.* 41 Fed. 163.

If the parties to a contract containing a provision for an arbitration of matters in difference wholly ignore such provision in all their dealings, they will be deemed, when litigation ensues, to have waived it. *Meyer v. Berlandi*, 53 Minn. 59, 54 N. W. 937.

A clause in a building contract providing for the submission to arbitration of any dispute respecting the true value of omitted or extra work will be treated as waived upon an appeal from a judgment in favor of the contractor for the last instalment of the contract price and for compensation for extra work, where neither party has insisted upon or offered to make a submission, and where, upon the trial, no objection was made to the claim for extra work, upon the ground that there had been no arbitration. *Sinclair v. Tallmadge*, 35 Barb. 602.

An objection that an arbitration and award were made, by the terms of a contract, a condition precedent to an action for damages, waived in the court below, cannot be urged on an appeal, but must be regarded as abandoned. *Hamelin v. Bannerman*, 31 Can. S. C. 534.

The indefinite postponement of consideration of a claim of loss under a fire insurance policy is not the equivalent of a rejection of the claim and a repudiation of liability for it so as to amount to a waiver by the underwriter of any condition in the policy. *Patrick v. Farmers' Ins. Co.* 43 N. H. 621, 80 Am. Dec. 197.

XXV. Effect of unconditional denial of all liability.

If the underwriter does not deny its liability for a loss, it is the duty of the policy holder to demand an appraisal, when a policy of fire insurance provides for one as a condition precedent to the right to sue. *Carp v. Queen Ins. Co.* 104 Mo. App. 502. 79 S. W. 757.

In England the effect of totally denying liability on a contract containing clauses requiring an arbitration to determine an

amount payable, and forbidding any suit or action to be maintained on the contract until after an award, upon the necessity of an arbitration and award as a condition precedent to resorting to the courts, was considered in the case of *Goldstone v. Osborn*, 2 Car. & P. 550. In that case it was held, in harmony with a long line of decisions in the United States, that one insured by a policy of fire insurance providing that, in case any difference between the insurer and insured should arise out of the contract, there should be an immediate submission of the dispute to arbitrators chosen by a prescribed method, and that nothing should be payable for insurance under the policy until after an award had fixed the amount payable, might maintain an action to recover for a loss insured against without proceeding to an arbitration or procuring an award, where the insurer had absolutely denied the right of the policy holder to recover any sum at all, and did not merely question the amount of his loss.

In the United States an overwhelming majority of the courts have held that the absolute and unconditional denial by an insurance company of any liability whatever to pay anything upon the policy renders inoperative and nugatory the customary provisions for an arbitration to determine the amount of a loss and an award as a condition precedent to an action to recover it. *Farnum v. Phoenix Ins. Co.* 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549; *Retail Merchants' Asso. Mut. F. Ins. Co. v. Cox*, 138 Ill. App. 14; *Liverpool & L. & G. Ins. Co. v. Hall*, 1 Kan. App. 18, 41 Pac. 65; *Insurance Co. of N. A. v. Forwood Cotton Co.* 12 Ky. L. Rep. 846, 13 Ky. L. Rep. 261; *Lewis Baillie & Co. v. Western Assur. Co.* 49 La. Ann. 658, 21 So. 736; *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 408, 14 Am. Dec. 289; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; *Hamburg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388; *Moore v. Sun Ins. Office*, 100 Minn. 374, 111 N. W. 260; *Dautel v. Pennsylvania F. Ins. Co.* 65 Mo. App. 44; *Thomas v. Lebanon Town Mut. F. Ins. Co.* 78 Mo. App. 268; *Blackwell v. American Cent. Ins. Co.* 80 Mo. App. 75; *Montgomery v. Lebanon Town Mut. F. Ins. Co.* 80 Mo. App. 500; *Vining v. Franklin F. Ins. Co.* 89 Mo. App. 311; *White v. Farmers' Mut. F. Ins. Co.* 97 Mo. App. 590, 71 S. W. 707; *Savage v. Phoenix Ins. Co.* 12 Mont. 458, 33 Am. St. Rep. 591, 31 Pac. 66; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb. 331, 30 N. W. 246; *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519; *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521, 66 N. W. 278; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Lasher v. Northwestern Nat. Ins. Co.* 18 Hun, 98; *Lang v. Eagle Fire Co.* 12 App. Div. 39, 42 N. Y. Supp. 539; *Baldwin v. Fraternal Acci. Asso.* 21 Misc. 124, 46 N. Y.

Supp. 1016; *Yendel v. Western Assur. Co.* 21 Misc. 348, 47 N. Y. Supp. 141; *Sands v. Dwelling-House Ins. Co.* 26 Pittab. L. J. N. S. 318; *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; *Connecticut F. Ins. Co. v. Hilbrant*, — Tex. Civ. App. —, 73 S. W. 558; *Stoddard v. Cambridge Mut. F. Ins. Co.* 75 Vt. 253, 54 Atl. 284; *Pencil v. Home Ins. Co.* 3 Wash. 485, 28 Pac. 1031; *Hennessy v. Niagara F. Ins. Co.* 8 Wash. 91, 40 Am. St. Rep. 892, 35 Pac. 585; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

In the Texas and Washington cases above cited, the denial of liability was regarded as an implied waiver of the arbitration clauses. In the Louisiana case, the court said the denial of liability left nothing to arbitrate. In the Maryland case, the insurance company plainly and unequivocally notified the policy holder that his claim for indemnity would not be adjusted or allowed. In *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388, the company told the policy holder to go ahead and sue. In one of the Washington cases, the insurance company took the position at the outset that the fire which destroyed the insured property had been wilfully started by the policy holder himself; and in the other that the policy holder had sworn falsely to the proofs of loss. In the Wyoming case the insurance company contended that the policy was absolutely void, thereby repudiating the entire contract.

In case of an absolute unconditional denial of all liability on a contract for whatever reason assigned, compliance with an arbitration provision in it is deemed unnecessary. *Insurance Co. of N. A. v. Forwood Cotton Co.* 12 Ky. L. Rep. 846, 13 Ky. L. Rep. 261; *Retail Merchants' Assn. Mut. F. Ins. Co. v. Cox*, 138 Ill. App. 14; *Dautel v. Pennsylvania F. Ins. Co.* 65 Mo. App. 44.

Or, as some put it, unnecessary and useless or idle. *Moore v. Sun Ins. Office*, 100 Minn. 374, 111 N. W. 260; *Thomas v. Lebanon Town Mut. F. Ins. Co.* 78 Mo. App. 268; *Blackwell v. American Cent. Ins. Co.* 80 Mo. App. 75; *Montgomery v. Lebanon Town Mut. F. Ins. Co.* 80 Mo. App. 500.

If, said the court in *Carp v. Queen Ins. Co.* 104 Mo. App. 502, 79 S. W. 757, a fire insurance company takes the stand that it is not liable at all, and will pay nothing, it would be senseless to incur the trouble and expense of an appraisal.

The sole object of an arbitration clause in a fire insurance policy is to enable the parties to adjust the loss and ascertain the damages which the insured is entitled to recover, but to make it available to the insurer, according to the court in *Lang v. Eagle Fire Co.* 12 App. Div. 39, 42 N. Y. Supp. 539, there must be something to arbitrate, and certainly this is not the case where all liability under the policy is denied. "In other words," said the court, "the insurer must admit its liability to 47 L.R.A.(N.S.)

pay something before it can insist upon the insured going through with what would be otherwise an idle and useless ceremony."

It would, in the opinion of the court in *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041, be only a farce to adjust the amount of a fire loss by arbitration when the insurer denied liability for any amount, since, in that case, the insurer has nothing to arbitrate, and the amount of damage is something to be determined only after the question of liability has been conceded or adjudged.

A provision in a fire insurance policy for an appraisal of the amount of a loss is put in for the rational purpose, it has been said, of ascertaining in a fair and impartial way what the loss is, in order that the insurer may settle it; and, if the insurer does not intend to settle, there is no reason why the loss should be appraised,—if litigation must be resorted to, to collect, the means of ascertaining the damage without litigation need not be called into play. *Vining v. Franklin F. Ins. Co.* 80 Mo. App. 311.

The policy under consideration in *White v. Farmers' Mut. F. Ins. Co.* 97 Mo. App. 590, 71 S. W. 707, contained a clause which read as follows: "All disputes between this company and any member thereof touching the point of liability of this company to pay any loss, or the value of property destroyed or damaged by fire or lightning, shall and must be settled by mutual agreement or by arbitration; and other proceeding in court is entirely prohibited,"—a clause which, in the words of the court, was not a condition precedent to defendant's liability, but an absolute prohibition of the right to sue either before or after arbitration.

Plainly such a clause, if valid, ousts the courts of their jurisdiction.

The court did not, however, find it necessary to express an opinion concerning the validity of this provision, since the insurer unqualifiedly denied all or any liability whatever upon the policy, so that whether the provision for arbitration was good or bad, compliance with it was unnecessary and wholly useless.

If an insurer intentionally gives the policy holder to understand and believe that all liability for the loss claimed is denied, the provision in a fire insurance policy for an arbitration of the amount of a loss preliminarily to any suit on the contract may be disregarded by the insured. *Seigle v. Badger Lumber Co.* 106 Mo. App. 110, 80 S. W. 4.

An insurer who denies all liability upon a fire insurance policy, and unreasonably delays adjusting a claim of loss, and neglects to take any steps to have the amount of the loss appraised by arbitration, waives the benefit of a clause in the policy providing for that method of ascertaining the amount of a loss preliminarily to litigation, and absolves a policy holder who has done all that he could do to have the loss ap-

praised as required by the contract, from the obligation to obtain an appraisal before bringing suit. *Stephens v. Union Assur. Soc.* 16 Utah, 22, 67 Am. St. Rep. 595, 50 Pac. 626.

An absolute unconditioned refusal of underwriters to pay a loss insured against gives the assured an immediate right of action to recover it, notwithstanding a clause in the policy that payment shall not become due until ninety days after proof and adjustment of loss, and that, in case of dispute, the same shall be settled by arbitration. *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 408, 14 Am. Dec. 289.

The court will not exercise its discretion to stay the proceedings in an action on an insurance policy containing a provision for an arbitration of the amount of loss, in statutory form, where the insurer refuses to admit any liability for the loss. *Hughes v. London Assur. Co.* 4 Ont. Rep. 293.

A disagreement over the amount of a fire loss, and an offer by the adjuster of the insurer of a sum in settlement, followed by its rejection by the policy holder and subsequent silence and inaction by the underwriter, is not an absolute denial of all liability, or unqualified rejection *in toto* of the policy holder's claim, such as justifies him in bringing an action to recover upon the policy for his loss without proceeding to an arbitration under its provisions, even when the underwriter in answer to the suit denies all liability. *Murphy v. Northern British & M. Co.* 61 Mo. App. 323.

But if the adjuster, after such an offer and rejection, gives express notice in writing to the policy holder that the offer of compromise settlement is withdrawn, his action is in effect a refusal to pay anything upon the policy, and relieves the insured of any obligation to proceed with an arbitration. *Dautel v. Pennsylvania F. Ins. Co.* 65 Mo. App. 44.

A denial by the insurer of all liability on the policy prevents a provision in it for an appraisal from operating as a condition precedent to an action on the policy by the insured to recover for a loss, but does not estop the insurer from contesting the amount of the loss in such action. *Penn. Plate Glass Co. v. Spring Garden Ins. Co.* 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138.

The doctrines just set forth respecting contracts of insurance hold good concerning other contracts.

If all liability under a contract containing a provision for arbitrating differences arising out of it is denied, an arbitration need not be resorted to before bringing suit. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713.

And this, notwithstanding the arbitration and award are expressly made conditions precedent to suit. *Crilly v. Philip Rinn Co.* 135 Ill. App. 198.

In *Berry v. Carter*, 19 Kan. 135, the court held valid and binding an agreement by several neighbors by which each covenanted to guard his own cattle and to pre-

vent his stock from trespassing on the lands and injuring the crops of the others for a stated term of years, and further if any one of them should suffer injury from the trespasses of another's cattle, and the owner of the stock and the injured party should disagree as to the amount of damages sustained, that the question of the amount of such damages should be submitted to the decision of arbitrators chosen from the other signatories to the contract, whose award should be final. The court declared it knew of no reason why such a contract should not be valid and binding, and held the provision in it for an arbitration of the amount of damages to have been waived by an absolute repudiation by the defendant of the entire principal contract. This unconditional repudiation by one who had broken all his covenants in a contract containing a provision for arbitrating damages in case of a breach was held to give the injured party a right to sue at once in any court having the requisite jurisdiction to recover his damages. In that case the court expressed the opinion that for one party to propose an arbitration under a contract which the other refused to recognize would be an idle and useless ceremony.

In *Smith v. California Ins. Co.* 85 Me. 348, 27 Atl. 191, an action on a fire insurance policy to recover a loss, the contract contained the usual provision for an arbitration to determine the amount of loss as a condition precedent to suit. No arbitration had taken place, neither party had requested one, or taken any step to bring one about. The company repudiated utterly all liability, on the ground that the policy holder had not only been guilty of fraud, but had purposely and with criminal intent set fire to the insured property. The court held that the defense had been established by a strong preponderance of evidence, and set aside a verdict for the plaintiff and remanded the case for a new trial. In so ruling the court did not deem it necessary to decide as to the legal effect upon the arbitration clause of the denial by the company of any liability whatever on the policy.

On the new trial there was a verdict for the company, and when the case came again before the court for review, in 87 Me. 190, 32 Atl. 872, complaint was made that the trial justice had erred in refusing to rule as a matter of law that the defendant had waived its right to an arbitration as a condition precedent to the action. The court answered that the waiver had not been made out, but did not refer to, nor did counsel, so far as the report of the case discloses, argue, the point that the absolute and unconditional refusal of the company to pay any sum whatever made an arbitration unnecessary.

There have been one or two decisions somewhat out of harmony with the great number of American cases on the point here under consideration.

It has been held in Ohio that a denial

of ultimate liability on a fire insurance policy is not necessarily a denial of the amount of a loss, and, in thus ruling, it was said that in many, perhaps in most, cases, there is nothing inconsistent in demanding compliance with the conditions agreed upon for ascertaining the amount of loss of damage, and at the same time insisting that there are legal defenses to any liability whatever. *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805.

This view found favor in one case in Texas.

When an insurance policy provides for an appraisal to ascertain the amount of a loss or damage, and also contains a clause that the insurer shall not, by proceeding to an appraisal, waive any other condition in the policy, a denial by the insurer of all liability on the policy by reason of an alleged breach of its conditions by the assured does not preclude it from insisting that an appraisal of the loss, previously made in conformity with the terms of the policy in that respect, is conclusive as to its amount. *American Cent. Ins. Co. v. Bass Bros.* 90 Tex. 380, 38 S. W. 1119.

A total denial of all liability upon a marine insurance policy for a loss claimed by the policy holder does not entitle him to bring an action on such policy to recover his loss, where the policy distinctly provided that, if any difference arose between the insurer and insured as to a loss or damage or any other matter relating to the insurance, arbitrators should be appointed in the usual way to decide it, and that the insured should not be entitled to maintain any action at law or suit in equity on the policy until the matters in dispute had been referred to arbitration, and that the obtaining of an award from the arbitrators should be a condition precedent to maintaining any action or suit on the policy. *Lantalum v. Anchor M. Ins. Co.* 22 N. B. 14.

A provision in a fire insurance policy for an arbitration touching any loss or damage, and an award that shall be binding as to the amount of such loss or damage, but shall not decide the liability of the insurer, and the underwriter's request for an arbitration pursuant thereto, do not preclude the insurer, after the award, from denying legal liability upon the policy, upon grounds rendering the policy void. *Johnson v. American F. Ins. Co.* 41 Minn. 396, 43 N. W. 59; *Johnson v. Orient Ins. Co.* 41 Minn. 400, 43 N. W. 1151.

If an underwriter, before suit, has not waived a provision in a fire insurance policy requiring an arbitration and award as a condition precedent to the policy holder's action when the amount of a loss is not agreed upon, it is not precluded from setting up and insisting upon the defense that the action is not maintainable because no arbitration has been had, by also pleading facts to show that it is not liable on the merits for any sum whatever. *Carp v. Queen Ins. Co.* 104 Mo. App. 502, 79 S. W. 757.

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When a difference has arisen over the amount of a loss between insurer and insured, and the former has made a written request of the latter for an arbitration, pursuant to the provisions of a fire insurance policy making one a condition precedent to any suit or action, and no arbitration takes place without the insurer's fault, the benefit of the arbitration as a condition precedent is not lost by the insurer's setting up as a defense to the policy holders' action the further claim that there is no liability whatever in any event for the loss. *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C. 28, 10 S. E. 1057.

A provision in an accident insurance policy to the effect that any difference that might arise between the insurer and the assured or any beneficiary, as to the meaning or extent of the contract, the amount of any claim upon it, the fulfilment of any of its conditions, or any matter or thing arising out of or concerning the insurance, should be referred to arbitration and the decision of a neutral person, whose award should be final and binding and conclusive evidence of the amount payable, coupled with a stipulation making an award by such arbitrator a condition precedent to the insurer's liability or obligation to pay the insurance, and to the enforcement of any claim for it, was held in *Nolan v. Ocean Acci. & Guarantee Corp.* 5 Ont. L. Rep. 544, valid and binding on the policy holder, and, notwithstanding the defendant had explicitly denied all liability to pay any sum whatever on the policy, it was held that the action could not be maintained without a compliance with the condition. Logically, the court conceded this conclusion made the action premature and subject to dismissal, but, as the insurance company had not asked this, but only moved for a stay of proceedings constraining the plaintiff to go to an arbitration, the motion was granted.

Upon the question whether a policy holder whose claim is absolutely rejected is bound, before bringing suit, to seek an arbitration, the reasoning of *Shaw, Ch. J.*, in *Boynton v. Middlesex Mut. F. Ins. Co.* 4 Met. 212, respecting the right of an insured to maintain his action in the county where he lived, instead of in the county where the insurer had its home office, when the act incorporating the company designated its home county as the place to try actions to recover for losses of disputed amounts, is worth stating for its analogous application. If, said, in substance, the chief justice in that case, the directors, as will most frequently happen, determine that the loss is one for which the company is not liable, they cannot proceed to ascertain its amount; it is their duty to resist the claim altogether. Yet the assured must have his remedy, and cannot have the special one provided. If his entire right to recover is denied, it seems reasonable to allow him the privilege granted by law to other litigants to choose his own forum. But if the right is conceded, and it is a

mere question as to amount, a suit promptly brought and tried in the vicinity would seem to be all that is required to secure to the assured the indemnity promised by the policy.

XXVI. Pleadings.

Questions of pleading in actions on contracts stipulating for preliminary arbitrations as conditions precedent to suits have, with some frequency, engaged the attention of the courts and require separate notice.

The necessity for the plaintiff to plead specifically compliance, or adequate excuse for a failure to comply, with the condition precedent on his part, in order to make out his cause of action on the one hand, or the need, on the other hand, for the defendant to plead particularly in defense the condition and nonfulfillment of it, in order not to be esteemed as having waived it, are questions of prime importance.

As a general rule, the plaintiff is bound to set up performance of the arbitration agreement, or excuse the nonperformance of it affirmatively by appropriate specific allegations.

In an action by a policy holder on a fire insurance policy containing the usual clause for an appraisal to determine the amount of the loss, as a condition precedent to any action to recover insurance, a general allegation that the plaintiff has duly kept and performed all the conditions of the contract is not the equivalent of an averment that an arbitration has been had and an award made, excused, or waived. *Carroll v. Girard F. Ins. Co.* 72 Cal. 297, 13 Pac. 863; *Vernon Ins. & T. Co. v. Maitlen*, 158 Ind. 393, 63 N. E. 755; *Mosness v. German-American F. Ins. Co.* 60 Minn. 341, 52 N. W. 932.

This is because the award is an integral and essential element in the cause of action. *Carroll v. Girard F. Ins. Co.* and *Vernon Ins. & T. Co. v. Maitlen*, supra.

And because, too, the making of an award is the act of third persons, and not of the policy holder. *Carroll v. Girard F. Ins. Co.* and *Mosness v. German-American F. Ins. Co.* supra.

And obviously only the defendant can waive the condition expressly or impliedly.

An allegation in an action to recover for railroad construction work, that the person who was designated in the contract to act as arbitrator "wholly neglected and refused" to pass upon the subject out of which the plaintiff's claim arises, as contemplated in a condition precedent to suit, is insufficient to excuse noncompliance with such condition. *Low v. Fisher*, 27 Fed. 542.

A general averment of performance of all the conditions of a contract which contains an arbitration clause is, however, sufficient as against a general demurrer. *Cupples v. Alamo Irrig. & Mfg. Co.* 7 Kan. App. 692, 51 Pac. 920.

In general, also, a defendant sued on a contract containing a provision for an arbitration as a condition precedent to suit is

required to set up the plaintiff's neglect to comply with the condition, if he intends to rely on noncompliance as a defense.

A plea setting up, as a defense to an action on a contract of sale and delivery with a warranty of quality, that it was a condition therein that differences respecting grade and quality should be settled by arbitration, is bad unless it further alleges arbitration to have been made a condition precedent to suit. *Hudmon v. Cuyas*, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355.

That there has been no arbitration notwithstanding differences arose over the amount of the loss, as required by a fire insurance policy providing that, in case differences should arise, the amount of the loss should be submitted to arbitration, and no suit or action should be maintained until an award was made, is a matter of defense to an action on the policy to recover a loss. *Bergman v. Commercial Union Ins. Co.* 12 Ky. L. Rep. 942.

Although an agreement in a contract of sale and delivery of live stock of certain specific qualities, to arbitrate differences, is valid, and will, if not performed, waived, or excused, bar a suit for the purchase money, nevertheless nonperformance is a defense, and if not set up in the pleading of defendant or reserved by him therein, and if he appears and defends without raising the point, such defense is to be deemed abandoned. *Alford v. Tiblier, McGloin* (La.) 151.

A clause in an insurance contract that no holder of the policy shall be entitled to maintain an action on it until he shall have offered to submit his claims to reference, and if, without doing so, he shall commence suit, his claim shall be released and the insurer discharged from liability, availeth not an underwriter though uncomplied with, unless formally set up and pleaded as a defense. *Dyer v. Piscataqua F. & M. Ins. Co.* 53 Me. 118.

An award or settlement, to be available to a defendant, must be pleaded, or it is inadmissible in bar of the suit. *Derby Desk Co. v. Connor Bros. Constr. Co.* 204 Mass. 461, 90 N. E. 543.

While a plea to a suit by a benefit building society to foreclose a mortgage given to secure a loan to one of its members, on the ground of breaches of his obligations to pay dues and subscriptions, that the constating articles and agreements provided for a reference of the controversies involved to arbitration, pursuant to an act of Parliament (10 Geo. IV. chap. 56, § 27, etc.), and that arbitrators had been named accordingly, and were in office at the beginning of the suit, but had made no award, is good, and the arbitration provided for excludes the right to bring the suit, yet a replication that arbitrators, by inadvertence, accident, or mistake of the society and its members, had never been appointed, and there were none to act in the premises, meets and avoids the plea. *Reeves v. White*, 21 L. J. Q. B. N. S. 169, 17 Q. B. 995, 16 Jur. 637, 16 J. P. 118.

XXVII. Legislation.**a. General effect of statutes regulating arbitrations.**

A statute regulating arbitrations and awards does not nullify common-law arbitrations, but is merely cumulative, as a general thing. *Miller v. Goodwine*, 29 Ind. 46; *Webb v. Zeller*, 70 Ind. 408.

Irrespective of legislation regarding the reference of pending suits to arbitration, it is within the regular scope of the powers of courts of law and equity to order, with the consent of the parties, an arbitration of the matter in controversy in any litigation then depending, and to enforce the award. *Phillips v. Shipley*, 1 Bland, Ch. 516.

A submission to arbitration under a statute must conform to the statute in every essential particular. *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370.

The failure to have a submission conform in substance to the terms of a statute authorizing it in the particular case, and the neglect of the arbitrators to convene and begin the arbitration within the time limited by such statute for commencing the proceedings, render a subsequent award nugatory, if there has been no waiver of the objections. *Re Smith*, 12 Ont. Rep. 20.

An attempt to enter into a statutory arbitration, which fails because some of the essential provisions of the statute are not complied with, cannot be made effective as a common-law submission. *Holdridge v. Stowell*, 39 Minn. 360, 40 N. W. 259.

In South Carolina the presumption is, where it is not expressly stipulated, that a submission to arbitration is under the statute of that state. *Bishop v. Valley Falls Mfg. Co.* 78 S. C. 312, 58 S. E. 939.

A statutory arbitration in California is virtually an action culminating in a judgment upon the award entered in court. The arbitrators under this statute constitute a part of the court, and have no jurisdiction where the court has none of the subject-matter, nor do they possess any common-law powers as arbitrators. In short, the statute, and it alone, governs the whole proceeding and determines every question, including the validity of the submission itself. *Williams v. Walton*, 9 Cal. 142.

A submission of a controversy under the New Hampshire Statute (Gen. Laws, chap. 251, § 2), though carried to an award, is held no bar to an action for the same cause, where the award has not been filed with the court and a motion made for judgment upon it, and judgment ordered. *Pitman v. Thompson*, 63 N. H. 73.

Either party to a New York standard fire insurance contract has a right for a reasonable time to require an appraisal of a loss, when there is a disagreement over its amount. *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392.

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form of policy provided for by the Massachusetts Statute (Pub. Stat. chap. 119, § 139) is held not to prevent the policy holder from suing for and recovering the amount of his loss in the courts. *Clement v. British American Assur. Co.* 141 Mass. 298, 5 N. E. 847.

The fact that a standard form of insurance contract has been provided for by statute, for the parties to make, affords no reason for giving to an arbitration clause contained in it any different construction from that which courts have given all along to similar contracts made without any legislative sanction. *Dunton v. Westchester F. Ins. Co.* 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.

The statute of South Dakota (Comp. Laws, § 3582) declaring void every stipulation or condition in a contract by which any party to it is restricted from enforcing his rights under it by the usual legal proceedings in the ordinary tribunals, or which limits the time in which he may thus enforce his rights, does not apply to or affect a clause in a building contract providing that the architect shall fix the value of additional or omitted work and materials, and determine the amount to be paid or withheld for such work or materials. *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

By statute in Ontario, fire insurance contracts are sanctioned with provisions for references to arbitration under an arbitration regulation statute, and, apparently, the statutory provision is indorsed upon standard policies in common use, but it is permissible for the parties to insurance contracts to vary, by agreement, conditions dealing with the same subjects as those covered by statute, provided they are made just and reasonable, and do not impose on the policy holder more stringent, onerous, or complicated terms than the statute does. The statutory conditions respecting arbitration and award are, like others, variable in this way, but when the substituted provisions are more burdensome, stringent, and complicated respecting a reference to ascertain and determine the amount of a loss, than the statutory terms are, the courts hold the assured not bound by them, and entitled to maintain his action on the policy without proceeding to arbitration. *Cole v. London Mut. F. Ins. Co.* 15 Ont. L. Rep. 619, 10 Ont. Week. Rep. 930.

There is a similar statute in Nova Scotia (acts of 1899, chap. 30, Rev. Stat. 1900, chap. 147). *Harrison v. Western Assur. Co.* 35 N. S. 488.

An insurance company issuing a fire insurance policy in the Province of Ontario falls under the operation of a provincial statute (39 Vict. chap. 24) allowing the insertion of conditions respecting arbitrations, but if the company does not use the statutory form, it is held quite strictly to have either waived the condition or not to have gone beyond the statute, and in any case not to have bound the policy holder, unless the substituted condition conformed to the requirements of the statute in the

manner of printing it. And the statute seemingly does not make an arbitration a condition precedent to a suit on the policy, but allows a trial on the question of liability to be had and an after reference, if necessary, to arbitration, to determine the amount. *Ulrich v. National Ins. Co.* 42 U. C. Q. B. 141.

b. Valued policy statutes and total losses by fire.

In several of the United States, statutes have been enacted declaring the amount written in a fire insurance policy to limit the liability of the insurer the measure of the value of the insured property when the policy was issued.

This legislation has had much effect upon the customary clauses in fire insurance policies providing for appraisements to determine the amounts of losses as conditions precedent to actions to recover insurance.

As a general rule, when no statute interferes, such clauses are upheld in the courts. They are valid and binding in the absence of any prohibitory legislation. *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566.

The numerous decisions cited *ubi supra* et *infra* support this statement.

Where there is no statute productive of a contrary rule, a clause in a fire insurance policy providing for an appraisal of the amount of a loss applies and is operative as well where the loss is total as where it is partial only. *Stout v. Phoenix Assur. Co.* 65 N. J. Eq. 566, 56 Atl. 691.

But statutes respecting insurance prevail over policy contracts. *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907; *Franklin v. New Hampshire F. Ins. Co.* 70 N. H. 251, 47 Atl. 91; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072; *Thompson v. St. Louis Ins. Co.* 43 Wis. 459.

And when a statute requires the insurer to pay the policy holder the full sum written in the policy in case the property insured thereby shall be entirely destroyed by fire or other disaster insured against, the provisions in the policy for an appraisal of the amount of any loss are abrogated, nullified, and rendered nugatory by operation of law when the loss is total. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739; *Ohage v. Union Ins. Co.* 82 Minn. 426, 85 N. W. 212; *Moore v. Sun Ins. Office*, 100 Minn. 374, 111 N. W. 260; *O'Keefe v. Liverpool, L. & G. Ins. Co.* 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922; *Baker v. Phoenix Assur. Co.* 57 Mo. App. 559; *Jacobs v. North British & Mercantile Ins. Co.* 61 Mo. App. 572; *Marshall v. American Guarantee Mut. F. Ins. Co.* 80 Mo. App. 18; *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684; *Gragg v. Northwestern Nat. Ins. Co.* 132 Mo. App. 405, 111 S. W. 1184; *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907; *Queens Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072; *Cincinnati Coffin Co. v. Home Ins. Co.* 8 Ohio Dec. Reprint, 422; *Phoenix Ins. Co. v. Port Clinton Fish Co.* 14 Ohio C. C. 160, 7 Ohio C. D. 468; *Ætna Ins. Co. v. Shacklett*, — Tex. Civ. App. —, 57 S. W. 583; *Thompson v. St. Louis Ins. Co.* 43 Wis. 459.

Under the operation of such a statute, an arbitration to fix the amount of a loss is unnecessary, because there is naught that is legally the subject of an arbitration,—there is nothing to arbitrate. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739; *Ohage v. Union Ins. Co.* 82 Minn. 426, 85 N. W. 212; *Moore v. Sun Ins. Office*, 100 Minn. 374, 111 N. W. 260; *O'Keefe v. Liverpool, L. & G. Ins. Co.* 140 Mo. 558, 39 L.R.A. 819, 41 S. W. 922; *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684.

In such a case, the statute having determined the matter and fixed the amount the very instant the property insured was wholly destroyed, the agreement to arbitrate is *nudum pactum*,—there is no consideration to support it. No benefit or advantage inures to the policy holder, no harm or disadvantage results to the underwriter, from the agreement to arbitrate. It is a mere gratuity and binds neither. *Baker v. Phoenix Assur. Co.* 57 Mo. App. 559; *Jacobs v. North British & Mercantile Ins. Co.* 61 Mo. App. 572; *Marshall v. American Guarantee Mut. F. Ins. Co.* 80 Mo. App. 18.

If the amount of a loss or damage to insured property is indisputable, either by the terms of the policy or by statute, the agreement to arbitrate is void. And the enactment of such a statute as has just been referred to manifests a public policy conclusively to close the question of the value of property totally destroyed, which renders, whenever a loss is total, the usual provision for an arbitration nugatory. *Hartford F. Ins. Co. v. Bourbon County Ct.* 115 Ky. 109, 72 S. W. 739.

It will suffice to refer to the legislation in point here of some one state as typical in general of the valued policy statutes. A statute of Missouri enacted in 1879 (Rev. Stat. 1879, § 6009) provided that whenever any policy of insurance should be written upon real property, and the insured property should be wholly destroyed without criminal fault of the policy holder, the amount of insurance written in such policy should be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed, and gave the insurer an option either to pay the amount in cash or completely to restore the destroyed property to its former state forthwith. *Vide, Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718.

A decade later, another statute was enacted in that state (Rev. Stat. 1889, §§ 5897, 5898) providing that in all suits brought upon policies of insurance against loss or

damage by fire, thereafter issued or renewed, the insurer should not be permitted to deny that the property insured was worth the full amount of the policy when insured, and that in case of a total loss the measure of damage should be that sum less any subsequent depreciation in value of the insured property, the burden of proving which should rest on the underwriter. This statute also provided that when the loss was not total, the measure of damage should be that proportion of the sum insured which the property lost or destroyed bore to the whole of the insured property.

A further provision was that no condition of any policy contrary to the statute should be valid.

This legislation was held constitutional in *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85, and the decision was afterwards sustained in 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

If a loss is only partial, and not total, the valued-policy statute of Missouri (now § 7979, Rev. Stat. 1899) does not render inoperative the provisions for arbitration and award in a fire insurance policy upon personal property. *Stevens v. Norwich Union F. Ins. Co.* 120 Mo. App. 88, 96 S. W. 684.

Notwithstanding the opinion expressed in *Stout v. Phenix Assur. Co.* 65 N. J. Eq. 566, 56 Atl. 691, there is respectable authority for holding that when insured property has been altogether destroyed by a cause insured against, then, irrespective of legislation to that effect, a reference to determine the amount of the loss ought not to be obligatory.

A provision in a fire insurance policy that if the parties fail to agree on the amount of sound value and damage to the property insured, the same shall, at the written request of either, be submitted to arbitrators, whose award as to the amount of loss shall be binding and conclusive, has no application to a total loss, where the insured property has absolutely ceased to exist. *Rosenwald v. Phenix Ins. Co.* 50 Hun, 172, 19 N. Y. S. R. 732, 3 N. Y. Supp. 215; *Lang v. Eagle Fire Co.* 12 App. Div. 39, 42 N. Y. Supp. 539.

Items of total loss over which the parties to a fire insurance contract do not differ do not come under the operation of an arbitration clause in the policy. *Pioneer Mfg. Co. v. Phenix Assur. Co.* 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731.

In an action upon a fire insurance policy insuring sundry items of property each in stated amounts, and containing the customary provision for an arbitration of the amount of a loss upon the written request of either party in case differences shall arise between them, as a condition precedent to the maintenance of any suit or action upon its appearing that no arbitration had been had and that one had been neither waived nor excused, the policy holder may avoid the effect of his failure to arbitrate by abandoning his claim to recover 47 L.R.A. (N.S.)

for the loss or damage upon such items as were in dispute, and recover for those items of property which were totally destroyed, and over the amounts of which no differences arose, and which were not subject to arbitration. *Ibid.*

In the case of a total destruction of property insured, it would be vain to appraise the loss when the insurer denies all liability. *Phœnix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805.

If an arbitration clause in a fire insurance policy relates to the ascertainment only of the amount of damage to property insured, and not wholly destroyed, the award can cover nothing more, and hence the policy holder can recover any additional loss that he may have sustained by the total destruction of some of the insured property. *Liverpool, L. & G. Ins. Co. v. Colgen*, — Tex. Civ. App. —, 34 S. W. 291.

When a clause in a fire insurance policy requires a submission to arbitration to determine only the amount of loss or damage to personal or other movable property insured thereby, then, notwithstanding the policy also provides that no suit or action to recover a loss shall be maintained by the policy holder in any court of law or equity until after an award shall have been made fixing the amount of his claim by arbitration, the insured may, without arbitrating or offering to refer, bring and maintain suit upon the policy to recover for a loss of a building totally destroyed and insured by the policy. *Doxey v. Royal Ins. Co.* — Tenn. —, 36 S. W. 950.

When, in an action on a fire insurance policy, the evidence establishes that there was a total loss of the property insured, and that it was clearly worth a much larger sum than the insurance, proof that the appraiser or arbitrator selected by the insurer refused to join in the selection of an umpire, pursuant to provisions in the policy for arbitrating the amount of the loss, will be held sufficient to entitle the policy holder to maintain his action for the loss without further proceeding with the arbitration. *McCullough v. Phenix Ins. Co.* 113 Mo. 606, 21 S. W. 207.

When insured property has been totally destroyed by fire, and was in value much greater than the whole sum for which it was insured, so that a claim has arisen for the whole amount of insurance, an action to recover on a fire insurance policy is maintainable by the policy holder without resorting first to an arbitration and appraisal of the amount of loss, and this although the policy covered other property partly burned, for which the insured waived any claim. *Williamson v. Hand-in-Hand Mut. F. Ins. Co.* 26 U. C. C. P. 266.

The case of *Raymond v. Farmers' Mut. F. Ins. Co.* 114 Mich. 386, 72 N. W. 254, calls for special examination and analysis. The action apparently was brought to recover for a total loss by fire of farm buildings and property insured by the defendant, a co-operative company. The contract of insurance was embodied in the policy, the

by-laws of the defendant, and the written application signed by the defendant. The wording of the policy itself is not set forth in the report, and attention must be concentrated upon the by-laws and the application in relation to the subject-matter of this note. So far as is necessary in the present discussion, the by-laws provided that "any and all differences between this company and any of its members which cannot be settled, arising from the adjustment of losses or auditing of claims, shall be submitted to three arbitrators." After providing for the selection of, and proceedings before, such arbitrators, the by-law continued: "They [the arbitrators] shall then take the case under consideration, apart by themselves, and determine and decide what is equitable and right between the parties under the charter and by-laws of this company and the laws of this state." The by-law, then providing for the manner of making and communicating the award of the arbitrators, added: "When such decision or finding of the arbitrators has been complied with, it shall be a final settlement of the controversy. . . . After the case is thus settled, neither party shall have any right of action at law or in equity on account of the matter thus submitted to arbitrators; and if either party shall refuse to arbitrate the difference between them, or fail to comply with the decision of the arbitrators after the matter has been submitted to them, and goes to law for his claim, he shall pay the whole cost of said suit and the excess of the finding or judgment of the court over the claim of this company." The application signed by the policy holder contained the following question and answer: "Will you submit all unadjustable differences between yourself and this company to arbitrators, as provided for in § 41 of the by-laws of said company, and abide by their decision? A. Yes." Upon the trial of the action, the circuit judge entertained the opinion that the by-law was unauthorized by the law under which the defendant was organized, and also that it was in conflict with a statute of Michigan (3 How. Anno. Stat. Supp. § 4258) allowing any member of a corporation to prosecute a suit at law against it for claims accruing and remaining unpaid for more than sixty days after falling due, hence, that the contract was not binding upon the policy holder in respect of the arbitration and award provisions.

A judgment followed for the plaintiff, and the defendant brought error.

The first thing which strikes the observant reader about this contract to arbitrate is that it provides for the submission of "any and all differences," and for a decision as to "what is equitable and right between the parties under the charter and by-laws of the company and law of the state," which shall finally settle the controversy, and that "neither party shall have any right of action at law or in equity on account of the matter" submitted.

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It is therefore plainly an attempt to oust the courts of their jurisdiction.

And a second thing noticeable about the contract is that it is an agreement to submit all disputes that shall later arise to a common-law arbitration by arbitrators not necessarily associated with either insured or insurer, but presumably disinterested outsiders, whose award is to be final and conclusive on the parties as to the whole controversy.

It is therefore essentially unlike that class of cases where a member of a voluntary association engages to submit his claims and grievances to an officer, officers, committee, or other members of the organization as a private tribunal to determine questions of internal discipline and economy. It is also dissimilar to the line of cases in which contractors to erect buildings, construct railroads and public works, or furnish supplies or transportation, agree to leave to the decision of architects, engineers, or public officers the questions of quantities and values of work, materials, and service. Nor is it in any respect similar to those common insurance contracts providing for arbitration to determine the amount of a loss preliminarily to an action on the policy, and leaving the question of the underwriter's liability to pay the loss thus ascertained to the decision of the ordinary courts of justice:

This being so, one is quite unprepared for Mr. Justice Hooker's answering the contention of the counsel for the policy holder that the contract to arbitrate in the case at bar was void as an attempt to oust the courts of their jurisdiction, by saying in the opinion of the supreme court, reversing the judgment and ordering a new trial: "Unless we are to distinguish between policies of mutual insurance companies indemnifying against loss by fire, and mutual benefit certificates providing for sick and death benefits, we must consider the last question settled by our former decisions. In *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863, it was held that a condition requiring a doctor's certificate, and providing that the determination of an investigating committee should be conclusive of the member's right to a benefit, was valid and binding. This was followed by the case of *Canfield v. Great Camp*, K. M. 87 Mich. 626, 13 L.R.A. 625, 24 Am. St. Rep. 186, 49 N. W. 875, which was a case of death. *Hembeau v. Great Camp*, K. M. 101 Mich. 161, 49 L.R.A. 592, 45 Am. St. Rep. 400, 59 N. W. 417, was similar, as also was *Filmore v. Great Camp*, K. M. 103 Mich. 437, 61 N. W. 785. . . . We cannot distinguish between this case and one that arises upon a certificate of a mutual benefit society insuring life."

Whether these cases were rightly decided one need not pause to inquire at this point; the real matter to consider is whether they applied to the case then at bar, since they were all the authorities relied upon to support the conclusion reached by the court.

Without reference to cases elsewhere, it had in Michigan previously been "conceded that an agreement to submit all matters in controversy between parties to arbitration, and thus oust courts of their jurisdiction, is void, and may be repudiated by either party at any time before award is made" (*Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055), and that the authorities undoubtedly hold an agreement to arbitrate all differences between the parties revocable by either of them (*Weggner v. Greenstine*, 114 Mich. 310, 72 N. W. 170), and it had been declared with emphasis that "courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. . . . They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself" (*Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812).

Unfortunately the policy holder did not attempt to repudiate the agreement to arbitrate, but united in submitting his claim to the arbitrators, and did not bring suit until an award was made against him. The court might perhaps have held it was then too late. It is just possible that the associates of Mr. Justice Hooker, who concurred, did so upon this ground, although none took pains to say so explicitly.

The record showed "that the arbitrators took what the courts would consider an erroneous view of the legal rights of the parties, and there" was "some reason for believing that testimony admissible upon a trial in a court of law was excluded;" but the court declared it could not help this, and it closed its opinion with a virtual appeal to the defendant to right, of its own volition, the wrong done its policy holder.

c. English and Canadian statutes.

The practice and administration of the law respecting arbitrations have been profoundly affected in England by the passage, during the eighteenth and nineteenth centuries, of sundry acts of Parliament designed to compel litigants, in more or less indirect ways, to keep their contracts to arbitrate their controversies. It is foreign to the purpose in hand, and indeed quite impracticable, to set forth all the pertinent legislation, and cite all the decisions that have construed and applied it, but it will be of help to the general reader to call attention to the more prominent parts of some of the statutes, and to many of the decisions rendered since their enactment, to the end that the modification the law has undergone through this influence may be perceived and appreciated.

The statute of William III. (8 & 9 Wm. III. chap. 15) authorized all merchants, 47 L.R.A.(N.S.)

traders, and others who desired to end any controversy, suit, or quarrel for which there was no other remedy than a personal action or a suit in equity, by arbitration, to agree to the submission of their controversy to the award or umpirage of any person or persons, and the reference to be made a rule of any of his Majesty's courts of record, provided the dispute existed at the time of the submission and was then a proper subject of a personal action or equitable suit. *Id.*, note to *Lee v. Hemingway*, 3 Nev. & M. 860.

The act of William IV. (3 & 4 Wm. IV. chap. 42) had a section (§ 39) providing for staying the proceedings in actions where the parties had previously agreed to arbitrate.

But this act did not take away the common-law right of a party to revoke his submission. *Reg. v. Hardey*, 19 L. J. Q. B. N. S. 196, 14 Q. B. 529, 14 Jur. 649.

Nor did it apply to a case where the chosen arbitrators differed and failed to select an umpire, because, it was said, the court could not compel the appointment of an umpire, and if the action was stayed, one might never be appointed. *Bright v. Durnell*, 4 Dowl. P. C. 756.

But under that statute, the court declined to interfere to prevent an arbitration where an action had been brought to recover damages for the breach of a contract of sale and purchase of a quantity of Australian wheat, providing for a submission of any dispute between seller and buyer to the arbitrament of two corn factors of London respectively chosen, and stipulating that the submission might be made a rule of court on the application of either party. *Forwood v. Watney*, 49 L. J. Q. B. N. S. 447.

When submissions by agreement were made rules of court under the act of William III. (9 & 10 Wm. III. chap. 15), the litigants had power as before to revoke, but were liable to punishment for contempt in revoking. The act which first prohibited revocations was that of William IV. (3 & 4 Wm. IV. chap. 42, § 39). By that act, however, it was essential, to make the submission irrevocable, that there should have been an agreement that it might be made a rule of any of his Majesty's courts of record. Then came the common-law procedure act of 1854 (17 & 18 Vict. chap. 125), the 17th section of which authorized any submission to be made a rule of court, and this legislation made the parties incompetent to revoke without leave of court, but left power in the court to grant permission to revoke. *Re Rouse*, L. R. 6 C. P. 212, 40 L. J. C. P. N. S. 145, 23 L. T. N. S. 865, 19 Week. Rep. 438.

In *Sturgis v. Curzon*, 21 L. J. Exch. N. S. 38, 7 Exch. 17, a case decided before the common-law procedure act of 1854 was enacted, the court denied an application to stay proceedings in an action by provisional assignees of an insolvent debtor, against one alleged to be his debtor, grounded on an order nisi in an action

between the insolvent and such debtor for the same cause referring all the matters in difference to an arbitration, which was still pending and undetermined.

"The old rule of law," said Byles, J., concurring in a refusal to stay proceedings in an action, on the ground certain essential elements to bring the case within the statute were lacking, in *Mason v. Had-den*, 6 C. B. N. S. 526, "was that an agreement to refer was no bar to an action at common law. That rule was productive of great hardship and inconvenience; and accordingly the 11th section of the 17 & 18 Vict. chap. 125, was directed to remedy the evil."

There seems, said Lord Campbell in delivering his judgment in *Livingston v. Ralli*, 5 El. & Bl. 132, 24 L. J. Q. B. N. S. 269, 1 Jur. N. S. 594, 3 Week. Rep. 488, to have prevailed in our courts a horror of a domestic forum which I can neither sympathize with nor account for; but the legislature has recently, in the common-law procedure act 1854 (17 & 18 Vict. chap. 125) § 11, made a provision in such cases not that the agreement to refer shall be pleadable in bar, but that the court may stop the action.

The same jurist gave expression in very similar language to the same views in *Russell v. Pellegrini*, 6 El. & Bl. 1020, 26 L. J. Q. B. N. S. 75, 3 Jur. N. S. 184, 5 Week. Rep. 71.

The 11th section of the common-law procedure act of 1854 (17 & 18 Vict. chap. 125) was in substance, that whenever the parties to any deed or instrument in writing thereafter made or executed, or any of them, should agree that any existing or future differences should be referred to arbitration, and any one or more of such parties, or any one or more persons claiming under them, should nevertheless begin any action at law or suit in equity respecting matters so agreed to be referred, it should be lawful for the court in which the suit was brought, or any judge of it, upon a defendant's application after appearance and before pleading, upon being satisfied that no sufficient reason existed why the controversy should not be referred to arbitration as agreed, to make a rule or order staying all proceedings in the action or suit on such terms as to costs as the court or judge might see fit to impose; with a proviso that any such rule or order might at any time afterwards be discharged or varied as justice might require.

This statute had a section (§ 13) providing that when one party to a submission failed or refused to appoint an arbitrator, the other might name some person to act as sole arbitrator, but it was held that this provision did not deprive a party to a submission which had not been made a rule of court, of his common-law right and power to revoke the submission and annul the arbitrator's authority any time before an award should be made. *Fraser v. Ehrensperger*, L. R. 12 Q. B. Div. 310, 53 L. J. 47 L.R.A.(N.S.)

Q. B. N. S. 73, 49 L. T. N. S. 646, 32 Week. Rep. 240.

The 11th section of the common-law procedure act of 1854 was substantially re-enacted in the arbitration act of 1889 (52 & 53 Vict. chap. 49). The 4th section of that statute read as follows: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

In a reference to arbitration under the common-law procedure act, the parties have a perfect right to stipulate, on the coming in of the award and its confirmation by the court, not to take a writ of error or an appeal to review, and if they so stipulate, they will be bound, and will not be heard on error or appeal. *Gumm v. Fowler*, 2 El. & Bl. 890, 29 L. J. Q. B. N. S. 189, 6 Jur. N. S. 1093, 2 L. T. N. S. 282, 8 Week. Rep. 436; *Jones v. Victoria Graving Dock Co. L. R. 2 Q. B. Div. 314*, 46 L. J. Q. B. N. S. 219, 36 L. T. N. S. 347, 25 Week. Rep. 501, 6 Eng. Rul. Cas. 272.

The cases are said to be few and exceptional where the court should exercise the discretion given by the common-law procedure act, to refuse to allow matters which parties have expressly agreed to refer to arbitration to be so referred. *Russell v. Russell*, L. R. 14 Ch. Div. 471, 49 L. J. Ch. N. S. 268, 42 L. T. N. S. 112.

It was said in one case that it is not a good reason for denying a stay of proceedings under the act in an action on a contract containing a stipulation to refer to arbitration any difference that should arise between the parties, either in principle or detail, that the dispute was over a question of law as to the legal construction of the contract. *Randegger v. Holmes*, L. R. 1 C. P. 679.

But then again it has been said that the discretion given courts by the arbitration act of 1889 to stop a lawsuit and relegate the litigants to an arbitration, where they had previously agreed to refer their disputes, is never exercised where the controversy is simply over a question of law that arises on undenied facts. *Re Carlisle*, L. R. 44 Ch. Div. 200, 59 L. J. Ch. N. S. 520, 62 L. T. N. S. 821, 38 Week. Rep. 638.

The courts will not stay proceedings under the common-law procedure act, in an ac-

tion on a contract providing for an arbitration, when it is admitted that there is no defense. *Lury v. Pearson*, 1 C. B. N. S. 639.

They refuse also to stay proceedings in actions where the matters in issue are not covered by the terms of the arbitration agreement. *Turnock v. Sartoris*, L. R. 43 Ch. Div. 150, 62 L. T. N. S. 209, 38 Week. Rep. 340.

The court will not stay the proceedings on a bill filed to restrain the omission of certain acts covenanted to be done, and certain violations of covenants, by lessees in a coal mining lease containing a clause for referring to arbitration all questions to arise between lessor and lessees relative to or concerning the indenture or any covenant, clause, matter, or thing in it contained, because the agreement for submission does not cover the entire subject of the litigation. *Wheatley v. Westminster Brymbo Coal & Coke Co.* 2 Drew. & S. 347, 11 Jur. N. S. 232, 11 L. T. N. S. 728, 13 Week. Rep. 400.

The court of Queen's bench held in the case of *Blyth v. Lafone*, 1 EL. & EL. 435, 28 L. J. Q. B. N. S. 164, 5 Jur. N. S. 364, 7 Week. Rep. 189, that the common-law procedure act applied only to cases in which the agreement to refer had been embodied in the very contract or instrument upon which the controversy in litigation arose.

Afterwards the court of common pleas in the case of *Mason v. Haddon*, 6 C. B. N. S. 526, expressed a doubt as to whether the court of Queen's bench had really meant so to decide, and added that if it did, the former court could not agree with the decision.

The point again came before the court of Queen's bench in the later case of *Randell v. Thompson*, L. R. 1 Q. B. Div. 748, 45 L. J. Q. B. N. S. 713, 35 L. T. N. S. 193, 24 Week. Rep. 837, and Mr. Justice Blackburn, citing the two cases, supra, said that the reports of the first in *Ellis & Ellis* and the *Law Journal*, both went to show that the decision was really as stated, and this being so, it was now to be determined which of the two opposing opinions should be followed. As the court were unanimous in thinking the language of the statute was general and embraced all agreements to arbitrate, whether incorporated in or separate from the instrument involved in the litigation, it agreed with the court of common pleas and overruled its own former decision.

But while asserting the general application of the statute to all arbitration agreements, the court went on to hold that it might be defeated in any particular case by the revocation of the submission, pursuant to the ancient common-law right to revoke where there was no agreement that the reference should be made a rule of court.

This decision aroused the ire of Chief Justice Cockburn, and was vigorously reprehended by that jurist in the case of *Moffat v. Cornelius*, 26 Week. Rep. 914. 47 L.R.A. (N.S.)

Referring to it, he said: The distinction there made is sublety itself. I entirely dissent from that decision, and will only follow it where I am absolutely bound to do so. This case is distinguishable from that. There, there was no provision that the submission might be made a rule of court, and here no arbitrator has been appointed. I am glad to be able to decide this case in accordance with the clear intention of the act.

Since the enactment of the common-law procedure act, the English courts customarily exercise their discretion to stay proceedings in suits between partners and former partners for dissolutions, accountings, and liquidations, where the articles of copartnership provided for submitting controversies between members of the firms to arbitrations. *Re Evans*, 22 L. T. N. S. 507, 18 Week. Rep. 723; *Law v. Garrett*, L. R. 8 Ch. Div. 26, 38 L. T. N. S. 3, 26 Week. Rep. 426; *Russell v. Russell*, L. R. 14 Ch. Div. 471, 49 L. J. Ch. N. S. 268, 42 L. T. N. S. 112; *Kitchen v. Turnbull*, 20 Week. Rep. 253; *Plews v. Baker*, L. R. 16 E. 564, 43 L. J. Ch. N. S. 212; *Gillet v. Thornton*, L. R. 19 Eq. 599, 44 L. J. Ch. N. S. 398, 23 Week. Rep. 437; *Turnock v. Sartoris*, L. R. 43 Ch. Div. 150, 62 L. T. N. S. 209, 38 Week. Rep. 340; *Re Carlisle* L. R. 44 Ch. Div. 200, 59 L. J. Ch. N. S. 520, 62 L. T. N. S. 821, 38 Week. Rep. 638; *Belfield v. Bourne* [1894] 1 Ch. 521, 63 L. J. Ch. N. S. 104, 69 L. T. N. S. 786, 8 Reports, 61, 42 Week. Rep. 189; *Vawdrey v. Simpson* [1896] 1 Ch. 166, 65 L. J. Ch. N. S. 369, 44 Week. Rep. 123.

A suit in equity to wind up a partnership dissolved by an agreement which provided for a reference of disputed matters to arbitration, where arbitrators were chosen, but one of them died, and there was a refusal to appoint another in his stead, should nevertheless be stayed under the common-law procedure act at least until further order, to be made if an award is unreasonably delayed. *Kitchen v. Turnbull*, 20 Week. Rep. 253.

When the validity of a notice to dissolve a partnership is questioned, and the partners, to avoid litigation, agree to separate, the retiring partner to be paid the value of his interest in the firm as determined by two arbitrators named in the agreement, or their umpire if they should differ, a dispute exists within the terms of the common-law procedure act under which the court is authorized to name an umpire where one has not been selected by the arbitrators. *Re Evans*, 22 L. T. N. S. 507, 18 Week. Rep. 723.

A suit in equity for a partnership accounting on the footing of a dissolution, by notice pursuant to a provision in the articles, the validity and effectiveness of the notice being disputed, entitles the defendant to an order of stay from the court of chancery under the provisions of the common-law procedure act, where the partnership agreement provided for a reference to arbitration of any dispute or difference

of opinion respecting any clause, matter, or thing in it, or as to the conduct of any partner, or upon any other point. *Plews v. Baker*, L. R. 16 Eq. 564, 43 L. J. Ch. N. S. 212.

When articles of copartnership provide for a reference of disputes arising between the partners to arbitration, and for an appraisal of values on dissolution, the courts will stay proceedings in a litigation between the partners under the common-law procedure act although the term of duration of the partnership was fixed at one year, and the firm continued business for several years afterwards without any new articles or formal renewal of the original ones. *Gillet v. Thornton* L. R. 19 Eq. 599, 44 L. J. Ch. N. S. 398, 23 Week. Rep. 437.

When partners in their articles of copartnership stipulate for the reference to arbitration of disputes that may arise between them, the court should exercise the discretion conferred by the common-law procedure act, and hold them to compliance with the stipulation, except in cases where fraud is charged upon the party objecting to the reference, and where the party charging the other with fraud establishes a *prima facie* case of it. *Russell v. Russell*, L. R. 14 Ch. Div. 471, 49 L. J. Ch. N. S. 268, 42 L. T. N. S. 112, limiting *dicta* of *Wickens*, V. C., in *Willesford v. Watson*, L. R. 14 Eq. 572.

In a suit by a partner for an account of the partnership dealings, where the articles contained a provision that any differences or disputes which might arise between the partners should be settled by an arbitrator to be agreed upon between them, whose decision should be final and binding upon all, upon the plaintiff's appeal from an order staying his proceedings until the questions in dispute might be referred to arbitration, pursuant to the provisions of the common-law procedure act and the judicature act of 1873 (§§ 57, 59), his counsel contended that a written revocation by him of the submission to arbitration in the partnership agreement, served before the motion for a stay came up for hearing, was effectual, because a submission, where there was no agreement to make it a rule of court, might always be revoked before an award, and cited several cases in support of this contention. But *Jessel, M. R.*, for the court of appeal, replied that, with respect of this point, they were all clearly of opinion that a general agreement to refer matters in dispute to arbitration could not be revoked, and that the cases cited did not apply, because they all related to cases in which the reference had been actually made to a particular arbitrator. *Piercy v. Young*, L. R. 14 Ch. Div. 200, 42 L. T. N. S. 710, 28 Week. Rep. 845.

Afterwards, *Jessel, M. R.*, in a similar case, followed the above decision, observing that, although a particular submission to arbitration might be revoked, a partner could no more revoke a general agreement to refer than he could revoke any other

contract in the partnership articles. *Christie v. Noble*, L. R. 14 Ch. Div. 203, note (6).

The order appealed from in *Piercy v. Young*, supra, was nevertheless reversed upon other grounds, chiefly because the issues in the cause were not properly to be characterized as disputes between the partners, and hence did not fall within the purview of the arbitration clause.

The fact that partners agreed by their articles to submit their differences to arbitration is not in and of itself alone a sufficient reason for staying a subsequent litigation between them.

A suit in equity between partners for a dissolution of the firm and an accounting and liquidation of its affairs and dealings, and a distribution of its property and assets, should not be stayed upon an application made under the common-law procedure act, merely because the partnership articles contain the customary clause for reference to arbitration of disputes between the partners. *Joplin v. Postlethwaite*, 61 L. T. N. S. 629.

A litigation to wind up a partnership under direction of the court of chancery will not be stayed pursuant to the common-law procedure act of 1856, § 14, where, although the partners had agreed to arbitrate, the applicant for stay persisted, after the dissolution, in carrying on the partnership business. *Dennehy v. Jolly*, 22 Week. Rep. 449.

A limitation of time in which the submission must be made in a clause providing for arbitration of disputes of partners, in articles of copartnership, will prevent, after it has expired, the granting, pursuant to the common-law procedure act, of a stay of proceedings upon a bill in equity filed by the personal representatives of a deceased partner for a receivership. *Young v. Buckett*, 51 L. J. Ch. N. S. 504, 46 L. T. N. S. 266, 30 Week. Rep. 511.

In *Cook v. Catchpole*, 34 L. J. Ch. N. S. 60, 10 Jur. N. S. 1068, 11 L. T. N. S. 264, 13 Week. Rep. 42, Vice Chancellor Sir William Page Wood, remarking that the occasion was the first on which he had been called upon to decide the question, expressed the opinion that the ordinary arbitration clause in articles of copartnership applied merely to disputes respecting the construction of the agreement and the management of the firm affairs, and that when charges were made that one or the other of the partners had wholly broken through the articles, the controversy was foreign to the arbitration clause, and therefore a suit in equity for a dissolution and liquidation on such grounds should not be stayed under the common-law procedure act of 1854 (17 & 18 Vict. chap. 125) § 11.

Actions on fire and other insurance policies containing the usual clauses for arbitrations to determine the amounts of losses are among those in which the courts stay proceedings pursuant to the common-law procedure act of 1854 and the arbitration act of 1889. *Baker v. Yorkshire F. & Life*

Assur. Co. [1892] 1 Q. B. 144, 61 L. J. Q. B. N. S. 838, 66 L. T. N. S. 161.

An action to recover a loss upon a fire insurance policy which provided for an arbitration to determine the amount payable in case of differences between the insurer and insured, and made an award a condition precedent to any liability or right of action upon the policy, is properly stayed under the English common-law procedure act of 1854 (17 & 18 Vict. chap. 125) § 11, notwithstanding the insurer has denied all liability on the policy on the ground that the policy holder has been guilty of misrepresentation and fraudulent removal of the insured goods. *Trainor v. Phoenix F. Ins. Co.* 8 Times L. R. 37.

The same is true where the policy containing such an arbitration clause also gave the underwriter liberty to revoke it for any breach of its conditions by the policy holder, and where the action was brought after the latter had asked for an arbitration and the insurer had refused to arbitrate, all the while claiming to have been released from liability because of breaches by the insured of sundry conditions in the policy. *Kenworthy v. Queen Ins. Co.* 8 Times L. R. 211.

An accident insurance company sued on a policy containing an arbitration clause authorized by the statute governing its existence and operations is entitled under the common-law procedure act 1854 (17 & 18 Vict. chap. 125), § 11, to a stay of proceedings where fraud is not suggested, although the trial of the issues may involve a question of fraud or no fraud. *Minifie v. Railway Pass. Assur. Co.* 44 L. T. N. S. 552.

When a policy of insurance against accidental death, conformably to the provisions of an act of Parliament incorporating and regulating the business of the insuring company, provides that any question as to the liability of the company to pay the sum assured in case of fatal accident, or to make compensation for personal injury, shall, if either party to the contract requires it, be referred to arbitration in the manner provided in such statute, an action by the executors of one insured by such policy, to recover for his death, the sum assured, will be stayed by the court, unless the plaintiffs are able to adduce clear and satisfactory reasons why an arbitration cannot or should not take place. *Hodgson v. Railway Pass. Assur. Co.* L. R. 9 Q. B. Div. 188.

An agreement in a contract of purchase and sale of a cargo of maize to refer controversies arising out of it to arbitration, and make the submission a rule of court, may not be revoked by either party to it alone, and should a revocation be attempted and an action be brought, the proceedings will be stayed under the common-law procedure act. *Moffat v. Cornelius*, 26 Week. Rep. 914.

An action to recover back purchase money paid on a contract to purchase a cargo of grain to come in by ship from over sea, on the ground that the subject-matter of

the contract was by mistake, and in a very material respect, misdescribed, is not grounded in fraud, so as to justify the court in refusing to stay proceedings, and in declining to send the parties to an arbitration agreed upon under the common-law procedure act. *Alexander v. Mendl*, 22 L. T. N. S. 609.

Granting, however, the power of the court to stay proceedings in an action by a purchaser of a cargo of linseed oil cake, under a contract to pay the price on presentation of shipping documents, and providing that any dispute as to quality should be settled by arbitration, to recover back the purchase price on the ground that the goods delivered were a spurious imitation of linseed oil cake, under the common-law procedure act, there being a bona fide issue of fraud raised, a stay should be refused in the exercise of a reasonable discretion. *Wallis v. Hirsch*, 1 C. B. N. S. 316, 26 L. J. C. P. N. S. 72.

In the very similar action of *Hirsh v. In Thurn*, 4 C. B. N. S. 569, 27 L. J. C. P. N. S. 254, 4 Jur. N. S. 587, 6 Week. Rep. 605, where there was a contract in almost the same terms for the purchase of a quantity of white Bombay sesame seed, and the purchaser brought suit for a breach of warranty, alleging a nondiscovery of defects before converting the seed into oil and reselling much of it, the court stayed the proceedings and sent the parties to a reference on the ground that no issue of fraud was presented by the record.

An action by a shipowner for freight, and a cross claim by the charterer of the vessel for damages for the captain's refusal to take on a reasonable amount of cargo and otherwise disobeying orders, is properly stayed under the common-law procedure act, where the charter party provided that any dispute that should arise between the owners and the charterers should be referred to arbitrators, chosen in the usual way, whose award should be final and enforced by rule of court. *Seligmann v. Le-Boutillier*, L. R. 1 C. P. 681.

But a surety for the payment of freight earned by a vessel under charter to his principal is not entitled to a stay of proceedings in an action to recover the freight under the common-law procedure act, on the ground that the charter party contained the usual arbitration clause. *Daunt v. Lazar*, 27 L. J. Exch. N. S. 399.

A suit in equity for an injunction to restrain certain workings in a mine and for an account between the parties to a mining lease, which contained a clause providing for a reference to arbitration of any dispute that should arise touching the working of the mine or the compensation to be paid, or the rights or duties of lessor or lessee, is properly stayed by the court of chancery under the common law procedure act. *Willesford v. Watson*, L. R. 14 Eq. 572.

A farming lease containing an agreement to refer to arbitration all matters in dispute touching the instrument, or any clause,

matter, or thing in it, or ought to be done under its covenants, or the rights, duties, or liabilities of the parties to it, and a supplemental deed of even date, silent respecting arbitration, releasing the lessee from sundry restrictive covenants, fall within the operation of the common law procedure act, and hence an action by the lessor's assignees, of ejectment for breaches of covenants, should be stayed and the parties relegated to an arbitration notwithstanding lack of power in arbitrators to award ejectment. *Wade-Gery v. Morrison*, 37 L. T. N. S. 270.

An action upon a contract of employment at a stated salary, with a share of the profits in addition, for a term of years, for damages for a wrongful dismissal before the end of the term, should not be stayed under the common law procedure act, when the contract only provided that any dispute over its construction or respecting the accounts, transactions, or profits of the business should be referred to arbitration. *Smith v. Allen*, 3 Fost. & F. 156.

On the other hand, an action by a servant against his master for an alleged wrongful discharge from employment as a business manager under a contract for five years' service, providing that in case any dispute or question should arise between the parties in respect of carrying on the business or any matters connected with the contract, it should be referred to arbitration, is properly stayed by virtue of the common law procedure act. *Wickham v. Harding*, 28 L. J. Exch. N. S. 215, 5 Jur. N. S. 871.

Forasmuch as, by the common law procedure act, disputants were privileged to determine for themselves, in some cases to have a forum of their own selection, to decide their controversies, instead of resorting to the ordinary courts, and the judges, while vested with a discretion to hold the parties to their agreement, had cast upon them a *prima facie* duty to respect it, where British subjects had entered into a partnership agreement in the Russian language, registered in Russia, to carry on trade in that country with the head office of the firm at St. Petersburg, and stipulated in the deed "that all disputes, no matter where or how they shall arise, shall be referred to the St. Petersburg commercial court," whose decision should be final, the English court of chancery refused to appoint a receiver of the firm property and assets upon the bill of one partner for a dissolution, liquidation, and accounting, where proper and regular proceedings to that end were already on foot in the St. Petersburg commercial court, and stayed the British suit pending the action and judgment of the foreign tribunal. *Law v. Garrett*, L. R. 8 Ch. Div. 26, 38 L. T. N. S. 3, 26 Week. Rep. 426.

This case was followed in *Kirchner v. Gruban*, 78 L. J. Ch. N. S. 117, in which a manufacturing firm at Leipsic, Germany, agreed with a German that he should be sole agent for the sale of its wares in Great

Britain and Ireland, with headquarters in London, and stipulated in the employment contract that the parties submitted themselves in all cases of dispute to the exclusive jurisdiction of the Royal Landgericht or the Amtsgericht at Leipsic, and that the German law should exclusively hold good, and accordingly stayed proceedings in an action by the manufacturers against the agent after he had quit their service and taken employment with a rival concern.

The English practice of staying proceedings in suits and actions between litigants who had agreed to arbitrate their controversies, and thus forcing a resort to arbitration, which has its foundation in the common law procedure act of 1854 (17 & 18 Vict. chap. 125), § 11, prevails in Canada in the province of Ontario, in virtue of a statute (Rev. Stat. chap. 62, § 6) having similar provisions. *Sherwood v. Balch*, 30 Ont. Rep. 1.

The courts in Manitoba follow the practice of the English courts respecting agreements to arbitrate under the common law procedure act of 1854 (17 & 18 Vict. chap. 125) § 11. *Northern Elevator Co. v. McLennan*, 14 Manitoba L. Rep. 147.

A statute of Ontario, in force in the late years of the last century (Rev. Stat. chap. 50, § 214), provided that when parties to any instrument agree that any difference between them shall be referred to arbitration, the court or a judge may stay proceedings on application of the defendant in any action commenced by any of the parties to the agreement, upon being satisfied that no sufficient reason exists why such matters ought not to be referred according to the agreement, and that the defendant was, at the time of bringing the action, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration.

Since the enactment of that act it is no longer an objection that the jurisdiction of the courts is ousted by an agreement to arbitrate. *Woodward v. McDonald*, 13 Ont. Rep. 671.

Under a section (§ 167) of one of the Canadian common law procedure acts (which is similar in terms to § 11 of the English common law procedure act of 1854 (17 & 18 Vict. chap. 125), an action on a fire insurance policy, containing the usual clause for an arbitration to determine the amount of loss, is properly subject to a stay of proceedings. *McInnes v. Western Assur. Co.* 30 U. C. Q. B. 580.

XXVIII. Awards.

a. Awards after revocations.

An award made after the authority of the arbitrators to act has been duly revoked is of no binding force. It is a nullity. *Sangster v. Quantrell*, 1 Hayw. & H. 18, Fed. Cas. No. 12321; *Allen v. Watson*, 16 Johns. 205; *Frets v. Frets*, 1 Cow. 335; *Power v. Power*, 7 Watts, 205; *McKenna v. Lyle*, 155 Pa. 599, 35 Am. St. Rep. 910.

26 Atl. 777; *Erie v. Tracy*, 2 Grant, Cas. 20; *Wood v. Finn*, 1 Clark (Pa.) 396; *Nicholas v. Carr*, 6 Luzerne Leg. Reg. 204; *Friedrich v. Fergen*, 15 S. D. 541, 91 N. W. 328; *Key v. Norrod*, 124 Tenn. 146, 136 S. W. 991; *Hathaway v. Strong*, 2 Tyler (Vt.) 105; *Marsh v. Bulteel*, 5 Barn. & Ald. 507; *Clapham v. Higham*, 1 Bing. 87; 7 J. B. Moore, 703, 1 L. J. C. P. 5; *Milne v. Gratrix*, 7 East, 608; *Greenwood v. Misdale*, 1 McClell. & Y. 276.

An award made after the submission has been revoked is not binding. *Wood v. Lafayette*, 46 N. Y. 484.

An award of arbitrators, made after revocation, is not binding upon and may be ignored by the revoking party, but if he does not treat it as null, and accepts benefits under it, he estops himself from questioning afterwards its validity. *Harrell v. Terrell*, 125 Ga. 379, 54 S. E. 116.

A revoked submission is no bar to a suit on the claim submitted. *Mead v. Owen*, 83 Vt. 132, 74 Atl. 1058.

It affords no defense. *Mason v. Bullock*, 6 Ala. App. 141, 60 So. 432; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233.

A revocation terminates the authority of arbitrators to act. *Key v. Norrod*, 124 Tenn. 146, 136 S. W. 991.

With the service of an unequivocal revocation in writing, a submission comes to an end, and the authority of the arbitrators ceases. *McKenna v. Lyle*, 155 Pa. 599, 35 Am. St. Rep. 910, 26 Atl. 777.

An award made by arbitrators named under the Canadian railway act (Consol. Stat. chap. 66) to value land proposed to be taken for railroad purposes, after formal written notice has been served that the land is not wanted, is null. *Cawthra v. Hamilton & L. E. R. Co.* 35 U. C. Q. B. 581.

b. Need of unanimity.

An award by a majority of the arbitrators, or by any number of them less than all, is good and binding if the submission so provides. *Maywood v. Frederick*, 7 Cush. 247; *Haley v. Bellamy*, 137 Mass. 357.

But unless the submission provides otherwise, all the arbitrators must join in the award to make it good. Without their unanimous concurrence the award is a nullity. *Nettleton v. Gridley*, 21 Conn. 531, 56 Am. Dec. 378; *Bannister v. Read*, 6 Ill. 92; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Phippen v. Stickney*, 3 Met. 384; *Quimby v. Melvin*, 28 N. H. 250; *Dinsmore v. Hanson*, 48 N. H. 413; *Cope v. Gilbert*, 4 Denio, 347; *Norfleet v. Southall*, 7 N. C. (3 Murph.) 189.

A submission to two arbitrators and an umpire to be selected by them has, however, been held necessarily to imply authority to any two of the three to make an award, because it is the function of the umpire to decide between the arbitrators when they disagree. *Stringer v. Toy*, 33 W. Va. 86, 10 S. E. 26.
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c. Finality.

After an award has been made, it is too late to revoke the submission. *Toledo S. S. Co. v. Zenith Transp. Co.* 106 C. C. A. 501, 184 Fed. 391; *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855; *Alford v. Tiblier*, McGloin (La.) 151; *Coon v. Allen*, 156 Mass. 113, 30 N. E. 83; *Hunt v. Wilson*, 6 N. H. 36; *Clement v. Hadlock*, 13 N. H. 185; *Ivins v. Ivins*, 77 N. J. L. 368, 72 Atl. 94; *Merritt v. Thompson*, 27 N. Y. 225; *Robinson v. Bickley*, 30 Pa. 384; *Gardner v. Lincoln*, 5 Phila. 24; *Friedrich v. Fergen*, 15 S. D. 541, 91 N. W. 328; *Rogers v. Nall*, 6 Humph. 29; *Elliott v. Green*, 2 Shannon, Cas. 232; *Houston & T. C. R. Co. v. Newman*, 2 Tex. App. Civ. Cas. (Willson) 303; *Marsh v. Packer*, 20 Vt. 198; *Morse v. Stoddard*, 28 Vt. 445; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Levy v. Scottish Union & Nat. Ins. Co.* 58 W. Va. 546, 52 S. E. 449.

One reason is that an authority already exercised cannot be withdrawn. *Rogers v. Nall*, 6 Humph. 29.

Another, that if the right to revoke the submission is not exercised before an award is made, it must be deemed to have been waived. *Connecticut F. Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118.

Then, too, the courts will not allow a party to speculate on the result of the arbitration. If he has ground or desires to repudiate his submission, he is bound to do so before the result is known and he has been defeated. *Hewitt v. Lehigh & H. River R. Co.* 57 N. J. Eq. 511, 42 Atl. 325.

A party who goes to trial before arbitrators, and takes his chances of a favorable award, is conclusively bound by an award against him. *Bingham v. Guthrie*, 19 Pa. 418.

Then again, after the power given the arbitrators by a submission has been executed by the making of an award, it has assumed the form of a contract upon sufficient consideration, and has passed beyond the dominion of either party acting alone. *Shisler v. Keavy*, 75 Pa. 79.

After persons chosen to appraise a loss or damage by fire have made their award, the insured cannot, by any notice to the insurer of determination not to abide by such award, arbitrarily escape the binding force and effect of the contract. *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297.

The announcement to the parties by an arbitrator of his conclusion and award, although coupled with a statement that he had mislaid part of his judgment containing the reasons for his decision, is a sufficient publication to prevent the revocation of the submission, and to render the award binding. *Milner v. Luttrell*, 18 N. B. 87.

An agreement between the respective owners of two steamships which collided at sea, to arbitrate the question as to which was at fault, and that being decided, to submit the question of the amount of damages to be paid by the owners of the boat found

to have been in fault, is valid and binding, and may not be repudiated or revoked after a decision by the arbitrators, fixing the blame for the collision. *Toledo S. S. Co. v. Zenith Transp. Co.* 108 C. C. A. 501, 184 Fed. 391.

If the parties proceed to the end of an arbitration, the award made will be enforced. *King v. Howard*, 27 Mo. 21.

An award final in terms, and fairly made and published, is conclusive on the parties to the submission. *Oxley v. Oldden*, 1 Dall. 430, 1 L. ed. 209; *Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; *Payne v. Crawford*, 97 Ala. 604, 11 So. 725; *Waterman v. Smith*, 13 Cal. 373; *Crumlish v. Wilmington & W. R. Co.* 5 Del. Ch. 270; *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661; *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 298, 27 S. E. 975; *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Seely v. Pelton*, 63 Ill. 101; *Dilks v. Hammond*, 86 Ind. 563; *Vincent v. German Ins. Co.* 120 Iowa, 272, 94 N. W. 458; *Masterson v. Masterson*, 22 Ky. L. Rep. 1193, 60 S. W. 301; *Cushing v. Babcock*, 38 Me. 452; *Phillips v. Shipley*, 1 Bland, Ch. 516; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52; *Haley v. Bellamy*, 137 Mass. 357; *Donnell v. Lee*, 58 Mo. App. 288; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 285; *Connecticut F. Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118; *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458; *Garr v. Gomez*, 9 Wend. 649; *Robertson v. M'Niel*, 12 Wend. 578; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; *Morton v. Cameron*, 3 Robt. 189; *Williams v. Branning Mfg. Co.* 153 N. C. 7, 31 L.R.A. (N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954; *Wilcox v. Singletary*, *Wright (Ohio)* 420; *Scott v. Reedy*, 5 Ohio Dec. Reprint, 388; *Dixon v. Morehead*, *Addison (Pa.)* 216; *Davis v. Havard*, 15 Serg. & R. 165, 16 Am. Dec. 537; *Bowen v. Cooper*, 7 Watts, 311; *Robinson v. Bickley*, 30 Pa. 384; *Houston & T. C. R. Co. v. Newman*, 2 Tex. App. Civ. Cas. (Willson) 303; *Saengerbund v. Dunn*, 41 Tex. Civ. App. 376, 92 S. W. 429; *Corbin v. Adams*, 76 Va. 53; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Chandos v. American F. Ins. Co.* 84 Wis. 184, 19 L.R.A. 321, 54 N. W. 390; *Montgomery v. American Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175.

An award made pursuant to a submission to arbitration of a dispute will be binding whether the matter submitted did or did not afford a legal cause of action. *Saengerbund v. Dunn*, 41 Tex. Civ. App. 376, 92 S. W. 429.

After arbitrators have acted and made their award, their decision binds the parties to the submission. *Corbin v. Adams*, 76 Va. 58.

If fairly made, it is final and conclusive on the questions submitted, and the rights of those who submitted them. *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458. 47 L.R.A. (N.S.)

An award at common law is a bar to an action on the original cause. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

If, pursuant to a stipulation in a contract that in case a dispute arises between the parties, they shall forbear to sue, and refer the matter to arbitration, any controversy is submitted to arbitrators, and they make a fair and unimpeachable award, it will be binding and a complete bar to any suit which either party may afterwards bring for the same cause of action. *Contee v. Dawson*, 2 Bland, Ch. 264.

An award of arbitrators, made after a full hearing of the parties, and not impeachable for corruption or bias, is conclusive upon the parties and their privies, and a bar to a subsequent action for matters involved in the submission. *McGill v. Proudfoot*, 4 U. C. Q. B. 40.

If the parties to a contract containing a stipulation for a reference to arbitration of all matters in dispute that shall arise under the contract, which would be held void as an attempt to oust the courts of their jurisdiction, actually proceed to an arbitration in conformity with such stipulation, and an award is made by the arbitrators on the matters submitted, such award, if not impeached for fraud, mistake, or misconduct, will be conclusive. *Florida Athletic Club v. Hope Lumber Co.* 18 Tex. Civ. App. 161, 44 S. W. 10.

It is in one sense true that an agreement to submit to arbitration is not binding, and cannot divest the courts of their jurisdiction, for it cannot be pleaded in bar to an action in respect of the subject-matter of the submission, neither will equity specifically enforce it; yet, in another sense, it is binding, for there is naught illegal in the contract, and when it has been acted upon and an award has been made, the jurisdiction of the courts over the matter decided by the arbitrators is gone, and all they have to say is whether or not the award is good. *Kidwell v. Baltimore & O. R. Co.* 11 Gratt. 676.

A settlement by arbitrators mutually chosen by the parties is as binding as if made by the parties themselves. *Seely v. Pelton*, 63 Ill. 101.

An award pursuant to the terms of a submission becomes a law by which the parties are to act in relation to the subject-matter that was in dispute. *Robinson v. Bickley*, 30 Pa. 384.

It is a contract similar to an accord and satisfaction, and is equal to the judgment of a court. *Dixon v. Morehead*, *Addison (Pa.)* 216.

It is a judgment pronounced by arbitrators in deciding the dispute submitted. *Garr v. Gomez*, 9 Wend. 649.

A valid award operates as a final and conclusive judgment as between the parties to the submission, respecting all matters determined by, and within the jurisdiction of, the arbitrators. *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; *Williams v. Branning Mfg. Co.* 153

N. C. 7, 31 L.R.A.(N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

An award fairly made and within the submission is conclusive and binding regardless of the question whether the party in whose favor it has been made had or had not originally a good cause of action for the sum awarded. *Dilks v. Hammond*, 86 Ind. 563.

One is not permitted to ignore the decision of judges selected by himself to arbitrate his dispute, merely because he does not like their award. *Ibid*.

However disappointing that award may prove to be, he must abide by it. *Sweet v. Morrison*, *supra*.

The award of an arbitrator pursuant to a clause in a building contract providing that all questions and differences which might arise between the parties to it, growing out of it or the work done in performing it, should be referred to him, and that his decision should be final and binding, is alike conclusive upon the surety of the contractor and the contractor himself, even when rendered upon their default, after due notice had been given them to appear and be heard. *Conneaut Lake Agri. Asso. v. Pittsburg Surety Co.* 225 Pa. 592, 74 Atl. 620.

Awards that appear on their face to be in accord with the submissions are presumed to be valid. *Robinson v. Bickley*, *supra*.

An unimpeached award, fair and unambiguous on its face, made pursuant to an arbitration, under a rule of court in a pending suit, is binding on the parties, and will be carried out by the decree of the court. *Phillips v. Shipley*, 1 Bland. Ch. 516.

If parties agree understandingly to settle a controversy, and carry their agreement into effect, the courts will enforce such agreement. *Hathaway v. Strong*, 2 Tyler (Vt.) 105.

An award must conform to the terms of the submission; otherwise it will not be valid nor binding on the parties. *Home Ins. Co. v. M. Schiff's Sons*, 103 Md. 648, 64 Atl. 63.

An award on a matter not within the submission is void. *Garr v. Gomez*, *supra*.

To be binding, it must cover all the claims submitted to the arbitrators, and be mutual, certain, and final. *Boston & L. R. Corp. v. Nashua & L. R. Corp.* 139 Mass. 463, 31 N. E. 751.

To be valid it must be consonant with the submission, certain in its terms, possible of performance, and final. *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486.

To be conclusive it must be certain and definite in terms, and dispose finally of the whole controversy submitted. *Connor v. Simpson*, 104 Pa. 440.

But the law only requires certainty to a common intent in an award. *Ingraham v. Whitmore*, 75 Ill. 24.

It neither exacts nor expects technical precision. *Payne v. Crawford*, 97 Ala. 604, 11 So. 725.

An award of arbitrators chosen simply 47 L.R.A.(N.S.)

to determine what precise sum is due from one to the other of the parties to the submission binds both and is final. *Cushing v. Babcock*, 38 Me. 452.

Thus, the award of arbitrators under a submission to determine the amount of a fire loss, pursuant to an arbitration clause in a fire insurance policy, is final and conclusive alike on insurer and insured. *Chandos v. American F. Ins. Co.* 84 Wis. 184, 19 L.R.A. 321, 54 N. W. 390; *Montgomery v. American Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175; *Herndon v. Imperial F. Ins. Co.* 107 N. C. 183, 12 S. E. 126.

An award by arbitrators, fixing a division line between coterminous lands after a legal submission by the respective landowners, is conclusive on both. *Payne v. Crawford*, 97 Ala. 604, 11 So. 725; *Robertson v. M'Niel*, 12 Wend. 578; *Davis v. Havard*, 15 Serg. & R. 165, 16 Am. Dec. 537; *Bowen v. Cooper*, 7 Watts, 311.

A published award, made under a written submission giving the arbitrators authority to find and establish the boundary line between the adjoining lands of different owners, is conclusive on the parties, and estops them to dispute the line drawn by the award. *Weeks v. Trask*, 81 Me. 127, 2 L.R.A. 532, 16 Atl. 413.

An award by arbitrators, fixing the boundary line between the respective lands of two grantees from the Mexican government of different but undefined portions of a single large tract, while valid and conclusive upon both so long as the lands remain unsurveyed, has no force or effect upon the government and officers of the United States, as successors to the Mexican authorities, and must give place to after-made government surveys and patents to one or both of the holders of the Mexican grants. *Waterman v. Smith*, 13 Cal. 373.

As in other cases, if partners, pursuant to provisions to arbitrate in their articles of copartnership, or agreements to dissolve, enter into a submission and proceed to the end with an arbitration without revoking the authority of the arbitrators, a fair and honest award made will be binding, and treated by the courts as conclusive. *Gibson v. Moore*, 6 N. H. 547; *Madison v. Henderson*, 86 Ill. App. 113.

But only as to matters included in the submission and covered by the award. *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52.

If two partners enter into a submission to arbitration upon dissolving the partnership, for the purpose of settling the affairs and accounts of the firm and its members, the award afterwards made affords one of them a good plea of defense and offset to an action by the other, brought pending the arbitration, to recover upon an account assigned to him in the liquidation of another firm in which both were also partners. *Jones v. Harris*, 58 Miss. 293.

An award by arbitrators assigning to landlord and tenant of a farm rental for a share of the crops their respective proportions of the crops grown is conclusive on

both in a subsequent litigation. *Donnell v. Lee*, 53 Mo. App. 288.

Whether or not a provision in a lease for years for a reference to three disinterested persons to determine the amount payable as rent is technically an agreement for a submission to arbitration, and whether or not the decision of such persons is technically an award, is immaterial; their determination of the amount of rent is binding and conclusive on both lessor and lessee. *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161.

An award of arbitrators, finding that the defendant in a litigation pending in a Federal court, and submitted to them for decision, has not infringed the other party's patent, as there contended, is valid, and imposes on the latter the obligation to dismiss his suit as he covenanted he would do, in case the award was against him, in the submission. *Scott v. Reedy*, 5 Ohio Dec. Reprint, 388.

An award of arbitrators upon a mutual submission, fixing the amount of alimony to be paid by a husband to his wife in a divorce suit, when adopted and confirmed by the court as a proper allowance, is final and conclusive. *Masterson v. Masterson*, 22 I. J. L. Rep. 1193, 60 S. W. 301.

The award of arbitrators in a suit for damages for criminal conversation, referred to them by consents and made a rule of court, made after hearing the evidence and arguments of both parties, followed by the entry of judgment for the sum awarded, is binding upon the litigants, notwithstanding the cause of action was not among those which are by statute referable by order of court. *Yates v. Russell*, 17 Johns. 461.

An award by arbitrators is binding and conclusive upon a partnership, although the submission was made by one of its members in behalf of the firm. *Wilcox v. Singletary, Wright* (Ohio) 420.

If an award is void as to one party to the submission, it is void as to all. *Offerman v. Packer*, 26 Phila. Leg. Int. 205.

But an award of arbitrators that one in possession of land is its owner affords him no defense in an action of ejectment by the true owner, who was a party to the submission, because the title to real estate cannot be transferred by an award, for the reason that the parties themselves cannot convey in that manner, and arbitrators can do naught that the parties cannot do. *Dixon v. Morehead, Addison* (Pa.) 216.

d. Enforcement.

If arbitrators award a certain sum of money as due from one party to the other, the latter may recover the sum awarded under a count in indebitatus assumpsit. *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486.

Awards upon common-law submissions to arbitration are enforced by actions upon them. *Webb v. Zeller*, 70 Ind. 408; *Dilks v. Hammond*, 86 Ind. 563, 47 L.R.A. (N.S.)

There is no other mode of enforcing an award for the payment of a sum of money under a common-law submission to arbitration but by an action. *Smith v. Compton*, 20 Barb. 262.

An award by an arbitrator fixing a price pursuant to a contract for the sale and purchase of land, under a submission made a rule of court, affords the vendor only a good cause of action; it cannot be enforced by an attachment against the purchaser. *Re Lee*, 3 Nev. & M. 860, 15 Q. B. 305, note, 3 L. J. K. B. N. S. 124.

A court of equity may decree the specific performance of an award made conformably to the terms of the submission, and not impeached for mistake, corruption, or fraud. *Robinson v. Bickley*, 30 Pa. 384. Thus, chancery will compel the specific performance of an award of arbitrators determining the location of a disputed division line between adjoining lands. *Davis v. Havard*, 15 Serg. & R. 165, 16 Am. Dec. 537.

A court of equity has jurisdiction to enforce an award, but if it is only for the payment of money, the remedy at law is adequate. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.

Where an incoming tenant of a farm bargained with the outgoing tenant for the hay and a farming implement, agreeing to pay therefor such price as third persons named should determine to be its value, less the amount of cost of repairing the farm gates and fences, and received the hay and chattel, it was held, after an appraisal by the chosen appraisers fixing the amount, that the outgoing tenant might recover such amount in an action for debt for goods sold and delivered. *Leeds v. Burrous*, 12 East, 1.

Under the usual clause for an arbitration or appraisal of the amount of a loss in a fire insurance policy, when it has been complied with and the amount determined by the arbitrators, an action to recover the loss is properly brought on the policy, and not upon the award, the office of which is to fix the amount of the recovery. *Billmyer v. Hamburg-Bremen F. Ins. Co.* 57 W. Va. 42, 49 S. E. 901.

An award fixing the amount of a loss or damage by fire, pursuant to provisions in an insurance policy for a reference to arbitrators of the single question, What was the amount of loss? merely establishes, if unimpeachable, the measure of damages the policy holder is entitled to recover in an action on the policy. *Soars v. Home Ins. Co.* 140 Mass. 343, 5 N. E. 149.

e. Annulment.

As a general rule courts are liberal in construing awards, making all reasonable presumptions in their favor, and no unreasonable intendments to overturn them. *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661.

They favor awards and indulge all reasonable presumptions to uphold them. *Green-*

ville County v. Spartanburg County, 62 S. C. 105, 40 S. E. 147.

Every presumption is in favor of an award. *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975.

Every reasonable intentment and presumption is in favor of the finality of settlements of disputes by arbitration. *Toledo S. S. Co. v. Zenith Transp. Co.* 106 C. C. A. 501, 184 Fed. 391.

Awards of arbitrators are regarded by the law with peculiar favor, and nothing will be presumed against them. *Houston & T. C. R. Co. v. Newman*, 2 Tex. App. Civ. Cas. (Willson) 303.

They have been regarded with great favor because they tend to quiet litigation, and are determinations of tribunals the parties themselves have elected. *Western Female Seminary v. Blair*, 1 Disney (Ohio), 370.

An award should not be impeached or annulled for slight causes. *Dilks v. Hammond*, 86 Ind. 563.

An award is conclusive until it is set aside, although it may be impeached and annulled for sufficient and established reasons in a suit in equity. *Vincent v. German Ins. Co.* 120 Iowa, 272, 94 N. W. 458.

If it is within the submission, and is an honest decision of the arbitrators after a full and fair hearing of the parties, a court of equity will not set it aside for any errors of law or fact. *Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96.

In the absence of fraud or palpable mistake, the courts will not generally interfere with an award, even in a case where the verdict of a jury to the same effect might be set aside as contrary to law. *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696.

A court of equity has jurisdiction to set aside an award where the arbitrators have exceeded their authority and undertaken to decide matters not embraced in the submission. *Kearney v. Washtenaw Mut. F. Ins. Co.* 126 Mich. 246, 85 N. W. 733.

And the misconduct of arbitrators vitiates their award. *Western Female Seminary v. Blair*, supra.

The misconduct of arbitrators chosen to appraise a fire loss pursuant to the customary arbitration clause in a fire insurance policy, plainly indicative of unfairness and bias, although not perhaps sufficient to establish actual fraud or bad faith, warrants setting aside their award. *Schmitt Bros. v. Boston Ins. Co.* 82 App. Div. 234, 81 N. Y. Supp. 767; *New York Mut. Sav. & L. Assn. v. Manchester F. Assur. Co.* 94 App. Div. 104, 87 N. Y. Supp. 1075.

An award may always be set aside and annulled for the misconduct, partiality, or fraud of the arbitrators. *Hartford F. Ins. Co. v. Bonner Mercantile Co.* 11 L.R.A. 623, 44 Fed. 151.

Like a judgment, an award may be impeached for actual and intentional fraud. *Hostetter v. Pittsburgh*, 107 Pa. 419.

But it can be successfully impeached only on grounds which will invalidate any judgment. *Corbin v. Adams*, 76 Va. 58. 47 L.R.A. (N.S.)

The parties can be relieved from an award pursuant to the terms of a submission, only by making out a clear case of such mistake, corruption, or fraud as will justify equitable interference. *Robinson v. Bickley*, 30 Pa. 384.

Inclining to uphold awards, the courts must be affirmatively satisfied that some manifest injustice has been done, or plain misconduct committed, before they will interfere. *Gardner v. Lincoln*, 5 Phila. 24.

Except for corruption, gross partiality, or action clearly in excess of powers conferred, the awards of arbitrators are not open to review in the courts. *Cushing v. Babcock*, 38 Me. 452.

An award will not be set aside where the party asking it covenanted to perform and revoked the submission, because that might deprive the other party of his action on the covenant, and besides would be superfluous, since an award after revocation is void. *King v. Joseph*, 5 Taunt. 452.

A motion in arrest of judgment on the coming in of an adverse award by an arbitrator to whom the cause was submitted under a rule restraining the parties from suing out a writ of error cannot be entertained. *Chownes v. Brown*, 2 Dowl. & L. 706, 14 L. J. Exch. N. S. 219.

When parties entering into a submission stipulate that the award shall be final and conclusive, and that neither party shall have the right to appeal from or except to it, and that judgment upon it shall be entered as of course, the courts cannot afford any relief for mistakes in matters of fact. *McCahan v. Reamey*, 33 Pa. 535.

The decision of a referee named in a contract for constructive or preparatory work, to decide finally disputes arising in the course of it, respecting the performance of it, when free from fraud or mistakes so gross as necessarily to impute bad faith, is not subject to judicial revision. *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228.

Where the parties themselves have created a tribunal to adjudicate their rights, and have submitted themselves to the jurisdiction and decision of arbitrators, the decision and award on all matters within the scope of the submission will be held final and conclusive, in the absence of fraud or mistake so gross as to show that the judgment of the arbitrators was not exercised. *Crumlish v. Wilmington & W. R. Co.* 5 Del. Ch. 270.

But adequate reasons being shown for annulling an award, such, for example, as the gross inadequacy of the sum awarded, and the incompetence, unfairness, and bias of an arbitrator, a court of equity may, taking jurisdiction of a suit by the holder of a fire insurance policy, set aside the award and give judgment against the insurer for the true amount of his loss. *Glover v. Rochester-German Ins. Co.* 11 Wash. 143, 39 Pac. 380.

No court has any general supervision over the awards of arbitrators. However unreasonable or unjust an award may be, it is

merits cannot be reinvestigated, for otherwise, instead of being an end of the litigation, it would simply be a useless step in its progress. *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276.

No court will re-examine the merits of an award, appraisal, or decision fairly made by an indifferent third person chosen by the parties for the purpose of making it. *Smith v. Boston, C. & M. R. Co.* 36 N. H. 458.

The courts will not retry on its own merits a controversy submitted to and decided by arbitration, nor inquire whether or not another and different award should have been made. *Crumlish v. Wilmington & W. R. Co. supra.*

Until an award is set aside by a court of equity, it is conclusive and obligatory on the parties, and if it was made a condition precedent to an action on a contract providing for a submission to arbitration, it effectively bars a recovery. *Vincent v. German Ins. Co.* 120 Iowa, 272, 94 N. W. 458.

He who assails an award assumes the burden of establishing its invalidity. *Greenville County v. Spartanburg County*, 62 S. C. 105, 40 S. E. 147.

If he objects to it on the ground that it embraces matters not within the power of the arbitrators, it lies with him to show affirmatively that the submission did not include the specified things. *Blair v. Wallace*, 21 Cal. 317.

A statutory arbitration and award are not open to a collateral attack, but only to a direct one, in the mode prescribed by the statute. *Weir v. West*, 27 Kan. 650.

Of course, any award may, by mutual consent, be waived and set aside. *Georges v. Niess*, 70 Minn. 250, 73 N. W. 644.

And, by entering into a second submission of a controversy, all rights acquired by a first arbitration and award are waived. *Hewitt v. Lehigh & H. River R. Co.* 57 N. J. Eq. 511, 42 Atl. 325.

An award of arbitrators may not be reformed by a court of equity on the ground of misconduct in the arbitrators in considering and passing upon matters not included or properly belonging in the submission, by annulling it in part and upholding it in other respects, for that would be in effect the making of a new award by the court, which it has no power to do; but when a bill for such an end contains the general prayer for relief in equity, the award may be set aside *in toto* for such reasons. *Vernon v. Oliver*, 11 Can. S. C. 156.

In New York, where both equitable and legal jurisdiction are lodged in the same court, an action lies to set aside, on the ground of fraud, misconduct, or for other adequate reasons an award of arbitrators selected pursuant to a provision in a fire insurance contract, to appraise the amount of a loss, and then to recover on the policy for the actual loss proved. *Kaiser v. Hamburg-Bremen F. Ins. Co.* 59 App. Div. 525, 69 N. Y. Supp. 344; *Schmitt Bros. v. Boston* 47 L.R.A. (N.S.)

Ins. Co. 82 App. Div. 234, 81 N. Y. Supp. 767; *New York Mut. Sav. L. Asso. v. Manchester F. Assur. Co.* 94 App. Div. 104, 87 N. Y. Supp. 1075.

In jurisdictions keeping up the distinctions between actions at law and suits in equity, a policy holder suing at law to recover for a loss under a fire insurance policy requiring an appraisal by arbitrators of the amount of the loss, as a Condition precedent to an action on the policy, cannot in such action impeach, and have set aside for misconduct of the arbitrators, an award made, so as to entitle him to recover a larger sum. *Early v. Providence & W. Ins. Co.* 31 R. I. 225, 140 Am. St. Rep. 750, 76 Atl. 753.

The holder of a fire insurance policy seeking to recover for a loss insured against may, in an action on the policy, attack the validity of an award or appraisal made pursuant to its terms, without first resorting to equity to set aside such award. *Davis v. Atlas Assur. Co.* 16 Wash. 232, 47 Pac. 436, rehearing denied in 16 Wash. 239, 47 Pac. 885; *Davis v. Imperial Ins. Co.* 16 Wash. 241, 47 Pac. 439.

XXIX. Conclusion.

Despite the mass of authorities and many instances of apparent conflict in the opinions of jurists, not all of whom have expressed themselves with lucidity, and leaving out the very few jurisdictions which stand virtually alone, it is doubtless clear to the reader who has followed through the exposition of the cases, that the fundamental questions respecting the validity and obligation of agreements and stipulations for arbitrations are now substantially settled.

Of these agreements, some—those submitting causes of action in their entirety, assuming to make final and conclusive decisions of the arbitrators respecting liability, and absolutely closing the doors of the courts against the parties—are everywhere said to be void. Practically they are void, since they attempt to oust the courts of all their jurisdiction over the entire subject-matter. But this is true only of executory agreements. If the parties to any such agreement choose to perform it, and each is fully heard, an award fairly and honestly made by the arbitrators, covering all the matters submitted, will be upheld and enforced by the courts the same as any other award.

Another class of agreements for arbitration or appraisal are universally held to be valid, so far as to support actions to recover damages for their breaches, but of no binding obligation if either party chooses to repudiate them, so far as litigations over their subject-matters are concerned. Either party to a submission to arbitration, which is a separate, independent, collateral contract, is free to ignore it, and sue at law and in equity for the enforcement of a right or the redress of a wrong, without thereby affording his adversary any defense.

But there is a third class of agreements to arbitrate or appraise, incidents to principal contracts, now almost universally esteemed valid and obligatory, and held by the courts, when not executed, excused, or waived, to be effectual bars to the maintenance of any action or suit upon the contracts to which they are collateral. These are agreements expressly or impliedly making conditions precedent to litigations, awards determining some preliminary question or subsidiary fact, upon the ascertainment of which any liability is contingent. The agreements of this class usually require the award to be conclusive evidence of the extent of a loss, the amount of a damage, the value of property or services, quantity or quality, and make liability on the main contract contingent upon the award. All the courts, except those of Nebraska, uphold and enforce now this class of agreements.

The greater number of cases in modern times have involved, not so much questions of the validity and binding force of agreements to arbitrate disputes between litigants, and to make appraisements settling finally amounts, but whether or not such agreements had been waived, or the performance of them had been adequately excused. It is here that the widest differences of opinion are found. Some courts under the influence of early precedents, dealing with contracts virtually unilateral, have been astute to find reasons for brushing aside arbitration or appraisal clauses; others, perceiving no reason why parties making contracts voluntarily with arbitration clauses in them should not be held to their performance to the letter, have been equally astute to enforce them. No general rule can be laid down infallibly to determine when a case arises in which an arbitration has been agreed to be a condition precedent to litigation, and has not taken place, whether it has been excused or waived; but, so numerous are the cases, that it is highly improbable that one or more good authorities in point will not be found among those above cited.

J. B. G.

LOUISIANA SUPREME COURT.

J. N. WHITE

v.

J. E. McCLANAHAN.

(— La. —, 63 So. 61.)

Judge — relation to attorney — recusal.

A party in interest, though not to the record, is even more surely than a mere party to the record, without interest, with-

Headnote by MONROE, J.

Note. — For relationship to attorney in case as disqualifying judge, see note to *Yazoo & M. Valley R. Co. v. Kirk*, 42 L.R.A. (N.S.) 1172.
47 L.R.A. (N.S.)

in the meaning and purpose of the law (act No. 35 of 1882), which declares that one of the causes for which "a judge shall be recused" is "his being related to one of the parties within the fourth degree." Hence, in a case where an attorney at law is prosecuting an action in damages, under a contract for a purely contingent fee, before a judge who is related to him within the fourth degree, the judge should recuse himself; since the attorney has a direct interest, similar to that of his client, in the judgment to be rendered, and, under act 124 of 1906, may record his contract, and thereby make himself a party to the record, and acquire rights equal to those of his client with respect to the disposition of the case.

(June 30, 1913.)

APPPLICATION by defendant for writs of mandamus and prohibition upon denial of his motion for recusation of the presiding judge in an action for damages in which plaintiff's attorney, a relative of the judge, was to have a contingent fee. Peremptory writ granted.

The facts are stated in the opinion.

Messrs. C. P. Thornhill, G. L. Alford, and Hundley & Hawthorn, for relator:

George Wear, Jr., attorney for the plaintiff, who is interested in the subject-matter of the litigation, is a "party" to the litigation, within the meaning of the above statute.

Vine v. Jones, 13 S. D. 54, 82 N. W. 82; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *Johnson v. State*, 87 Ark. 45, 18 L.R.A. (N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531; *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432; *Yazoo & M. Valley R. Co. v. Kirk*, — Miss. —, 42 L.R.A. (N.S.) 1172, 58 So. 710.

Messrs. Wear & Jones, *amici curiæ*.

Monroe, J., delivered the opinion of the court:

This being an action in damages, defendant called on plaintiff to furnish a bond for costs, to which plaintiff pleaded extreme poverty, and was excused, agreeably to the provisions of act 156 of 1912, from complying with the demand. Defendant then moved that the presiding judge be recused on the ground that his son is one of the counsel by whom plaintiff is represented, and who are prosecuting the suit upon an agreement for a purely contingent fee; to which the counsel answered, admitting the fact so alleged, and incorporating in their answer an agreement between them and defendant's counsel to the effect that the presiding judge should be recused and should appoint the judge of an adjoining district

court to try the case. The judge, however, declined to recuse himself, for the reason, as stated by him, that "the lawmakers of Louisiana not having seen fit to make the judge's relationship to an attorney appearing for a party in a cause, a cause of recusation, your respondent reached the conclusion that no cause of recusation was shown."

In support of which view respondent refers to articles 338 and 340 of the Code of Practice and the cases of *State v. Barnes*, 34 La. Ann. 399; *State v. Chantlain*, 42 La. Ann. 719, 7 So. 669. The law under which the question is to be determined is as follows: "That in cases in which a district judge" (referring to district judges, parish of Orleans excepted) "shall be recused, except for cause of interest, he shall, for the trial thereof, appoint a lawyer having the qualifications of a judge of the district court in which the recused case is pending, and, if no lawyer having the necessary qualifications can be obtained at the term of court at which the recusation is declared, the judge (recused) shall immediately appoint some district judge of an adjoining district to try the case, who shall be notified of his appointment in the manner provided in § 3 of this act."

Act No. 40 of 1880, § 2.

"The causes for which a judge shall be recused are:

"(1) His being interested in the cause; provided that in all civil and criminal causes in which the state, the parishes, or political or religious corporations are interested, it shall not be sufficient cause to challenge the judge or justice of the peace, who may have cognizance of the case (nor the sheriff, or the executive officer, or any of the jurors who are called to serve in the cause), to allege that they are citizens or inhabitants of the state or of the parishes, . . . or that they pay any state, parish, or city tax."

"2. His being related to one of the parties within the fourth degree.

"3. His having been employed or consulted as advocate in the cause.

"4. His being father-in-law, son-in-law, or brother-in-law of one of the parties. . . .

"5. His having performed any judicial act in the cause in any other court."

Act No. 35 of 1882.

Act 124 of 1906 confers upon attorneys at law a special first privilege on all judgments obtained by them, and on the property recovered under such judgments, for the amount of their professional fees; and further provides that "by written contract signed by the client, attorneys at law may acquire as their fee in such matter an interest in the subject-matter of the suit, 47 L.R.A.(N.S.)

proposed suit, or claim, in the prosecution or defense of which they are employed, whether such suit or claim be for money or for property, real, personal, or of any description whatever. And in such contract of employment it shall be lawful to stipulate that neither the attorney nor the client shall have the right, without the written consent of the other, to settle, compromise, release, discontinue, or otherwise dispose of such suit or claim. Either party to said contract shall have the right at any time to file same with the clerk of the district court where the suit is pending or is to be brought, and to have a copy made and served on the opposing party, and due return made, as in case of petitions in ordinary suits; from and after the date of such service any settlement, compromise, discontinuance, or other disposition made of such suit or claim by either the attorney or the client, without the written consent of the other, shall be null and void, and such suit or claim shall be continued and proceeded with as if no such settlement or discontinuance had been made."

It is not here contended that the respondent judge should be recused because of his relationship to "an attorney appearing for a party in a cause;" the motion to recuse being based solely upon the ground that the attorney, so related to the judge and so appearing, has a direct, pecuniary interest in the judgment to be rendered. In other words, that, whilst not a party litigant upon the face of the record, he is a party in interest, and may even become a party to the record by recording the written contract, if there be one, between him and the plaintiff. The law, as we have seen, declares that one of the causes for which a judge shall be recused is, "his being related to one of the parties, within the fourth degree;" and it may be said that the words "one of the parties," as thus used, means one of the parties litigant; and that may be true, though the law does not so read; but, conceding it to be true, the reason why the judge is to be recused in such case is that a party litigant is presumed to have a direct interest in the outcome of the litigation, and the lawmaker does not consider it proper that the relative in the fourth degree of a party having such interest should sit as judge in the matter. The party in interest, though not a party to the record, is even more surely within the meaning of the law than the party to the record who is without interest. And that is the view which the courts have generally taken in construing similar statutes. Thus, the supreme court of Arkansas has said: "While the Constitution speaks of a 'party to the cause,' we are of the opinion that, both upon

sound reason and according to the weight of authority, the word should not be construed in a technical and restricted sense to mean a party to the record, but it should be held to mean anyone who is pecuniarily interested directly in the result of the suit, although not a party to the record and not necessarily bound by the judgment. Any other construction totally disregards the spirit and defeats the purpose of the constitutional prohibition; for if a judge may be influenced at all in his judgment by the fact that a person who is directly interested in the result of the suit is related to him, the potency of the influence is not lessened by the absence of the related party from the record. For a very thorough and convincing discussion of this question, see the following authorities: *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. We are aware that the authorities are not entirely harmonious on this question, but we are satisfied, after a careful consideration, that the conclusion we have reached is in accord with sound reason and a majority of the adjudged cases."

Construing § 170 of the California Code of Civil Procedure, which prohibits a judge from sitting or acting as such in any proceeding "where he is related to either party . . . by consanguinity or affinity within the third degree, computed according to . . . law," the supreme court of California (in the case of *Howell v. Budd*, cited above) has said:

"To hold that the word 'party,' as used in § 170 of the Code of Civil Procedure, is confined to parties of record by name, would be a construction so narrow as to find support neither in principle nor authority. . . . We conclude, therefore, that the word 'party,' as used in § 170, is not confined to the parties to the record by name, but includes all persons represented by the parties to the record."

The Alabama law (construed in *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432) reads:

"No judge of any court, chancellor, county commissioner, or justice" of the peace, "must sit in any cause . . . in which he is interested or related to either party within the fourth degree of consanguinity or affinity." Code 1896, § 2637.

And it was held that "the purpose of the statute is to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal. Next in importance to the duty of rendering a righteous judgment is that of doing it in such manner as will be-
47 L.R.A.(N.S.)

get no suspicion of the fairness or integrity of the judge. "The principle of disqualification is to have no technical or strict construction, but is to be broadly applied to all classes of cases where one is appointed to decide the rights of his fellow citizens. . . . Disqualifying statutes are not to be construed in a strict, technical sense, but broadly, with liberality. The term "party," used to indicate persons to whom the judge is related, and who are connected with the litigation, is not confined to parties of record,"—12 Am. & Eng. Enc. Law, p. 41 and notes 3 and 4, p. 42. . . . These authorities are conclusive that the disqualification extends not only to the party to the record, but that the judge is incompetent when related within the fourth degree to any person interested in the judgment or decree."

In Mississippi, the statute reads: "No judge of any court shall preside on the trial of any cause, where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties." Const. 1890, § 165.

And the supreme court of that state has said: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest be revealed by an inspection of the record or developed by evidence *aliunde* the record. The real parties in interest furnish the reason for the judge to recuse himself, when it becomes known that they are related to the judge, although they may not be parties *eo nomine*." *Yazoo & M. Valley R. Co. v. Kirk*, — Miss. —, 42 L.R.A.(N.S.) 1172, 58 So. 710.

In view of what we conceive to be the purpose of our own statute and of the fact that plaintiff's counsel are as directly, and perhaps as much, interested in the judgment to be rendered in this case as the plaintiff himself, and may in effect even make themselves parties of record, we are of opinion that the judge, being related to one of the counsel within the degrees specified in the statute, should be recused.

It is therefore adjudged and decreed that the alternative writ of prohibition herein issued be made peremptory; that the respondent judge be recused in the matter of *White v. McClanahan*, now pending in his court; and that he appoint a lawyer or judge to hear and determine said cause, as provided by act No. 40 of 1880, § 2, or as agreed on by the litigants.

MINNESOTA SUPREME COURT.

FRANCIS W. SWEET, Appt.,
v.

MRS. BEATRICE LOWRY et al., Respts.

(123 Minn. 13, 142 N. W. 882.)

Guardian and ward — failure to redeem from mortgage — accounting laches.

In an action brought by the plaintiff against the devisees of his former guardian, and the heirs and devisees of the guardian's bondsmen, to charge them with liability because of the failure of the guardian to redeem certain property of his ward from a mortgage foreclosure sale, the action being

Headnote by DIBELL, C.

Note. — Limitation of actions or suits to compel guardian to account, or to recover on his bond.

I. Actions or proceedings against principal.**a. In law courts, 451.****b. In equity or probate courts.****1. Statutes of limitation.****(a) General statutes.****(1) Doctrine of trust relation, 451.****(2) Doctrine repudiating trust relation, 454.****(3) Where there has been an accounting or repudiation of the trust, 456.****(b) Special statutes, 456.****2. Statutes of nonclaim, 457.****3. Doctrine of laches.****(a) In general, 457.****(b) Reasonable excuse, 459.****II. Actions or proceedings against sureties.****a. In general, 460.****b. Statutes of limitation.****1. General statutes, 460.****2. Special statutes, 461.****c. Laches, 462.**

The scope of this note covers only the question of limitation of actions or suits by wards, or those who stand in the same right, against guardians or their personal representatives, and actions or suits against their sureties. Although a few cases have been cited by way of illustration, involving the limitation on the right to follow the trust property into the possession of the guardian's heirs or assigns, the note is not intended to be exhaustive of such cases.

I. Actions or proceedings against principal.**a. In law courts.**

On the question of the right of a ward to maintain an action at law against guardian for guardianship funds, after termination of 47 L.R.A. (N.S.)

brought thirty-five years after the foreclosure, and twenty years after the ward became of age, the only excuse given for the delay being that he was not apprised of his ownership of the mortgaged land or his rights under the guardianship until shortly before suit, it is held that the complaint affirmatively shows laches, and that a demurrer was properly sustained.

(August 8, 1913.)

A PPEAL by plaintiff from an order of the District Court for Hennepin County sustaining demurrers to a complaint filed to compel an accounting of property received by Thomas Lowry as guardian of plaintiff. Affirmed.

The facts are stated in the Commissioner's opinion.

guardianship, but before settlement of account, see note to Mitchell v. Penny, 26 L.R.A. (N.S.) 789.

Practically all actions or suits by a ward to compel an accounting, or in any way make his guardian liable for the trust funds, are brought either in the probate courts or in courts of equity (see *infra*), so that there is very little authority on the question as to when an action at law would be barred, but all the probate and equity courts appear to assume that such an action would be barred by the statute of limitation the same as any other action of law.

In Green v. Johnson, 3 Gill & J. 389, it was said that the statute of limitations runs from the time a ward reaches his majority in bar of any cause of action at law that he may have against his former guardian arising out of or because of the guardianship. And it has sometimes been held that where the action is equivalent to an action at law, although actually brought in a probate or court of equity, it is barred by the statute of limitations. See Bull v. Towson, Bones's Appeal, and other cases, *infra*.

b. In equity or probate courts.**1. Statutes of limitation.****(a) General statutes.****(1) Doctrine of trust relation.**

There is much more chance for different opinions as to the applicability of general statutes of limitation to actions or suits against guardians, than in the case where a special statute is directed specially to such actions or suits. It appears in I. b, 1 (b), and II. b, 2, *infra*, that the difference among the courts in the latter case is limited to the question as to when limitation begins to run, and not as to the applicability of the statute.

There are two opposing doctrines as to the barring of suits in equity to compel guardians to account. The English doctrine, as enunciated in Mathew v. Brise, 14 Beav. 341, explained and followed in Tinker v.

Messrs. Henry E. Barnes and Frank W. Booth for appellant.

Messrs. Koon, Whelan, & Hempstead, for respondents:

The equitable obligations resting upon, and the equitable remedies given against, a guardian, "are analogous to those resting upon and given against actual trustees; they result . . . from the theory of trusts, and are not mere applications of the doctrine concerning accounting."

2 Pom. Eq. Jur. §§ 157, 1088, 1097.

Upon the termination of the guardianship, plaintiff had the right to have an immediate guardianship accounting and final settlement of the quasi trust.

Watson v. Watson, 65 Minn. 335, 68 N.

Rodwell, 8 Reports, 1, 69 L. T. N. S. 591, is that the relation between a guardian and his ward is a trust relation, i. e., a direct, continuing, subsisting trust, and that although either party may, when the ward becomes of age, completely terminate the trust, yet it is not absolutely terminated without some affirmative action by one or the other of the parties; hence the equitable rule of limitation in analogy to the statute of limitations does not begin to run in favor of the guardian so long as he does not account for the funds, or in some other way affirmatively deny the trust relation. On the general question as to what trusts are within the bar of the statute of limitations, see note to Cone v. Dunham, 8 L.R.A. 647.

SWEET v. LOWRY and other cases cited under "Doctrine of Laches" I. b, 3, *infra*, by implication, support this doctrine, for the doctrine of laches is consistent with this doctrine, but is inconsistent with the doctrine that the statute of limitation, or a rule of equity in analogy thereto, bars the action. If the statute or the rule allowing only a short fixed period in which to bring the action (see I. b, 1, (a) (2)) bars the action, there would be no need of the doctrine of laches, which fixes no definite period.

Thus, in Pennington v. L'Hommiedieu, 7 N. J. Eq. 343, the case was tried on the theory that the ward was guilty of laches, and on finding the delay excusable, it was contended that the statute of limitations had barred her right of action; but the court said that, even though the statute had been specially pleaded, it would not bar her right of action.

This doctrine is based upon the sounder reasoning, is more equitable (the guardian can file his account if there is danger of losing his vouchers and other evidence), and, considering implication in the cases applying the rule of laches, is supported by the great weight of authority.

In the comparatively recent case, Stevenson v. Markley, 72 N. J. Eq. 686, 66 Atl. 185, affirmed in 73 N. J. Eq. 731, 70 Atl. 1102, the court gave a masterly exposition of this doctrine, and applied it where the action was by the executors of a deceased

W. 44; Brandes v. Carpenter, 68 Minn. 388, 71 N. W. 402.

The plaintiff is barred of all remedy or relief in this action, by reason of his laches.

Mackall v. Casilear, 137 U. S. 550, 566, 34 L. ed. 776, 779, 11 Sup. Ct. Rep. 178; 18 Am. & Eng. Enc. Law, 2d ed. 97, 105, 114; 5 Pom. Eq. Jur. 3d ed. §§ 20, 21; Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Brandes v. Carpenter, 68 Minn. 388, 71 N. W. 402; Hanson v. Swenson, 77 Minn. 70, 79 N. W. 598; Birch v. Funk, 2 Met. (Ky.) 544; Re Lewis, 36 Misc. 741, 74 N. Y. Supp. 469; Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767; Myrick v. Edmundson, 2 Minn. 259, Gil. 221; Foster v. Mansfield C. & L. M. R.

ward, who died long after attaining her majority, against the administrators of the guardian, who had died some time before suit was brought.

And the holding in the Stevenson Case is supported by Roush v. Griffith, 65 W. Va. 752, 65 S. E. 168.

Where a stepfather acted as guardian, receiving funds belonging to the ward both before she arrived at her majority and a few days after that time, she continuing to remain in his home as a member of his family, the statute of limitations will not bar her right to an accounting. Hayden v. Stone, 1 Duv. 396.

In Murphy v. Cady, 145 Mich. 33, 108 N. W. 493, a delay of twenty-three years after the guardian's death did not bar the ward's right to an accounting, by virtue of the statute of limitations.

And in Miller v. Ash, 156 Cal. 544, 105 Pac. 600, although forty-five years had elapsed between the time the guardian received the fund and time of bringing action, the court refused to hold the claim barred by the statute of limitation. As to doctrine of laches and peculiar circumstances, see same case, *infra*.

And in Mississippi the limitation does not begin to run in favor of the guardian until he has filed his final account or in some positive way terminated the trust. Dunn v. Clingham, 93 Miss. 310, 47 So. 503; Nunery v. Day, 64 Miss. 457, 1 So. 636.

When a guardian fraudulently conceals trust property and the facts concerning it, the statute does not commence to run until the discovery of the fraud, and the ward may follow the trust property into the hands of the guardian's heirs or legatees, and into the hands of purchasers thereof, who have purchased with notice of the trust. Allen v. Conklin, 112 Mich. 74, 70 N. W. 339.

It is also held that equity will not only refuse to apply the statute of limitations or a rule in analogy thereto, but will in proper cases interfere to prevent the application of the statute, where the probate court may be powerless to avoid injustice. Ibid. Newbery v. Wilkinson, 118 C. C. A. 111, 190 Fed. 673.

Co. 146 U. S. 88, 90, 36 L. ed. 899, 903, 13 Sup. Ct. Rep. 28; *Wetzel v. Minnesota R. Transfer Co.* 169 U. S. 237, 240, 42 L. ed. 730, 732, 18 Sup. Ct. Rep. 307, 12 C. C. A. 490, 27 U. S. App. 594, 65 Fed. 23; *Melms v. Pabst Brewing Co.* 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757; *Hammond v. Hopkins*, 143 U. S. 224, 272-274, 36 L. ed. 134, 152, 153; *Ripple v. Kuehne*, 100 Md. 672, 60 Atl. 464; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. ed. 836, 838; *Mowry v. McQueen*, 80 Minn. 385, 83 N. W. 348; *Humphrey v. Carpenter*, 39 Minn. 115, 39 N. W. 67; *Trebby v. Simmons*, 38 Minn. 508, 38 N. W. 693; *Rolfe v. Gregory*, 31 L. J. Ch. N. S. 710, 8 Jur. N. S. 606, 7 L. T. N. S. 10, 10 Week. Rep. 711.

This doctrine is so fair and equitable that it has been applied in a few cases to the extent of holding that a full account and settlement in the probate court will not start the statute of limitations running against the ward's right to a fair and full accounting on the ground of fraud or undue influence in the settlement, so long as the ward remained in ignorance of the fraud or of his legal rights, or so long as he remained subject to the influence of his former guardian. Thus, in *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967, on further appeal in 79 Vt. 449, 118 Am. St. Rep. 975, 65 Atl. 577, it was held that, although the final account and the discharge of the guardian by the probate court had terminated the relation of guardian and ward, yet the influence of that relation was presumed to continue, although there were no subsequent communications of any kind between the parties to perpetuate the influence, and, until the ward had actual knowledge not only of all the facts, but of his legal rights thereunder, the rule of equity in analogy to the statute of limitations would not commence to run against him. But for cases of this class, see I. b, 1 (a) (3), *infra*.

In cases such as *Kuhn's Appeal*, 87 Pa. 100; *Voltz v. Voltz*, 75 Ala. 555; and *Magruder v. Goodwyn*, 2 Patton & H. (Va.) 561, and many others, the courts reach the same result as the Vermont court, but these cases involve other principles, and are not considered in point here. While the filing of a false account seems to be considered as equivalent to no accounting at all, yet all of them have in them the possible suggestion that the ward may have been lulled into a false security by the fraudulent acts of the guardian, which could not have been the case if no pretense at settlement had been attempted. See I. b, 1 (a) (3), *infra*.

And in *Motes v. Madden*, 14 S. C. 488, a delay of almost ten years after the ward became of age did not prevent him from maintaining an action for an accounting against the guardian's administrator, even though he had given a receipt in full two months before he had arrived at his majority, thereby starting the statute of limita-

Our statute limiting the time for the commencement of actions applies as well to equitable as to legal proceedings.

Ozmun v. Reynolds, 11 Minn. 459, Gil. 341; *Cock v. Van Etten*, 12 Minn. 522, Gil. 431; *McClung v. Copehart*, 24 Minn. 17; *Humphrey v. Carpenter*, 39 Minn. 115, 39 N. W. 67; *Schmitt v. Hager*, 88 Minn. 413, 93 N. W. 110; 21 Cyc. 159; *Hanson v. Swenson*, 77 Minn. 70, 79 N. W. 598; *Wycoff v. Michael*, 95 Iowa, 559, 64 N. W. 608; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18.

Dibell, C., filed the following opinion:

This is an appeal by the plaintiff from an order of the district court of Hennepin

tion to run in favor of his guardian's sureties.

And there are many cases holding the converse of this rule, *i. e.*, that the limitation period begins when the guardian is discharged by the court, if the ward is of legal age and has knowledge of the facts constituting the ground of attack, or sufficient ground of suspicion to put him upon inquiry. See *infra*, I. b, 1 (a) (3).

So, in many jurisdictions the statute of limitations does not bar the right to compel, by citation, the guardian to account in the probate court. *Gilbert v. Guptill*, 34 Ill. 112; *Gregg v. Gregg*, 15 N. H. 190; *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499; *Gress's Appeal*, 14 Pa. 463; *Whitfield v. Burrell*, 54 Tex. Civ. App. 567, 118 S. W. 153; *Watson v. Watson*, 65 Minn. 335, 68 N. W. 44 (the probate court's holding was direct upon this point, but the appellate court did not pass upon it); *Woodbury v. Hammond*, 54 Me. 332.

In *Re Camp*, 126 N. Y. 377, 27 N. E. 799, reversing, on other points, 10 N. Y. Supp. 141, and 50 Hun. 388, 3 N. Y. Supp. 335, it was held that the statute of limitations was not applicable so as to bar the right of the ward to compel an accounting in the surrogate court. It is true that the guardian had a life interest in the fund, and the ward did not know of the fund until within a year of the time when he commenced proceedings, but the decision apparently does not rest upon that ground. The court, after discussing the authorities on the doctrine that the statute of limitations is applied to trusts under certain circumstances, said: "But I do not regard the matter as very important upon this question. The guardian has obtained possession of the fund as guardian, and he deals with it not alone in his own right as life tenant in this case, but he also deals with it as the property of others confided to his care. In this sense he occupies the position of a trustee so far as to prevent the running of any statute of limitations in his favor regarding the property intrusted to him. Although he may cease to be guardian upon the ward coming of age, yet so long as the property remains in his

county sustaining the demurrers of certain of the defendants to the complaint.

On September 29, 1875, Thomas Lowry was appointed guardian of the plaintiff and his brother. About November 1, 1875, Lowry received \$1,966.66 as guardian of his two wards.

On January 18, 1874, Francis P. Sweet, the father of the plaintiff, died intestate, leaving a widow and the plaintiff and his brother as his sole surviving heirs. At the time of his death he was the owner of certain land in Hennepin county, occupied as a homestead, subject to a mortgage.

On April 3, 1877, this property was sold on mortgage foreclosure sale, Lowry being the attorney of the mortgagee, for \$515. At the time of the foreclosure and during

the period of redemption the value of the property was in excess of twice the amount necessary to redeem from the sale, and during such period Lowry had in his possession, as guardian, moneys sufficient to redeem. No redemption was made. The plaintiff's mother had a life estate in the property. No settlement of the guardianship matter was ever had in probate court.

On February 4, 1909, Lowry died. His estate was probated in Hennepin county, and his executors were discharged prior to February, 1912.

The defendants Beatrice Lowry, Horace Lowry, and Mary Schwyzer are devisees of Lowry, and received large amounts of money from the estate.

William W. Herrick and E. W. Herrick

possession as guardian, and unaccounted for, he must remain liable to account."

In *Re Barker*, *infra*, the court seemed to doubt that *Re Camp*, *supra*, is decisive of the nonapplicability of the statute of limitations to the settlement of guardian's accounts, but distinguished it, and applied the statute. And see *New York cases*, *infra*, applying the statute where the action was against the representatives of a deceased guardian, but not when it was brought against the guardian in his lifetime.

But *Re Camp*, *supra*, was cited and followed in *Re Sask*, 70 App. Div. 401, 75 N. Y. Supp. 120, where it appeared that eighteen years had elapsed since the ward had attained her majority, but that she did not know until six months before bringing suit that the guardian had ever received any funds belonging to her.

The *Camp Case* was also cited and followed in *Grandin v. Fenton*, 61 Hun, 219, 15 N. Y. Supp. 946, and the court refused to apply the statute in favor of a special guardian who was ordered to sell the ward's land and invest the proceeds, although the court admitted that in *Witter v. Brewster*, 12 N. Y. Week. Dig. 358, the court had held that the statute would bar the claim against a special guardian, as distinguished from a general guardian.

And see cases, in I. b. 3, *infra*.

In a few cases the facts were such that there was not an express trust, but a constructive or an implied trust. Such is the case where the party intrudes upon an infant's estate so that he must be treated as guardian *de facto*, or where the law in any way raises a constructive trust. Such cases are exceptions to the doctrine here considered, since it is usually held that the statute of limitation, or the rule of equity in analogy thereto, will begin to run against the *cestui que trust* as soon as his right of action accrues, where the trust is constructive. See note in 8 L.R.A. 650.

If the money comes into the hands of the guardian as an implied trust, and the ward, after arriving at legal age, is given to understand that the guardian does not consider

himself legally liable, the statute will run against the ward. *Beers v. Myers*, 28 Ill. App. 648. On the repudiation of the trust, see I. b. 1 (a) (3), *infra*.

And the same rule has been applied where there was no disavowal of the trust, on the ground that the intruder was liable only for money had and received. This is based upon the ground that constructive trusts are protected by the statutes of limitation. *Johnson v. Smith*, 27 Mo. 591.

Where a person intrudes upon the estate of an infant in such manner as to make himself a constructive guardian or trustee, the ward is barred after the period of limitation has expired, the statute beginning to run when he arrives at legal age. This holding is based upon the well-established theory that the statute bars constructive trusts. *Weaver v. Leiman*, 52 Md. 708.

But it was held in *Goodhue v. Barnwell*, Rice, Eq. 198, that where the ward dies during minority, the statute of limitations does not begin to run in favor of one who has intruded upon his estate so as to be his guardian, until letters have been granted upon the estate of the ward, for the reason that until there is a party legally competent to maintain the action, the statute will not begin to run. And see *Bull v. Towson*, *infra*.

(2) Doctrine repudiating trust relation.

Some courts refuse to hold that a guardian is within the class of trusts to which the statute of limitations, or a rule of equity in analogy thereto, is not applicable, and hold that, as soon as the representative character of the trust is terminated in any way, the rule in analogy to the statute of limitations begins to run against the ward, and in favor of the guardian. This rule seems to be based on the analogy the case bears to common-law actions, in that the limitation begins to run against the ward as soon as a cause of action arises in his favor. The analogy, however, is not a good one, and fails at the crucial point, for the guardian, unlike the common debtor, can,

were bondsmen for Lowry in the guardianship proceeding. They died prior to February, 1912. The estate of William W. Herrick was probated, and the executors discharged, and the defendants Garafilia Herrick and Izzie L. Herrick, are his sole devisees, and have received property from his estate. The defendant Roy D. Herrick, who is the only one of the Herricks who demurs, is the administrator and sole heir of E. W. Herrick, and there is money in the estate.

This action is, in substance, to compel the defendants to account for the present value of the foreclosed property. The theory of it is that, since the estate of Lowry has been closed and the executors have been discharged, his devisees, who have received

property from his estate, can be required to make the accounting which he should have made, and that, since a default cannot be established in the probate court, the heirs and devisees of the bondsmen may be brought into this action, and their liability determined. The cause of action, if any, is in equity.

The demurrers are upon the ground of want of jurisdiction, defect of parties plaintiff, defect of parties defendant, and that the facts stated are insufficient.

We are not in accord upon the question whether the district court has jurisdiction. We leave this and the other grounds of demurrer specified, and pass to the question of the sufficiency of the facts stated.

The particular claim is that the plain-

and it is his moral and legal duty to, file his account without compulsion, and thus protect himself against loss of evidence and against stale demands.

The following cases support the proposition that, as soon as the guardianship terminates, by the death of either party, by the marriage of a female ward, by the ward's attaining his majority, or in any other way, the statute of limitations or the rule of equity in analogy thereto begins to run in favor of the guardian: *Jones v. Jones*, 91 Ind. 378; *Lambert v. Billheimer*, 125 Ind. 519, 25 N. E. 451; *Blake v. Wolfe*, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2; *Lane v. Lane*, 87 Ga. 268, 13 S. E. 335; *Humphreys v. Mattoon*, 43 Iowa, 556; *Langston v. Shands*, 23 S. C. 149; *Lane v. Farmer*, 11 Lea, 568; *Wycoff v. Michael*, 95 Iowa, 559, 64 N. W. 608; *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738 (not a direct holding); *Fawcett v. Fawcett*, 85 Wis. 339, 39 Am. St. Rep. 844, 55 N. W. 405; *Bertine v. Varian*, 1 Edw. Ch. 343. In this last case one guardian was dead, and the suit was against his administrators and the surviving guardian, and the court, after stating the rule with approval, made an order dismissing the suit as to be administrators, saying nothing in regard to the surviving guardian. See the other New York cases, *infra*, that make a distinction between a suit against the guardian and one against his representatives after his decease.

Likewise, a few courts have held that the statute of limitations is applicable to proceedings to compel the guardian to account in the probate courts, and that it begins to run from the time the trust for any reason terminates, usually by the ward's attaining his majority. *Jones v. Strickland*, 61 Ga. 356; *Harris v. Calvert*, 2 Kan. App. 749, 44 Pac. 25; *Re Barker*, 4 Misc. 40, 24 N. Y. Supp. 723 (not a direct holding). The court distinguished this case from the *Camp Case*, 126 N. Y. 377, 27 N. E. 799, in that there were facts that were construed to be a settlement, which started the statute to running.

The New York courts seem to be unwilling to apply this rule where the guardian is

living, the action being against him personally, and the ward not knowing the facts (see *Re Camp*, 126 N. Y. 377, 27 N. E. 799, and cases following it), but they do apply it where the guardian is dead and the action is against his representatives. *Re Lewis*, 36 Misc. 741, 74 N. Y. Supp. 469; *Re Van Derzee*, 73 Hun, 532, 26 N. Y. Supp. 121 (action against executors of guardian, but no point made of that fact); *Libby v. Van Derzee*, 80 App. Div. 494, 81 N. Y. Supp. 139 (ruled by *Re Van Derzee*, *supra*, and both cases distinguished from *Re Sask*, 70 App. Div. 401, 75 N. Y. Supp. 120, on the ground that action was against executors; affirmed without opinion in 176 N. Y. 591, 68 N. E. 1119).

This distinction is based upon the holding in *Re Wiley*, 119 N. Y. 642, 23 N. E. 1054, that under the Code of Civil Procedure, § 2606, the ward has a right to compel the legal representatives of his guardian to account for the guardianship immediately upon their qualifying as such representatives.

In *Bull v. Towson*, 4 Watts & S. 557, the funds with which it was sought to charge the guardian were alleged to have been received after the ward had attained her majority and after her marriage, and there was much uncertainty as to whether or not they had ever been received by him. The court said that, assuming their receipt by him, he had received them not as guardian, but to be paid over, and that an action in a court of law could have been maintained within six years after he received them. All right of action to recover them regardless of the form of action, was therefore barred by the statute of limitation.

And in *Bones's Appeal*, 27 Pa. 492, the statute of limitations was held to bar a right to a citation on a guardian to file his account in the orphans' court, but this was upon the ground that the proceeding was in substance an action for negligence, and the court disregarded the form of action, and applied the statute. This case and *Bull v. Towson*, *supra*, have been frequently cited to the general proposition here under annotation, but they go only to the extent of

tiff, conceding that he once had a cause of action, has lost it through laches.

The plaintiff was born in 1871. In 1892 he became of age. In 1912, twenty years later, he commenced this action. The acts which he claims give him a cause of action occurred thirty-five years before.

The complaint alleges that the "plaintiff never discovered, knew, or was in any way put on inquiry as to his rights under the said guardianship, or knew or had any intimation, indication, or ground of inquiring as to his part ownership, with his brother, of the said real estate and the said moneys until the month of February, 1912." It is clear that the plaintiff knew of the guardianship when he became of age. It is not shown that any inquiry or investigation

was made as to the execution of the trust, nor is an excuse offered for not making inquiry, nor is it shown that such inquiry would have been resultless. For twenty years no investigation was had, and until now no complaint has been made of an undischarged trust resting in Lowry.

In *Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 490, 27 U. S. App. 594, 65 Fed. 23, affirmed in 169 U. S. 237, 42 L. ed. 730, 18 Sup. Ct. Rep. 307, the court said: "The plea of laches does not always depend for its support upon mere lapse of time, but upon the manifest inequity of permitting the claim to be enforced, in view of some change in the condition of the property or in the relations of the parties to the controversy. It is also a well-established rule

holding that an action at law cannot be relieved of the bar of the statute merely by bringing the action in the orphans' court in the form of a citation or otherwise. If there can be any implication at all, they rather imply that the statute is not applicable to ordinary proceedings in the orphans' court. See other Pennsylvania cases, *infra*, III. c.

This seems to have been the theory upon which the decision in *Evan's Estate*, 11 Pa. Co. Ct. 324, was based.

(3) Where there has been an accounting or repudiation of the trust.

Where the guardian has terminated the relation by full settlement after the ward becomes of legal age, or by expressly denying his liability, and the ward has full knowledge of all the facts and his legal right thereunder, or sufficient knowledge to put him upon inquiry, the limitation period in analogy to that prescribed by the statute of limitation at once begins to run against the ward's right to compel an accounting. *Plant v. Pittro*, 65 W. Va. 147, 63 S. E. 768; *Southall v. Clark*, 3 Stew. & P. (Ala.) 338; *Meridith v. Nichols*, 1 A. K. Marsh. 595; *Heater v. Watkins*, 54 Ala. 44; *High v. Snedikor*, 57 Ala. 403; *Jackson v. Harris*, 66 Ala. 565; *Briscoe v. Johnson*, 73 Ind. 573; *Whedbee v. Whedbee*, 58 N. C. (5 Jones, Eq.) 392; *Timberlake v. Green*, 84 N. C. 658; *Kern v. Burnham*, 28 Ala. 428; *Steadham v. Sims*, 68 Ga. 741; *Ela v. Ela*, 84 Me. 423, 24 Atl. 893; *Willis v. Rice*, 141 Ala. 168, 109 Am. St. Rep. 26, 37 So. 507.

This, of course, is true even in jurisdictions which adopt the trust doctrine, as well as in those in which it is repudiated.

A disavowal of the trust after the ward becomes of age, such as a settlement unofficially in the presence of the probate judge, will start the statute running against the ward. *Mason v. Johnson*, 13 S. C. 20.

Where the evidence does not show that the guardian practised any fraud or made any fraudulent concealment of the state of his account, but does show that he made a somewhat informal settlement in the court, and that the ward, with the least degree of

diligence, might have ascertained all of the facts many years before bringing suit, and did not bring suit for more than twenty years after arriving at legal age, the action is barred by the statute of limitations. *Heath v. Elliott*, 83 Iowa, 357, 49 N. W. 984.

In *Owens v. Watts*, 24 S. C. 76, it was held that the statute was a bar to an action by the ward against his former guardian, where a settlement in full had been made by the ward through his attorney, and he was seeking to avoid settlement on the allegation for fraud.

The same is true of the holding in *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899, it being held that an action by the ward to set aside a judgment discharging her guardian and releasing his sureties is barred by the four-year statute of limitation.

The statute of limitation is applicable where the whole fund consisted of a note which the guardian in good faith turned over to the mother of the wards before they became of age, and while they were living with and being supported by her, which note could have been easily found when they arrived at the legal age, they having knowledge of the whereabouts of the note. *Hanson v. Swenson*, 77 Minn. 70, 79 N. W. 598.

(b) Special statutes.

A few states have enacted statutes limiting the time for the bringing of suits to compel guardians to account, and of course courts of equity enforce them.

In Louisiana there is a statute, art. 356 of the Code, which is directed especially to the prescription of actions by wards against guardians, and bars all such actions after four years from the time when the ward arrives at legal age. *Commagere v. Gally*, 6 La. 161; *Gourdain v. Davenport*, 10 Rob. (La.) 173; *Rhodes v. Cooper*, 113 La. 600, 37 So. 527; *Offutt v. Collins*, 11 Rob. (La.) 491; *Aillot v. Aubert*, 20 La. Ann. 509; *Cochran v. Violet*, 37 La. Ann. 221; *Bedell v. Calder*, 37 La. Ann. 805; *Gallion v. Keegan*, 39 La. Ann. 468, 2 So. 50 (an ac-

that when a suitor applies to a court of chancery for relief, for any considerable length of time after the wrong complained of was committed, it is incumbent on him to show, both by averment and proof, some sufficient excuse to justify the delay."

In *Schmitt v. Hager*, 88 Minn. 413, 93 N. W. 110, the court said: "But the defense of laches is not, like the statute of limitations, exclusively a matter of time, for it is purely an equitable defense, based upon grounds of public policy, which require, for the peace of society, the discouragement of stale demands, and is addressed to the sound judicial discretion of the court, under the facts of each particular case."

It is a circumstance of importance, in determining whether a plaintiff has been

guilty of laches, that the situation of the parties has changed, or that material witnesses have died, or that, because of lapse of time, evidence has otherwise been lost, so that the ascertainment of the essential facts is made difficult, and the exact facts upon which the rights of the parties depend must necessarily be in doubt. *Mackall v. Casilear*, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134; 12 Sup. Ct. Rep. 418; *Ripple v. Kuehne*, 100 Md. 672, 60 Atl. 464; *Badger v. Badger*, 2 Wall. 87, 17 L. ed. 836.

The following Minnesota cases are pertinent upon the question of laches: *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; *Hanson v. Swenson*, 77 Minn. 70, 79 N. W.

tion against representatives of deceased tutor); *Viala v. Burguieres*, 19 La. Ann. 149; *Romero's Succession*, 31 La. Ann. 721.

But even this statute prevents only an inquiry into the acts of the guardian performed before the ward becomes of age, and where all the funds were received by the guardian after that time, the action should not be barred (*Harvey's Succession*, 44 La. Ann. 80, 10 So. 410); and on the theory that a statute of limitations can be used only as a shield, and never as a sword, it was also held that where the guardian voluntarily files her account after the prescribed period, she cannot plead that the statute to bar objections thereto so as to prevent a full accounting.

The Georgia statute which gives an unrepresented estate five years before the statute of limitations begins to run against it applies to the estate of a ward who died after his majority, so that the statute begins to run in favor of the guardian, who never filed an account, five years after the death of the ward, and when the general imputation period has thereafter run, the guardian cannot be cited to render an account. *Morgan v. Woods*, 69 Ga. 590.

The Georgia act of 16th of March, 1869, barring all causes of action which accrued before June, 1865, unless sued by January 1, 1870, could not bar an action by a ward who became of age in September, 1869, against her guardian, since her cause of action did not arise before June, 1865; hence the limitation must be governed by the Code.

But that statute does apply where the ward reached legal age in 1863, and was discovered from 1868 to 1870; and where the guardian's wrongful act was performed prior to 1865, and the ward did not become of age until after January 1st, 1870, the act applied in that the ward had then only nine months and sixteen days after becoming of age in which to bring the action according to the terms of the statute. *Munroe v. Phillips*, 65 Ga. 390.

2. Statutes of nonclaim.

And frequently the statute of nonclaims 47 L.R.A.(N.S.)

is held to bar the ward's right to sue the representatives of his deceased guardian under particular circumstances, if not presented before the estate is settled.

The statute of nonclaim will bar the right of action at law of a ward against his former guardian's administrator, if the claim is not presented within the time specified; and where it is shown that the administrator never received the specific trust fund, has settled the estate and been discharged before suit is brought or claim presented, the action is completely barred in equity. *Newbery v. Wilkinson*, 100 Fed. 62, affirmed in 118 C. C. A. 111, 199 Fed. 673 (both courts citing *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480, which case overruled *Neis v. Farquharson*, 9 Wash. 517, 37 Pac. 697, though neither case involved actions between ward and guardian). But the circuit court of appeals says that if the suit had been commenced seasonably after the ward became of age, the statute would not have stood in the way.

To the same effect is *Rhodes v. Hannah*, 66 Ala. 215, where it was held that the statute of nonclaim would bar an action for a general accounting by the guardian's administrator; but it was said that if specific money of the trust comes into the hands of the administrator, an action for it would not be barred. And this holding is supported by *Gillespie v. Winn*, 65 Cal. 429, 4 Pac. 411; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

And in Arkansas it is held that the statute of nonclaim bars an action by the ward against the guardian's administrator, if not presented in time; but this does not relieve the guardian's sureties. See Arkansas cases, *infra*.

3. Doctrine of laches.

(a) In general.

As shown *supra*, many courts regard the relation of the guardian and ward as an express, continuing, and subsisting trust, not affected by the statute of limitations or any rule of equity in analogy thereto, so

598; *Marcotte v. Hartman*, 46 Minn. 202, 48 N. W. 767; *Sanborn v. Eads*, 38 Minn. 211, 36 N. W. 338.

We hold that the complaint shows laches barring a recovery. Whether there is laches must usually be determined as a question of fact upon a consideration of the evidence. It is possible that the complaint

long as that relation is not terminated by some affirmative action.

But even in jurisdictions where that doctrine obtains, the ward may in some circumstances, under the doctrine of laches, be barred from compelling his guardian to account, although there has been no repudiation of the trust, and hence the statute or the rule in analogy to the statute has never begun to run. The question is determined not so much by the length of time as by the particular circumstances of the case. Sometimes it is said that twenty years is the allowable period, but that is merely suggestive, for circumstances may either lengthen or shorten the period.

Even though the termination of the representative character of the guardianship be construed to be a repudiation of the trust, in courts holding the relation to be an express trust, there might remain elements which would prevent a delay from constituting laches which would defeat the action. On the general question as to laches which will defeat relief after repudiation of an express trust, see note to *Williams v. Woodruff*, 5 L.R.A. (N.S.) 986.

Again, the ward's property may have passed into the possession of parties who had knowledge of its trust character. On the question as to laches as a bar to enforcement of trust as against such persons, see note to *Newman v. Newman*, 7 L.R.A. (N.S.) 370.

The doctrine of laches that will bar a ward's right to compel his guardian to account is well stated by the court in *Roush v. Griffith*, 65 W. Va. 752, 65 S. E. 168, where, in holding that a delay of fourteen years after majority had not barred the right under the particular circumstances, the court said: "All of this conduct is likewise important on the inquiry as to whether relief is barred by laches independently of any settlement. In this connection, it must be observed in the outset that the guardianship was an express trust against which the statute of limitations never runs, and under which the principle of laches does not operate so freely and extensively as it does in the case of a constructive trust, unless the trust has been disavowed or repudiated, and it is not pretended that there has been any repudiation of it in this instance. We do not doubt that long lapse of time will bar relief to the beneficiary of an express trust, but it must be so long, and the circumstances such in character, as to establish clearly a relinquishment or abandonment thereof, or a situation occasioned by the death of witnesses, loss of evidence, or other matter in 47 L.R.A. (N.S.)

may be so amended as to evade a demurrer. It is inconceivable, however, that a state of facts can be shown which will relieve the plaintiff of a charge of laches, when he delayed for twenty years after attaining his majority, and now asks the court to make a finding as to transactions thirty-five years old, and the witness who could give the

the nature of an estoppel, that will make it clearly inequitable and unjust to enforce it."

The great weight of authority supports the doctrine that where the ward is guilty of negligence in not bringing the suit for an unreasonably long time after the right accrued, and the guardian has practised no fraud or concealment, the inexcusable laches will bar the suit. *Birch v. Funk*, 2 Met. (Ky.) 544 (forty-five years); *Railsback v. Williamson*, 88 Ill. 494 (but this was an effort many years after the death of the guardian, to impress a trust upon lands alleged, but not proved, to have been purchased with trust funds, in the face of an accounting in full by the guardian); *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600 (the doctrine was approved, but not applied, as the delay of forty-five years was held to be excusable. See same case, *infra*); *Roush v. Griffith*, *supra* (doctrine approved, but not applied because delay was excusable. See same case, *supra*).

In *Garrett v. Garrett*, 69 Ala. 429, it was held that the equitable rule that twenty years' delay bars a suit should be applied in favor of a guardian when cited to account to his ward. The court was of the opinion that the rule should begin to run from the time of the last recognition of the trust by the guardian, whether that was before or after the ward arrived at legal age; but in the case before the court only nineteen years had elapsed since either event, so that it was found unnecessary to decide which event would start the rule to running, since in any event the action was not barred.

In *Bennett v. Bird*, 139 Ga. 25, 76 S. E. 568, the attempt was made by a ward, twenty years after settlement, to claim property which it was alleged had been bought with trust funds, and it was held that, although the statute did not bar the right to attack a settlement for fraud for four years after the discovery thereof, the ward must use due diligence in acting upon information that would lead to the discovery, and that the circumstances here showed negligence in not doing so, and the action was barred.

And the same rule as to laches is applied by the probate courts in many jurisdictions. Thus, in *Gress's Appeal*, 14 Pa. 463, the court said: "For the reasons given by the president of the orphans' court, we think its decree dismissing the citation is well pronounced. It will therefore be perceived our conclusion is not based upon any supposed operation of the statutes of limitation; for these, as is shown by *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499, and the

most important evidence upon the issue, and whose acts are drawn in question, is dead.

We decide the demurrers upon the narrow ground that under the allegations of the complaint laches is shown. Whether there is a showing that Lowry, in failing to redeem the property, rendered himself

liable, is a question of some doubt. We may say in passing that there is nothing in the situation which gives the plaintiff, if in fact he has a cause of action, the right to recover the present value of the foreclosed property, or an amount based upon its present value.

Order affirmed.

cases there cited, are inapplicable here. Nor do we proceed upon any presumption of payment springing from mere lapse of time. Less than twenty years have expired between the moment when the petitioner might have called on the guardian for payment, and the period of the initiation of this proceeding; and I have failed to perceive any peculiar circumstances proper to aid the absence of the full period. Neither is our refusal to aid the petitioner founded in an actual settlement between the guardian and the husband of his ward. It results, altogether, from the unwarrantable negligence of the party to call for an account, without offering any sufficient reason accounting for the delay. The rule which obtains in courts of equity, suggested by the hazard of exposing the trustee to injustice, was well stated by the court below; and although no particular period can be ascertained which, of itself, will be sufficient to bar relief in all cases, it is certainly true that at least reasonable diligence is required in every case."

The following cases support the same theory: *Maulfair's Appeal*, 110 Pa. 402, 2 Atl. 530 (nineteen years); *Ralston's Estate*, 23 Pa. Co. Ct. 45 (fourteen years); *Beck's Estate*, 17 Phila. 471 (eight years); *Hanson v. Swenson*, 77 Minn. 70, 79 N. W. 598 (fifteen years); *Bauer's Estate*, 30 W. N. C. 429 (eight years); *Rahm's Estate*, 219 Pa. 201, 68 Atl. 186 (twenty-five years, also settlement).

In *Walls's Appeal*, 104 Pa. 14, a delay of eight years was held to be no bar to a ward's right to a full accounting by the guardian. It appeared that the ward was under the disability of coverture when she arrived at age and during all the eight years thereafter; but no point was made of this fact by the court.

And the doctrine is especially applicable to the case where there is a settlement between the guardian and ward shortly after the ward becomes of age, and the settlement is attacked by the ward. A much shorter period will bar the action in such case, and the burden is upon the ward to show fraud, mistake, or undue influence. *Re Rouch*, 2 Pearson (Pa.) 480 (four years, and action was against guardian's representative after his death); *Lukens's Appeal*, 7 Watts. & S. 48 (four years); *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. 63 (twelve years); *Rogers v. Lindsay*, — Kan. —, 131 Pac. 611.

Under the doctrine of laches, it is sometimes said that lapse of time without excuse on the part of the ward raises the presumption of payment (*Gregg v. Gregg*, 15 N. H. 190, where thirty years had elapsed), but 47 L.R.A. (N.S.)

in most of the cases, *supra*, the holding is based upon the theory that the one who allows rights of third person to vest, or changes to be made that render proof or disproof of the claim impossible, when he knew that he could act, is guilty of laches, and is barred under the general principles of equity. This seems to be the theory underlying *SWEET v. LOWRY*.

(b) Reasonable excuse.

It is seen, *supra*, that circumstances largely determine whether or not lapse of time constitutes laches in a given case, such as will bar the action, and it should be further observed that a reasonable excuse for the delay will prevent the bar.

Where the wards were under age or under coverture most of the time, lapse of time will not bar their right to compel their guardian to account, especially where they live in the same home with him in a special fiduciary relation. *Felton v. Long*, 43 N. C. (8 Ired. Eq.) 224.

And in *Pennington v. L'Hommiedieu*, 7 N. J. Eq. 343, where the ward had been of age for eleven years, the last nine of which she had been under the disability of coverture, before bringing suit, and the action was against his guardian's executors, it was held that her suit for an accounting was not barred by her laches.

A delay of two years by a ward after he had executed a release of his guardian, fourteen days after he had arrived at legal age, does not constitute laches on his part, where the evidence showed that he had brought the action immediately upon his discovery that he had been defrauded by his former guardian, and had been, by false and fraudulent representation, induced to accept worthless stock for the balance due to him; and under such circumstances a court of equity will compel a complete accounting by the former guardian. *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 465.

A delay of twenty years, during all of which time the ward was under coverture, will not prevent her from compelling her guardian to account, even though he had, through misrepresentations, secured a release from her on the day of her marriage. *Waller v. Armistead*, 2 Leigh, 11, 21 Am. Dec. 594.

Where the guardian died without accounting, and the ward knew absolutely nothing of the guardianship for twenty-one years after the death, but immediately, upon earning thereof, consulted those in interest, caused an administrator to be appointed for the estate, and brought suit for an account-

ing within two years after her discovery of the facts, the twenty-three years' delay under the circumstances was held not to be laches that would bar her action. *Murphy v. Cady*, 145 Mich. 33, 108 N. W. 493.

Actual fraud of the guardian in concealing receipt of the ward's funds, absence of knowledge of the same, and absence of even a ground of suspicion that the guardian had received the fund, guardian's omission of the particular fund from his statement, his repeated statements that there were no other funds than the one accounted for, and his failure to file any account for thirty-five years, and then his filing of a false account, were in *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600, held to excuse a delay of nearly forty-five years on the part of the ward, even though the guardian was dead and the suit was against his representatives.

The fact that the ward disappeared at or about the time he became of age, making it necessary to allow the seven-year period of presumption of death to elapse before any action could be taken, would excuse a delay of about eight years from date of ward's majority in compelling the guardian to account, if, indeed, any excuse is necessary. *Gilbert v. Guptill*, 34 Ill. 112.

But a delay of forty-five years after the wards arrived at legal age, before bringing suit, is not sufficiently explained by an allegation that they did not know until the past year, that the guardian had received the property, but is sufficiently explained by the allegation that the guardian fraudulently concealed the fact, and that the ward was under the disability of coverture until within two years of the time action was brought. *Birch v. Funk*, 2 Met. (Ky.) 544.

That both the ward and her husband were without business experience, and placed implicit confidence in the guardian, accepting from him an itemized statement, believing it to be correct, is not a sufficient excuse for a delay of nineteen years after majority of the ward. *Maulfair's Appeal*, 110 Pa. 402, 2 Atl. 530.

II. Actions or proceedings against sureties.

a. In general.

The best practice is to fix first the amount of the guardian's liability to the ward by means of an accounting, then an action or suit may be brought against his sureties for the amount so fixed. *Ball v. La Clair*, 17 Neb. 39, 22 N. W. 118; *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39, 33 So. 434; *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65; *State ex rel. Little v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430, 47 N. E. 17, appeal on new trial 155 Ind. 67, 57 N. E. 711; *Bybee v. Poynter*, 117 Ky. 109, 77 S. W. 698; *Perkins v. Cheney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595; *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; *Wescott v. Upham*, 127 Wis. 590, 107 N. W. 2; *Eiland v. Chandler*, 8 Ala. 781; *Vance v.* 47 L.R.A.(N.S.)

Beattie, 35 Ark. 93; *Newton v. Hammond*, 38 Ohio St. 430. If this rule were mandatory, which is the case in a very few jurisdictions, it would logically follow that time limitations ought to be computed from the time of the confirmation of the guardian's account. But it will be seen, *infra*, that the courts are not in harmony as to this.

And it seems to be generally held that a judgment against a guardian, or a decree fixing his liability to the ward, is binding and conclusive upon his sureties. See note in 40 L.R.A.(N.S.) 717.

b. Statutes of limitation.

1. General statutes.

Usually sureties on guardians' bonds come within the statutes of limitation fixed for bonds generally, but the courts are not in harmony as to when the statute begins to run; the better reasoning and the weight of authority support the rule that the limitation begins when the guardian's account has been confirmed by the court, and the surety's liability is thus fixed and determined.

It has been held that the statute of limitation begins to run against the ward in favor of the guardian's sureties, when the account has been confirmed by the court. *Ball v. La Clair*, 17 Neb. 39, 22 N. W. 118; *State use of Coleman v. Willi*, 46 Mo. 236; *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65; *Alston v. Alston*, 34 Ala. 15 (not definite as to time the guardianship terminates); *Re Walling*, 35 N. J. Eq. 105; *Newton v. Hammond*, 38 Ohio St. 430.

Where the guardian's account showing a balance due the ward was properly filed and confirmed, the right of the ward to collect the amount as shown therein from the guardian's sureties is subject to the statute of limitation, which begins to run from the time such right of action accrued. *State use of Coleman v. Willi*, 46 Mo. 236.

The statute of limitations does not commence to run in favor of the sureties of the guardian until the termination of the guardianship. *Alston v. Alston*, 34 Ala. 15.

In *Re Walling*, 35 N. J. Eq. 105, it was held that a delay of nine years after the youngest ward became of age would not bar the right of action by the wards against the sureties on the guardian's bond, the guardian having become insolvent shortly after the youngest ward became of age.

A ward's giving to his guardian for the purpose of filing, which he did, a receipt in full for all the trust fund, under a secret agreement that the guardian shall pay him the amount in several payments later, at a time when the ward lacked but two months of being of legal age, will start the statute of limitations to running in favor of the sureties on the guardian's bond. *Motes v. Madden*, 14 S. C. 488.

In *Hull v. Jones*, 10 Lea, 100, it was held that, although a ward suing while yet under age, to recover from her guardian's admin-

istrator and sureties, was barred as to the administrators by the six-year period in a special statute, yet she was not barred as to the sureties, her minority suspending the statute as to them.

Where a ward soon after becoming of age filed a bill for an accounting against the administrator of her late guardian, and twenty-four years later obtained the decree, and then filed a bill against the guardian's sureties, it was held in *Roberts v. Colvin*, 3 Gratt. 358, that the action was not barred by the statute of limitations.

If the amount due to the ward from the estate of his guardian has been fixed by the probate court, the statute of nonclaim may bar it in favor of the estate, but that does not bar it as against the sureties, the latter question being dependent upon the statute of limitations. *Smith v. Smithson*, 48 Ark. 261, 3 S. W. 49; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102; *Padgett v. State*, 45 Ark. 495; *Vance v. Beattie*, 35 Ark. 93.

On the other hand, it has been held that the statute begins to run when the guardianship has terminated because of majority of the ward, or by any other means. *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39, 33 So. 434; *Morrison v. Householder*, 79 Va. 627; *Franklin v. McElroy*, 99 Ga. 123, 24 S. E. 975; *Parish v. Alston*, 65 Tex. 198 (see same case *infra*, as to special statute); *Bybee v. Poynter*, 117 Ky. 109, 77 S. W. 698.

Where a right of action upon a guardian's bond accrued to the ward, later the statute of limitations was suspended, and during the period of suspension the female ward was married, she cannot plead the coverture existing at the end of and after the period of suspension, to prevent the bar. *State use of Howard v. Parker*, 8 Baxt. 495.

An action on a guardian's bond is barred by the lapse of ten years after the ward attains his majority, where the breach of the bond occurred thirty years before bringing the action, and no fraud on the part of the guardian is shown, the ten years being the period designated by the statute of limitation. *Franklin v. McElroy*, 99 Ga. 123, 24 S. E. 975.

2. Special statutes.

Many states have special statutes governing the time in which an action or suit must be brought against sureties on a guardian's bond. These, of course, differ, but it will be seen, *infra*, that the courts are not in harmony in the interpretation of the same statute enacted by different states, some holding that the limitation period begins when the representative character of the guardianship terminates, and others holding that it begins when the guardian's account has been confirmed by the court.

In the Massachusetts statute which provides "that no action shall be maintained against the sureties in any bond given by a guardian, unless it be commenced within four years from the time within which this chapter shall take effect, or within four

years from the time when the guardian shall be discharged," the term "discharged" means any mode by which the guardianship is effectually determined and brought to a close, either by removal, resignation, death of guardian, the marriage of a female ward, the ward's attaining his majority, or otherwise, hence upon the happening of any of these events the limitation starts to run in favor of the sureties. *McKim v. Mann*, 141 Mass. 507, 6 N. E. 740 (death of ward under age); *Loring v. Alline*, 9 Cush. 68; *Hill v. Arnold*, 199 Mass. 109, 85 N. E. 97 (a lunatic who could not sue, and had no guardian during the limitation period, was barred by the statute).

This statute, in substantially the same words, was enacted in Michigan, and given the same construction by the courts there. *Tate v. Stevenson*, 55 Mich. 320, 21 N. W. 348; *Perkins v. Cheney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595; *Cheever v. Congdon*, 34 Mich. 296; *Murphy v. Cady*, 145 Mich. 38, 108 N. W. 493; *Campau v. Gillett*, 1 Mich. 416, 53 Am. Dec. 73. Also by Wisconsin. *Paine v. Jones*, 93 Wis. 70, 67 N. W. 31; *Hudson v. Bishop*, 32 Fed. 519, affirmed on rehearing in 35 Fed. 820; *Wescott v. Upham*, 127 Wis. 590, 107 N. W. 2. Also in Nebraska. *Globe v. Simeral*, 67 Neb. 276, 93 N. W. 235. Also in Montana. *Berkin v. Marsh*, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528. And in Alabama. *Glass v. Woolf*, 82 Ala. 281, 3 So. 11.

And there seems to be a similar statute in Kansas. *Harris v. Calvert*, 2 Kan. App. 749, 44 Pac. 25.

And the statute of the state of Washington was construed the same way in *Newbery v. Wilkinson*, 190 Fed. 62, affirmed in 118 C. C. A. 111, 199 Fed. 673, but the circuit court of appeals found that plaintiff was guilty of laches in not acting upon information possessed in time, and strongly intimates that the bar would not have been enforced had there been no laches.

But in *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, the court cited *Loring v. Alline*, 9 Cush. 68, and several other cases, but refused to follow that construction, the statute being identical with the Massachusetts statute; and the court held that the limitation did not begin to run in favor of the sureties until the final discharge or removal of the guardian by the court.

In *Dunn v. Clingham*, 93 Miss. 310, 47 So. 503, the court, in construing a similar statute, justly and severely condemns the Massachusetts construction, and says that a construction of that sort would impute to the legislature monumental absurdity, and would work out the grossest injustice. And the courts of that state had previously held that the statute does not begin to run in favor of either the guardian or his sureties until he has filed his final account. *Nunnery v. Day*, 64 Miss. 457, 1 So. 636; *Bell v. Rudolph*, 70 Miss. 234, 12 So. 153.

And the same construction has been placed upon the Texas special statute, which follows the wording of the Massachusetts, that is, the limitation does not begin to run

until the guardian has filed his final account, and has been discharged by the court, even though the guardianship had previously terminated by the death of the ward, by his attaining his majority, or by the marriage of a female ward. *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52 (death of ward did not start the running of the statute); *Allen v. Stovall*, 94 Tex. 618, 63 S. W. 863. Neither the arrival at legal age by a ward, nor the marriage of a female ward, started the statute to run. In this case the court overrules *Read v. Henderson*, — Tex. Civ. App. —, 57 S. W. 78, and says that a writ of error was denied in the *Henderson* Case, but explains that the writ was denied because the application was made by party in whose favor the ruling had been made, and not because the ruling was correct.

And *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, seems to be supported by *State ex rel. Little v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430, 47 N. E. 17, appeal on new trial 155 Ind. 67, 57 N. E. 711.

Before the passage of the Texas special statute referred to, supra, the general statute of limitations ran in favor of the sureties on the guardian's bond, from the time a female ward was married. *Parish v. Alston*, 65 Tex. 198.

But the Texas statute which bars proceedings to review guardians' accounts, unless brought within two years, begins to run as soon as the ward arrives at legal age. *Freedman v. Vallie*, — Tex. Civ. App. —, 75 S. W. 322.

Under the Virginia statute which bars the right of action on a guardian's bond, all the stay periods in which suits may not be brought, such as the period during the Civil War, must be deducted from the time, and the suit is not barred unless ten full years, exclusive of such periods, have elapsed since the ward arrived at full age; and in *Morrison v. Householder*, 79 Va. 627, it was held that the discharge of the guardian and the appointment of another would not start the statute to running against the sureties of the former, where the circumstances were such that the new guardian had no right of action on the bond of the old one.

The earlier statute in North Carolina imposed a bar to the ward's claim against his guardian's sureties in three years after he arrived at legal age, unless he compels or obtains a final settlement with the guardian during that period, and either sues for the balance that may be due him, or notifies the sureties of the situation. *Johnson v. Taylor*, 8 N. C. (1 Hawks) 271; *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131, 133. And the same is true of the later statutes, with the proviso that if the guardian files a final account when the ward is of legal age, the period of limitation is extended to six years. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468; *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484.

And under the Maryland Code, § 192, art. 93, which provides that, "on a ward's arrival at age, or on the marriage of a female ward, the guardian shall exhibit a final account to the orphans' court, and shall deliver up, agreeably to the court's order, to the said ward [or to the husband, as the case may require], all the property of such ward in his hands, including bonds and other securities, and, on failure, his bond may be put in suit, and he shall be liable to attachment and fine not exceeding \$300; and a female shall be of the age at eighteen . . . for the purposes of this section." The statute of limitation begins to run against the ward, and in favor of the sureties on the guardian's bond, when the ward reaches the required age, and not from the final accounting of the guardian. *State use of Henderson v. Henderson*, 54 Md. 332.

Where property belonging to several wards is sold by their guardian under a single bond given for the purpose, a special statute barring actions by wards against their guardian's bond in five years after they become of age does not run against any of the wards until the youngest attains his majority. *Johnson v. Chandler*, 15 B. Mon. 584.

c. Laches.

The surety's liability upon the bond being covered almost completely by statutes of limitation, there is not much room for the doctrine of laches, but in a few cases the period allowed by the statute is so long that the question of laches arises.

Independent of the statute of limitations, an unexplained delay of twenty-two years, during which time one of the sureties dies and the guardian became insolvent, will constitute such laches on the part of the ward as will bar her action against the surviving surety. *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402.

In *Langston v. Shands*, 23 S. C. 149, it was held that the twenty-year period of presumptive payment begins to run in favor of the sureties at the time the female ward marries under age. J. W. M.

NEW YORK COURT OF APPEALS.

HARRY S. GORDON, Appt.,

v.

ELLENVILLE & KINGSTON RAILROAD COMPANY, Respnt.

(195 N. Y. 137, 88 N. E. 14.)

Water — interference with flow — trespass.

A railroad company is not liable in trespass for injuries to an abutting farm by water from a mountain stream which emp-

Note. — Eminent domain: distinction between taking or damaging property and consequential injuries.

The purpose of the present note is to discuss only in a general way the principles which determine the line between what constitutes a taking or damaging, or what is

ted into an abandoned canal, the bed of which was narrowed by the construction of the railroad embankment, so that it was not sufficient to carry the water of a freshet, which consequently tore out a portion of the embankment and overflowed the adjoining land, to its injury, where there was nothing to show that the result was one which must necessarily have ensued from the construction of the embankment.

(March 30, 1909.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the Ulster County Court, dismissing the complaint in an action brought to recover damages for trespass alleged to have

been committed by defendant upon plaintiff's lands. Affirmed.

The facts are stated in the opinion.

Mr. James Jenkins, with Mr. John R. DeVany, for appellant:

The case is one of trespass and direct damage.

Sullivan v. Dunham, 161 N. Y. 290, 47 J.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923; Mairs v. Manhattan Real Estate Assn. 89 N. Y. 498; Huffmire v. Brooklyn, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176; Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. Supp. 1095; Wickham v. Lehigh Valley R. Co. 85 App. Div. 182, 83 N. Y. Supp. 146; Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279.

The statutory authority possessed by the defendant to construct and maintain its

mere consequential injury for which no recovery can be had. Contrary to the usual rule governing the preparation of the notes in this series, there has been no attempt to make an exhaustive or even an approximately complete collection of cases on the question indicated in the title. The many ramifications of the subject and the innumerable specific aspects it presents, many of which have been treated in other notes subsequently referred to, render it impracticable to gather all or even approximately all of the cases involving the question.

The right of eminent domain gives to the legislature the control of private property for public use, with the limitation that where private property shall be taken for public use, just compensation must be made therefor. The physical taking of private property, such as the taking of land by a municipality for the erection of public buildings or the construction of streets, or the taking of land by a railroad company for a right of way, is clearly such an act as, under this provision of the Constitution, requires compensation. There are, however, incidental to such physical taking of property, damages which are not so clearly a taking of private property, and yet which result from the taking. Among these may be mentioned damage from the construction of a railroad through the built-up portion of a municipality, to property not immediately adjacent thereto; also damages arising as in *GORDON v. ELLENVILLE & K. R. CO.* from the construction of a railroad embankment.

These incidental injuries are sometimes spoken of as "consequential," for which no recovery can be had by the injured party. This term, however, has been loosely used, has no fixed meaning, and is not, therefore, of much assistance in determining whether or not in the given case a recovery can be had. As stated in *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147: "It is said that a landowner is not entitled to compensation where the damage is merely 'consequential.' The use of this term, 'consequential damage,' prolongs the dispute," and "introduces an equivocation which is

fatal to any hope of a clear settlement.' It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what Erle, Ch. J., aptly terms 'consequential damage to the actionable degree.' *Brand v. Hammersmith & City R. Co.* L. R. 2 Q. B. 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. The terms 'remote damages' and 'consequential damages' are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote.' *Sedgwick, Damages*, 5th ed. 56. When, then, it is said that a landowner is not entitled to compensation for 'consequential damage,' it is impossible to affirm or deny the correctness of the statement until we know in what sense the phrase 'consequential damage' is used. If it is to be taken to mean damage which would not have been actionable at common law if done by a private individual, the proposition is correct."

Christiancy, J., in rendering the opinion in *Grand Rapids Boom. Co. v. Jarvis*, 30 Mich. 308, says: "It is no objection against the recovery of damages that they are consequential, unless they are at the same time too remote, trivial, or uncertain, or result from some justifiable act. All damages for injuries are consequential."

See also discussion as to consequential injuries in note to *Louisville & N. Terminal Co. v. Lelleyet*, 1 L.R.A. (N.S.) 52.

The character of injuries for which no recovery can be had is well illustrated in the two following cases:

A reclamation district which has erected a levee along the side of a river to prevent the overflowing of lowlands adjacent thereto is not liable for damages done to a lower riparian proprietor on the opposite side of

read does not relieve it from the responsibility of its acts.

Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 8 N. E. 537; *Booth v. Rome*, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Lilly v. New York C. & H. R. R. Co.* 12 N. Y. S. R. 468; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Weet v. Brockport*, 16 N. Y. 172, note; *Byrnes v. Cohoes*, 67 N. Y. 204; *Huffmire v. Brooklyn*, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176; *Wickham v. Lehigh Valley R. Co.* 85 App. Div. 182, 83 N. Y. Supp. 146; *Mitchell v. New York, L. E. & W. R. Co.* 36 Hun, 177; *Drake v. New York, L. &*

W. R. Co. 75 Hun, 422, 27 N. Y. Supp. 739; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

Mr. John J. Linson, with Mr. H. Westlake Coons, for respondent:

The defendant is liable only for such injury as resulted from a want of due skill and care.

Bellinger v. New York C. R. Co. 23 N. Y. 42; *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Moyer v. New York C. & H. R. R. Co.* 88 N. Y. 351; *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 358; *Prime v. Yonkers*, 192 N. Y. 111, 84 N. E. 571; *Kipp v. New York C. & H. R. R. Co.* 89 App. Div. 392, 85 N. Y. Supp. 855;

the river for damages by the overflowing of his land, claimed to be due to the levee, which prevented the river from broadening out on the side occupied by such levee. Such damage is not a taking of the land. "In the first place," says the court, "when respondent built the levee it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for such land, or intended to use it, or even to damage it, or to interfere with it in any way; and then the subsequent damage which happened years afterward was not a 'taking' within the meaning of the most extreme cases on that subject. It was in the extreme sense indirect, remote, and consequential. There was no physical directness between the act and the damage. It cannot be claimed that the water which the levee prevented from going over and through the west bank of the river was the very water which afterwards flowed onto appellant's land. It was remote and indirect in point of place and distance. It took place 2 miles away and on the opposite side of a large navigable river. It was indirect, remote, and consequential in point of time. It took place more than seven years after the act complained of, and there was nothing in the nature of a permanent use or occupation of the land. It was a mere temporary overflow which occurred once in seven years, and it is impossible to know when, if ever, it will occur again, or with how small an effort appellant could make its recurrence improbable or impossible. It is therefore one of the plainest cases for the application of the well-established rule that the state is not liable for remote and consequential damages caused by the erection of public works." *Lamb v. Reclamation Dist.* 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

A riparian owner is not entitled to damages for the wearing away of his land by the current of the river, which is deflected and made somewhat more rapid by works placed in the river by a company authorized to remove obstructions therefrom. *Hollister v. Union Co.* 9 Conn. 439, 25 Am. Dec. 36, 47 L.R.A.(N.S.)

In the course of the opinion, the court states that "the defendants have not directly invaded the property of the plaintiff. They have not taken the property of the plaintiff for public use, without just compensation; they have not, therefore, brought themselves under the constitutional interdiction, but they have, under the sanction of the authority of the legislature, to which appertained the power of regulating a public navigable river, operated upon this river so as to produce an inconvenience,—a remote and consequential injury to the plaintiff's land. For such an injury, no action can be sustained."

There is a difference of opinion as to what constitutes "taking" of property within the meaning of the constitutional provision.

According to one line of decisions, the taking of property which is prohibited by this constitutional provision means "a physical, tangible appropriation of the property of another." *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65. It was accordingly held in this case that the erection of a bridge in a street, although it may have rendered less convenient the means of access to an abutting lot, was not a taking of property. It was also held that this was not a "damaging" of property within the meaning of that term as used in the Constitution.

An extreme illustration of strict construction of the word "taking" in the constitutional guaranty is afforded in *Livermore v. Jamaica*, 23 Vt. 361, holding that the appropriation of an easement for a highway was not such a taking of property for public use as is contemplated by the Constitution, since the taking did not divest the owner of his title in fee, nor of his right to use, occupy, and control the land in any manner not inconsistent with the public enjoyment of the easement, nor, upon a discontinuance of the highway, of his right to take possession thereof in as full and ample manner as he originally held it. In order to be such a taking, says the court, it must be such an act "as divests the owner of all title to or control over the property taken, and is an unqualified appropriation of it to the public."

Dunsbach v. Hollister, 49 Hun, 354, 2 N. Y. Supp. 94; Cuddeback v. Delaware & H. Canal Co. 20 N. Y. Week. Dig. 454; Brooklyn Elev. R. Co. v. Brooklyn, 2 App. Div. 93, 37 N. Y. Supp. 560.

The injury was not the natural or proximate consequence of any act of the defendant.

Garfield v. Toronto, 22 Ont. App. Rep. 128; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Warwick v. Hutchinson, 45 N. J. L. 81; Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am. Rep. 106; Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664; Dubuque Wood & Coal Asso. v. Dubuque, 30 Iowa, 176; Neal v. Atlantic Refining Co. 16 Pa. Co. Ct. 241.

Plaintiff's injuries were caused by the

acts of independent contractors and their employees, and defendant is not responsible therefor.

McCafferty v. Spuyten Duyvil & P. M. R. Co. 61 N. Y. 178, 19 Am. Rep. 267; King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Pierrepont v. Loveless, 72 N. Y. 211; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Ketchem v. Newman, 141 N. Y. 205, 24 L.R.A. 102, 36 N. E. 197; Schular v. Hudson River R. Co. 38 Barb. 653; Wood v. Watertown, 58 Hun, 208, 11 N. Y. Supp. 864.

Werner, J., delivered the opinion of the court:

This action was brought to recover damages for a trespass alleged to have been

Another extreme illustration of strict construction is afforded by Valparaiso v. Hagen, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062, that the damage to riparian land by the discharge of municipal sewage into the stream does not amount to a "taking" of property within the constitutional guaranty, but the damage is merely consequential. That position, however, is clearly against the weight of authority,—certainly against the prevailing view in cases dealing specifically with the municipal liability for pollution of streams, as is shown in the note subsequently referred to on that question.

For a further discussion of this question, see the first part of subdivision III. of note on cutting off access to a highway as a taking. Ranson v. Sault Ste. Marie, 15 L.R.A. (N.S.) 49.

The majority of the decisions, especially of the modern decisions, do not require a tangible appropriation, but tend strongly "to the doctrine that a destruction of property rights is a taking of property, although there may be no dispossession of any physical object in the class of either real or personal property." Note to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; 15 Cyc. 652.

Speaking of the nature of property and the taking thereof the court, in Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147, says: "The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin, Jur. 3d ed. 836. Wells, J., in Walker v. Old Colony & N. R. Co. 103 Mass. 10, p. 14, 4 Am. Rep. 509. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *inso facto*, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this 47 L.R.A. (N.S.)

right takes 'property,' although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using 100 acres of land to a limited right of using the same land may work a far greater injury to A than to take from him the title in fee simple to 1 acre, leaving him the unrestricted right of using the remaining 99 acres. Nobody doubts that the latter transaction would constitute a 'taking of property.'"

On this question, the court, in Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155, says: "Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands. If it is of such a character and so situated that the exercise of the public use of it, as warranted by the legislature, does, in its necessary and natural consequences, affect the property by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it, then it is 'appropriated' to public use by competent authority, and the owner is entitled to compensation."

So the Supreme Court of the United States, in Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, states that a serious interruption to the common and necessary use of property may be equivalent to the taking of it; and that under this constitutional provision it is not necessary that the land should be absolutely taken, and applying this doctrine to the specific facts of the case at bar it was held that where real estate is actually invaded by superinduced additions of water, sand, or other material, or by having any artificial structure placed upon it so as effectually to destroy or impair its usefulness, it is a taking within this constitutional provision. The injury in this case resulted from overflowing the land by means of a dam erected across a river which was the outlet of a

committed by the defendant upon plaintiff's farm lands. It was instituted in a justice's court, where the defendant introduced no evidence and the plaintiff took judgment. Upon defendant's appeal for a new trial to the Ulster county court, a motion for a nonsuit was granted at the close of the evidence. Plaintiff then appealed to the appellate division, where the judgment entered upon the nonsuit was affirmed by a divided court, and the case is now before us upon plaintiff's appeal.

The question to be decided is whether this is a case of *damnum absque injuria*, because the injury suffered by the plaintiff is purely consequential, or whether it is one involving a direct trespass for which the defendant is liable. That this is the precise

question at issue is plainly indicated by the context of the complaint and the attitude of plaintiff's counsel at the trial. The complaint is clearly framed upon the theory of a direct and wrongful trespass, and at the trial the learned counsel for the plaintiff expressly disclaimed any charge of negligence against the defendant. The issue being thus sharply defined, it is necessary to consider a few pertinent facts.

The defendant is a corporation organized for the purpose of building and operating a steam railroad between Ellenville and Kingston. The plaintiff is the owner of a farm in the town of Wawarsing, in Ulster county. The route of the defendant's road runs across the plaintiff's farm, the right of way for which was acquired by the defendant

lake, by which the waters of the lake were raised so high as to do the damage complained of. This decision was approved in *Arimond v. Green Bay & M. Canal Co.* 31 Wis. 316,—a case growing out of the same facts.

The fine distinctions made by the courts in deciding what is a "taking" is illustrated by studying in connection with this case, the case of *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, a case very similar. In the *Atwater* Case injuries arising from the construction of a temporary bulkhead, as authorized by statute, at the outlet of a lake, during improvements of a village sewage system, so as to raise the water of the lake and cause it to remain on the land of an adjoining owner longer than it otherwise would have remained, and so as to deprive the owner of the beneficial use of the land for that season, were held to be consequential, for which compensation need not be made. In the course of the opinion the court refers to the *Pumpelly* Case, and calls attention to the fact that the flooding in that case was permanent, and that the dam was raised higher than authorized by statute. The latter fact was not given any consideration in the decision of the *Pumpelly* Case, however, as, after the dam had been constructed, the legislature adopted it, and the issue between the parties is thus stated by the court: "The plea, as thus considered, presents substantially the defense that the state of Wisconsin, having, in the progress of its system of improving the navigation of the Fox river, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries." And further the court says, with reference to the argument of the defendant: "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right 47 L.R.A. (N.S.)

to for the improvement of its navigation." The distinction between the injury in the *Pumpelly* Case, which was considered a "taking," and that in the *Atwater* Case, which was not a "taking," is somewhat elusive.

Even among the cases that take the more liberal view there are differences of opinion as to what constitutes a taking.

In *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392, it is stated that a man cannot do anything upon his own soil, under plea of ownership, which amounts to a nuisance and works injury to his neighbor, but within that limit he may do whatever his whim may dictate; and the court takes the position that the same rule applies to corporations. Referring to streets, the court continues that a city has the right to grade its streets in any manner the representatives of the public may deem conducive to its interest, without becoming liable for errors of judgment; and if, in the process of grading, it leaves private property many feet below or many feet above the surface of the street, it is free from all claim for damages on this account for precisely the same reason that a private person is exempt under similar circumstances. In this case the flooding of an abutting owner's house and ground at every considerable rain with mud and water, and the forming of a stagnant pond a short distance from his house, rendering it unhealthy and ruining his business, was held to be a taking of private property for which compensation must be made.

The position that a corporation entitled to take land under an eminent domain proceeding is liable as for a taking in the same circumstances that would render an individual liable is also taken in the following cases: *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Peters v. Fergus Falls*, 35 Minn. 549, 29 N. W. 586; *Eaton v. Boston*, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545.

This is also the position taken by Lewis in his work on *Eminent Domain*, § 65.

The test in these cases is whether the

through a conveyance from the plaintiff. For a short distance within the limits of this farm this right of way followed the basin and towpath of the former Delaware & Hudson canal. The Rondout creek also crosses this farm about 200 yards westerly of the railroad, and the plaintiff's land adjacent to this creek is low or bottom land. In the Shawangunk mountains, which rise to the easterly of the railroad, there is a mountain stream that runs a rapid course down into the valley. Before the canal was built the stream had emptied into Rondout creek, but later it had been diverted somewhere near its mouth so as to make it a feeder for the canal. This physical condition continued until the canal was abandoned, when the water of the

stream was again conveyed into Rondout creek by means of a waste weir. In 1901 the defendant constructed its roadbed over the right of way granted by the plaintiff. At the point where this right of way overlapped the old towpath, the latter was demolished and the space filled by an embankment, which also extended into the prism of the abandoned canal, and thus narrowed the channel for the waters of the mountain stream. In December, 1901, while the earthwork of this embankment was still fresh, that section of Ulster county was visited by a severe storm, which was followed by a heavy freshet that filled and overflowed the narrow channel of the old canal, carried away a large part of the railway embankment, and then inundated

corporation is making a reasonable use of its land.

A somewhat different view is taken by the Massachusetts court in *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489. This view is stated by the court in the following language: "When the legislature authorizes something to be done in the neighborhood of a plaintiff's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the plaintiff cannot claim any under the Constitution, because what is done does not amount to a taking. And even if the thing authorized would be actionable at common law and a nuisance but for the statute, still it is not necessarily a taking, and unless it does amount to that, no compensation can be recovered if the statute does not give it." The court then adds that, however, if the damages complained of would be a nuisance but for the statute, a court should be more ready to find a remedy under the act than in a case of *damnum absque injuria* at common law.

In some cases a distinction has been made in this respect between private corporations which have the power to exercise eminent domain and public or municipal corporations. Thus, in *Evansville & C. R. Co. v. Dick*, 9 Ind. 433, where a railroad company was being sued for damages arising from the construction of an embankment across a bayou, the court states that the party sued is a private corporation exercising its corporate privileges under a private grant of the legislature, conferring upon it specific powers for its own direct and private advantage; that, being thus a private corporation, there is no reason why it should not, in respect to responsibility for injuries for which its charter allowed no remedy, stand on the same ground as individuals not clothed with corporate privileges.

For the New York view see *GORDON v. ELLENVILLE & K. R. Co.*

Even under a constitutional provision against "damaging" property, it is not intended to indemnify all losses or injuries 47 L.R.A. (N.S.)

occasioned to the individual. If this were the case, the point at which such damages would stop would be difficult of ascertainment. In the case of the construction of a railroad at some distance from a town, causing the laying out of a new town on the road, and a consequent depreciation of property in the old town, it might be urged that this is a damage caused by the construction of a road; or, in the case of the construction by a municipality of a new and improved thoroughfare, it might be urged that the depreciation of property on the old thoroughfare is a damage caused by the construction of the new; yet it is clear that such cases were not intended to be covered by the constitutional provision.

Thus, a depreciation of the value of real property, caused by the establishment of a smallpox hospital in the neighborhood, under statutory authority, was held in *Frazer v. Chicago*, 186 Ill. 480, 51 L.R.A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055, not to constitute a taking or damaging of private property without just compensation. Generally as to right of property owner to complain of location of contagious disease hospital in neighborhood, see notes in 5 L.R.A. (N.S.) 1028 and 25 L.R.A. (N.S.) 228.

Nor can the owner of an apartment house recover damages from an electric elevated railway company whose tracks cross the highway within 19 feet of his property, where the injury suffered by him differs from that suffered by the general public only in the proximity of the tracks. *Aldrich v. Metropolitan West Side Elev. R. Co.* 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155.

The court, in *Rigney v. Chicago*, 102 Ill. 64, states that not all damages are intended to be compensated under this provision, but that "in all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

the plaintiff's lowland, covering it with stumps, stones, and gravel, and washing out its fertile soil.

These are the facts upon which we must decide whether this was a direct trespass or a consequential injury. The railroad was built pursuant to legislative authority upon land granted to the defendant by the plaintiff. In the exercise of its legal rights the defendant extended a part of its road-bed into the prism of the canal, which had theretofore served as an outlet for the waters of the mountain stream. The fact that this plan of construction narrowed the outlet simply bears upon the question whether the defendant exercised the necessary care and skill to so construct its road-bed as to save the adjacent lands of the plaintiff from any injurious consequences that would be likely to result from interference with the natural surface of the ground, or with the conditions that existed before the railroad was built. If the plaintiff had framed his complaint or tried his case upon the theory that the defendant had been negligent in so constructing its road-bed as to divert the waters directly from the

stream to the plaintiff's lowland, or so as to leave an insufficient channel for the water along its natural course, and had supported that theory by evidence, there would possibly have been a question for the jury. The complaint was not framed upon the theory of defendant's negligence, but solely upon the ground of its wrongful and unlawful invasion of the plaintiff's lands. This is not an immaterial or technical variance in pleading which, under the liberal rules of the Code, may be disregarded in the interests of justice. It involves a substantial distinction based upon well-defined legal principles which cannot be ignored. "Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." *Southwick v. First Nat. Bank*, 84 N. Y. 429. Assuming for the purposes of this discussion that the complaint is broad enough to entitle the plaintiff to recover either for a direct and un-

In an English case under the land clause compensation act, which gives compensation for property "injuriously affected," where a landowner claimed compensation for an injury to his property from an embankment, it was held that "where, by the construction of works, there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 243, 43 L. J. C. P. N. S. 385, 31 L. T. N. S. 182, 23 Week. Rep. 115.

For an extended discussion of the constitutional provision against damaging property, see note to *Rasch v. Nassau Electric Co.* 36 L.R.A.(N.S.) 741.

The effect which an authorization from the legislature has upon this question has not been clearly kept in view in all cases. The power of the legislature to authorize an act is limited by the constitutional provisions against taking or damaging property without compensation. Hence, if the act authorized by the legislature is a "taking," or, under the more recent Constitutions, a "damaging," it cannot be valid unless such compensation is provided therein; but if it does not amount to a "taking" or "damaging," the powers of the legislature are not thus limited. The question resolves itself into one as to whether or not the act complained of amounts to a taking or damaging. 47 L.R.A.(N.S.)

If it does, and no compensation is provided, it is invalid and furnishes no protection to the party doing the act.

The question as to the effect of legislative authority upon liability for private nuisance has been treated in the note to *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A.(N.S.) 49.

An attempt to harmonize the general statements of the courts as to what constitutes a taking or damaging and what is mere incidental damage, for which no recovery can be had, results in confusion. In the consideration of specific injuries, however, the decisions are, at least, more definite, if not always harmonious. The question now under discussion, as to what constitutes a taking or damaging of property as distinguished from injuries for which no compensation can be had, is touched upon in many of its concrete and specific aspects in notes in this series about to be cited. It will be observed that some of these notes are confined to the distinctive point just suggested, and others include that point with others bearing on the ultimate question of liability. The Index to Notes should be consulted for other annotation involving the question, under the particular concrete subject in connection with which it arises: *e. g.*, Damages; Highways; Municipal Corporations; Railroads, etc.

See note to *Parks v. Southern R. Co.* 12 L.R.A.(N.S.) 680, covering the liability of railroad for conducting surface water through its embankments and onto the property of an adjoining owner.

Note to *White v. Pennsylvania R. Co.* 38 L.R.A.(N.S.) 1040, for injury to riparian property by the collection of water by struc-

lawful trespass, or a consequential injury caused by the defendant's negligence, the obvious fact remains that the case was not tried upon the latter theory. Upon defendant's motion for a nonsuit, based in part upon the ground that "the case is destitute of any evidence of negligence for which the defendant can be made responsible," the counsel for the plaintiff said: "I oppose this, as it is not a question of negligence; it is a question of trespass." The record discloses no evidence tending to establish any negligence on the part of the defendant. It is true that the embankment built by the defendant yielded to the pressure of the waters, and that some of the *débris* which was cast upon the plaintiff's land came from this source. Had the same thing occurred more than once, it might be regarded as some evidence of negligence. But this was the first time that such a thing had happened, and for aught that we know, it may have been due to causes which the defendant could not have anticipated or prevented. It also goes without saying that, if it was the plaintiff's purpose to recover upon the theory of defendant's negligence, he

should have been compelled to assume the burden of pleading and proving it. Having failed in both these essentials of pleading and proof, he must stand or fall upon the ground of a direct trespass.

When the case is considered from that point of view, it is not distinguishable in principle from *Bellinger v. New York C. R. Co.* 23 N. Y. 42; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Moyer v. New York C. & H. R. Co.* 88 N. Y. 351, and a long line of similar cases, in which it has been decided "that public officers lawfully employed in making public improvements, and corporations engaged in the performance of work of a public nature authorized by law, are not liable for consequential damages occasioned by it to others, unless caused by misconduct, negligence, or unskilfulness." *Atwater v. Canandaigua*, *supra*, and cases cited. And by the same rule this case is clearly distinguishable from *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Sullivan v. Dunham*, 161 N. Y. 290, 47 L.R.A. 715, 76

ture erected under statutory authority as a taking.

As to the right of riparian owner to compensation for damages to his property by construction, under legislative authority, of dams or booms for floating or storing logs, see note to *Kalama Electric Light & P. Co. v. Kalama Driving Co.* 22 L.R.A. (N.S.) 641.

Note to *Johnson v. White*, 65 L.R.A. 250, and supplementary note to *Hume v. Des Moines*, 29 L.R.A. (N.S.) 126, as to the rights and duties of municipal corporations with respect to surface water.

Note to *Avery v. Vermont Electric Co.* 59 L.R.A. 817, as to liability for damming back water of a stream.

As to the liability of a drainage district for flooding land, see note to *Bradbury v. Vandalia Levee & Drainage Dist.* 19 L.R.A. (N.S.) 991.

An extensive note as to the liability of a railroad company for obstructing surface waters is in the course of preparation, and will be appended to the case of *Conn v. Chicago, B. & Q. R. Co.* — L.R.A. (N.S.) —.

As to the liability of a municipal corporation for injury to neighboring property from maintenance of prison, see note to *Bowling Green v. Rogers*, 34 L.R.A. (N.S.) 461.

For cutting off access to a highway as a taking, see note to *Ranson v. Sault Ste. Marie*, 15 L.R.A. (N.S.) 49.

As to liability of a municipality on various questions connected with injury to abutting property from changing the grade of the street, see note to *Hickman v. Kansas*, 23 L.R.A. 658; note to *Leiper v. Den-*

ver, 7 L.R.A. (N.S.) 108; and note to *Dickerson v. Okolona*, 36 L.R.A. (N.S.) 1194.

See note to *Davis v. New England R. Co.* 20 L.R.A. (N.S.) 1061, as to the right of a property owner to compensation for interference with light or air by railroad structure on the company's own property.

Note to *Hutton v. Webb*, 59 L.R.A. 33, as to the right to obstruct or destroy rights of navigation.

Note to *Northern P. R. Co. v. S. E. Slade Lumber Co.* 34 L.R.A. (N.S.) 423, as to the right to obstruct or destroy wharf rights in navigable waters for public purposes without compensation.

As to the right of a municipal corporation to drain sewage into water, see note to *Platt Bros. & Co. v. Waterbury*, 48 L.R.A. 691, and supplementary notes to *State v. Concordia*, 20 L.R.A. (N.S.) 1050, and *McLaughlin v. Hope*, *ante*, 137.

As to an abutter's right to compensation for railroad in street, see note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A. (N.S.) 673.

As to the right, under a constitutional provision against "damaging" private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken, from smoke, noise, dust, etc., incident to the ordinary operation of a railroad, see note to *Tidewater R. Co. v. Shartzter*, 17 L.R.A. (N.S.) 1054, and supplementary note to *Hyde v. Minnesota, D. & P. R. Co.* 40 L.R.A. (N.S.) 48.

As to noise made by street cars and use of alarm signals as giving right to compensation, see *Harrison v. Denver City Tramway Co.* 44 L.R.A. (N.S.) 1164.

W. A. E.

Am. St. Rep. 274, 55 N. E. 923; *Huffmire v. Brooklyn*, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176, and others, where there was either a physical invasion of the lands damaged, or the injury was the direct result of the wrongdoer's act.

The defendant in this case confined its operations to its own land. The record discloses nothing from which it can safely be assumed that the result was one which must necessarily have ensued from the construction of the defendant's works. If the case were one in which the defendant, although acting under authority of law, had so constructed its own road, or had so interfered with adjacent physical conditions, as to directly cause the injury of the plaintiff, it would fall within the principle of *Huffmire v. Brooklyn*, supra, and other cases of like character which have been cited. We think it is not such a case. All that appears is that the plaintiff's land was damaged by the washing out of the defendant's embankment. If this happened without fault on the part of the defendant, the case is *damnum absque injuria*; and, in the absence of allegation and proof of such fault, the plaintiff was not entitled to recover.

The judgment should therefore be affirmed, with costs.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Willard Bartlett, and Hiscock, JJ., concur. Chase, J., absent.

NEW YORK COURT OF APPEALS.

CHASE-HIBBARD MILLING COMPANY,
Appt.,
v.

CITY OF ELMIRA, Resp't.

(207 N. Y. 460, 101 N. E. 158.)

Water — changing river channel — interference with tailrace — liability of municipality.

1. A municipal corporation which is given statutory authority over its roads and

Note. — Liability of municipality for damages by changing the channel or course of a stream.

Cases where the damage complained of was caused by diverting the waters of a stream without actually changing the course, as by abstraction or appropriation of the waters for domestic purposes, or by erecting embankments on either side of the stream, so as to cause an overflow upon the opposite side, are excluded.

Generally as to right of riparian owner to restore stream which has changed its course by natural causes, to old channel, see 47 L.R.A. (N.S.)

bridges, and to clean out and repair the waterways under its charge, is not liable for injury to a mill owner who, under statutory authority, places a dam across a stream within its limits which had been declared by statute to be a public highway, by restoring an old channel of the river which had become filled with *débris* in such a manner as to cast the current through a new channel against and threaten to undermine a bridge abutment, the effect of which restoration is to interfere with the flow in the tailrace and set back the water on the wheels.

Evidence — reason for public act.

2. In an action to hold a municipal corporation liable for interfering with the flow of water in the tailrace of a mill by clearing the channel of a river within its limits, which it had statutory power to do, a letter from the mayor, purporting to give the reason for the act, is properly excluded from evidence.

(March 4, 1913.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a special term for Chemung County in defendant's favor in an action brought to recover damages for setting water back upon plaintiff's mill wheels. Affirmed.

The facts are stated in the opinion.

Mr. Henry Selden Bacon, with Messrs. Baldwin & Allison, for appellant:

The acts found to have been committed by the defendant would have been unlawful if committed by an individual.

Rothery v. New York Rubber Co. 90 N. Y. 30; *Stye and Mordant*, 1 Rolle, Abr. 104; *Haight v. Price*, 21 N. Y. 241.

The public duty of protecting the bridge did not justify the raising of the water on the plaintiff's wheels.

Sauer v. New York, 180 N. Y. 27, 70 L.R.A. 717, 72 N. E. 579; *Eaton v. Boston*, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; *Ordway v. Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Stenson v. Mt. Vernon*, 104 App. Div.

note to Yazoo & M. Valley R. Co. v. Brown, 33 L.R.A. (N.S.) 804.

The following notes may also be consulted with profit:

Right of upper proprietor to deflect water in stream, to injury of lower proprietors. *Morton v. Oregon Shore Line R. Co.* 7 L.R.A. (N.S.) 344.

Injury to riparian property by deflection of water by structure erected under statutory authority as a taking. *White v. Pennsylvania R. Co.* 38 L.R.A. (N.S.) 1040.

Rights in water of stream as affected by act of God or natural change of course. *Wholey v. Caldwell*, 30 L.R.A. 820.

17, 93 N. Y. Supp. 309; *Smith v. Boston & A. R. Co.* 181 N. Y. 132, 73 N. E. 679.

Mr. Michael Danaher, for respondent:

The Chemung river being a public highway, and Main street bridge a public bridge, the defendant not only had the right, but it was its duty, to protect the piers of that bridge. If plaintiff sustained injury by reason thereof, it is *damnum absque injuria*.

Farnham, Waters, § 332; *Kerr v. Joslin*, 20 N. Y. Supp. 929; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Prime v. Yonkers*, 192 N. Y. 105, 84 N. E. 571; *Gordon v. Ellenville & K. R. Co.* 195 N. Y.

137, ante, 462, 88 N. E. 14; *Diggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Radeliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Ely v. Rochester*, 26 Barb. 133; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *East Montpelier v. Wheelock*, 70 Vt. 391, 41 Atl. 432.

If the defendant had the right to excavate that channel and construct that wing dam, the motives that may underlie the act are not material.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345, 14 L.R.A. 481, 28 N. E. 358; *Atwater v. Canandaigua*, 56 Hun, 293, 9 N. Y. Supp. 557; *Ely v. Rochester*, 26 Barb.

Right of the government to divert water from nontidal streams without compensation to riparian owner. *Fulton Light, H. & P. Co. v. State*, 37 L.R.A.(N.S.) 307.

The channel in which a stream flows is a component part of the stream itself, and one owner cannot change the flow of the water to another channel, to the injury of a lower proprietor, without being liable for the injury. 2 Farnham, Waters, 1634.

And it seems to have been assumed in the cases cited in the present note that the principle applies to a municipality as well as to an individual.

It will be noted that in *CHASE-HIBBARD MILL. CO. v. ELMIRA*, denying the liability of the municipality, the river was restored to its former channel.

Where a city turned a natural stream into a new channel which was not equal in capacity to the old channel, whereby plaintiff's lot was overflowed and damaged, the city was held liable in *Barns v. Hannibal*, 71 Mo. 449.

So, where an owner of land bounded by a stream sued the city for injury to his premises, caused by the erection of a bridge which changed the current of the stream, the court, in *Stone v. Augusta*, 46 Me. 127, said: "He has the right to the quiet enjoyment of his land, to its full extent; and if, by any unauthorized diversion of the stream from its natural channel, he has been injured, he is entitled to a legal remedy for such injury."

And in *Geurkink v. Petaluma*, 112 Cal. 306, 44 Pac. 570, a suit enjoining a threatened permanent injury to a party's realty by a city's changing the natural course of a stream, the court said that when work had been completed and the damage actually done, there could be no question but that a remedy at law for such damages could be invoked.

The court in *Ordway v. Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835, laid down the rule that a municipal corporation is not, merely from the fact that it is such a corporation, exempt from the rule that, irrespective of any question of negligence or malice, a riparian owner who, by a wilful act, diverts the waters of a natural stream from its accustomed channel, and causes them to flow upon the land of a neighbor, is liable for re-

sulting damages. Nor is a municipality exempt from such liability merely from the fact that the acts on its part complained of were done in the supposed exercise of its authority conferred by law to protect public and private property within its corporate limits from damage by floods, when the infringement of a riparian owner's right to have the stream continue to flow through his land in its natural channel, direction, and volume, as it had been accustomed to flow, is direct and immediate, and the damage complained of is certain to result therefrom in a time of flood, and is permanent in its character. In such case, where a municipality renders a riparian owner's land practically worthless by the diversion of the stream, the value of the land at so much per acre previous to the diversion is a proper measure of damages.

Where a city changed the channel of a water course on plaintiff's premises with plaintiff's knowledge and consent, and for such consent agreed to construct a sewer entirely across the premises, but abandoned it when constructed less than half way across, thereby allowing it to discharge upon and overflow plaintiff's premises, to his material injury and damage, such city, in *McBride v. Akron*, 12 Ohio C. C. 610, 6 Ohio C. D. 739, was held liable.

Where a city authorized by statute to construct a levee along the bank of a river for the purpose of reclaiming the land subject to overflow, and protecting the highways, built a levee along the bank, across the northerly half of plaintiff's land, abutting on the river, where the banks were high, thereby closing several natural channels through which, in times of freshet, high water had been accustomed to escape and pass into another river, and confined it to a much narrower channel, but refused to extend such levee as requested along that portion of his farm where the banks were low, though frequently warned by him of the danger of an overflow, it was held in *Barden v. Portage*, 70 Wis. 126, 48 N. W. 210, that the city was liable to him for the damages caused by the compressed and accumulated waters of the river overflowing upon his land in time of freshet.

It is held in *Allebrand v. Duquesne*, 11 Pa. Super. Ct. 218, that a borough cannot

133; *Prime v. Yonkers*, 192 N. Y. 105, 84 N. E. 571.

It had these rights.

Slater v. Fox, 5 Hun, 544; *Moyer v. New York C. & H. R. R. Co.* 88 N. Y. 351; *Beltinger v. New York C. R. Co.* 23 N. Y. 47; *Ferdon v. New York, O. & W. R. Co.* 131 App. Div. 380, 115 N. Y. Supp. 352; *Gordon v. Ellenville & K. R. Co.* 195 N. Y. 137, 88 N. E. 14.

Defendant had the right summarily to abate any nuisance or other encroachment that tended seriously to injure that bridge.

Bidelman v. State, 110 N. Y. 232, 1 L.R.A. 258, 18 N. E. 115; *Cornell v. Butternuts & O. Turnp. Co.* 25 Wend. 365.

Plaintiff acquired no title to the tailrace by prescription or adverse possession.

Penrhyn Slate Co. v. Granville Electric Light & P. Co. 181 N. Y. 80, 73 N. E. 566, 2 Ann. Cas. 782; *Prentice v. Geiger*, 74 N. Y. 341; *Hammond v. Zehner*, 21 N. Y. 118; *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Walker v. Caywood*, 31 N. Y. 51; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Arundel v*

be held impliedly liable on the doctrine of *respondent superior* for the unauthorized diversion of a stream by a councilman; that the failure of a borough to compel restoration of the stream, diverted by a citizen, to its natural channel, is not such evidence of an adoption or ratification of the wrong as would make the borough liable as a trespasser *ab initio*.

In *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261, it is held that plaintiff, who owns a mill in Rhode Island, may maintain an action in Massachusetts for diverting a stream in the latter state from said mill.

Riparian rights are property, and where a municipal corporation diverts a navigable stream from the front of an owner's land, whereby he is deprived of the right of access, it is a taking, and the municipality is liable for damages. *Meyers v. St. Louis*, 8 Mo. App. 266. In the above case the court said: "The right to have the river flow by his land as it flowed by nature, and the right of access to the river at this point, were rights of plaintiff as riparian owner, additional to his right as one of the general public to use the river as a highway. His rights to access were exclusive, subject to the general easement in the public to use the river for purposes of navigation, and to make a temporary landing there when the exigencies of the case might require it. And this right was the property of the plaintiff."

So, in *Harrison v. Sulphur Springs*,—Tex. Civ. App. —, 67 S. W. 515, a city which had changed the course of a stream and turned it over land was held liable to the owner of the land so taken under that section of the Constitution forbidding the taking of property without compensation. 47 L.R.A. (N.S.)

McCulloch, 10 Mass. 70; *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L.R.A. 828, 19 Atl. 902; *Com. v. Alburger*, 1 Whart. 469; *Mills v. Hall*, 9 Wend. 315; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514.

The erection and maintenance by plaintiff of an embankment in the river was a public nuisance, which the city had a legal right to abate.

Hart v. Mayor, 9 Wend. 571; *People v. Vandervilt*, 26 N. Y. 287; *Farnham, Waters*, 356, 357.

Gray, J., delivered the opinion of the court:

This action was brought by the plaintiff to have the city of Elmira restrained from diverting the waters of the Chemung river into a tailrace, or channel, by which the waters passing through the plaintiff's mill were carried away. The facts are stated in findings by the trial court, and are conclusively established by the unanimous affirmation of a judgment which dismissed the plaintiff's complaint upon the merits. No

The court said: "If the land not taken was damaged by the cutting of the channel and straightening of the branch, plaintiffs could recover therefor; but, in determining whether it was damaged, the jury should have been instructed to offset such damage by the enhancement to the land, if any, resulting from the straightening of the branch. If the benefits were equal to the damage, then there could be no recovery for damages to the land not taken."

So, where, upon the construction of a ditch for the purpose of preserving a highway, the waters of a river were diverted from one part of the land of a riparian proprietor and thrown upon another part thereof in such a way as to change the condition and cut away a portion of the bank, it was held in *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369, former appeal in 59 Wis. 631, 18 N. W. 457, that there was a taking of his land within the meaning of the statute, and that he was entitled to compensation therefor.

Where, however, city levee commissioners under legislative authority changed a river channel so as to have it flow at right angles into another river for the protection of a city, whereby lands on the opposite side of the river were damaged, it was held in *Green v. Swift*, 47 Cal. 536, that such damage was not a taking of land for public use, and that the legislative act was a sufficient defense to an action brought to recover such damage. To the same effect see *Green v. State*, 73 Cal. 29, 11 Pac. 603, 14 Pac. 610, an action based upon similar facts by the same plaintiff as in *Green v. Swift*, the court observing with reference to the ruling of *Green v. Swift*, supra, that "if the question had not been determined by the highest judicial tribunal existing

opinion was expressed at the appellate division.

In 1813 the Chemung river, then known as the Tioga River, was declared to be a public highway by an act of the legislature, which is still in force. In 1824 a dam was authorized by legislative enactment to be built across the north branch of the river, in the village of Newton, which thereafter became the present city of Elmira. One Baldwin, in whose behalf the legislature had acted, erected a gristmill in 1827, and since that time a dam and a mill have been maintained on the original sites. The plaintiff, through meane conveyances, in 1890, acquired the title to the properties, and has operated a gristmill, using the water power supplemented by a steam plant. The mill site is at the western extremity of an island in the island in the river, and within the limits of the city, which was commonly known in earlier times as Davis island, and in later times as Clinton island, and which divided the river at that point into two channels, to the north and south of the island. Its westerly end is owned by the

plaintiff for a distance of 200 feet, and the easterly portion is owned by the city. When the dam was originally constructed, a wall, extending a short distance easterly from the mill, guided the discharge of water from the mill wheels into the river. Subsequently the plaintiff's predecessors in title extended this wall through a construction of piles and planking and parallel to the north bank of the river (all of which north bank is covered by buildings fronting on Water street of the city and built back to the river), for about 250 feet, or some 50 feet beyond the boundary line of the mill property. Later the extension was continued further by an earth embankment, which, at the time of the plaintiff's purchase of the property, had reached to the bridge carrying Main street over the river, a distance of about 700 feet from the mill. After its purchase the plaintiff extended the embankment some 200 feet eastwardly from the bridge. This embankment, substantial in width and in height throughout the greater part of its length, and at the easterly end sloping to the level of the bed

under the former Constitution (and the canal had been dug after the adoption of the present Constitution), we might hold, in view of the language of the present Constitution, that injury such as that alleged in the complaint was a 'damage' to property, for which the plaintiffs were entitled to compensation. But the acts which caused the alleged injuries were done while the former Constitution was in force, and similar injury caused by the same acts was held by the supreme court, created by that Constitution, not to be a 'taking' within the meaning of the clause thereof, which prohibited a taking without compensation."

The two cases last above mentioned proceed upon the theory that it is within the police power of the state to authorize the changing of a river channel in order to protect a city from threatened inundation, such being distinctively a work of a public character.

And it was held in *Murphy v. Wilmington*, 6 *Houst. (Del.)* 108, 22 *Am. St. Rep.* 345, not to be an exercise of the right of eminent domain for a city to change the course of a small, nonbeneficial stream, for the purpose of general drainage, at the request and with the consent and approval of the owners of lots through which the stream flowed. The above case was an application for injunction to restrain a city from collecting an assessment for constructing a sewer.

The right to maintain an equitable action to enjoin a threatened injury to a landowner by changing the natural course of a stream seems to be well settled. Thus, an injunction lies to restrain supervisors of a county from changing the channel of a natural water course, to the injury of a riparian owner. *Rudel v. Los Angeles County*, 118 *Cal. St.* 281, 50 *Pac.* 400. 47 *L.R.A. (N.S.)*

In *Deming v. Cleveland*, 22 *Ohio C. C.* 1, 12 *Ohio C. D.* 198, a city, at the suit of a riparian owner, was enjoined from turning a natural water course into an artificial channel, on the ground that it was a nuisance, the statute authorizing the city to divert or change the course of any brook or stream if found to be dangerous to public health being held unconstitutional in making no provision for compensation to riparian proprietors.

But it is held in *Illinois & M. Canal Comrs. v. East Peoria*, 179 *Ill.* 214, 53 *N. E.* 633, affirming 75 *Ill. App.* 450, that an injunction will not lie to restrain a village from turning a natural water course into a navigable river at a different place by means of an artificial channel, on the ground that deposits therefrom as a consequence of such diversion, would impede navigation, where it is not shown that the tendency to fill up the river and impede navigation would be any greater than formerly.

So, in *Savage v. Philadelphia*, 16 *Phila.* 174, an injunction restraining a city from straightening a creek was denied, such being a public work, protected from interference by statute.

In *Murphy v. Wilmington*, 5 *Del. Ch.* 281, where the contention was that a city had no authority to construct a culvert in such a manner that the waters of a stream would be diverted from their original course, the court said that a stream passing through a city by a sinuous course, under sinks, manufactories, through culverts, and emptying its filth upon low ground in the midst of the city before it finally discharged into a certain river, is no such water course as a municipality may not divert or fill up for the protection of the lives, health, and comfort of its inhabitants.

J. D. C.

of the river, was added to, from time to time, by depositing upon it gravel and rubbish taken by the plaintiff and its predecessors from the confined portion of the river, which constituted the tailrace of the mill. The northerly branch of the river, now in question, had been so affected by the action of the river waters and ice in creating gravel bars in the part south of the tailrace embankment that it became filled up, and its channel was shifted more and more to the south. Prior to 1902 or 1903, there was a main channel of the river practically running parallel to the embankment, which, from a point a little westwardly of the Main street bridge, flowed in a northeasterly direction under the bridge and into the tailrace. This channel, in the course of time changing its course southwardly, bore upon the second pier of the bridge with such force as to cause a deep hole in the river bed at that point, and to seriously threaten the foundations of the pier. This bridge, constructed in 1874, was a much-traveled city highway, and the defendant undertook to repair the damage and to protect against its recurrence. The finding is that, "for the purpose of turning the current from the head of the pier and enabling the defendant to more economicaly and expeditiously fill the hole," the defendant excavated the bed of the old main channel, which had filled up with gravel. This excavation was made practically at the same depth as the old bed, and it ended eastwardly of the end of the tailrace embankment. In order to turn the river current into this excavated channel, a temporary obstruction of posts and planks, which we might describe as a wing dam, was placed across that part of the river. The effect of thus diverting so much of the river waters and of discharging their volume into the channel made by the tailrace was to lessen the current in the raceway and to increase the depth of water on the plaintiff's wheels some 4 inches, thereby lessening the water power.

The facts, which necessarily have been stated at this length, show that the public authorities of the city of Elmira were making a public improvement for the purpose of protecting a bridge, which constituted one of its important highways, and that the diverting of the river waters into an old channel, as restored, carried them to a point beyond the tailrace embankment. It does not appear that the work was performed negligently, or with any lack of reasonable care and of skill. We may assume, as the appellant argues, that if an

individual had committed the same act in diverting the stream, there would have been an actionable injury; but this rule of the individual can have no application to an act of the defendant, performed in the accomplishment of a public purpose, and within the powers granted by the legislature.

By the charter of the city (Laws of 1906, chap. 477), of which judicial notice may be taken, because not only declared to be a public act (see §§ 239 and 240), but because it is a public statute (Dill. Mun. Corp. § 50), all the powers of highway commissioners were conferred on the common council, and the board of public works was empowered and authorized to build, rebuild, or repair public bridges, and to clean out and repair the waterways under the charge of the city. Sections 77, 154. Section 242 of the charter invested the common council with power to clear out and deepen the channel of the river, and to cause to be removed all unlawful obstructions. These express powers sufficiently authorized the defendant to do whatever was necessary to be done in maintaining its public bridges and waterways in a proper condition. The municipality held and exercised them in its political or governmental capacity, and necessarily the need and occasion for their exercise were committed to the discretion of the proper public authorities. As observed, the authority of the defendant over the public highways being conferred by legislative grant, and therefore governmental in its nature, when the defendant, for the purpose of repairing and of permanently protecting one of its bridges, restored the old channel in such wise as to deflect its current from the bridge pier, it could incur no liability for consequential damages to the plaintiff. In such case the rule should be considered as well settled that consequential damages, which arise as the incidental, and not the immediate, consequences of an act, and are occasioned in the making of an authorized public improvement, there being no question of negligence or of unskilfulness, are not recoverable. *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 48, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; Dill. Mun. Corp. § 39.

In *Atwater's Case*, 124 N. Y. 602, 27 N. E. 385, which related to the building of a bridge, the dam used for the work of construction, while not encroaching upon the

plaintiff's premises, obstructed the flow of water in the channel, to the prejudice of owners of property affected by it; but, it being a lawful public improvement, the defendants were held not to be liable for the consequences. In this case the defendant's officers were conducting a public work designed for the public good and safety. Though not taking, nor directly invading, the plaintiff's premises, when the consequences of the defendant's act were to cause injury to the plaintiff, the case came within the rule as one of *damnum absque injuria*. In the able argument of the appellant's counsel it is insisted that the public duty of protecting the bridge did not justify the raising of the water on the plaintiff's wheels, and that the excavation of the new channel was not for the purpose of protection. The difficulty with this argument is twofold. In the first place, it was discretionary with the municipal authorities what should be done with the channels of the river, whether for purposes of bridge protection, or for any other relevant municipal purpose; and, in the next place, the finding of fact was that the bridge pier was seriously threatened by the river current. Furthermore, it appears that in the restoration of the old north channel the excavation did not cut the embankment of the tailrace, but ended to the east of it.

It is also argued for the appellant that there was error committed upon the trial in the exclusion of a letter from the mayor of the defendant, which was written, after the action was commenced, to the plaintiff. Its purport was relevant to the controversy, but it was immaterial to the determination of the issues. Although evidencing that the mayor considered that what had been done had been with a purpose other than the mere protection of the bridge, it could not affect the determination of the question. If the public authorities were authorized to do what they did do with the river channels, the reasons that moved them do not concern the plaintiff. *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 362, 14 L.R.A. 481, 28 N. E. 358. The assignment of an improper motive or reason for doing an act which the municipality was authorized to perform could not make that act illegal.

For these reasons, I advise the affirmance of the judgment appealed from.

Callen, Ch. J., and Willard Bartlett, Hiscock, Cuddeback, Hogan, and Miller, JJ., concur.
47 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT. (Division No. 2.)

DANIEL W. HOGAN et al., Pliffs. in Err.
v.

J. G. LEEPER, Exr., etc., of Thomas J. Bailey, Deceased.

(— Okla. —, 133 Pac. 190.)

Jury — suit to cancel deed.

1. The defendant in a suit to cancel a deed of trust, alleged to have been executed under duress, is not entitled to a jury trial, though the effect of the cancellation will be to restore the maker of the instrument to the control of land described in said instrument.

Same — advisory verdict.

2. A suit to cancel an instrument conveying land in trust is an equitable suit, and the verdict of a jury is merely advisory to the court, and the court may make different findings if satisfied that different findings are required by the evidence.

Duress — threat of guardianship.

3. The evidence showed that a son came to the city of his father's residence, employed a lawyer, and had the lawyer to prepare a deed of trust conveying all of his father's real estate to a trustee for the life of his father, with directions to apply \$40 per month of the income to the support of the father, and the balance to the expenses of the trust and payment of certain mortgages on some of the property. The father was then requested to go to the lawyer's office, and was there requested to sign the deed of trust, and was told that if he did not proceedings would be commenced to appoint a guardian for him. He then signed the instrument without having had time or opportunity to reflect or consult friends or counsel of his own choosing, saying at the time that he was signing his life away. Held, that the instrument should be canceled.

Guardian — desire of old man to marry.

4. The fact that a man seventy-six years

Headnotes by ROSSER, C.

Note. — Desire of aged person to marry as ground for appointment of guardian.

Often, and perhaps in the majority of cases where children ask for the appointment of a committee for their father, and he is a widower, the cause of their action is the fear that the property of the parent will be absorbed by woman in general or in particular; yet there seems to be very little about it in the law digests.

It is not to be supposed that there will be any material dissent from the views on this subject which the court in *HOGAN v. LEEPER* has expressed with so much vigor and lucidity; and these views, of course, are not to be construed as involving any difference of opinion with the medical books mentioning the desires of old men for the

of age desires to marry is not sufficient ground for the appointment of a guardian of his property.

Evidence — duress — burden of proof.

5. When circumstances, such as are related in paragraph 3, above, are shown conclusively or admitted by the party procuring the execution of the instrument, the presumption arises that the instrument was obtained through duress and undue influence, and the burden is then upon the party procuring the execution of the instrument to show that the execution was not so procured.

(June 19, 1913.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in a suit to cancel a deed of trust. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Caldwell & Garnett, for plaintiffs in error:

Plaintiff, knowing at the time he commenced his action that the grantee, Daniel W. Hogan, was in possession under the trust deed of all the property conveyed by said trust deed, and continued in such possession at the time of the trial, the defendants were entitled to a jury trial.

Kansas P. R. Co. v. McBratney, 12 Kan. 9; Riggs v. Anderson, 47 Kan. 66, 27 Pac. 112; Pope v. Nichols, 61 Kan. 230, 59 Pac. 257; Povah v. Lee, 29 Wash. 108, 69 Pac. 639; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Brown v. Calloway,

34 Wash. 175, 75 Pac. 630; Jennings v. Brown, 20 Okla. 294, 94 Pac. 557; Sorrells v. Jones, 26 Okla. 569, 110 Pac. 743.

Plaintiff could not defeat this right of defendants to a jury trial by coupling with his action for possession an equitable action to avoid the trust deed.

Davison v. Jersey Co. 71 N. Y. 333; Van Deventer v. Van Deventer, 32 App. Div. 578, 53 N. Y. Supp. 236; Parker v. Laney, 1 Thomp. & C. 593; Hudson v. Caryl, 44 N. Y. 553; Green v. Stewart, 19 App. Div. 202, 45 N. Y. Supp. 982; Newsome v. Hamilton, 142 Ky. 5, 133 S. W. 952; American Creosote Works v. C. Lemboke & Co. 165 Fed. 809; Prescott v. Brown, 30 Okla. 428, 120 Pac. 991.

Plaintiff Thomas J. Bailey waived the right to have the issues of fact in the case determined by the court by voluntarily proceeding to trial to a jury.

Brown v. Lawler, 21 Minn. 327; Leggett v. Leggett, 88 N. C. 108; State ex rel. McClung v. Powell, 10 Neb. 48, 4 N. W. 317; Taffe v. State, 90 Ga. 459, 16 S. E. 204; Danziger v. Metropolitan Elev. R. Co. 81 Hun, 5, 30 N. Y. Supp. 580; Wright v. Wright, 50 Tex. Civ. App. 459, 110 S. W. 158; 24 Cyc. 174; Weigle v. Cascade F. & M. Ins. Co. 12 Wash. 449, 41 Pac. 53; McDaniel v. Marygold, 2 Iowa, 500, 65 Am. Dec. 786; Miller v. Wills, 95 Va. 337, 28 S. E. 337; Carter v. Campbell, Gilmer (Va.) 170; Foushee v. Lea, 4 Call. (Va.) 279.

The special findings of fact made by the court are not sufficient to support the judg-

society of young girls as a symptom which may be present in senile dementia.

In McCormick v. Frazer, 17 Ont. Week. Rep. 383, the court, in rejecting an application for the appointment of a committee of a man of eighty, as there was not unsoundness of mind or incapability, said, in referring to his marriage with a woman of thirty: "It is said that to marry a comparatively young woman, a stranger in the vicinity, after so short an acquaintance, is, in itself, evidence of insanity, and rebuts the presumption of sanity. I do not think so. The presumption of sanity is not rebutted by the fact of suicide, and it certainly is not by the fact of a marriage of a man over eighty to a girl about or under thirty."

While capacity to manage one's affairs and capacity to make a will are not necessarily the same thing, cases on wills are interesting in this connection.

In Thomas v. Stump, 62 Mo. 275, an action to set aside a will, where it was shown that the testator, at the age of sixty-eight, had married a woman of eighteen, the court said: "That such a marriage is to be regarded as *per se* proof of insanity or imbecility, we are not prepared to admit."

In a contest over a will it appeared 47 L.R.A. (N.S.)

that the testator was a bachelor till he was eighty-three years of age, when he married a woman of twenty-five; that whereas he had formerly shown no inclination for female society, he changed in that respect after he passed eighty years, and showed a desire for the society of young women, particularly girls of eighteen or thereabouts, but there was no suggestion of any impropriety in his conduct or of lack of respect for women. Sometimes he would say that he was too old to marry, at others that it would be of great benefit to him if he could marry some middle-aged woman to be good to him and take care of him in his old days. The court, in holding that he was not incompetent to make a will, said, referring to a medical witness: "The . . . witness said that if a man over eighty years of age should express a desire to marry, to make a home for himself, and have a wife to take care of him in his old days, it was no symptom of senile dementia. Common sense is not indebted to science for knowledge of that fact." Hamon v. Hamon, 180 Mo. 685, 79 S. W. 422.

For mere mental weakness as not justifying the appointment of a guardian, see the note to Emerick v. Emerick, 13 L.R.A. 757.

B. B. B.

ment of the court, rendered thereon, and are not sufficient to support any judgment for the plaintiff Thomas J. Bailey, deceased.

Miller v. Miller, 68 Pa. 486; Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Radich v. Hutchins, 95 U. S. 210, 213, 24 L. ed. 409, 410; Adams v. Stringer, 78 Ind. 175; Brower v. Callender, 105 Ill. 88; Hines v. Hamilton County, 93 Ind. 266; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Flanigan v. Minneapolis, 36 Minn. 406, 31 N. W. 359; Gabbey v. Forgeus, 38 Kan. 62, 15 Pac. 866; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Rochester Mach. Tool Works v. Weiss, 108 Wis. 545, 84 N. W. 866; Holmes v. Hill, 19 Mo. 159; Taylor v. Cottrell, 16 Ill. 93; Knapp v. Hyde, 60 Barb. 80; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Mundy v. Whittemore, 15 Neb. 647, 19 N. W. 694; Meek v. Atkinson, 1 Bail. L. 84, 19 Am. Dec. 653; McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727; Stouffer v. Latschaw, 2 Watts, 165, 27 Am. Dec. 297; Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. 1102; Gregor v. Hyde, 10 C. C. A. 290, 27 U. S. App. 75, 62 Fed. 107; Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363.

In determining whether or not a threat of imprisonment constitutes menace or duress, it is wholly immaterial whether the threatened imprisonment be unlawful or lawful.

Cribbs v. Sowl, 87 Mich. 340, 24 Am. St. Rep. 166, 49 N. W. 587; Hartford F. Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651; Adams v. Irving Nat. Bank, 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; City Nat. Bank v. Kusworm, 88 Wis. 188, 26 L.R.A. 49, 43 Am. St. Rep. 880, 59 N. W. 564; Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Gorringer v. Reed, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912.

Messrs. Vaught & Ready for defendant in error.

Rosser, C., filed the following opinion:

This was an action by Thomas J. Bailey, now deceased, against Daniel W. Hogan, Samuel E. Bailey, Dora L. Adams, Mamie L. Huntley, John A. Bailey, Thomas A. Bailey, and Leigh M. Bailey. There was a judgment for plaintiff, and defendants appeal.

The plaintiff has died since the trial, and the case has been revived by making J. G. Leeper, executor of his will, the defendant in error here. The plaintiff, 47 L.R.A. (N.S.)

Thomas J. Bailey, had been married a number of years ago, and the defendants named, except Hogan, are his children by the wife of his youth. These children grew up, and his first wife died, and he married a second time. At the opening of the territory of Oklahoma he came to Oklahoma City with his second wife and one or two of his younger children and established a home here. He lived in a tent for a time, and endured other hardships to acquire and hold property until, at the time of the transaction involved in this case, he had accumulated property valued by different persons at from \$25,000 to \$75,000. His second wife died. His children established homes for themselves, and he began boarding. For three or four years he boarded or made his home with a woman named Scantlin, who was a married woman living apart from her husband. She lived in one of his houses, and their relations were very friendly, but from the testimony not more than friendly. Some of his daughters visited him, and it seems that they became apprehensive that this woman would induce him to give her some of his property. At any rate, after some correspondence among the children, the defendant Leigh M. Bailey came to Oklahoma City and employed a lawyer to draw a deed of trust. He remained in the city two or three days, consulting with his lawyer and with some of plaintiff's neighbors, who were busying themselves in the matter. He had the records examined, found out what property his father had and its condition, and had his lawyer to prepare the deed of trust involved here. His lawyer telephoned the plaintiff to come to his office and see him on a matter of interest to the plaintiff. The plaintiff started to his office to see him and was met by his son, Leigh M. Bailey, who until then had not permitted him to know that he (the son) was in the city, and who accompanied him back to the lawyer's office. When he reached there the lawyer informed him that he (the lawyer) had been retained by Leigh M. Bailey to look up the condition of his property; that they believed Mrs. Scantlin was trying to get his property; and that if he continued to live with her and did not put his property where she could not get it, in time she would get it. Bailey replied that she had not yet gotten any considerable part of his property, and that he did not intend for her to have it, and thought he could protect himself. He was then asked what disposition he wanted to make of his property, when he died, and he stated that he wanted his six children to have it, and also stated that he had a will. He was then told that a will was uncertain, and that the woman might get another will. The lawyer

then showed him the deed and explained it to him. The plaintiff testified that the lawyer and his son threatened to have him and the Scantlin woman arrested unless he signed the deed of trust. The testimony of his son and the lawyer, however, is that they told him that if he did not sign the deed of trust they would have a guardian appointed for him, and their statement is accepted as correct. After some discussion, at the request of the plaintiff, the lawyer withdrew from the room and the plaintiff talked the matter over with his son. The lawyer returned to the room and told his son to make him sign the deed of trust just as it was. After further conversation he signed the deed of trust. When he did so, according to his and his son's statement, he began crying and stated that he had signed his life away. He went with the trustee, however, and pointed out the property and introduced him to the tenants in the property, with the instruction that they pay the trustee the rent from that time on. A short time after he signed the deed of trust he became dissatisfied and began writing to his children, and asked them to release him from its provisions, and threatened suit if they did not. There is absolutely no evidence that Mrs. Scantlin was trying to get his property, except that one witness, who had interested herself a good deal in the matter, testified that Bailey told her upon one occasion that the woman had obtained \$15 from him. She testified that he was very much dissatisfied on that account, and stated to the witness that he was going to move. The evidence shows that the woman waited upon him during his sickness and was kind to him in every way, and that his children expressed themselves as being satisfied with her treatment of him at the time they visited him when he was boarding with her. The case was tried to a jury, and there was a verdict for the defendants. The court set aside the verdict upon motion and rendered judgment for the plaintiff.

The defendants contend that as the trustee was in possession of the plaintiff's property, he was entitled to a jury trial, and that the court erred in disregarding the verdict of the jury, and rendering judgment in accordance with his views of the law and the evidence. They based their contention upon the provisions of the Code with reference to trial by jury in ejectment cases, and the further provision of § 6122, Comp. Laws 1909, in substance, that an equitable title will support the action of ejectment. The contention is not well founded. This was not an action in ejectment. Plaintiff was not suing to recover possession. He was suing to cancel a deed of trust. The possession of the property was only inci-

dentally involved. The purpose of the suit was to cancel the deed and remove the trustee. It was not a suit to recover specific real property.

The suit to cancel the deed was an equitable one, and defendants were not entitled to a jury trial. *Mosier v. Walter*, 17 Okla. 365, 87 Pac. 877; *Watson v. Borah*, — Okla. —, 132 Pac. 347; *Barnes v. Lynch*, 9 Okla. 156, 59 Pac. 999; *Richardson, R. B. Dry Goods Co. v. Hockaday*, 12 Okla. 546, 73 Pac. 957; *Murray v. Snowder*, 25 Okla. 421, 106 Pac. 645; *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L.R.A.(N.S.) 901, 121 Pac. 237; *Wat-Tah-Noh-Zhe v. Moore*, 38 Okla. 631, 129 Pac. 877. See also *Evans v. McConnell*, 99 Iowa, 326, 63 N. W. 570, 68 N. W. 790; *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418; *Bethany Hospital Co. v. Philippi*, 82 Kan. 64, 30 L.R.A.(N.S.) 194, 107 Pac. 530; *Mesenburg v. Dunn*, 125 Cal. 222, 57 Pac. 887. The foregoing decisions of this court also hold that in an equity case a verdict of a jury is advisory only, and that the court may disregard the verdict if he is of a different opinion. This does not mean that the court should ignore the verdict in an equity case. When a jury has been impaneled and a verdict rendered in such cases, the court should give the verdict consideration; but if, after due consideration, he is unable to agree with the jury, and is of the opinion that a different finding is the correct one, it is his duty, notwithstanding the verdict of the jury, to enter what, in his opinion, is a correct judgment.

The question is, then, whether the evidence supports the judgment. It does. In the first place there was no consideration for the deed of trust. *Thomas J. Bailey* was giving up the control of property which he had accumulated by his own exertions, and paying another person a consideration to look after the property when he was himself entirely competent to superintend it. It is true the compensation paid the trustee was not more than he earned, but the trusteeship was not necessary. There was no proof offered or attempted to be offered that Bailey was not managing his property well enough. It is true there were some small mortgages on some of it, but there is no proof at all that he had squandered or was squandering any money. One of the mortgages was for part of the purchase price of the property which he had bought a short time before the transaction involved here. If the mere giving of a mortgage subjected the giver to having a trustee appointed over his property, many people of the highest standing socially, professionally, and in a business way, and even some in official life, would be required to surrender

the control of their possession to the hands of trustees. A little bad management or an occasional unprofitable business transaction, or even an occasional useless expenditure of money, is not sufficient ground upon which to take from a man the control of his property. If the deed was not procured by technical duress, at least it was not the voluntary act of Thomas J. Bailey.

Leigh M. Bailey, the son, came to Oklahoma City, but instead of going to his father, he counseled with some people named Yeager, and, acting under their advice, employed a lawyer. Evidently he did not believe there was immediate danger that the woman would obtain the property, for he remained in the city three days without speaking to his father. During that time he saw his father, but his filial affection was of such a lukewarm nature that he got away to prevent his father from seeing him. When the deed of trust was ready, he had his lawyer telephone to his father to come to the office, and then went out and met the old man and guided him to the office. When the old man reached the office, his son and his counsel unfolded the purpose for which he had been requested to come. That he demurred to surrendering, without reason and without consideration, the control of his property appears from the proof. There is a conflict in the testimony as to what was said. He says that his son and his counsel told him that he would be arrested, charged with improper relations with the woman, unless he signed the instrument. They deny this and say that they told him that if he did not sign application would be made to the court to have a guardian appointed for him. The effect from either threat would be about the same. If they did believe he was so incompetent as to need a guardian or committee, it seems inconsistent that they should have been willing for him to sign a deed of trust, surrendering the control of the results of a lifetime of labor,—a transaction which certainly required the complete use of his faculties. Their attitude apparently was that if the old man would sign the deed, he was competent, but if he did not, he needed a guardian. When he was confronted with the alternative of delivering his property to the care of a stranger, or being arrested, or having his child the moving party in an effort to show him incapable of attending to his affairs, he asked for an opportunity to talk privately with his son. "And he called his son Joseph, and said unto him: If now I have found grace in thy sight, put, I pray thee, thy hand under my thigh, and deal kindly and truly with me."

When the attorney retired, Bailey asked his son why he had not come to him instead 47 L.R.A.(N.S.)

of going to a lawyer. His son did not answer; he made no appeal on the ground of affection. He offered no time for advice or reflection, but, though dealing with his father, stood coldly on the advice of his lawyer. The lawyer returned to the room and the plaintiff signed the deed, saying, with emotion, that he had signed his life away. The whole transaction only took a short time. He had no opportunity to reflect and had no opportunity to consult a lawyer of his own choosing. The fact that he had no opportunity for reflection and advice is a strong circumstance in the case. *Miller v. Simonds*, 72 Mo. 669; *Davis v. Strange*, 86 Va. 793, 8 L.R.A. 261, 11 S. E. 406; *Story*, Eq. Jur. 251. The father undoubtedly had confidence in his son.

"Whenever there exists between parties confidence on the one hand and influence on the other, from whatever cause they may spring, equity requires in all dealings between them the highest degree of good faith on the part of him in whom the confidence is reposed. If a conveyance is executed by the other in his favor, the burden rests upon him to prove that it was not procured by means of such confidence and influence. It is his duty, before accepting the conveyance, to see that the grantor has disinterested advice and full information." *McClure v. Lewis*, 72 Mo. 314. See also *Parker v. Parker*, 45 N. J. Eq. 224, 16 Atl. 537; *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353.

In the case of *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843, which was a transaction between a father and son, in which the son was the beneficiary, the court said: "It is not necessary, under such circumstances, that the court should be satisfied the case was one of fraud, or even of undue influence; it is enough if the defendant has dealt oppressively with his parents, and that the consideration for the mortgage was either wanting or was inadequate."

"Influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by anyone immediately over the testamentary act, whether by direction or indirection." *Re Disbrow*, 58 Mich. 96, 24 N. W. 624.

This statement of the law as applied to wills is not only the law with reference to wills, but with reference to conveyance contract which a party might enter into.

The evidence upon the part of the defend-

ants in this case scarcely attempts to controvert the allegation that the plaintiff executed the deed of trust under a species of coercion. A considerable portion of the evidence is directed to the proposition that Thomas J. Bailey was infatuated with a woman, and it was necessary to protect him; but the evidence does not show that any improper relations existed between them, or that she was making any effort to secure his property. They had been together for a considerable length of time, and there is no proof that she ever sought to have him convey any part of his property to her. It does appear that he advanced her a few hundred dollars to engage in a small business. But the evidence tends to show that she was using the money in the business, and there is nothing in the evidence to show that the business was not successful. She, or the husband she later married, bought out his interest in the business and paid him for it. The proof does show that he complained to a neighbor once that she had gotten \$15 from him, and that she was costing him too much. This circumstance strengthens his case. If he complained of giving her \$15 while pressing his suit, it is likely he would have become very penurious later.

The evidence does tend to show that he wanted to marry the woman. His son probably objected to that. He probably believed it was right to prevent the marriage. There is no doubt, though, that he was actuated largely by a desire to secure the old man's property to himself and his brothers and sisters. Old men try to control the marriages of their children. Children sometimes think that their surviving parent must get their consent before embarking for another voyage on the sea of matrimony. Usually the efforts of both parents and children are futile when directed toward preventing the other from marriage. Children have no right to act as guardians for a parent if the parent is in possession of his faculties and possessed of means sufficient for his support.

It is claimed the old man was infatuated with the woman. The writer of this opinion knows no reason why an old man has not the same right to be infatuated with a woman as a sixteen-year-old boy or a thirty-year-old man. Men of all ages and conditions are continually becoming infatuated with all sorts of women, and unless the infatuation goes to the extent of destroying the freedom of will and reason, it furnishes absolutely no ground for the appointment of a guardian. This old man had raised a family which had scattered out over the world and left him alone. If he could find solace with a woman who would give him good treatment in his declining years, there

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is absolutely no reason in law, equity, or morals why he should not do so, and even bestow upon her his property if, acting in full exercise of his reason, he desired to do so. This deed of trust was obtained for the purpose of preventing him from disposing of his own property, and undue influence and coercion were brought to bear to induce him to sign it.

It is claimed the court erred in holding that the burden of proof was on the defendants to show that the deed of trust was not obtained by force or undue influence or duress. The burden is always on the party alleging one or all of these grounds of cancellation to prove them or some of them, and some of the language of the court was not an accurate statement of the law, but a fair interpretation of his decision is that when it was shown that Bailey was called to the office of a stranger to him, suddenly presented with the deed of trust, and by his son and his son's lawyer given the alternative of signing the instrument or having guardianship proceedings begun, and that he signed it with the statement, with tears in his eyes, that he was signing his life away, the plaintiff had made a prima facie case that must be met by proof on the part of the defendant. That this was the correct view is supported by natural reason as well as by several authorities cited above.

The judgment should be affirmed.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.

JOHN A. GOOCH, Plff. in Err.,
v.

POLINA B. GOOCH et al.

(— Okla. —, 133 Pac. 242.)

Divorce — foreign — effect on property rights.

1. Where a husband residing with his family in this state abandons his family, takes up his residence in another state, and brings an action for divorce, obtains service by publication, and the wife is not personally served, does not appear in the action, and is without actual knowledge of the pendency of the action, whatever effect a decree of divorce by such court may have

Headnotes by HAYES, Ch. J.

Note. — Generally as to the effect of a divorce in one state upon property rights in another, see note to Benton's Succession, 59 L.R.A. 178 et seq. And see further as to effect on dower rights, note to Van Blaricum v. Larson, 41 L.R.A.(N.S.) 219.

upon the marital relation, such court is without jurisdiction by its decree to affect the rights that the wife and children have acquired as members of plaintiff's family in his property located in this state.

Homestead — form and ownership.

2. By § 1, art. 12, of the Constitution, and § 3346, Comp. Laws 1909, the homestead of a family may consist of more than one tract of land, and may be owned by either husband or by the wife, or by both jointly, or one tract may be owned by one and the other tract owned by the other, so long as the aggregate number of acres occupied as a home does not exceed 160 acres.

Same — family benefit.

3. The benefits of a homestead exemption provided by the foregoing provisions of the Constitution and of the statute are not reserved to the head of the family alone, but to the entire family, without regard to whether the husband or the wife is the owner of the title.

Ejectment — to recover homestead from family.

4. Where the husband, without cause, abandons his family, who were residing upon the homestead, he may not maintain an action of ejectment to dispossess his wife and family of said homestead or any part thereof.

(June 10, 1913.)

ERROR to the Superior Court for Logan County to review a judgment for defendant in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Devereux & Hildreth, for plaintiff in error:

There was error in holding that the wife of the homesteader can keep her husband out of possession of the homestead.

Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324.

Where the statute of the state authorizes a decree of divorce on service by publication, the decree is good.

Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; Felt v. Felt, 59 N. J. Eq. 606, 47 L.R.A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071; Baughman v. Baughman, 32 Kan. 538, 4 Pac. 1003; McCormick v. McCormick, 82 Kan. 31, 107 Pac. 546; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Wesner v. O'Brien, 56 Kan. 724, 32 L.R.A. 289, 54 Am. St. Rep. 604, 44 Pac. 1090; Hatch v. Small, 61 Kan. 242, 59 Pac. 262; Durland v. Durland, 67 Kan. 734, 63 L.R.A. 959, 74

Pac. 274; Roberts v. Fagan, 76 Kan. 536, 92 Pac. 559.

Messrs. Burford & Burford for defendants in error.

Hayes, Ch. J., delivered the opinion of the court:

Plaintiff in error, hereinafter referred to as plaintiff, brought this action originally in the court below to recover possession of a certain tract of land. The trial was to the court without a jury, who made findings of fact and conclusions of law, upon which he rendered judgment in favor of defendants.

The substantial facts are: That for several years prior to 1905 plaintiff was the owner of the N. W. $\frac{1}{4}$ of section 14, township 17 N., range 17 W., of I. M., Logan county, and for several years said quarter section had been occupied by him and his family as the family homestead. On the 1st day of November, 1905, family discord having arisen, he executed a deed to defendant Polina B. Gooch, his wife, for the S. $\frac{1}{4}$ of said quarter section of land, on which was the residence; and his wife executed to him her deed for the N. $\frac{1}{4}$ of said quarter section. This deed was executed in pursuance of an agreement of separation by which the personal property of the family was also divided between them. In pursuance of the agreement, a fence was built upon the dividing line between the two tracts of land, and defendant Polina B. Gooch and the minor children, one of whom is defendant John H. Gooch, occupied the 80 acres deeded to her. Plaintiff left his family and departed from the state. After two or three years had elapsed, he returned to the state, took up his residence with his family, resumed the marital relation, and cohabited with his wife for a period of about one year. At the time of his return, or shortly thereafter, he told his wife that they might as well destroy the contracts and deeds, for they were no longer of any force; but the evidence fails to disclose that the same were destroyed, or that either ever reconveyed to the other the land theretofore conveyed by the deeds executed in 1905. The partition fence was torn down, and plaintiff, with his children, cultivated the entire tract of land for about one year, and the same was occupied during that time and used by the family as its homestead. After the expiration of about one year, plaintiff suddenly disappeared, without the

Generally as to the validity and extra-territorial effect of a decree of divorce rendered upon constructive service of process without appearance, see notes to 19 L.R.A. 814; 59 L.R.A. 162; 7 L.R.A. (N.S.) 1127; and 18 L.R.A. (N.S.) 647.

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As to rights of child in parent's homestead, see note to 56 L.R.A. 33. And see Index to L.R.A. Notes, "Homestead," for various other questions as to the respective rights of husband, wife, and family in homestead.

knowledge of anyone. He departed from the state and took up his residence in the state of Missouri, where, after maintaining his residence for the statutory time required to obtain a divorce, he instituted an action against his wife for divorce and procured service by publication. He prosecuted this proceeding to a judgment in his favor. His wife never appeared in the action, and was never served personally, and was without actual knowledge of the proceeding.

The trial court found as conclusions of law that upon resuming the marriage relation, the deeds executed by plaintiff and his wife became nullities, and plaintiff became vested with the title to the entire 160 acres of land; but that the residence of himself and family thereupon re-established the homestead upon the entire tract of 160 acres, and that the second abandonment by plaintiff of his family did not destroy the homestead rights of the family in the land, and the decree of divorce of the Missouri court is void. Considerable discussion by counsel for both parties in their briefs has been devoted to what effect should be given to the decree of divorce of the Missouri court by the courts of this state. Since it has been made clear by the evidence in this case that plaintiff abandoned his family, who continued their residence in this state, it does not appear to us to be of material consequence what effect the courts of this state shall give to the decree of the Missouri court upon the marriage relation existing between plaintiff and his wife. Since there was no personal service upon her or appearance in the court rendering the decree, and she was not a resident of that state, although the decree may have restored plaintiff to the status of an unmarried man, the court was without jurisdiction by its decree to affect the rights his wife and family had acquired in the property he may have owned in this state. *Lynn v. Sentel*, 183 Ill. 383, 75 Am. St. Rep. 110, 55 N. E. 838; *Doerr v. Forsythe*, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055.

We think the trial court committed error in his conclusion of law that, when plaintiff returned to his home and reassumed the duties he owed to his family, and cohabited with his wife, the deeds executed between them became abrogated. Although their agreement of separation may in part have been rescinded, in that they resumed the marital relation, the evidence fails to disclose that there was any return of all the other property involved in the agreement, or any act on the part of either reconveying his or her interest in the land theretofore conveyed. Treating plaintiff as the owner of the title to the north 80 acres of land,

for possession of which he sues, and his wife as the owner of the south 80 acres conveyed to her by his deed of 1905, the erroneous conclusion of law of the trial court above mentioned does not require a reversal of the cause. This is not an action brought by plaintiff to compel his wife and other members of his family to permit him to share and enjoy jointly with them the benefits of the homestead of the family, but he seeks to exclude them entirely from the possession and enjoyment of one half of said homestead. The law of this state does not reserve the homestead to the head of the family. By § 1, art. 12, of the Constitution, it is provided: "The homestead of any family in this state, not within any city, town, or village, shall consist of not more than 160 acres of land, which may be in one or more parcels, to be selected by the owner." And § 3346, Comp. Laws 1909, provides: "The following property shall be reserved to every family residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife." Under these provisions, it seems to us clear that the homestead of the family may consist of more than one tract of land, and may be owned either by the husband or by the wife, or by both jointly, or one tract be owned by one and another tract owned by the other, so long as the aggregate number of acres occupied as the home shall not exceed 160 acres. The benefit of the homestead exemption was intended by these provisions to be vouchsafed, not to the head of the family, but to the entire family, without regard to whether the husband or the wife is the owner of the title. When plaintiff returned to his home, tore down the partition fence between the land that he had deeded to his wife, and that she had deeded to him, and the family proceeded to occupy the entire tract as their home and to cultivate the same, it became the homestead of the family; and the right of the family therein cannot be destroyed by plaintiff's abandonment of his family. The authorities are numerous to the effect that the abandoned wife may claim the homestead exemptions; and that a husband cannot, by absenting himself from his family, disintegrate the family, or change the relation existing between the remaining members. *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73; *McDannell v. Ragdale*, 71 Tex. 23, 10 Am. St. Rep. 729, 8 S. W. 625; *Grace v. Grace*, 96 Minn. 294, 4 L.R.A. (N.S.) 786, 113 Am. St. Rep. 625, 104 N.

W. 969, 6 Ann. Cas. 952; *Lynn v. Sentel*, 183 Ill. 383, 75 Am. St. Rep. 110, 55 N. E. 838; *Roco v. Green*, 50 Tex. 483.

To hold that a husband who deserts his wife and minor children, and refuses to them the care and support that the law imposes upon him, may, by such violation of his duties, become entitled to the exclusive possession of the family homestead, or any part thereof, would be to turn his wrong into a profit, which the law will not do. There can be no doubt that so long as he continues a member of the family and discharges his duty toward them, he may be permitted to occupy and enjoy jointly the benefits of the homestead with the members of his family; but the mere fact that he was the head of the family does not give him any superior rights therein, when he himself seeks to sever the family relation by desertion, and lives apart from them. In *Ehrck v. Ehrck*, 106 Iowa, 614, 68 Am. St. Rep. 330, 76 N. W. 793, a wife chose to live apart from her husband. The family homestead had been set aside out of property owned by her. The court held that, so long as she chose to live apart from her husband, the husband had full right to live upon and cultivate the homestead; and that the wife was without power to set aside the selection of the homestead and restrain her husband from occupying and using the same. See also *Grace v. Grace*, 96 Minn. 294, 4 L.R.A.(N.S.) 786, 113 Am. St. Rep. 625, 104 N. W. 969, 6 Ann. Cas. 952.

From the foregoing views, it follows that the judgment of the trial court should be affirmed.

All the Justices concur, except Williams, J., not participating.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Plff. in
Err.,

v.

JOHN A. JONES, Admr., etc., of Herman
Winters, Deceased.

(113 C. C. A. 55, 192 Fed. 769.)

Master and servant — low tunnel over
railroad — liability for injury.

A railroad company which maintains a

Note. — *Liability of railroad to trainmen injured by overhead structure.*

Bridges — maintenance of low bridges as
negligence.

In a few cases the broad general principle has been laid down that no negligence can
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tunnel with the roof lower in the middle than at the ends is liable for the death of a brakeman who, without knowledge of the danger, is killed by coming in contact with the roof while he is on top of the car, where his duties require him to be.

(January 3, 1912.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. **Affirmed.**

Statement by Warrington, Circuit Judge:

This action was brought by Jones, as administrator, to recover damages for the alleged negligent killing of Winters while in the employ of the railway company as brakeman. The negligence charged in the first count of the declaration is in substance that the railway company maintained certain tunnels on its road, which were so low and in such unsafe and dangerous condition that deceased, on the night of October 8, 1907, while riding on one of the cars of a freight train through one of these tunnels, was, without fault on his part, and through this alleged negligence of defendant, struck and killed. The case was submitted to a jury on this count, under pleas of not guilty and contributory negligence, and a verdict for \$5,500 was rendered in favor of the administrator.

The freight train in question was running southwardly from Pine Knot, Kentucky, to Oakdale, Tennessee. The portion of the road in which the tunnels mentioned were maintained is located in a mountainous district of Morgan county of the latter state; and the tunnels are numbered 22, 23, and 24, counting from north to south. The tunnel in which the deceased was struck is No. 23, and the distances between its north and south ends respectively and the other tunnels are each about one-half mile. No person saw the deceased at the time of the injury. He was last seen with his lantern on top of the train at a point several hundred feet back of the locomotive, as the train was leaving Lancing. It was proper for him to be on or to pass along the top of the train, and it was necessary for him to be there when communicating signals to the engineer. The train comprised about

be imputed to a railroad company because its bridges are not high enough to allow a person to pass under them standing upright on the top of the cars. *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23, 29 Am. Rep. 208; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, 15 Am. Neg. Cas.

fifty cars and was running at a rate variously estimated from 25 to 40 miles an hour. Winters's body was found the next day about 200 feet north of tunnel 24 on the east side of the track and about 2 feet from the ends of the ties, the track at that place running north and south. There was a large gash over his right eye and extending along the side of the head. Signs of blood were found on a piece of wood lying in the middle and on the east side of tunnel 23, and also from the south end of that tunnel along the east side of the track to a point near the mouth of tunnel 24.

Tunnel No. 23 is 800 feet long. Defendant's locomotive engineer testified that the track within the tunnel "has two curves, or what is called a reverse curve, and the

second curve commenced about middle ways. I judge of the curve in his tunnel by riding my engine through it." The tunnel was cut through solid sandstone, and it has the original rock sides and roof. The surface of the roof is irregular and generally higher along the center line of the track, but with less slope on the west side than on the east side. At the time of the Winters's injury a portion of the roof near the middle of the length of the tunnel, and extending over and across the track, was 15 inches lower than it was at the ends of the tunnel, and lower than were any of the other portions of the roof.

There was not room between the sides of the tunnel and the sides of an ordinary box car for a man to climb up or down the side

361; *Lake Shore & M. S. R. Co. v. Shook*, 16 Ohio C. C. 665, 9 Ohio C. D. 9; *Erie R. Co. v. McCormick*, 69 Ohio St. 45, 68 N. E. 571, 15 Am. Neg. Rep. 162.

In the absence of a statute requiring it, and of evidence showing that it is usual, a railroad company is not required to construct its bridges so as to permit one to stand upon them in safety while a train is passing. *Erie R. Co. v. McCormick*, supra.

The maintenance of a structure across a railroad, of height insufficient to allow a brakeman to stand on top of the freight cars, is not *per se* illegal. *Neff v. New York C. & H. R. R. Co.* 80 Hun, 394, 30 N. Y. Supp. 323.

In *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, 15 Am. Neg. Cas. 361, it was held that it could not be said that there was negligence in constructing a bridge so low that a conductor or brakeman could not pass under it in safety on the top of a high car, where his duty required him sometimes to be, when the proof shows that employees of the company and the injured employee among them every day passed under the bridge safely by observing the simple and easy precaution of stooping or sitting down while passing under the bridge.

In *Lake Shore & M. S. R. Co. v. Shook*, 16 Ohio C. C. 665, 9 Ohio C. D. 9, the court held that it was not the duty of the railroad company to measure the distance between the tops of its cars and the bottom of overhead bridges, so as to ascertain whether or not its employees could, while in the pursuance of their duties, pass under such bridges on the tops of cars.

A railroad company cannot be held guilty of actionable negligence in maintaining low bridges over its tracks, where the bridges were built at the height prescribed by the proper city authorities, and the company had warned the employees of the danger thereof, and had constructed telltales at proper points before reaching the bridges. *Myers v. Chicago, St. P. M. & O. R. Co.* 37 C. C. A. 137, 95 Fed. 406.

On the other hand, the great majority of cases hold that it is *prima facie* negli-

gence on the part of railroad companies to maintain bridges so low that trainmen, in pursuit of their duties on the top of the cars, are in danger of being struck by them.

Thus, in *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627, the court said: "It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employee or servant can do and perform all the labors and duties required of him with reasonable safety." This was quoted and approved in *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584, 14 Am. Neg. Cas. 488.

So, in *Gusman v. Caffery Cent. Refinery & R. Co.* 49 La. Ann. 1265, 22 So. 742, the court said: "It is rare that abstract propositions of law are so fixed and absolute as not to be modified or controlled by the special facts of the cases to which they are sought to be applied. While defendants' proposition that 'it is not negligence in a railroad company to construct or permit to be constructed overhanging bridges, etc., over its tracks, so low as not to permit a brakeman to stand upright on the top of the box car,' might be true in some special case under exceptional circumstances, it is certainly not true as a general proposition. On the other hand, were it true that, if a brakeman knew or was presumed to know of the existence of such a construction, he would be held, as a general rule, to have assumed the risk of injury therefrom, it is not true that the mere fact of such knowledge carries with it necessarily and on all occasions, and under all circumstances, the cutting off of remedy for injuries received by him from such construction."

"It must be regarded as the settled law of this state that the maintenance of a bridge such as the one in question, so low as to make it unsafe for the trainmen to perform the duties required of them, is *prima facie* negligence, and where injury results to an employee from such cause, the company is held liable, unless the injured employee is chargeable with contributory

of the car; nor was there room for him to sit on either of the edges of the car roof. There was not sufficient clearance between the running board of a box car and the tunnel roof to stand. There is conflict in the testimony as to the distance between the lowest portion of the protruding ridge of the tunnel roof, before described, and the running board of a box car of average height, and also between this portion of the tunnel roof and the top of the head of a man of ordinary height when sitting on the running board; but there is probably a clearance of not more than 10 inches between the bottom of this low part of the roof and the top of the head of a man of the height of Winters while sitting upright on the running board. The testimony does

not show the height of the car, or even the kind of car, on which Winters was riding at the time of the injury, but there is testimony showing that box cars vary in height.

Testimony was introduced without objection tending to show that before Winters was employed he signed a paper (which, with the station containing it, had been destroyed by fire) in which he stated that he knew the tunnels on the line were "too low to clear a man standing on a box car or sitting on the edge thereof," and also that there is not room in the tunnels safely "to climb up or down the side of a box car, while trains are in motion;" and further tending to show that before he entered upon his duties he was required "to learn the

negligence, or with the assumption of the risks of such danger." *Atchison, T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010.

And in *Louisville, N. A. & C. R. Co. v. Wright*, supra, it was said that there could be no sufficient reason for holding that, while the railroad company must exercise reasonable care to provide a safe roadbed and bridges below, it may abandon to a large extent all care as to overhead bridges.

So, in *Atchison, T. & S. F. R. Co. v. Love*, 57 Kan. 36, 45 Pac. 59, the court said that it was not prepared to say that a railroad company was not guilty of very gross negligence in continuing to maintain for many years a low bridge over which it operated trains with some cars so high that a brakeman could not stand upon them and pass through the bridge in safety.

And in *Cincinnati, N. O. & T. P. R. Co. v. Sampson*, 97 Ky. 65, 30 S. W. 12, the court rejected the contention of the railroad company that, as the bridge had been constructed for many years and no employee had been injured or killed by reason of its construction, it must be held to be a reasonably safe structure for the employees. The court said that they could not adopt this view of counsel, but on the contrary it was plain that the overhead structure was in no such condition as enabled the injured employee to discharge the duty he owed the company, and at the same time, however careful, to protect himself from the danger impending by reason of the unsafe condition of the bridge.

An instruction that it is not negligent for a railroad company to maintain a bridge having overhead beams too low for one safely to stand upon the top of a car when passing under them, unless the duties of the employees call them to that place of danger, is misleading and questionable. *Louisville & N. R. Co. v. Thomas*, 87 Miss. 600, 40 So. 257.

If a railroad company fails to show its right to maintain a highway bridge over its road at an elevation so low that a brakeman on top of the cars cannot stand straight while passing under it, by which such brakeman is injured, it is prima facie guilty of

negligence. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277, second appeal, 91 Ala. 112, 24 Am. St. Rep. 863, 8 So. 371.

When, in crossing a street or highway, it becomes necessary to span it with a bridge, it is the duty of the railroad company to place the structure, if reasonably practicable, at such an elevation that trains with their customary employees can pass under it unharmed; but the bridge may extend below the line of absolute safety where such elevation is impossible from natural hindrance, or would greatly incommode the public or unduly increase the expense; in no case, however, is it permissible so to place the bridge that brakemen on top of the train in discharge of their duty cannot avoid danger by bending or stooping, since such a bridge is gross negligence, and *per se* a nuisance. *Ibid*.

It is error to sustain a demurrer to a complaint where the latter was faultless in form, and charged that the employee was struck and thrown from his train by an overhead bridge which he could not see because his back was turned toward the bridge, and his mind and body actively engaged in an effort to apply the brakes and stop the train before it reached the bridge, and that he could and would have done so, had the brakes not been defective and insufficient, and that he was ignorant of the defective condition of the brakes. *Beard v. Chesapeake & O. R. Co.* 90 Va. 351, 18 S. E. 559.

So, also, in the following cases it was held to be prima facie negligence for a railroad company to maintain a bridge so low that employees are in danger of being struck by it while in the performance of their duties on the top of passing cars:

Chicago & A. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381; *Coles v. Union Terminal R. Co.* 124 Iowa, 48, 99 N. W. 109; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146, 15 Am. Neg. Cas. 60; *Louisville & N. R. Co. v. Cooley*, 20 Ky. L. Rep. 1372, 49 S. W. 339, 5 Am. Neg. Rep. 600; *Redrick v. Southern R. Co.* 136 N. C. 510, 48 S. E. 830; *Norfolk & W.*

road," and have "the signatures of several conductors showing he had made a proper number of trips over the road;" and thereupon a statement was made out showing that he had passed a satisfactory examination. Winters was twenty-two years of age, and had been in the employ of the company about eight days prior to his death.

Argued before Warrington, Knappen, and Denison, Circuit Judges.

Mr. Edward Colston, with Mr. T. A. Wright, for plaintiff in error:

If plaintiff was notified previously to employment that the tunnels were of such

nature and character that he could not be on a car while passing through a tunnel, and, in violation of such knowledge, he should attempt to ride through on a car, and was injured, the defendant would not be liable for such injury.

Hughes v. Cincinnati, N. O. & T. P. R. Co. 91 Ky. 528, 16 S. W. 275; *Haffner v. Chesapeake & O. R. Co.* 96 Va. 528, 31 S. E. 899; *Johnson v. Boston & M. R. Co.* 78 Vt. 344, 4 L.R.A.(N.S.) 856, 62 Atl. 1021, 20 Am. Neg. Rep. 218; *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99; *Jones v. Ft. Worth & D. C. R. Co.* 47 Tex. Civ. App. 596, 105 S.

R. Co. v. Marpole, 97 Va. 594, 34 S. E. 462, 7 Am. Neg. Rep. 171; *Chesapeake & O. R. Co. v. Rowsey*, 108 Va. 632, 62 S. E. 363; *King v. Seaboard Air Line R. Co.* 1 Ga. App. 88, 58 S. E. 252.

Whether it is negligence for a railroad company to maintain a bridge having overhead tie beams too low to admit of the safe passage of a brakeman who, in the discharge of his appropriate duties, stands on the running board of a furniture car, which is higher than the ordinary box cars, when no warning of the dangerous character of the bridge was given by telltales or otherwise, is a question of fact for the jury. *Northern P. R. Co. v. Mortenson*, 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530.

In *Dukes v. Eastern Distilling Co.* 51 Hun, 605, 4 N. Y. Supp. 562, it was held that a manufacturing company who maintained a bridge over railroad tracks too low to clear a brakeman on a train passing under it was liable for injuries to a newly employed brakeman, who, just as the train was approaching the bridge, was called by the engineer's whistle to set the brakes on the cars.

Some courts note the fact that the danger of injury from overhead structures is increased where the trainmen on ordinary cars can pass through safely, but there are some cars in the train too high to allow a safe passage to employees on them.

Thus, if the ordinary cars are such that employees may stand upon the top of them without danger in passing under a railroad bridge, and if the company introduced into its train a car higher than its ordinary cars, and gave no warning to its employees of the condition of such car, then the jury may infer that the company was negligent therein because of the increased hazard and danger to its employees. *Stirk v. Central R. & Bkg. Co.* 79 Ga. 495, 5 S. E. 105.

And in *Louisville & N. R. Co. v. Tucker*, 23 Ky. L. Rep. 1929, 65 S. W. 453, it was held that when cars were built larger than could pass under overhead bridges in safety, it was the duty of the railroad company to raise the bridges.

—master's duty to warn—telltales, etc.

In a few cases the fact that the railroad company had failed to give any warning is 47 L.R.A.(N.S.)

adverted to as one of the elements of the company's negligence in the maintenance of a low bridge.

Thus, in *Chicago & A. R. Co. v. Matthews*, 48 Ill. App. 361, affirmed in 153 Ill. 268, 38 N. E. 559, the court said: "If the master so arranged matters, by allowing a viaduct at a point where the brakeman was required to be on top of the train, and by admitting into the train a car too high to pass safely with a brakeman standing upon it, and by providing no light or other warning, that it became necessary for the brakeman to incur some risk in performing his duty, and if the brakeman in this seeming conflict between his duty and his safety used reasonable care and judgment, exercising such caution as a reasonably prudent man would, ordinarily, under like circumstances, then the master ought to compensate him for the injury."

So, a railroad company is liable for maintaining a highway bridge over its track at an insufficient height to enable its brakemen to perform their labors and discharge their duties without great danger and hazard to the life and personal safety of such brakemen, where it makes no effort to inform the brakeman of the danger thereof. *Baltimore, O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627.

And in some cases it has been held to be the master's absolute duty to give warning of the danger, and a failure so to do is negligence.

Thus, it is the duty of a railroad company to inform its trainmen of the danger of low bridges of which the trainmen are unaware. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277, second appeal, 91 Ala. 112, 24 Am. St. Rep. 863, 8 So. 371.

And in *Chicago, M. & St. P. R. Co. v. Carpenter*, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, 7 Am. Neg. Cas. 486, the court said: "The weight of judicial opinion, as well as of sound reason, is in favor of the view that railway companies are under an obligation to all persons who have a right to be on the top of their trains in the discharge of any duty, to so construct their overhead bridges or other overhanging structures adjacent to their tracks that they will not expose such persons to unnecessary risks, or

W. 1007; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 276, 37 C. C. A. 56, 95 Fed. 244; *Lamb v. Union R. Co.* 195 N. Y. 260, 88 N. E. 371; *Van Norman v. Modern Brotherhood*, 143 Iowa, 536, 121 N. W. 1080; *Chicago v. Carlin*, 141 Ill. App. 118; *Emrich Furniture Co. v. Byrnes*, 44 Ind. App. 341, 87 N. E. 1042; *Lucas v. International Paper Co.* 131 App. Div. 368, 115 N. Y. Supp. 814; *McDonnell v. Metropolitan Bridge & Constr. Co.* 131 App. Div. 301, 115 N. Y. Supp. 865; *Coughlan v. Philadelphia, B. & W. R. Co.* 6 Penn. (Del.) 242, 67 Atl. 148; *St. Louis & S. F. R. Co. v. Hill*, 79 Ark. 76, 94 S. W.

914; *Minahan v. Grand Trunk Western R. Co.* 70 C. C. A. 463, 138 Fed. 37; *Virginia & S. W. R. Co. v. Hawk*, 87 C. C. A. 300, 160 Fed. 348; *Nashville, C. & St. L. R. Co. v. Hayes*, 117 Tenn. 680, 99 S. W. 362.

Mr. George Hoadly also for plaintiff in error.

Messrs. John B. Daniel and John M. Davis, for defendant in error:

If there is a low bridge or low tunnel or other defect in the road, either in the track or cars, or so near the track or cars as to strike an employee in the discharge of his duties, the company is liable for such damages as the employee may sustain by rea-

son to perils that can easily and without any great outlay be avoided. If, for any reason, structures of the kind last mentioned are maintained, which do expose persons who have a right to be on the top of moving freight trains to unusual risks (such as the liability to be knocked off), then we think that the exercise of ordinary care requires of a company which maintains such a structure to give some warning, either verbally or by whip lashes, to all of those persons who, in the discharge of their duties, are liable to sustain injury in consequence of such structures."

Where the railroad company knew of the danger of a low bridge, and the injured employee did not, and the company failed to instruct in respect to the bridge, there is no error in refusing a nonsuit. *Altee v. South Carolina R. Co.* 21 S. C. 550.

A railroad company is negligent in maintaining a bridge over a railroad so low as not to clear a tall man standing on top of certain cars which compose part of its train, without maintaining a sufficient system of telltales or warning. *West v. Chicago, B. & Q. R. Co.* 103 C. C. A. 293, 179 Fed. 801.

A mere printed notice has been held to be insufficient as a warning of the danger incurred from low bridges.

Thus, a railroad company cannot avoid liability for negligence in maintaining a low bridge over its railroad tracks by printing a notice thereof in a time-table. *Ibid.*

And the delivery to a brakeman when he is first employed by the company, of a printed book of rules informing him that the bridges may be dangerous or are dangerous to pass under standing erect, is not, as a matter of law, a sufficient warning for the balance of his life, to place the risk upon him, if he should, under any stress of circumstances, forget the warning and be injured by the dangerous structure. *Gulf, C. & S. F. R. Co. v. Knox*, 25 Tex. Civ. App. 450, 61 S. W. 969.

The most common form of warning is by maintaining "telltales" or "whip lashes" at such a height above the rails as to strike the trainmen on the cars, and thus indicate to them the nearness of the bridge.

In *Central of Georgia R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424, it was held that, 47 L.R.A. (N.S.)

while it is true that the court cannot affirm, as a matter of law, that the failure to place whipping straps on a bridge is negligent, yet, on the other hand, the court could not affirm, as a matter of law, that it was not negligent to fail so to do.

If the company undertakes to maintain telltales, it is guilty of negligence in failing to keep them in proper working condition.

Thus in *Harrison v. New York C. & H. R. Co.* 127 App. Div. 804, 111 N. Y. Supp. 812, it was held that a railroad company could be found negligent in permitting, for a period of several months, its telltales to be out of order, so that they would not give the requisite notice. The court said: "The telltales, with several strands gone, are a snare, instead of a protection, to the brakeman on the running board. If in condition, so that a man on top of the car comes in contact with them, he has distinct warning of the nearness of the bridge. He knows that this judicious provision by the defendant is in order that he may be apprised of the proximity of the bridge, and naturally he relies upon it. If the defendant allows this signal to become defective, so that it fails to give the warning intended, it is far worse than if none was there at all; for in that event the brakeman would be expected to be alert, and have the location of the bridge fixed in his mind as a danger and menace to be anticipated and guarded against, instead of depending upon telltales, which he has a right to assume are in proper condition."

So, in *McGarrity v. New York, N. H. & H. R. Co.* 25 R. I. 269, 55 Atl. 718, it was held that it was the duty of a railroad company to keep telltales in order, and the negligence of any servant charged with that duty was the negligence of the defendant.

And it is not error to refuse a nonsuit where the evidence shows that a bridge is so low that a man could not stand erect on the top of an ordinary box car and pass under it in safety, and that the company failed to keep in proper condition and repair telltales which had been erected on either side of the bridge. *Savannah, F. & W. R. Co. v. Day*, 91 Ga. 676, 17 S. E. 959.

A railroad company is liable for injuries caused to a brakeman by being struck by an overhead bridge, where the telltales main-

son thereof, where assumption of risk or contributory negligence does not affirmatively appear.

Choctaw, O. & G. R. Co. v. McDade, 50 C. C. A. 591, 112 Fed. 888, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Texas & P. R. Co. v. Swearingen, 196 U. S. 62, 49 L. ed. 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Chesapeake & O. R. Co. v. Cowley, 92 C. C. A. 201, 166 Fed. 283; Norfolk & W. R. Co. v. Beckett, 90 C. C. A. 25, 163 Fed. 479; Kane v. Northern C. R. Co. 128 U. S. 95, 32 L. ed. 341, 9 Sup. Ct. Rep. 16; Mexican C. R. Co. v. Eckman, 42 C. C. A. 344, 102 Fed. 274; West v. Chicago, B. & Q. R. Co. 103 C. C. A. 293, 179 Fed. 801; Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272; Baltimore & O. & C. R. Co. v. Rowan,

104 Ind. 88, 3 N. E. 627; St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 704, 1 Am. St. Rep. 266, 16 Pac. 146, 15 Am. Neg. Cas. 60; Cincinnati, N. O. & T. P. R. Co. v. Sampson, 97 Ky. 65, 30 S. W. 12; Louisville & N. R. Co. v. Cooley, 20 Ky. L. Rep. 1372, 49 S. W. 339, 5 Am. Neg. Rep. 600; Shearm. & Redf. Neg. 4th ed. §§ 178, 199, 200; Beach, Contrib. Neg. § 134; Wallace v. Central Vermont R. Co. 138 N. Y. 304, 33 N. E. 1069; Dorsey v. Phillips & C. Constr. Co. 42 Wis. 598; Hunter v. New York, O. & W. R. Co. 116 N. Y. 615, 6 L.R.A. 246, 23 N. E. 9.

Warrington, Circuit Judge, delivered the opinion of the court:

At the close of the evidence offered by the administrator, and again at the close of all

tained by it were not in order so as to give him warning upon approaching the bridge. Hines v. New York C. & H. R. R. Co. 78 Hun, 239, 28 N. Y. Supp. 829, affirmed in 149 N. Y. 569, 43 N. E. 987.

A railroad company is guilty of negligence in maintaining telltales as a warning against a low bridge, which are insufficient to give such warning. Whitehead v. Wisconsin C. R. Co. 103 Minn. 13, 114 N. W. 254, 467. In this case, a platform covered the beam to which the telltales were attached and the telltales were frequently lodged on the platform.

Evidence merely that one strand of the telltale was missing, leaving an open space of about 12 inches, is not sufficient to carry the question of the negligence of the railroad company to the jury, where there is no evidence of the length of time that it had been missing, or evidence that the employee did in fact pass through such opening. Quinlan v. New York, N. H. & H. R. Co. 89 App. Div. 266, 85 N. Y. Supp. 814, affirmed in 181 N. Y. 523, 73 N. E. 1130.

The fact that the telltales erected by a railroad company were defective, so that a brakeman on top of a train might have passed through without being struck by them, does not render the railroad company liable for injury to a brakeman by being knocked off the train by the bridge, where, when he was last seen, he was walking toward the bridge and there was sufficient light for him to see the telltales and the bridge. Albring v. New York C. & H. R. R. Co. 46 App. Div. 460, 61 N. Y. Supp. 763, appeal dismissed in 167 N. Y. 529, 60 N. E. 1106.

In Deschenes v. Concord & M. R. Co. 69 N. H. 285, 46 Atl. 467, it was held that, in order that a trainman injured because of the alleged defects in a telltale should recover, it is necessary for him to prove the existence of such defect.

In a few cases the company has been held liable for the injuries received by an employee struck by a low bridge, where the telltales were of such a height as to permit a trainman on top of the cars to pass under without being struck.

Thus, in Hardy v. Boston & M. R. Co. 68 47 L.R.A. (N.S.)

N. H. 523, 41 Atl. 179, 16 Am. Neg. Cas. 617, it was held that the jury may find that telltales are not sufficient where the lower end thereof is higher than the underside of the bridge.

So, telltales are not a sufficient protection against a low bridge where a brakeman could pass under them upon an ordinary car without being struck by them. Taliaferro v. Vicksburg, S. & P. R. Co. 115 La. 443, 39 So. 437.

Again, negligence is imputable to the company where the telltales are of themselves a source of danger to the employees.

Thus, the maintenance of a telltale intended to warn brakemen of the approach of a train to a bridge which is unsafe for brakemen on a portion of the cars, which are of unusual height, is a breach of the railroad company's duty to provide safe appliances, although it is safe for cars of the ordinary height. Darling v. New York, P. & B. R. Co. 17 R. I. 708, 16 L.R.A. 643, 24 Atl. 462.

A railroad company is liable for injuries to a brakeman on a passing train, caused by a bridge guard consisting of a strip of wood extending over the track, which revolved easily on a pivot, and which, because of the breaking of a rope, stood diagonally, instead of at right angles, to the track, so that the end thereof came in contact with the brakeman. Warden v. Old Colony R. Co. 137 Mass. 204.

—effect of statutes.

In a few cases of the character under discussion, the decision is controlled by a statute.

Under the Alabama employers' liability act, it has been held that the branch of a tree which overhangs the railroad track so as to be dangerous to employees while riding on trains is a defect in the ways of the company. Southern R. Co. v. Bentley, 1 Ala. App. 359, 56 So. 249.

If the defendant railroad company permits another company to erect a bridge over its track, and continues to operate its trains under said bridge, a defect therein will con-

the evidence, the railway company moved for a directed verdict. The motions were overruled and exceptions reserved. The company then presented requests for special instructions to be given to the jury; these in large part were covered by the general charge, and the rest were either given or so far explained that they will not, in the view we take of the case, require specific attention.

The main reliance of the railway company is that under the testimony the injury is traceable as well to causes for which the company is not responsible as to any cause for which it is responsible; and, consequently, that the jury was permitted to conjecture and guess concerning the rights of the parties. If this could be sustained the

judgment would, under the settled authorities, have to be reversed. But when the general charge and all the pertinent facts adduced are considered, we think the claim relied on is not sustainable.

The general charge was full and also exceptionally clear in its analysis and submission of the issues of fact. Some of the causes pointed out for which the company would not be responsible must under the charge be eliminated; and a number of other ways mentioned by which injuries might have happened are inconsistent with the facts proved concerning the injury that did happen. Conceding the claim of the railway company that, in view of the contents of the paper which Winters is said to have signed before commencing his service as

stitute a defect in the ways of defendant. *Central of Georgia R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424.

A railroad company cannot disregard the effect of a statute requiring it to erect tell-tales before low bridges over railroads, by any form of contract which it requires employees to sign before securing employment. *Hailey v. Texas & P. R. Co.* 113 La. 533, 37 So. 131.

In *Chesapeake & O. R. Co. v. Rowsey*, 108 Va. 632, 62 S. E. 363, it was held that § 1492-D of the Code provided that if a railroad whose tracks pass under any bridge, tunnel, or other structure not sufficiently high to admit of the safe passage of cars upon the tracks with the servants and employees at their posts of duty on said cars, fails to maintain proper signals, the railroad company is liable in damages for the death or injury to any employee resulting from the insufficient height of the structures, and no contract, express or implied, and no plea of, or defense based upon, the contributory negligence of such servant, shall relieve the railroad company from liability.

—necessity of proving that bridge caused the accident.

Of course, in order to recover for injuries caused by a low bridge, it is necessary to show that the accident was in fact caused by the bridge. The following cases may be of interest upon this point, but no attempt has been made to exhaust the cases, since the question is not within the scope of the note:

Evidence to show that a brakeman's head might have just reached an overhead bridge, and that his body was found just beyond the bridge under which the train passed in rounding a curve at high speed, and that there was some dandruff in his hat, is not sufficient to sustain a verdict that he was killed by striking the bridge, rather than by falling from the train. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971.

Evidence that a brakeman apparently in good health was standing on the top 47 L.R.A. (N.S.)

of a car just before it passed under a bridge where the company did not maintain tell-tales as required by statute, and was thereafter found lying on the top of the same car, is not enough to show actionable negligence on the part of the railroad company in failing to maintain the tell-tales. *Fitzgerald v. New York C. & H. R. R. Co.* 154 N. Y. 263, 48 N. E. 514, 3 Am. Neg. Rep. 714.

Upon a second appeal (37 App. Div. 127, 55 N. Y. Supp. 1124) it was held that evidence that a brakeman was upon the top of a car shortly before a bridge 4 or 5 feet above the top of the car was reached, and that shortly after the bridge was passed he was discovered lying on the car with a wound about the size of a quarter upon the back of his head, and that some blood was found on the car, was sufficient to take the case to the jury.

—assumption of risk.

The proposition is asserted in some cases that the employee does not assume, by the contract of employment, the risk of injury from a low bridge, as such a risk is not one of the ordinary risks of the employment,—this being but another form of saying that the maintenance of such a bridge is *prima facie* negligence.

Thus, in *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271, 51 S. W. 558, the court rejected without hesitation the contention that a brakeman is held in law absolutely to have assumed the risk in passing under a low bridge, and that therefore a railroad company was not liable for failure to warn him of such danger.

And in *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584, 14 Am. Neg. Cas. 488, it was held that a trainman did not, by his contract of service, assume the risk of overhead structures which were so low that he could not do his work on top of the cars with reasonable safety.

So, in *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, the court said: "We do not think the danger of an overhead bridge

brakeman, he knew that the tunnel was too low to clear a man when either standing on a box car or sitting on the edge of its roof, still the charge was clearly in favor of the railway company on both of these points; and it cannot be assumed here that the jury violated the positive instructions of the court in these respects. This is true also of Winters's knowledge and the charge as to lack of room in the tunnels safely to climb up or down either side of a box car, while going through the tunnel. And if Winters was at the time of the injury attempting to climb up or down either end of a box car, his body could not have been dragged the distance indicated by the long line of bloodstains found on the east side of the track, without mutilation that would

necessarily have revealed the fact; and nothing to indicate anything of that kind was found on the body.

We are not unmindful of the insistence of learned counsel for the company that Winters was struck in the tunnel while sitting on the east edge of the roof of a box car; and that this is consistent with the line of bloodstains found, and also with the fact that the body was not jostled off the roof until the car reached the place where the body was discovered. This not only assumes that the jury found in the face of the charge of the court in this behalf, but also that the conductor of the train was in error when he said: "A man cannot hold his position when the train is running around curves sitting on the side

maintained by a railroad company, so low that it may come in contact with the heads of its brakemen while engaged in their duties on top of its cars as they pass under such bridge, is one of the dangers incident to such service. There are a thousand and one dangers incident to the service of all railroad operative employees that ordinary prudence cannot be expected to guard against, and for which the master is not liable, and the risks of which are assumed by the employee, but the maintenance of an overhead bridge so low as to fracture the skulls and endanger the lives of brakemen is not one of them."

A railroad company's negligence in building a bridge so low as not to clear employees necessarily on the top of moving trains is not a hazard usually or necessarily attendant upon the business, nor one which the servant in legal contemplation is presumed to take upon himself by the act of entering the employment. *West v. Chicago, B. & Q. R. Co.* 103 C. C. A. 293, 179 Fed. 801.

On the other hand, the employee who, with full knowledge and appreciation of the danger, gained from experience or otherwise, remains in the employment, is generally held to assume the risk thereof.

Thus, in *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. Rep. 459, it was held that if the deceased brakeman knew of the exposure to danger in serving as brakeman for the defendant upon a train having to pass a footbridge insufficiently high to permit him to pass under it while standing at full height on the top of a box car, and with such knowledge consented to and did remain in the service of the defendant as brakeman, and was thereafter killed by coming in contact with said footbridge, then there can be no recovery from the defendant for any negligence in the construction of the footbridge.

And in *Owen v. New York C. R. Co.* 1 Lans. 108, it was held that where a brakeman had full knowledge of the condition and height of a bridge which had been maintained by the railroad company for many years, he could not recover for injuries re-

ceived by coming in contact therewith, since he must be held to have assumed the risk.

So, in *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, 15 Am. Neg. Cas. 361, it was held that a conductor must be deemed to have assumed the risk of a low bridge where he had passed under it a great many times and was entirely familiar with the danger thereof.

Notwithstanding a brakeman is a minor, there can be no recovery for injury caused by an overhead bridge the danger of which he knew and appreciated. *Goff v. Norfolk & W. R. Co.* 36 Fed. 299.

A brakeman who remains for several years in the employ of the company, and knows the height of the bridges, will be held to have assumed the risk thereof. *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 520, 9 N. W. 364.

And in *Ryan v. Long Island R. Co.* 51 Hun, 607, 4 N. Y. Supp. 381, affirmed in 124 N. Y. 654, 27 N. E. 413, it was held that a brakeman who had passed certain bridges for three months, and clearly understood the situation, must be held to have assumed the risk of the absence of telltales, although the statute required them to be maintained.

So, also, in *Norfolk & W. R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462, 7 Am. Neg. Rep. 171, it was held error to give an instruction which permitted the jury to find for the plaintiff, although he knew the locality of the bridge which struck him, and knew that he could not pass under it in safety standing erect on top of the train, where, owing to the darkness, fog, or other natural or artificial causes, incident though they were to his employment, he did not know the precise locality of his train when he was struck, and did not see the bridge.

A brakeman knowing from the beginning of a trip that the engine drawing the train is leaking steam badly, and that all the engines on the road are in bad condition in this respect, assumes the risk of being choked by the steam in passing under a low bridge of which he knows, so that he cannot hold the company liable for injuries caused by raising his head to escape such steam while passing under the bridge. *Johnson v. Bos-*

or edge of the car, either in the tunnel or out of it."

It will be borne in mind that there is a reverse curve in this tunnel, and it may be added that the conductor thought that the train was "running 30 to 40 miles an hour." It cannot escape notice, however, that the circumstances considered by counsel pressing this claim led him to believe that Winters, at the time of the injury, was in fact on the roof of a box car.

The inquiry becomes pertinent, then, as to what part of the roof he in fact was occupying when he received the injury. Every part of a box car on which he could in our judgment have been, has been eliminated except the running board. He was not standing on the running board; and this brings us to the

point on which the decision must turn. Winters was not told or warned of the fact that any portion of the roof of any tunnel on the road, much less that any portion of the roof of tunnel No. 23, was lower than the roof was at the tunnel entrances; and yet, at the middle of tunnel No. 23 the portion of the roof over the track was 15 inches lower than it was at the north entrance. If Winters had been struck at the north entrance of the tunnel, it is hardly conceivable that the first appearance of bloodstains would have been found on the stick of wood near the middle of the tunnel, or that the continuous line of bloodstains found on the east side of the track would not have appeared before the south end of the tunnel was reached.

ton & M. R. Co. 78 Vt. 344, 4 L.R.A. (N.S.) 856, 62 Atl. 1021, 20 Am. Neg. Rep. 218.

There can be no recovery for injuries caused by a low bridge where the employee knew of the danger and had been warned against it, but notwithstanding he continued in the employment of the company. *Hollingsworth v. Chicago, I. & L. R. Co.* 160 Ind. 259, 65 N. E. 750.

But the servant cannot be held to have assumed the risk of a low bridge unless he does know of the bridge and appreciates the danger thereof.

Thus, in *Anderson v. Northern P. R. Co.* 34 Mont. 181, 85 Pac. 884, it was held that a brakeman was not required to carry a rule with him and measure the distance to the bridge from the platform of the car where he stood, and the mere fact that he may have noticed on the first trip which he made on this track, if he did so, that the bridge timbers were only about 8 inches above the top of the gondola car, is not sufficient to justify the court in saying that he should have appreciated the danger to himself in case he should attempt to ride upon the platform of the car while it was being drawn under the bridge.

It cannot be said as a matter of law that the danger from a slender bar forming part of a bridge, and crossing the track of a railroad at a height to permit a brakeman standing on some cars to pass in safety, while not on others, is one which is assumed by the brakeman. *New York, S. & W. R. Co. v. Marion*, 57 N. J. L. 94, 30 Atl. 316, 16 Am. Neg. Cas. 652.

A brakeman on his first trip over a railroad does not assume the risk of a low bridge of which he had no knowledge, and which was not guarded by telltales as the statute required. *Fitzgerald v. New York C. & H. R. R. Co.* 37 App. Div. 127, 65 N. Y. Supp. 1124. See also *Harrison v. New York, C. & H. R. R. Co.* 127 App. Div. 804, 111 N. Y. Supp. 812, modified on other points in 195 N. Y. 86, 87 N. E. 802.

A brakeman cannot be held chargeable with assumption of the risk in the absence of telltales, by the fact that a written notice to the effect that the telltales were down

was posted on a bulletin board, and that the matter was a frequent topic of conversation among the trainmen, where it was not shown by direct proof that the brakeman had knowledge either of the written notice or of the talk. *West v. Chicago, B. & Q. R. Co.* 103 C. C. A. 293, 179 Fed. 801.

An employee is not bound at his peril to keep his consciousness continually charged with memories of the location and relation of low bridges negligently maintained by the railroad company, and his engrossment in his duties at the time may free him from the charge of an assumption of risk. *Ibid.*

The fact that a railroad company maintained telltales at the approach of a low bridge will not, as a matter of law, bar a recovery for injuries to a trackman who was riding home from his work on the top of a car, without proof that they were observed by the deceased, or that he appreciated by reason thereof the fact that the train was nearing the bridge. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 213 Ill. 545, 72 N. E. 1133, 17 Am. Neg. Rep. 481.

A brakeman does not assume the risk of an unsafe telltale intended to give warning of approach to a bridge, which should not be in itself a source of any danger, especially where it is dangerous only to brakemen on cars of more than ordinary height. *Darling v. New York, P. & B. R. Co.* 17 R. I. 708, 16 L.R.A. 643, 24 Atl. 462.

—contributory negligence.

The failure of the employee to exercise due care at the time of the accident will in all cases defeat a recovery.

Thus, in *Norfolk & W. R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462, 7 Am. Neg. Rep. 171, it was laid down as a general proposition that, although it is negligence for a railroad company to operate its road with an overhead bridge too low for its employees whose duties are upon the cars to pass under them while standing on the cars in the discharge of their duties, yet, if the employee knows or ought to know of the dangers of the bridge, and fails to use ordinary care to protect himself, in consequence

The rational inference is that Winters's head struck the interior low portion of the tunnel roof. The first appearance of blood was discovered on the stick of wood found on the east side of the track at that place; and the fact that no sign of blood was found between that point and the end of the tunnel reasonably tended to show that the blood found on the stick of wood came from a spurt of blood caused by the stroke, and that the rest trickled over the roof and finally fell to the ground as the car passed out of the tunnel. Since we must assume, for reasons before stated, that at the time he was struck he was not standing, the question whether he could have been struck while sitting becomes immaterial. The fact remains that he could, consistently with the

warning he had received, have kept his body in some position (other than a sitting posture) similar to one that he might well have taken when he safely passed into the tunnel, and still have been struck by the protruding portion of the tunnel roof. Testimony tending to show that other employees did not even sit in an upright position on the running board, when passing through this tunnel, cannot affect the right of recovery respecting one who does not appear to have had any knowledge or means of knowing of the low portion of the roof in question. True, it is shown that Winters must have passed through this tunnel twice every twenty-four hours during his short service, and it is also to be inferred that he made trips over the road before he entered

of which he is injured, he is guilty of contributory negligence and cannot recover.

And it is reversible error to instruct the jury that the plaintiff was entitled to recover if the defendant railroad could have so constructed the bridge as to have prevented the injury complained of, even though the deceased failed to exercise ordinary care and prudence at the time that he was killed. *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. Rep. 459.

So, in *Lake Shore & M. S. R. Co. v. Shook*, 16 Ohio C. C. 665, 9 Ohio C. D. 9, it was held that it was negligence on the part of a brakeman not to ascertain whether or not he could pass under a structure which was plain before his eyes.

A brakeman must be charged with contributory negligence where it appeared that he had been instructed by his employer, at the time of the contract of service, as to the dangerous character of the service, and as to the danger in passing overhead structures without sitting down or stooping; that he had been especially warned of the danger of the particular bridge which struck him; that it was shown to him; that he had passed under it in broad daylight, which he could not have done without stooping; that after passing the bridge three times, he was again especially warned about it as he was about to pass under it, and that he failed to exercise the ordinary precaution required of stooping to pass under. *Clark v. Richmond & D. R. Co.* 78 Va. 709, 49 Am. Rep. 394.

So, in *Louisville & N. R. Co. v. Thomas*, 87 Miss. 600, 40 So. 257, the court approved an instruction to the effect that if the employee's duties did not require him to stand on top of the train, or even if the bridge was improperly constructed and too low for one safely to stand on the top of a train, if decedent was advised of this matter and negligently exposed himself, then there could be no recovery.

Where, at the time of the injury, the brakeman was sitting for his own convenience on the edge of a car, and was not upon the running board or at the brake, where he should have been, he was guilty of contributory negligence, when he knew of the dan-

ger of the bridge, and, had he been in a proper place, he would not have suffered injury. *Schlaff v. Louisville & N. R. Co.* 100 Ala. 377, 14 So. 105.

There could be no recovery where a brakeman stood upright on a car while going under a bridge, in violation of a rule of the company. *Texas & P. R. Co. v. Moore*, 8 Tex. Civ. App. 289, 27 S. W. 962.

In *Riley v. Connecticut River R. Co.* 135 Mass. 292, it was held that there could be no recovery where there was no evidence that the brakeman was in the exercise of due care.

There can be no recovery for injuries received by a brakeman who was struck by the stringer of a bridge under which he was passing on a car, where he had full knowledge of the bridge and had passed under it in safety many times, and on the occasion of the injury had stooped and passed in safety the first three stringers, but did not stoop for the fourth. *Chesapeake & O. R. Co. v. Hafner*, 90 Va. 621, 19 S. E. 166, second appeal, 96 Va. 528, 31 S. E. 899.

In *Murphy v. Boston & A. R. Co.* 167 Mass. 64, 44 N. E. 1087, it was held that due care on the part of a brakeman would require him to remain stooping after he had passed one bridge until he had passed another, where they were about 400 feet apart and the train was moving at the rate of 15 miles an hour, so that it would pass over the intervening distance in eighteen or twenty seconds.

The fact that the employee had knowledge of the danger, and was in a position to see the bridge and avert the danger, is the ground of some decisions holding the employee guilty of contributory negligence.

In an action to recover for injuries by being struck by an overhead bridge, it is error to refuse a nonsuit where the accident occurred in the daytime, the bridge was in plain sight, and the employee had passed daily under the bridge for over three weeks, and as he was approaching the bridge he turned his back and was going toward the rear of the car. *Williams v. Delaware, L. & W. R. Co.* 116 N. Y. 628, 22 N. E. 1117.

A brakeman is guilty of contributory neg-

into defendant's employ; but it is not shown whether he passed through it in the daytime, or that the low projection was visible during daylight. True, also, defendant maintains telltales at suitable distances from the tunnel entrances, but they served only as warning of approach to the tunnels; they were not calculated to give notice of any obstruction within the tunnel. Further, the car on which Winters was riding was not identified, and the fact appears that box cars vary in height. When these facts are considered, testimony showing distances between the running board and the low portion of the roof tend to confuse, rather than to show anything calculated to elucidate, the questions alike of defendant's negligence and Winters's assumption of risk

or his contributory negligence. The proofs were fatally lacking respecting the car or the height of the car on which Winters was riding. Hence, the question at last comes to this: Whether the defendant could maintain this tunnel roof with its central portion 15 inches lower than the roof is at the north entrance to the tunnel, and escape liability without showing that the person injured was either told of it, or was clearly chargeable with knowledge of it. In *Hunter v. New York, O. & W. R. Co.* 116 N. Y. 615, 619, 6 L.R.A. 246, 23 N. E. 9, 10, when speaking of an arch constructed within, but not extended to the ends of, a railroad tunnel, and of the warning that a telltale would give to an employee riding on top of a car, it was said: "The jury were

ligence where he passed under a low footbridge frequently for the space of two or three weeks, and knew the danger of coming in contact with it, and his attention had been called to the danger from the lowness of the footbridge, and with this knowledge he walked or stood erect on the box car and while standing or walking there was struck by the footbridge. *Rains v. St. Louis, I. M. & S. R. Co.* supra.

There can be no recovery for injuries to a brakeman caused by a low bridge, where the accident occurred in the daytime and the employee had been in the employment about three weeks, everyday during which time he had passed this bridge, and had been repeatedly warned to look out for this and other bridges, and, when last seen, just before reaching the bridge, he was sitting upon his brake facing it. *Devitt v. Pacific R. Co.* 50 Mo. 302, 16 Am. Neg. Cas. 451.

Where the plaintiff was perfectly familiar with the situation, and knew from the daily experience of five months that there was danger in standing on the running board even of the ordinary cars while passing under a low trestle, and knew that large cars had been in use to some extent for three months, and that they were much higher than the common cars, and must have known that he was on a large car at the time he was approaching the trestle, he was guilty of contributory negligence as a matter of law, and the trial court properly dismissed the complaint, notwithstanding any negligence that there might have been on the part of the defendant company. *Rock v. Retsoff Min. Co.* 40 N. Y. S. R. 556, 15 N. Y. Supp. 872.

A similar decision was reached in *Lynch v. New York, L. E. & W. R. Co.* 44 N. Y. S. R. 663, 18 N. Y. Supp. 417, where the facts were similar.

Wherever there is a conflict in the evidence or different conclusions may be drawn from the evidence, the court will not hold the employee guilty of negligence as a matter of law, but will send the case to the jury.

Thus, in *Atchison, T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010, the court 47 L.R.A. (N.S.)

said: "So far as the testimony goes, he was not informed of the danger when the high cars were introduced; no change of rules relating thereto was promulgated by the company; no warnings were given or signals placed on or near the bridge; he had no actual knowledge of the risk; and, as it is one which is not easily observed from the top of a moving train, the question of whether he was guilty of contributory negligence in not ascertaining by measurement or accurate observation whether he could pass safely under the overhead timbers of the bridge while standing erect on the furniture car is a question of fact, rather than of law, the determination of which is necessarily for the jury."

So, it cannot be said, as a matter of law, that a cattleman is guilty of contributory negligence in walking upon the top of a train of cars where he was simply following a custom of the cattlemen, and he had no knowledge of the bridge by which he was struck and injured. *Chicago, M. & St. P. R. Co. v. Carpenter*, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, 7 Am. Neg. Cas. 486.

And the fact that a track laborer, when struck by a bridge, was standing on top of a box car upon which he had been ordered to ride, cannot be held as a matter of law to have been negligence on his part, but raises a question for the jury. *Nelson v. Chesapeake & O. R. Co.* 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838.

Although a brakeman may know that it is dangerous to pass under a low bridge without lying on the car, he is not necessarily barred from recovery because he failed to measure the exact distance between the top of the car and the bridge with his eye, or did so and failed, after a reasonable effort, to get his body into an exact position to avoid a collision with the bridge. *Louisville & N. R. Co. v. Cooley*, 20 Ky. L. Rep. 1372, 49 S. W. 339, 5 Am. Neg. Rep. 600.

A conductor is not, as a matter of law, guilty of contributory negligence in sitting upon the side of the cupola of the caboose as the train enters a tunnel, where he had, while occupying the same position, passed through other tunnels in safety, and the

warranted in finding that the only notice that the plaintiff had of the existence of the arch was that received from the telltale. This was located about 200 feet west of the west entrance of the tunnel. It served as a warning of the approach to the tunnel, but it gave no notice of the obstruction within the tunnel. A person receiving its warning and noticing the height of the tunnel might naturally suppose that the height at the entrance would be maintained throughout its length, and if the height was at any point reduced, that notice of that fact would be given. Relying, therefore,

tunnel at the entrance is amply sufficient to clear him in that position, and he has no knowledge whatsoever that the tunnel does not carry throughout its length a height uniform with that at the entrance. *Mexican C. R. Co. v. Eckman*, 42 C. C. A. 344, 102 Fed. 274.

Whether a brakeman was guilty of contributory negligence in not ascertaining by measurement or accurate observation that he could not pass safely under the overhead beams of a bridge while standing on the running board of a furniture car, which is higher than the ordinary box car, is a question of fact for the jury. *Northern P. R. Co. v. Mortenson*, 11 C. C. A. 335, 27 U. S. App. 313, 63 Fed. 530.

In *Louisville & N. R. Co. v. Tucker*, 23 Ky. L. Rep. 1929, 65 S. W. 453, it was held that where it was a brakeman's duty to inspect the air brakes of cars, and such duty would call him onto the top of the cars, it will be presumed that he was injured while performing such duty, where there is no evidence that he was upon the cars for any purpose of his own.

The fact that a brakeman knew that the railroad company was required to erect telltales should be considered as bearing upon the question of his contributory negligence, where, as a matter of fact, the railroad company had not done so. *Wallace v. Central Vermont R. Co.* 138 N. Y. 302, 33 N. E. 1069.

In *Southern R. Co. v. Duvall*, 20 Ky. L. Rep. 1915, 60 S. W. 535, a judgment for the plaintiff in an action for injuries to a brakeman who had been knocked off a car by an overhead bridge was reversed upon the ground of contributory negligence. This opinion was, however, subsequently withdrawn, and the verdict for the plaintiff was sustained, but the reasons therefor were not given. 21 Ky. L. Rep. 1153, 64 S. W. 741.

—momentary forgetfulness; emergency.

Frequently the employee seeks to relieve himself from the charge of contributory negligence upon showing that, at the time of the injury, he was engrossed in his work and temporarily forgot the danger.

Thus, a brakeman cannot be held guilty of contributory negligence as a matter of law in failing to protect himself against a 47 L.R.A. (N.S.)

upon what would be apparent to his observation, he was exposed to a danger of which he had not notice or information."

While in that case the judgment below was reversed upon plaintiff's own testimony that he was "sitting down on the box car," and upon a matter of which a majority of the judges were willing to take judicial notice, still the court stated a rule of liability that is obviously sound; and it is applicable to an inference which seems to us rationally to dominate every other inference arising from the facts and circumstances proved here, namely, that Winters

bridge, where there was an open space in the telltales through which he might have passed, and he had duties to perform which would engross his attention, and where the smoke would to some measure obscure his vision. *Harrison v. New York C. & H. R. R. Co.* 127 App. Div. 804, 111 N. Y. Supp. 812.

So, in *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381, the court sustained an instruction to the effect that the law does not require of a brakeman that he should absolutely know all of the defects of construction, and all the obstructions, there may be along the line of the railroad, and that he should neglect the performance of his duties as a brakeman to be on the constant lookout for such obstructions, which may be dangerous. To the same effect, *Cleveland, C. C. & St. L. R. Co. v. Walter*, 147 Ill. 60, 35 N. E. 529, affirming 45 Ill. App. 642.

And the court cannot say that a brakeman is guilty of negligence as a matter of law where, upon a dark night, he was proceeding along the tops of the cars in the discharge of an immediate duty, and came in contact with an overhead structure negligently maintained by the railroad company. *West v. Chicago, B. & Q. R. Co.* 103 C. C. A. 293, 179 Fed. 801.

So, too, in *Whitehead v. Wisconsin C. R. Co.* 103 Minn. 13, 114 N. W. 254, 467, it was held that a trainman is not necessarily barred from recovering by reason of the fact that he momentarily forgot the danger of a low bridge, where the bridge was protected by telltales and the telltales had become so disarranged as not to give the requisite warning; and this is true notwithstanding he customarily stooped in passing the telltales so as to avoid being struck by them.

And in *Wallace v. Central Vermont R. Co.* 138 N. Y. 302, 33 N. E. 1069, reversing 63 Hun, 632, the court said: "It cannot be said that a brakeman is, as matter of law, careless, because he does not bear constantly in mind the precise location where the train is, and where every bridge is."

A brakeman recently engaged by the company, who was told to go on the rear of the train with a flag, ready to flag the rear end of the train, cannot be blamed for not knowing that he was about to come in contact with a bridge, where there was no warning

was struck by the protruding portion of the tunnel roof, when he was in a position not covered by any warning of danger from the tunnel that was ever given to him or that he could reasonably anticipate. It follows that the motions to direct a verdict were rightly overruled, and that the special instructions not given were properly refused.

Moreover, Judge Sanford reconsidered the entire subject when passing upon defendant's motion for a new trial, citing not alone the decision before alluded to, but many others which we think sustain the conclusions reached by him; and it is un-

necessary to pursue the subject for that reason. We may, however, add to his citations the cases of Toledo, St. L. & W. R. Co. v. Howe, 112 C. C. A. 262, 191 Fed. 776 (C. C. A. 6th C.); Marbury v. Illinois Cent. R. Co. 99 C. C. A. 483, 176 Fed. 9, at 15 bottom, and 16 (C. C. A. 6th C.); Chicago, M. & St. P. R. Co. v. Riley, 76 C. C. A. 107, 145 Fed. 137, 142, 7 Ann. Cas. 327 (C. C. A. 7th C.); Snyder v. New York C. & H. R. R. Co. 99 C. C. A. 620, 176 Fed. 346 (C. C. A. 2d C.)

The judgment below must be affirmed.

signal maintained. *Maber v. Boston & A. R. Co.* 158 Mass. 30, 32 N. E. 950.

But the mere fact that the injured employee was, at the time of his being struck by an overhead bridge, closely engaged in his work of cutting off cars, for the purpose of making a flying switch, is not sufficient to charge the railroad company with liability for the injury. *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23, 29 Am. Rep. 208.

And there can be no recovery for injuries caused to a trainman on top of a car, struck by the overhanging roof or awning of an elevator, where the employee had full knowledge of the danger thereof, and the accident was due to a momentary forgetfulness upon his part. *Clark v. St. Paul & S. C. R. Co.* 28 Minn. 128, 9 N. W. 581, 16 Am. Neg. Cas. 280.

As to contributory negligence in failing to remember dangerous conditions, see note to *Ergo v. Merced Falls Gas & Electric Co.* 41 L.R.A.(N.S.) 79.

Momentary forgetfulness of the danger from a low bridge is excused also upon the ground that the employee was confronted by an emergency.

Thus, the fact that the train started before the brakeman had released a brake, and he was obliged to act quickly so as to release it, will tend to exonerate him from the charge of contributory negligence in temporarily forgetting a low bridge. *Anderson v. Northern P. R. Co.* 34 Mont. 181, 85 Pac. 884.

And in *King v. Seaboard Air Line R. Co.* 1 Ga. App. 88, 58 S. E. 252, it was held that a brakeman is not necessarily guilty of contributory negligence as a matter of law, in forgetting the existence of a low bridge, where, upon the starting of the train, it was necessary for him to mount the cars and release the brakes in haste, to prevent injury to the wheels.

But in *Haffner v. Chesapeake & O. R. Co.* 96 Va. 528, 31 S. E. 899, it was held that the sounding of the whistle as a signal for the application of the brakes is not such an emergency as will free a brakeman from contributory negligence in forgetting the dangers from a low bridge under which he is passing.

In *Allen v. Boston & M. R. Co.* 69 N. H. 271, 39 Atl. 978, where it was held that there can be no recovery from a railroad 47 L.R.A.(N.S.)

company for injuries to a freight brakeman by coming in contact with an overhead bridge, where he was familiar with the service, and was aware of the existence of the bridge and of its dangerous character, and could have discovered that there were no telltales had he looked, the court called attention to the fact that he was merely performing his duty in the ordinary way, and his attention was not diverted by any sudden or unforeseen occurrence or condition.

—when knowledge of the danger of low bridges will be imputed to the servant.

As the defenses of assumption of risk and contributory negligence are based upon the knowledge of the servant of the danger causing the accident, it is of importance to know under what circumstances an employee will be deemed to have knowledge of the danger of a low bridge so as to be barred from recovery.

In many cases the fact that the employee had passed under the bridge frequently for a long period of time is held sufficient to charge him with knowledge thereof.

Thus, a brakeman who has been over a road for sixteen months must be deemed to know the danger from a low bridge. *Williamson v. Newport News & M. Valley Co.* 34 W. Va. 657, 12 L.R.A. 297, 26 Am. St. Rep. 927, 12 S. E. 824.

So, a brakeman who has been employed for seven months and has daily passed under the bridge must be held to have full knowledge of the danger thereof. *Carbine v. Bennington & R. R. Co.* 61 Vt. 348, 17 Atl. 491.

And an employee who has passed daily under a low bridge for nearly four months must be deemed to have knowledge of the danger thereof. *Schlaff v. Louisville & N. R. Co.* 100 Ala. 377, 14 So. 105.

So, too, a brakeman who has gone over a road twice a day for two months must be held to have knowledge of the location of the bridges and the dangers therefrom. *Brossman v. Lehigh Valley R. Co.* 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226.

And in *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 276, 37 Am. Rep. 684, it was held that where an employee had, for several months previous to the accident, been employed as a flagman on one of the trains of

the road, and had or ought to have had knowledge of the height of the bridges, the railroad company is not liable.

A brakeman who had been in the employ of a railroad company, for three months, and had passed a bridge daily, and must have stooped in order to have passed it safely, must be held to have waived the negligence of the company in maintaining such bridge. *Hooper v. Columbia & G. R. Co.* 21 S. C. 541, 53 Am. Rep. 691.

A brakeman who has passed under overhead bridges about fifty times must be deemed to have knowledge of the danger thereof, and to have assumed the risk. *Myers v. Chicago, St. P. M. & O. R. Co.* 37 C. C. A. 137, 95 Fed. 406.

A trainman who has gone under a low bridge nearly, if not quite, 120 times, and upon each occasion must have stooped in order to have passed under it in safety, must be deemed to have knowledge of the dangers thereof, and to be guilty of contributory negligence in failing to stoop upon approaching the bridge in broad open daylight. *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547.

If a brakeman has repeatedly passed over the road and under a bridge by which he was killed, for a considerable length of time, that fact bears upon his knowledge of the danger, and consequently upon the question of negligence. *Quinlan v. New York, N. H. & H. R. Co.* 89 App. Div. 266, 85 N. Y. Supp. 814, affirmed in 181 N. Y. 523, 73 N. E. 1130.

In *Derby v. Kentucky C. R. Co.* 9 Ky. L. Rep. 153, 4 S. W. 303, it was held that a conductor in charge of a train could not recover for injuries received in being struck by an overhead bridge while he was upon a car somewhat higher than the ordinary cars in use upon the road. This decision was placed upon the ground that the conductor must have known of the danger, since he himself was in control of the train. There was, however, nothing in the opinion to show that the conductor, although knowing of the bridge and of the high car, knew that there was danger of being struck by the bridge while on that car. There was no danger from ordinary cars, and the court expressly said that it did not mean to say that a conductor must stop and make a calculation by feet and inches before passing under a bridge. The decision seems very unjust, especially as the court expressly said that the railroad company was negligent.

On the other hand, it has been held that the mere fact that an employee had been under a bridge a considerable number of times is not sufficient to charge him with knowledge thereof, especially if there is evidence to show that he was not in a position carefully to observe the bridge and comprehend the danger.

Thus, the fact that a brakeman, for several months before the accident, passed under a bridge about twenty times a month, is not enough to show an appreciation of the danger, where it is not shown that he ever had

passed under it in the daytime, and there was no evidence that if he had passed under the bridge in the daytime, he was in a position to see and appreciate the danger, and there was no evidence that he had been actually told of the danger. *West v. Chicago, B. & Q. R. Co.* 103 C. C. A. 293, 179 Fed. 801.

So, in *Harrison v. New York C. & H. R. R. Co.* 127 App. Div. 804, 111 N. Y. Supp. 812, it was held that the fact that a brakeman had been under a bridge fifteen times before the day he was killed, and that he knew the bridge was there, is not conclusive upon the question of contributory negligence, where the defendant railroad company maintained a telltale as a warning of the approach to the bridge, and the company had permitted the telltale to get out of order so that it would not give the requisite warning.

Although a freight conductor had run over the track and through a bridge daily for three months prior to the accident, and knew of the existence of the overhead bridge, it does not necessarily follow that he was acquainted with the proximity of the braces of the bridge to the top of the car. *St. Louis, Ft. S. & W. R. Co. v. Erwin*, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146, 15 Am. Neg. Cas. 60.

The court cannot say as a matter of law that a trainman had such a knowledge of an overhead bridge that, as a matter of law, he must be deemed to have assumed the risk thereof, when the evidence showed that he had passed under it on twenty-two different occasions, on each of which, except the last, when he was hurt, he was in a passenger car, where he could not observe the bridge, and that the only other opportunity he had of seeing this bridge, even at a great distance, was while he was riding on the step of the pilot of an engine holding on with his hand and facing the engine, and, to have had even a distant view of the bridge while riding in this position, he would have had to turn his head considerably, which he would not naturally do, as his natural position and regard for his own safety would require him to look straight before him. *Pittsburgh, S. & N. R. Co. v. Lamphere*, 69 C. C. A. 542, 137 Fed. 20.

The mere fact that a brakeman may have noticed on his first trip that the bridge timbers were only 8 inches from the top of a gondola car is not sufficient to charge him with notice of the danger of riding on the platform of the car while passing under the bridge. *Anderson v. Northern P. R. Co.* 34 Mont. 181, 85 Pac. 884.

A jury would not be justified in holding that a brakeman who was found dead on the top of a high furniture car after it had passed a bridge too low to clear safely a man on such a car was guilty of contributory negligence, where he had never been informed of the bridge, had never been over the road except in the nighttime, and is not shown to have had any opportunity to observe the height of the bridge, and the night in question was dark and stormy. *Atchison,*

T. & S. F. R. Co. v. Love, 57 Kan. 36, 45 Pac. 59.

Passing under low bridges on ordinary low box cars is not of itself necessarily suggestive of the importance of keeping a lookout for such bridges while passing on cars of somewhat greater height. *Hailey v. Texas & P. R. Co.* 113 La. 533, 37 So. 131.

A jury is not bound to find that a newly employed brakeman has been duly warned of the dangers of a low bridge, where the yard master told him to lookout for it as it would not clear a man standing on an ordinary car, and the conductor had told him that it would not clear a man on a high car, but would clear a man upon a low car, and he was upon a low car when injured, and there were no telltales or other warnings maintained. *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271, 51 S. W. 558.

Tunnels.

In a few cases, injury has been caused by trainmen on top of passing trains coming in contact with the roof of tunnels which the railroad company maintains too low to clear employees when standing on the tops of cars.

A railroad company is not entitled to a peremptory instruction in its favor where it is shown that the plaintiff was, while in the discharge of his duties, knocked off a car by an appliance which had been erected a mile from the mouth of a tunnel for the purpose of indicating what cars were too large to pass through certain obstructions erected for the purpose of repairing the tunnel. *Louisville & N. R. Co. v. Roe*, 142 Ky. 456, 134 S. W. 437.

A brakeman is not necessarily guilty of contributory negligence in sitting upon the side of a box car while passing through a tunnel, where he had received no warning that such a position was unsafe, and that it was essential to his safety to keep in the center of the car. *Wainwright v. Lake Shore & M. S. R. Co.* 11 Ohio C. D. 530.

Where a brakeman had received no warning that he could not safely sit on the top of a box car while passing through a tunnel, it is no defense to an action for his wrongful death caused by being struck by the tunnel while so sitting on the car, that the company had erected telltales at a proper distance from the entrance thereof, if such telltales were not sufficiently low to strike one while so sitting on the car. *Ibid.*

In *Hughes v. Cincinnati, N. O. & T. P. R. Co.* 91 Ky. 526, 16 S. W. 275, where a brakeman was killed in passing through a tunnel that was too low for one to stand on top of a car and pass under, it was said by this court that, "if the decedent, knowing that he could not pass through the tunnels standing on top of the car, neglected to take the usual precaution of sitting or lying down, there can be no recovery."

In two cases, the liability of the railroad company is predicated upon the fact that it is negligence to maintain a tunnel which, although it will at the entrance clear a

man standing on the top of the cars, will not at some point in the interior so clear the employee. These cases support the position of the court in *CINCINNATI, N. O. & T. P. R. Co. v. JONES*.

Thus, a brakeman, seeing that the entrance to a tunnel is high enough to permit safe passage while standing on top of a train, has a right to assume, in the absence of notice to the contrary, that the tunnel is of such height throughout. *Hunter v. New York, O. & W. R. Co.* 116 N. Y. 615, 6 L.R.A. 246, 23 N. E. 9.

So, a special charge to return a verdict for the defendant upon the ground that no evidence was proved is properly denied where it is shown that the company maintained a tunnel which, at the entrance, cleared the rails by 18 feet and at a point 53 feet from the entrance the clearance was but 15 feet, 10½ inches from one rail and 16 feet, 1 inch, from the other, while the standard clearance is 19 feet, 8 inches; that no telltales were maintained at the entrance, and that no special warning was given to the plaintiff of the fact that the tunnel did not carry a height throughout its length uniform with the height at the entrance, and that he did not have any knowledge of that fact. *Mexican C. R. Co. v. Eckman*, 42 C. C. A. 344, 102 Fed. 274.

Other obstructions.

In many cases, injuries have been caused by other obstructions over railroad tracks, and in most of the cases the railroad company has been held liable for such injuries. In cases of what may be called transitory obstructions, as opposed to the permanent obstructions, such as bridges and tunnels, the trainmen are not as likely to be chargeable with knowledge thereof, and consequently the defenses of assumption of risk and contributory negligence are not open to the master.

—wires.

It is negligence on the part of a steam railway company to permit an electric street car company so to construct and maintain over its tracks a guy wire that it will endanger the lives of its servants and employees. *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86, 21 So. 153 (syllabus by the court).

So, in *New York, N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737, it was held that a railroad company who knew that a guy was being stretched over its tracks by a third person was under obligation to see that such guy was placed at a sufficient height above the track to clear a trainman while walking on the top of passing trains, and it was further held that a trainman could not be said to be guilty of contributory negligence in not avoiding a guy which had been stretched by third persons across the company's tracks, where there was no evidence that the danger therefrom was "plainly observable" by him.

Evidence showing suspension of wire

cables across a railroad track so low as to obstruct the passage of a train, and actually obstructing the track, but a short time before injury results therefrom, is sufficient in an action by a servant injured thereby to constitute a *prima facie* case of negligence, entitling him, until explained by the defendant, to have such evidence submitted to the jury. *Newhouse v. Kanawha & W. V. R. Co.* 62 W. Va. 562, 59 S. E. 1071.

But a railroad company cannot be held liable for injuries caused to a brakeman on one of its trains by being carried off the train by a wire which had been stretched across the track by third persons, where the railroad company never consented to the wire being stretched across the track, nor had any interest whatsoever therein. *Richmond v. New York C. & H. R. Co.* 8 App. Div. 382, 40 N. Y. Supp. 812.

And a wire stretched across a public street by private individuals with implied permission of the city, is not an obstruction of the railroad which the company is bound to remove. *Dalton v. Receivers*, 4 Hughes, 180, Fed. Cas. No. 3,550.

So, a wire stretched over and across the track of a railroad company not sufficiently high above a freight car running on the track to permit an employee standing on the top of such car safely to pass under the wire does not constitute a defect in the way or track, where there is nothing to indicate that such wire is not a mere movable object temporarily placed too near the track. *Hubbard v. Central of Georgia R. Co.* 131 Ga. 658, 19 L.R.A. (N.S.) 738, 63 S. E. 19 (cause of action arose in Alabama, and the employers' liability act of that state was applied).

And a railroad company is not liable for injuries to a brakeman while on a car by being struck by a guy wire which was permitted to hang over the tracks by fellow servants. *Holden v. Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343.

If an employee of the steam railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street car company, in the course of his employment, and saw fit, notwithstanding, to continue in it, he must be held to have assumed the extraordinary risk as well as the ordinary risks of his service. But this consequence must rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed. *Erslew v. New Orleans & N. E. R. Co.* *supra* (syllabus by the court). To the same effect, *Gusman v. Caffery Cent. Refinery & R. Co.* 49 La. Ann. 1265, 22 So. 742.

—derricks.

A railroad company is liable for permitting for several days a derrick to stand in close proximity to a track, with a guy wire stretched over the track, and so insecurely fastened that it might sag and be dangerous to brakemen. *Holden v. Fitchburg R. Co.* *supra*.

So, a railroad company is liable for in-
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juries caused to a brakeman by a derrick which was negligently permitted to swing over the track. *Gates v. Chicago, M. & St. P. R. Co.* 2 S. D. 422, 50 N. W. 907.

—waterspouts, etc.

It is negligent, as a matter of law, for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen upon its trains passing under the spout, where it might readily be so constructed and hung as to be safe. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230, affirming 50 C. C. A. 591, 112 Fed. 888. To the same effect, *Chesapeake & O. R. Co. v. Cowley*, 92 C. C. A. 201, 166 Fed. 283; *Norfolk & W. R. Co. v. Beckett*, 90 C. C. A. 25, 163 Fed. 479.

A railroad company is negligent in maintaining a waterspout which is free to swing over the top of passing trains at such a distance above the cars as to render it dangerous to employees thereon. *Ohio, I. & W. R. Co. v. Johnson*, 31 Ill. App. 183.

Where a brakeman was on the top of a car in the performance of his duty, and was caught around the neck by a rope hanging from a water pipe which had been negligently left hanging over the track, the railroad company is liable for the injuries received. *Lindsay v. Norfolk & S. R. Co.* 132 N. C. 59, 43 S. E. 511, 13 Am. Neg. Rep. 597.

A railroad company is liable for injuries caused by a waterspout which it maintains in such a condition that it would swing out over the train. *Greenleaf v. Dubuque & S. C. R. Co.* 33 Iowa, 52, 14 Am. Neg. Cas. 607.

A railroad company is liable for injuries to a brakeman on a car by being struck by a waterspout maintained so near the track that, when raised to its highest position, it would hit a man of ordinary height standing on top of a car a foot or two to the side of the running board, unless he dodged it, where the injured employee had been over the road but twice, and the danger was not an obvious one. *McDuffee v. Boston & M. R. Co.* 81 Vt. 62, 130 Am. St. Rep. 1019, 69 Atl. 124.

The danger from a cattle chute erected over a track at a height not sufficient to clear men standing on the tops of cars is not a danger inherent in railroading. *Cales v. Union Terminal R. Co.* 124 Iowa, 48, 99 N. W. 108.

In *Nance v. Newport News & M. Valley R. Co.* 13 Ky. L. Rep. 554, 17 S. W. 570, where a brakeman was knocked off a car by beams of a freight depot which projected over the track, a recovery was sustained. The court said: "Tunnels and bridges pertain to all roads, form a part of the road itself, and in operating trains the brakemen must be presumed to know the mode of construction and the danger in passing through or over them. Not so with a building, although used as a depot, where parts of it are necessarily known to be dangerous to the employer, and that part of it constituting

the danger not necessary or used in the operation of the road."

—pipes.

Whether the defendant was in the exercise of due care in running a steam pipe over its tracks less than 3 feet above the top of cars running on the tracks is a question of fact for the jury. *Renne v. United States Leather Co.* 107 Wis. 305, 83 N. W. 473.

Where a messenger boy had ridden under pipes maintained by defendant over its tracks eight or ten times on other tracks, and had passed under the pipe on the track in question two or three times, but never on the top of the cars, and approached the pipe with his back toward it while engaged in the performance of his duties, it is for the jury to say whether or not he was guilty of contributory negligence. *Ibid.*

But a railroad company is not liable for injuries caused to an employee on top of a moving car by a gas pipe placed over the tracks by coemployees too low to clear a man standing on a passing car. *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50.

—trees.

The mere knowledge of a trainman that a tree stands close to a track is not sufficient to inform him of the danger of being struck by overhanging branches thereof, so as to charge him with assumption of risk or with contributory negligence. *Southern R. Co. v. Bentley*, 1 Ala. App. 359, 56 So. 249.

And in *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514, it was held that a railroad company would be liable for injuries caused by the branches of a tree overhanging the railroad track, where the employee who was injured had no knowledge of the dangerous condition. W. M. G.

UTAH SUPREME COURT.

MARY ATKINSON, Resp't.,

v.

WILLIAM J. ATKINSON, Appt.

(— Utah, —, 134 Pac. 595.)

Divorce — action to set aside — submission to jurisdiction.

1. A complainant in a direct proceeding

Note. — *Delay in procuring order for publication of summons after making of affidavit.*

The statutes regulating service by publication as a rule simply provide that an affidavit of the defendant's nonresidence or inaccessibility to service shall be filed before an order of publication is granted, but make no provision as to the time within which the order must be made after the affidavit is sworn to.

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to set aside a decree of divorce because of fraud and lack of jurisdiction need not submit himself to the jurisdiction of the court to pass upon the merits of the divorce action, nor show a meritorious defense to such action.

Writ — service by publication — delay in order — effect.

2. Delay of a month after an affidavit for publication of summons in a divorce proceeding before an order for service is made renders the service void, and the court acquires no jurisdiction of the defendant under it.

(July 8, 1913.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in a proceeding to set aside and annul a decree of divorce. *Affirmed.*

The facts are stated in the opinion.

Mr. C. S. Patterson for appellant.

Mr. James H. Wolfe, for respondent:

A false affidavit nullifies service by publication.

Dunlap v. Steere, 92 Cal. 344, 16 L.R.A. 361, 27 Am. St. Rep. 143, 28 Pac. 563; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Nichells v. Nichells*, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73; *Herbert v. Herbert*, 47 N. J. Eq. 11, 20 Atl. 290.

The order for publication was defective because an unreasonable period elapsed between the time of making the affidavit for publication and the time of the making of the order of publication.

New York Baptist Union v. Atwell, 95 Mich. 239, 54 N. W. 760; *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051; *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151; *Campbell v. McCahan*, 41 Ill. 45; *Cohn v. Kember*, 47 Cal. 144; *Forbes v. Hyde*, 31 Cal. 351.

The court has power on its own motion to vacate a judgment irregularly, improvidently, or inadvertently entered. This may be done even after the term if the judgment was void on its face.

Winrod v. Wolters, 141 Cal. 399, 74 Pac.

It is generally held that an order of publication must be based upon facts existing at the time it is made. *Cohn v. Kember*, 47 Cal. 144 (delay of fifteen days between affidavit and order held fatal); *Forbes v. Hyde*, 31 Cal. 342 (delay of four months held fatal); *New York Baptist Union v. Atwell*, 95 Mich. 239, 54 N. W. 760 (delay of five days between making of affidavit and order held fatal). The court in *Forbes v. Hyde*, supra, said: "As to the first objection,—that it was incompetent for the court to

1037; *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739; *Smaltz v. Hancock*, 118 Pa. 550, 12 Atl. 464.

Frick, J., delivered the opinion of the court:

This is a proceeding in equity to set aside and annul a judgment or decree of divorce. The facts alleged in the complaint and found by the court are substantially as follows: That appellant and respondent were married at Patrick by Glasgow, Scotland, in 1881; that on the 14th day of August, 1909, appellant brought an action in the district court of Salt Lake county, Utah, to obtain a divorce from the respondent, who had never lived in Utah, and hence was a nonresident of this state, and absent

therefrom; that service of summons in that action was made by publication, the order for which was based upon an affidavit which was sworn to by the appellant on the 9th day of July, 1909, in Salt Lake county, but was not filed until the 14th day of August following, and on that date the order for service by publication was made, and the complaint for a divorce filed; that appellant in said affidavit made oath that the respondent, at the time of making the same, was a nonresident of the state of Utah, and that her "last known address" was Cleveland, in the state of Ohio; that said appellant, at the time he made and filed said affidavit to obtain said order for service by publication, well knew that respondent was not a resident of Cleveland, Ohio, and also

make the order upon affidavits some four months old,—it is plain to our minds, from an examination of §§ 30 and 31 of the practice act, that the affidavits should be prepared with reference to the condition of things as they exist at the time when the order for publication is applied for,—the residence of the defendant, or the inability to find him at that time. The proceedings are to follow each other in reasonably quick succession. The order for publication, when made, must 'direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence,' when known. It must not only be deposited, but it must be done 'forthwith.' The object of the statute is, if possible, to secure actual notice of the pendency of the action. In this and the neighboring states and territories the residences of a large portion of the people are notoriously temporary. It is important, therefore, that the inquiry as to residence should be directed to the time when the order and deposit in the postoffice is to be made; and we have no doubt that it was so intended by the legislature. If an affidavit can be used as the basis of an order which was made four months before the order, it can be used when made four years before; and in both cases there would be great probability that the notice contemplated by the statute would fail of reaching the defendant."

In *New York Baptist Union v. Atwell*, supra, it was held that the rule that a fact in its nature continuous, once being shown to exist, will be presumed to continue unless the contrary is shown, does not apply to the averment of a jurisdictional fact, and could not therefore be relied upon to establish the continued existence of facts stated in an affidavit made to procure an order of service by publication.

Since the statutes do not specifically regulate the length of time which is permissible between the making of an affidavit and the issuing of an order for service by publication, the question whether the delay between the making of an affidavit setting forth the necessary facts, and the making of the order

for publication is fatal, is generally held to depend upon whether the time which has elapsed is, under the circumstances, reasonable. *Campbell v. McCahan*, 41 Ill. 45; *Cornwall v. Falls City Bank*, 92 Ky. 381, 18 S. W. 452; *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051; *Gallun v. Weil*, 116 Wis. 236, 92 N. W. 1091; *Zahorka v. Geith*, 129 Wis. 498, 109 N. W. 552; *Roosevelt v. Land & River Co.* 108 Wis. 653, 84 N. W. 157; *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491; *Spreen v. Delsignore*, 94 Fed. 71.

The time elapsing has been held reasonable and the order valid:

—where the affidavit was made late Saturday, and the order was obtained early Monday morning. *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051.

—where the order was made the day after the affidavit was sworn to. *Cornwall v. Falls City Bank*, 92 Ky. 381, 18 S. W. 452; *Gallun v. Weil*, 116 Wis. 236, 92 N. W. 1091.

—where the order was made four days after the making of the affidavit, and three after the sheriff's return that the defendant could not be found. *Zahorka v. Geith*, 129 Wis. 498, 109 N. W. 552.

—where there was a lapse of two weeks between the making of the affidavit and the order of publication. *Roosevelt v. Land & River Co.* 108 Wis. 653, 84 N. W. 157.

On the other hand, the delay has been held unreasonable:

—where the order was not made until four months after the affidavit was sworn to. *Spreen v. Delsignore*, 94 Fed. 71.

—where the affidavit was made twenty-five days before the order of publication. *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491.

—where there was a lapse of twenty days between the making of the affidavit and the order, and it appeared that the complainant lived in an adjoining county. *Campbell v. McCahan*, 41 Ill. 45.

The court, in *Campbell v. McCahan*, supra, said: "This law being remedial in its character, it must, according to the canons of interpretation, be liberally construed, so as to promote the remedy sought. It would therefore seem, under a liberal construction,

knew that she, at the several times stated in said affidavit, was a resident of Bridgeport in the state of Connecticut, and that the statements with respect to the matters aforesaid were false; that respondent was not served with any notice or summons in said action, and she had no knowledge either that the same had been commenced or was pending; that the pretended service of summons was made upon her by publication in said action, which was based upon the affidavit and order aforesaid, and that on the 22d day of October, 1909, judgment by default was entered against her, whereby appellant was granted an interlocutory decree of divorce, which, on the 23d day of April, 1910, was made final, and a final decree was then entered; that respondent

had no notice of said decree, and did not know that the same had been obtained or entered as aforesaid until some time in November, 1911, and more than one year after the final decree aforesaid was rendered and entered in said action; that by reason of her want of notice and knowledge of the commencement and pendency of said action and the entry of said decree she did not appear therein, and failed to file an answer therein and defend the action. As conclusions of law, the court, in substance, found that by reason of the premises aforesaid the court "obtained no jurisdiction of the person" of respondent in said action for divorce; that said decree of divorce is void, and that respondent is entitled to have the same set aside and annulled. Judgment

not to be essential that the affidavit should be sworn to, and the order of publication made simultaneously with the filing of the bill. It would be sufficient if filed in a reasonable time. If the affidavit was made years or even months before the order of publication, the time would be unreasonable. It may be difficult to determine what is a reasonable time within which the affidavit must be filed after it is sworn to; but that must depend on the circumstances of each case. Where the person making the affidavit resides in the county in which the suit is pending, a shorter delay would be allowed than where he resided and made the affidavit in a different but adjoining county, and in the latter, less than if he resided and swears to the facts in another state. In such a case, a reasonable time would be allowed within which to transmit the affidavit to the place where it is to be used. If both acts are required to be performed, in all cases, on the same day, it would, in practice, work great inconvenience in many instances, and in some, great injustice. Nor is it believed that this section has, in practice, received so strict a construction; as it is believed that reasonable time has generally been allowed to file the affidavit after it has been made. But it seems obvious that twenty days is an unreasonable time to be allowed to transmit such an instrument from an adjoining county. A few days, at most, with slight effort, is only required for such a purpose. Allowing for the irregularity of the post, or delays of messengers sent for the purpose, no such a period of time could be required, and where it has occurred, it indicates either a want of effort in sending it, or inattention in filing it with the clerk. This affidavit, then, was made too long before it was filed, to authorize the publication, and the law not having been complied with in this respect, the publication was unwarranted; and being so, it failed to give the court jurisdiction of the person of the defendants."

In *Aherne v. WaKeeney Land & Invest. Co.* 82 Kan. 435, 108 Pac. 842, was the affidavit of a nonresidence in an action to quiet title was made twenty-four days before it

was filed in court, and thirty-seven days prior to the date on which the order of publication was made, it was held that the lapse of time alone did not render a decree rendered in the case void, the statute authorizing service by publication merely requiring the court to inspect the affidavit carefully, and cause the truth thereof to be established, and its form to be such as the law prescribes. The court said: "When the court, with all the facts before it, adjudicates that the affidavit, both in form and substance, is in full compliance with the law, it may make an order directing that the defendants be notified by publication, prescribing the time such notice shall be published, when the defendants shall answer, and that the notice contain such other facts as the statute requires. When a judgment has been rendered upon service obtained in pursuance to such careful precautionary steps, it should not be lightly overthrown. The court had full jurisdiction to make the order requiring service by publication, and however irregularly that jurisdiction may have been exercised, the order cannot be held to be void."

And an order of publication in a divorce suit, made two days after an affidavit stating that the defendant was concealed within the state, so that process could not be served, and that a subpoena had issued and returned unserved, although diligent search had been made, has been held sufficient to give the court jurisdiction within § 6870, 3 How. Anno. Stat., providing that "when the defendant is a resident of this state, upon proof by affidavit that the process for his appearance has been duly issued, and that the same could not be served, by reason of his absence from or concealment within this state," an order for service by publication may be made. *People v. Booth*, 121 Mich. 131, 79 N. W. 1100.

In a number of cases it does not appear whether the lapse of time in question occurred between the making of the affidavit and the petition for the order of publication, or the petition containing the general pleadings of the case.

Thus it has been held that the fact that

annulling said decree was entered accordingly, from which this appeal is prosecuted.

The first assignment of error argued in appellant's brief is that the court erred in not sustaining his demurrer to the complaint, because respondent did not allege therein that she had a meritorious defense to the action for divorce, and, further, because she did not consent that the court might have jurisdiction over her for the purpose of passing upon the merits of the action for divorce. In this connection it is contended that in seeking equity respondent must do equity. In our judgment the maxim has no application here. This action is a direct attack upon the service and judgment had and entered in the divorce action. *Liebhardt v. Lawrence*, — Utah, —, 120 Pac. 215. It is a separate and distinct action, and not a mere motion or proceeding in the original action for divorce to

set aside the judgment entered therein upon the ground that it was made within the time required by statute, or upon the ground of excusable neglect or inadvertence on the part of respondent. Her claim is that the appellant obtained the order for service of summons by publication by the practice of fraud and misrepresentation, in that he misstated her place of residence in the affidavit. She further insists that, in not obtaining the order for publication until more than a month after the affidavit for service by publication had been sworn to, the court acquired no jurisdiction over her in the divorce action. Whether, under such circumstances, the judgment would be subject to collateral attack, we need not determine, because, as already stated, this is a direct attack.

When it was made apparent from the facts set forth in the complaint that re-

affidavits that service by summons could not be made were sworn to two days before the petitions were filed does not raise a presumption of a change in the state of facts, and that such a delay is not unreasonable. *Leigh v. Green*, 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093, affirmed on other points on rehearing in 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255, affirmed in 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

And in *Crombie v. Little*, 47 Minn. 581, 50 N. W. 823, it was held that the fact that the affidavit for publication was sworn to six days before the complaint in an action to determine the validity of the foreclosure of a mortgage was filed, and thirteen days before the first publication, was not material. The court said: "If it be true, as defendants claim, that the affidavit must be sworn to the same day on which the action is commenced, then this must be on the very day of the first publication of the summons; for, except for the purposes of preventing the statute of limitations from running, an action is commenced by service of the summons, and not, as counsel assumes and is the case in some states, by filing the complaint and issuing a summons. Pub. Stat. 1858, chap. 60, § 48; Gen. Stat. 1878, chap. 66, § 52. The rule contended for would be not only contrary to the general understanding and practice, but an unreasonable and exceedingly inconvenient one. In the absence of any provision of statute regulating the matter, we apprehend that all that is necessary is that the affidavit be sworn to within such a reasonably brief time before the publication of the summons that no presumption could fairly arise that the state of facts had changed during the period intervening. This has always been the rule in the cases of affidavits for attachments, except in a line of decisions in Michigan, largely based upon the peculiar language of their statute, but which were so painfully and impracticably technical that the rule was changed by statute."

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And where the affidavit was sworn to in one county, and, together with the petition, filed in the clerk's office in another county, in which the suit, which related to land, was brought, on the following day, it was held sufficient to authorize service by publication. *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151.

And in *Himmelberger-Harrison Lumber Co. v. Keener*, 217 Mo. 522, 117 S. W. 42, it was held that the fact that eight days elapsed between the making of an affidavit of nonresidence and the filing of the petition would not avoid the order for publication.

In *People v. Huber*, 20 Cal. 81, in an action of forcible entry and detainer it was held that an order to publish a summons, made four days before the issuance of the summons, was invalid. The court said: "The practice act contemplates that the judge must be satisfied by affidavit of the absence of the defendant at the time when he is applied to for his order, and when it is to take effect. If an order might be procured in advance and held four days before taking out the summons, it might be so held for a much longer time; and so that when the summons actually issues, the defendant may have returned to the state."

In *Snell v. Meservy*, 91 Iowa, 322, 59 N. W. 32, where the statute provided that service by publication could be had "when an affidavit is filed that personal service cannot be made on the defendant within the state," it was held that the proper construction of an affidavit of nonresidence was that a personal service could not be had during the prescribed period for service for the particular term of court intended, and it was held that the court had jurisdiction upon it appearing that the petition in the case was filed the day after the affidavit was made, and an order of publication was made within a few days.

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spondent sought to set aside the judgment entered in the divorce action upon the ground of fraud and want of jurisdiction, she stated a good cause of action, and we cannot see why a court should, as a condition to setting aside the judgment, have required her to submit herself to the jurisdiction of the court for the purposes of the original action. If such a rule were enforced, then a party who obtained a judgment by the practice of fraud and misrepresentation in obtaining service by publication could always rely upon the judgment, until his adversary submitted himself to the jurisdiction of the court, and presented a sufficient defense to the original action.

Where a judgment is obtained by default upon constructive service, and the defendant moves to set the judgment aside by motion within the year allowed by our statute, or if he seeks to be permitted to open up the default judgment for the purpose of making a defense to the original action upon the ground of the excusable neglect or inadvertence, or for some other sufficient cause, the practice is well settled that, in order to have the judgment set aside and the cause reopened, he ordinarily must submit himself to the jurisdiction of the court, and must also set up a good defense to the action in the form of an affidavit or answer. But is this the rule without exception, and must a party also do this in a case wherein the plaintiff has been guilty of fraud in inducing the court to assume jurisdiction of the action in which the default judgment is entered, or where, as here, the court never acquired jurisdiction of the person, because the order for service by publication and the pretended summons were void? If a plaintiff can enforce such a rule, then he, in a divorce action, would be permitted to take advantage of his own wrong, since he could compel the defendant in such an action to submit his or her person to the jurisdiction of the court, when neither personal nor subject-matter jurisdiction (the marriage which constitutes the *res*) could be obtained in any other way. For example, in the case at bar the marriage between appellant and respondent was solemnized in Scotland, a foreign country, and the parties never had lived together in this state, and hence never had recognized the same therein. The "domicil of matrimony," therefore, was lacking in the divorce case, without which, as explained by the Supreme Court of the United States, in *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1, approved and followed by the same court in *Thompson v. Thompson*, 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. Rep. 129, the state courts can acquire no jurisdiction of the

res or subject-matter so as to render judgment which would be binding in a state other than where rendered, in cases where the only service is by publication, and no personal appearance is made by the defendant in the action. See also *State ex rel. Aldrach v. Morse*, 31 Utah, 213, 7 L.R.A. (N.S.) 1127, 87 Pac. 705.

If counsel's contention be allowed, therefore, the appellant could compel the respondent to appear in the original action and thus confer jurisdiction upon the court, both of the *res* and of her person, as a condition to having the decree of divorce set aside, which was rendered by a court, not only devoid of jurisdiction, but which, without her consent, could acquire none for the purpose of making a decree of divorce enforceable under the full faith and credit clause of the Federal Constitution. We are clearly of the opinion that, under such circumstances, the district court was right in refusing to require the respondent to subject herself to the jurisdiction of the court in the original action, as a condition to having the decree of divorce set aside. There may be some good reason why a party may not desire to have the case tried in a particular court or state, and if so, such person need not, under circumstances like those in this case, submit his person to the jurisdiction of the court in order to be entitled to the relief sought. Under such circumstances the respondent was entitled to have the judgment set aside as a matter of right, and not as a matter of grace. See *Dobbins v. McNamara*, 113 Ind. 54, 3 Am. St. Rep. 626, 14 N. E. 887; 1 Black, *Judgm.* 2d ed. § 348. Counsel for appellant has cited no cases to the contrary. The first assignment must therefore be overruled.

It is next argued that the court erred in its conclusion of law that the order for service by publication was void, because it was based upon an affidavit which was sworn to more than one month before the original action was commenced and the order for service by publication was made. Comp. Laws 1907, § 2949, among other things, provides that, in case a defendant is a non-resident of this state, and an affidavit is filed in which that fact is made to appear, and in case the place of residence of the non-resident defendant is known, such place must be stated; or, if unknown, that such fact be stated. Then the statute directs that "the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof." The clerk therefore issues the order in which he directs how long and in what newspaper the publication has to be made, and, in case the place of residence is stated in the affidavit, the clerk is also

required to forward by U. S. mail a copy of the complaint and summons to the defendant's place of residence. It will be observed that the statute is silent with respect to when the order for service by publication must be made after the affidavit therefor is filed. This omission seems to be frequent if not usual in statutes authorizing service of summons by publication upon nonresident defendants. The construction and application of statutes similar to ours have come before the courts upon various occasions. All the courts seem to hold that in order to confer jurisdiction upon the court, the provisions of the statute must be followed with at least reasonable strictness. It has been held, therefore, that, where no time is stated within which an order for service by publication must be made after the affidavit upon which the same is based is sworn to and filed, such order must be made within a reasonable time thereafter.

The question arises, therefore, what constitutes a reasonable time in such cases? It seems to us that the supreme court of Illinois, in the case of *Campbell v. McCahan*, 41 Ill. 45, disposes of that question in a very satisfactory manner. It is there held that by reasonable time is meant the time which is reasonably necessary for the party making the affidavit to take the same to and file it with the officer with whom the law requires it to be filed. For example, if the affidavit is sworn to in the county, city, or town where the officer has his office, it should be filed and acted on practically on the same day on which it is sworn to. If it is sworn to in an adjoining or some other county in the state, then within such time that it requires, in due course of the mails or transportation, to carry the affidavit from the place where it is sworn to to the place where it must be filed. It is held, however, that in no case should the time intervening between the making of the affidavit and the filing thereof be so long as to destroy the affidavit as constituting prima facie evidence of the fact of nonresidence and absence from the state, and that such facts exist at the very time the affidavit is sworn to and filed. Some courts, therefore, have held that if any considerable time has elapsed between the making of the affidavit and the issuance of the order for service by publication, so that in the meantime a non-resident defendant, in the ordinary course of travel, could have come into the state, that the affidavit loses its force as prima facie evidence of the fact of nonresidence and absence from the state. See *Armstrong v. Middlestadt*, 22 Neb. 711, 38 N. W. 151. To the same effect are the following cases: *New York Baptist Union v. Atwell*, 95 Mich. 239, 54 N. W. 760; *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051; *Cohn v. Kember*, 47 L.R.A. (N.S.)

47 Cal. 144; and *Roosevelt v. Land & River Co.* 108 Wis. 653, 84 N. W. 157. In *Cohn v. Kember*, 47 Cal. 144, the supreme court of California held "that a delay of fifteen days between the making of the affidavit and the application for the order [for publication] cannot be permitted." In *Campbell v. McCahan*, supra, the supreme court of Illinois held that twenty days was not a reasonable time, and in *New York Baptist Union v. Atwell*, 95 Mich. 239, 54 N. W. 760, the supreme court of Michigan held that, where five days intervened between the making of the affidavit and the order for service by publication, the order was void, and the court acquired no jurisdiction of the person of the defendant. In *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051, the same court held that an affidavit made on Saturday afternoon and filed on Monday morning, on which day the order for service by publication was made, was timely. The case from Nebraska is practically to the same effect as the Michigan case last cited. It is stated, however, in the Nebraska case, that the court does not wish to be understood as holding that if a longer time had intervened the service by publication would have been held sufficient.

The cases, therefore, all seem to hold that under statutes like ours the time that intervened in the case at bar between the making of the affidavit and the issuance of the order for service by publication was fatal to the validity of the order, and that the court could not acquire jurisdiction. Counsel for appellant has failed to refer us to any cases holding to the contrary, and we have found none. We are forced to the conclusion, therefore, that the order for service by publication in this case was of no force or effect, and that the case must be treated the same as if no order for service by publication and no service have been made. The district court committed no error, therefore, in holding the order for service by publication and the pretended service of summons without any form or effect, at least, as against a direct attack.

Lastly, it is contended that the finding of the court that appellant's statement in his affidavit that the last known place of residence of respondent was Cleveland, Ohio, was false, is not sustained by the evidence. It must suffice to say that, after considering the evidence, we are of the opinion that there is sufficient evidence to sustain the finding. In view of the conclusions reached, however, upon the second proposition discussed herein, the finding is not controlling.

The judgment is affirmed, with costs to respondent.

McCarty, Ch. J., and Straup, J., concur.

VERMONT SUPREME COURT.

ELMER W. TURNER

v.

NINA TURNER.

(— Vt. —, 88 Atl. 3.)

Domicil — for purpose of divorce — effect of intention.

Intention by one removing with all his effects from a town which is not his domicil of origin, to retain his residence there, is not sufficient to effect that result for the purpose of conferring jurisdiction of a divorce proceeding, if he has in that place neither property nor home nor place to which he has a right to return.

(August 22, 1913.)

EXCEPTIONS by libellant to rulings of the Windham County Court, dismissing his libel for divorce. Affirmed.

The facts are stated in the opinion.

Messrs. Carney & Blake, for libellant:

In the trial of any uncontested divorce libel, the court should make known any objection to the form and competency of offered evidence; if not immediately, so seasonably that the libellant may have an opportunity to obtain other evidence of the same fact in a more acceptable form; and the libellant, having no notice that the court found any fault with the form and competency of the evidence, had a right to assume that the informality was waived, and govern himself accordingly.

Weeks v. Barron, 38 Vt. 420; Warden v. Warden, 22 Vt. 563; Cavendish v. Troy, 41 Vt. 99; State ex rel. Phelps v. Jackson, 79 Vt. 511, 8 L.R.A.(N.S.) 1245, 65 Atl. 657; Wigmore, Ev. § 18.

Evidence that defendant paid taxes on his personal property in New York was held admissible as bearing upon the question of his legal residence in New York, even in the entire absence of the law in New York on the subject.

Hulett v. Hulett, 37 Vt. 581; Fulham v. Howe, 62 Vt. 396, 20 Atl. 101.

Even if the evidence of his assessment and registration for voting has been considered, it would not necessarily follow that the libellant's residence was in Londonderry at the time he signed the libel; still, residence is continuous in its nature, and a residence

Note. — As to character of residence essential to give jurisdiction in divorce proceeding, see the notes to Bechtel v. Bechtel, 12 L.R.A.(N.S.) 1100, and to Winans v. Winans, 28 L.R.A.(N.S.) 992. As to whether a domicil is lost by abandonment, without intention of returning, before acquiring a new one, see the note to Barhydt v. Cross, 40 L.R.A.(N.S.) 986.
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once acquired is presumed to continue until the contrary appears.

State ex rel. Phelps v. Jackson, 79 Vt. 511, 8 L.R.A.(N.S.) 1245, 65 Atl. 657; Rixford v. Miller, 49 Vt. 319; Hulett v. Hulett, 37 Vt. 581; Hallet v. Bassett, 100 Mass. 170; Story, Conf. L. § 44; Fulham v. Howe, 62 Vt. 396, 20 Atl. 101.

In most cases of this kind, the question which comes up is the converse of the one presented here, and in such cases, it has repeatedly been held that mere residence in a state, without the intent to remain, would not give a residence for the purpose of divorce.

Keezer, Marr. & Div. 196-199; Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184; Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333; Shaw v. Shaw, 98 Mass. 158; Ross v. Ross, 103 Mass. 575.

Rowell, Ch. J., delivered the opinion of the court:

The jurisdictional question is whether the libellant was a resident of Londonderry in Windham county when he brought his libel for divorce. He did not claim residence elsewhere in that county. The case is this, according to the finding of facts: The parties were married in July, 1905, and lived together in Londonderry till some time in the summer of 1907. The libellant became suspicious of his wife, and charged her with adultery. Thereupon they broke up housekeeping, gave up the tenement in which they lived, and sent the household furniture and all his personal belongings to her mother's in Peru, in Bennington county. His charges against her being well founded, he never lived with her again, but went away from Londonderry, working at different places, sometimes in Londonderry and sometimes elsewhere. About November, 1911, he went to Gardner, Massachusetts, to work, and took with him his personal clothing and all of his personal effects, except a few things that remained in Peru, and has lived and made it his home in Gardner ever since. He has had no home nor place in Londonderry since breaking up housekeeping in 1907, to which he had a right to return, except occasionally when he worked there temporarily; and has had neither property nor home nor place there to which he had a right to return since going to Gardner, as stated. He testified that he never intended to charge his residence from Londonderry, and corroborated his testimony in this respect to some extent.

The "findings" say that if, on the case thus made, the libellant has a sufficient residence, the divorce should be granted; but the court, upon the "findings," dismissed the libel, to which the libellant excepted. He

concedes in his brief that he had been working in Massachusetts about eight months next before he brought his libel, and was still working there at the time of the trial, and had no property nor fixed abode in Londonderry at the time of signing his libel; but says that he claimed below that he had no intention of remaining in Massachusetts permanently, nor of acquiring a residence there, and that the residence he had once established in Londonderry remained there permanently; but that, if his claim is unfounded in law, his libel was properly dismissed, and the court need consider the case no further, except to see whether the entry should not show that the dismissal was for failure to show residence, so that the judgment would not be a bar on the merits.

It is plain under our decisions that the court below was right, for intention alone cannot retain a residence, every vestige of which is gone, with no place left to which the party has a right to return. Thus, in *Jamaica v. Townshend*, 19 Vt. 267, a man residing in Jamaica with his family, bargained for the occupancy, and conditionally for buying, a piece of land in another part of the town, and had cleared part of it and cut some timber to use in building a house upon it. He then moved to Londonderry with his wife and family, taking with him all of his household furniture and effects, except a few small articles of little use or value, and lived there twenty-nine days, and then moved back to Jamaica. When he left Jamaica he had no intention of again living in the house he moved from when he left there, but intended to remain in Londonderry till he finished his contemplated house in Jamaica, and then move into it. This was held to be a change of residence, and to interrupt the gaining of a settlement in Jamaica by residence. The gist of that decision is found in the charge to the jury, which was sustained; namely that the intention to build a house in Jamaica and move into it did not retain the former residence in that town. That case, as Judge Aldis said in *Mann v. Clark*, 33 Vt. 61, was an attempt to control an actual residence in one town by a mere intention of removing to another town.

In *Barton v. Irasburgh*, 33 Vt. 153, it is said that, in considering the question of intention, it is always important to consider whether the party has anything to return to. If he has, he may well be supposed to have an intention to return. But if he has not, he may more reasonably be thought to carry his home with him.

In *Berlin v. Worcester*, 50 Vt. 23, it is said that the idea of a right to be and remain at a particular place is inseparable from the conception of a home or domicile. 47 L.R.A. (N.S.)

In *Jericho v. Burlington*, 66 Vt. 529, 29 Atl. 801, it is held that mere intention does not constitute residence; that it must have relation to a definite place to which the person has a right to return. That case overrules *Rockingham v. Springfield*, 59 Vt. 521, 9 Atl. 241, as at variance with our other decisions. The error in that case consisted in not distinguishing between a domicile of origin, which adheres till a domicile of choice is acquired, and a mere pauper residence sufficient under the statute to warrant an order of removal, which residence is lost as soon as abandoned, though no other is acquired.

As to the judgment barring the merits, the record shows that the dismissal was for failure to show residence.

Judgment affirmed. 1

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

T. C. THOMPSON.

(118 C. C. A. 79, 199 Fed. 395.)

Railroad — license to use tracks — posting signs — effect.

1. A railroad company which has permitted the use of its tracks by pedestrians between two points cannot relieve itself from the obligation to use reasonable care in handling its trains there by merely posting "no trespass" signs along the tracks.

Same — disregarding signs — trespass.

2. One does not become a trespasser in using a long-used path along a railroad track by the presence thereon of "no trespass" signs, if they have been so generally disregarded as to raise a presumption of acquiescence on the part of the railroad company.

(October 7, 1912.)

Note. — Posting signs warning trespassers as affecting liability of railroad company for injury to persons walking on track.

The practical question of primary importance underlying this problem is whether one who goes upon a railroad track in disregard of signs posted by the company, warning against trespassing, is thereby rendered a trespasser in legal contemplation, whereas but for those signs he would be a licensee; for upon the answer to this question depends the rule as to the company's duty of prevision and lookout, and the rule as to the degree of care which it owes such a person. — whether only the duty not to injure him wantonly or recklessly, or a higher degree

ERROR to the Circuit Court of the United States for the Southern Division of the Western District of Washington to review a judgment in plaintiff's favor, and denying motions for new trial and for a judgment *non obstante veredicto*, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Gilbert, Circuit Judge:

The defendant in error recovered a judgment against the plaintiff in error for damages for personal injuries received on October 16th in the town of Leavenworth, Washington. At the time of the accident Leavenworth had a population of 1,200 or 1,300. The town was divided into two sec-

of care, usually termed that ordinary or reasonable care demanded because of the dangerous character of the railroad business. A second question often arises in these cases as to the effect of the habitual disregard of such signs on the part of the public upon the duty and responsibility of the railroad company.

General rule.

The general rule seems to be that where one goes upon a railroad track in disregard of the company's warning signs forbidding trespassing, the company owes him no lookout duty whatever, but only the duty, after actually discovering him in peril, of exercising reasonable diligence not to injure him; i. e., not to injure him wantonly or recklessly. This rule has been applied to persons going upon railroad bridges. *Beiser v. Chesapeake & O. R. Co.* 29 Ky. L. Rep. 249, 92 S. W. 928 (bridge over city streets, sign reading: "Caution. Keep off the bridge"); *Prince v. Illinois C. R. Co.* 30 Ky. L. Rep. 469, 99 S. W. 293 (private railroad bridge within the company's switch yard, sign warning trespassers to keep off); *Lamb v. Southern R. Co.* 86 S. C. 106, 138 Am. St. Rep. 1030, 67 S. E. 958 (bridge a quarter of a mile or more in length, being part of a longer trestle, signboard posted near the end plainly forbidding persons to use the same, informing pedestrians that the passage of trains over the same was very frequent, and that the attempt to cross such bridge was dangerous).

The rule has also been applied to persons going upon railroad trestles. *Smith v. Illinois C. R. Co.* 28 Ky. L. Rep. 723, 90 S. W. 254 (sign placed at each end of a long trestle, warning the public against walking thereon, and informing all that any trespassing would be at the peril of the trespasser); *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489 (trestle 715 feet long and 34 feet high, with a notice posted at the end, warning people to keep off).

So, one who goes upon a railroad trestle 100 yards long and 50 feet high, in disregard of a signboard notifying people not

tions; the business portion of the town being on the east side, and the residence portion being on the west side, the distance between being about a quarter of a mile. Between the two divisions of the town run the tracks of the terminal yard of the plaintiff in error. For a number of years it had been the notorious and constant custom of the residents of the town to pass between the east and the west sides by walking, both in the daytime and at night, along the main railway track, from 200 to 300 persons passing each day, to the knowledge of the railroad company, and without its objection. Some three or four months before the accident, a "no trespass" sign was posted somewhere on the right of way, and thereafter, a month or six weeks before the accident,

to go on the trestle, knowing it is about train time, contributes to his injury received thereon by being struck by a train. *Little v. Carolina C. R. Co.* 119 N. C. 771, 26 S. E. 106.

This rule has also been applied to persons going upon tracks within railroad yards. *Pulley v. Chicago, B. & Q. R. Co.* 94 Iowa, 565, 63 N. W. 328 (8-foot posts carrying danger signs reading: "Dangerous. This is no thoroughfare. People crossing here will be trespassers"); *Perego v. Lake Shore & M. S. R. Co.* 158 Mich. 225, 122 N. W. 535 (sign reading: "Notice. Railroad grounds. No thoroughfare. No trespassing allowed. Dangerous"); *Hyde v. Missouri P. R. Co.* 110 Mo. 272, 19 S. W. 483 (signs warning people to keep off); *Koegel v. Missouri P. R. Co.* 181 Mo. 379, 80 S. W. 905 (signs reading: "No admittance except to employees. These grounds are private property and used as a switching yard. All persons are warned of danger" [signed by the superintendent], and "This is not a thoroughfare, but the private property of the K. — — R. Co. All persons are warned against trespassing").

So, in *Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 184, 46 U. S. App. 85, 74 Fed. 285, where a pedestrian was injured while crossing a switching track at a place not a public crossing, but where large numbers of persons were in the habit of crossing daily, to the knowledge of the railroad company, it was said that no earnest efforts were made nor efficient means employed to cause people to desist from passing that way, and the court remarked that perhaps a painted sign, "Keep off the tracks," at either end of the path, would have been sufficient to turn the passing people another way, and if not, at least to give such distinct and constant warning as to make trespassers of all who persisted in crossing, and thus to reduce the measure of care required towards them.

And where it appears that a well-defined path exists along a railroad track in a switch yard, and has been used by the public as a walk way for more than thirty-five years, without let or hindrance, and that no sign or notice has ever been posted for-

two or three other such notices were posted. Aside from posting the notices, the plaintiff in error took no steps to prevent the use of its track as it had been used before, and the use continued as before, notwithstanding the notices. The defendant in error, while walking between the rails of the main line track at about 10:45 o'clock at night, was struck down and injured by a caboose, which was coming from the direction towards which he was walking. He testified that the night was dark; that he took the usual course, walking on the beaten path between the rails of the main track; that, after proceeding a short distance, he was met by an engine drawing several cars; that he stepped off from the track to allow the engine and cars to pass;

bidding such use, a plaintiff, who has a prima facie case of negligence against the company, should not be nonsuited upon the ground that he was a trespasser in the company's switch yard, and that therefore the company owed him no duty except not to injure him wantonly or recklessly. *Sanders v. Southern R. Co.* 90 S. C. 331, 73 S. E. 356.

And one who attempts to cross railroad yards between sections of a standing freight train, at a point where there may be a trail used by pedestrians generally, but no recognized crossing, and where there is a sign warning trespassers, must be deemed to know the danger he thus encounters, and to take upon himself the risk of injury; and it is immaterial that others may have taken the same risk without mishap; this may induce him to take the same risk, but it does not shift the responsibility for the injury he receives from him to the railroad company. *Rodriguez v. International & G. N. R. Co.* 27 Tex. Civ. App. 325, 64 S. W. 1605, especially opinion on motion for rehearing.

And the rule has been applied to persons going upon the track in general, in disregard of signs posted at intervals, warning the public not to walk thereon, and cautioning them against danger. *Hamlin v. Columbia & P. S. R. Co.* 37 Wash. 448, 79 Pac. 991; *Frye v. St. Louis, I. M. & S. R. Co.* 200 Mo. 377, 8 L.R.A.(N.S.) 1069, 98 S. W. 566 (railroad right of way in a country district inclosed and signs posted at railroad station, positively forbidding persons not having business with the company to enter or walk upon the track, informing such that they have no legal right to disregard the notice, and that in every case where they do disregard it they are trespassers).

Also in *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582, where a pedestrian was injured while walking along the track at a point used as a passageway for the general public, but so used against the repeated protests of the railroad agents, it appears that sign posts had been placed by the company upon its right of way, warning persons against entering and crossing the tracks or using the property for their own conven- 47 L.R.A.(N.S.)

that after they passed he stepped back on the track, and was proceeding on his way when he discovered close upon him the car which struck him, approaching at a speed of 8 or 9 miles an hour and carrying no lights; that said car, a single truck caboose, was being switched by means of a flying switch onto a side track near by.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Messrs. F. V. Brown and F. G. Dorety, for plaintiff in error:

The erection of signs forbidding trespassing revoked any license previously existing, and made plaintiff a trespasser.

Anderson v. Northern P. R. Co. 19 Wash. 340, 53 Pac. 345, 4 Am. Neg. Rep. 235;

ience, and because of this lack of acquiescence by the company in the use of the tracks as a highway, and because of these warnings, the court says it is difficult to conceive how it is possible for a license to be acquired by the public, and it is implied very strongly that the pedestrian was therefore a trespasser, though in that particular case this point was not very important.

And it has been held that where a railroad crosses a private way owned by the railroad company, and connecting two city streets, and planks are placed between the rails at the crossing, and the way is considerably used by the public for travel, the posting of a sign at that point, reading: "This is not a public way and is dangerous," is not necessarily a denial to the public of the right of crossing; but it is a question of fact how far the sign is to be taken as a notice that persons had not a right to pass, the burden of proof being on the pedestrian who may be injured at such point to show, taking all the facts into consideration, the sign among them, that there is an implied license for all persons to pass over; if it shall be determined that there is no such license, such pedestrian is a trespasser, and the company would not be liable except for wantonness or gross negligence on its part. *O'Connor v. Boston & L. R. Corp.* 135 Mass. 352.

And in *Goudreau v. Connecticut Co.* 84 Conn. 406, 80 Atl. 281, where a pedestrian was killed by being struck by a trolley car upon a bridge built for the exclusive use of steam railway and trolley cars, and not generally used by foot passengers, the fact, among others, that there was a sign at each end of the bridge, warning persons of the danger of walking upon the same, was said to show that the deceased had no right to cross the bridge, that in attempting to do so he acted rashly, that he had no license or permission whatever to cross it on foot, and that he was no other than a trespasser in so doing. It is there held that under those conditions the motorman upon the car was under no obligation to look to see if anyone was crossing the bridge, since he knew it was solely for the use of the railroad, and

Hamlin v. Columbia & P. S. R. Co. 37 Wash. 448, 79 Pac. 991; *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582.

The plaintiff's contributory negligence is established as a matter of law by his own evidence, and bars recovery regardless of any negligence of the defendant.

Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; *Atchison, T. & S. F. R. Co. v. Schwindt*, 67 Kan. 8, 72 Pac. 573; *Missouri P. R. Co. v. Moseley*, 6 C. C. A. 641, 12 U. S. App. 801, 57 Fed. 921; *King v. Illinois C. R. Co.* 52 C. C. A. 489, 114 Fed. 855; *Tucker v. Baltimore & O. R. Co.* 8 C. C. A. 416, 8 U. S. App. 491, 59 Fed. 968; *Denver & R. G. R. Co. v.*

Buffehr, 30 Colo. 27, 69 Pac. 582; *Gulf, C. & S. F. R. Co. v. Wilkins*, — Tex. Civ. App. —, 32 S. W. 351; *Neal v. Carolina C. R. Co.* 126 N. C. 634, 49 L.R.A. 684, 36 S. E. 117; *Spaven v. Lake Shore & M. S. R. Co.* 130 Mich. 579, 90 N. W. 325; *Davis v. Boston & M. R. Co.* 70 N. H. 519, 49 Atl. 108; *Beck v. Vancouver R. Co.* 25 Or. 32, 34 Pac. 753; *Birrell v. Great Northern R. Co.* 61 Wash. 336, 112 Pac. 362, Ann. Cas. 1912 B, 1239; *Illinois C. R. Co. v. Hall*, 72 Ill. 222; *Gregory v. Louisville & N. R. Co.* 25 Ky. L. Rep. 1986, 79 S. W. 238; *Gulf, C. & S. F. R. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068; *Moody v. St. Louis, I. M. & S. R. Co.* 95 Ark. 319, 129 S. W. 783; *Lamb v. Southern R. Co.* 86 S. C. 106, 138 Am. St. Rep. 1030, 67 S. W. 958; *Exum v.*

that people were warned not to cross it on foot. The plaintiff was nonsuited.

But in *Fearons v. Kansas City Elev. R. Co.* 180 Mo. 208, 79 S. W. 394, it was held that where the only objection made by a street railway company to the use of a tunnel through which its line passes is a sign posted at the end thereof, reading, "No admittance," and this sign is unheeded by the public, but pedestrians pass through such tunnel in such numbers daily that the car operators know it is unheeded, and should consequently reasonably anticipate the presence of persons therein, the presumption of a clear track is destroyed, and the fact that such persons may actually be trespassers does not relieve such operators from the duty of keeping a careful lookout for the persons so expected at that point.

It is often said that when a railroad company has thus erected warning signs along its tracks, it has done its whole duty towards the public, and cannot be held bound to do more in order to avoid liability for injury to one going upon the track.

Thus, where some streets of a city cross railroad yards and the many tracks therein, and are guarded with flagmen, and other necessary precautions are taken, and other streets though established on both sides of the yards, are not open for travel across such yards, so far as concerns a warning to the public at the point where the latter streets meet the railroad yards, the company does its duty when it erects such signs. The law does not require that after such public warning the company must repeat it by protest or otherwise. It has done enough to put people on their guard for safety. And people who go across the tracks at such points are trespassers, and the company owes them no duty to watch for their presence. *Pulley v. Chicago, B. & Q. R. Co.* 94 Iowa, 565, 63 N. W. 328.

And where a railroad has posted along its right of way at street intersections a notice reading: "Grand Trunk Railway System. Warning: This right of way is the private property of the Railroad Company. All persons are warned against walking or trespassing on the track between stations; 47 L.R.A. (N.S.)

by doing so they run great risk and are liable to prosecution," it has done all the law requires, and it cannot be held liable for injuries received by a child that wanders upon the track. *Katzinski v. Grand Trunk R. Co.* 141 Mich. 75, 104 N. W. 409.

And where a railroad company has provided a safe approach from its tracks to its depot in a city, and has posted signs warning people not to cross the yards elsewhere, reading: "Notice. Railroad grounds. No thoroughfare. No trespassing allowed. Dangerous," it has performed its entire duty to prevent persons crossing at unsafe places. It is their legal duty to go to and depart from trains in the way provided. The company owes no duty to travelers to station a man at the dangerous place to prevent them from trespassing. *Perego v. Lake Shore & M. S. R. Co.* 158 Mich. 225, 122 N. W. 535.

And where a railroad company maintains warning signs in its yards to notify people that there is no thoroughfare, that no trespassing is allowed, and that the place is dangerous, it has done all it can to warn people away, unless it should station men at the highway along the tracks; if, in disregard of the dangers offered by the tracks themselves, and of the warning signs, persons persist in passing over such tracks, they do so with full knowledge of the dangers, and must take the risk of injury; and one so injured, though an employee of the company, and bent upon some errand in the line of his duty, cannot recover from the company. *Winnie v. Lake Shore & M. S. R. Co.* 160 Mich. 334, 125 N. W. 351.

Thus, in *Frye v. St. Louis, I. M. & S. R. Co.* 200 Mo. 377, 8 L.R.A. (N.S.) 1069, 98 S. W. 566, it was said that it is evident that railroad companies are in a sense defenseless against the appropriation of their tracks by footmen in flippant and defiant disregard and in the teeth of the company's protest, who, when injured, seek the court for relief. The companies fence their right of way, they erect cattle guards, and post notices and signs warning the public, and protesting against their use of the tracks. What more can the company do or should it be required to do to protect itself? Shall it

Atlantic Coast Line R. Co. 154 N. C. 408, 33 L.R.A. (N.S.) 169, 70 S. E. 845.

Messrs. Bates, Peer, & Peterson, and Sullivan & Christian, for defendant in error:

Defendant was guilty of negligence.

Northern P. R. Co. v. Baxter, 109 C. C. A. 635, 187 Fed. 789; East St. Louis Connecting R. Co. v. O'Hara, 150 Ill. 580, 37 N. E. 917, 11 Am. Neg. Cas. 416; Palmer v. Chicago, St. L. & P. R. Co. 112 Ind. 250, 14 N. E. 70; 1 Thomp. Neg. 2d ed. § 22; Schumacher v. St. Louis & S. F. R. Co. 39 Fed. 174; Overton v. Indiana, B. & W. R. Co. 1 Ind. App. 436, 27 N. E. 651; Rhymes v. Jackson Electric R. Light & P. Co. 85 Miss. 140, 37 So. 708; Eskridge v. Cincinnati, N. O. & T. P. R. Co. 89 Ky.

367, 12 S. W. 580; Roth v. Union Depot Co. 13 Wash. 536, 31 L.R.A. 855, 43 Pac. 641, 44 Pac. 253; Illinois C. R. Co. v. Hammer, 72 Ill. 347; Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628; Hooker v. Chicago, M. & St. P. R. Co. 76 Wis. 542, 44 N. W. 1085; Ft. Worth & D. C. R. Co. v. Longino, 54 Tex. Civ. App. 87, 118 S. W. 198; Young v. Clark, 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315; McAllister v. Seattle Brewing & Malting Co. 44 Wash. 179, 87 Pac. 68; Brown v. Boston & M. R. Co. 73 N. H. 568, 64 Atl. 194; Thomp. Neg. 2d ed. § 1717; Conley v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 402, 12 S. W. 764.

Plaintiff was not guilty of contributory negligence.

Indianapolis Street R. Co. v. Marschke,

employ armed guards? Shall it build fences that cannot be scaled, crawled through, or broken down? Shall it plant spikes in its cattle guards, to the danger of its own employees? Or use pitfalls? We confess our inability to answer.

Many of these cases declare that going upon the track in disregard of the warning sign characterizes one as a trespasser to whom no duty to keep a lookout is owing. But by referring to notes in 8 L.R.A. (N.S.) 1069 and 41 L.R.A. (N.S.) 264, it will be observed that some of the jurisdictions represented by the cases above cited, under some circumstances, recognize a duty to keep a lookout even for trespassers.

In a few cases it has been said that one who goes upon railroad tracks in disregard of such warning signs is at best a bare licensee, and must be treated in law as such.

Thus, one who, for his own convenience merely, attempts to cross railroad tracks at a point where a cross street abuts upon the railroad property, but does not extend across it, in disregard of signs or warning against trespassers, even in pursuance of a general custom by others so to cross, is at best a bare licensee, and if guilty of contributory negligence in waiting upon the track for a train to pass upon another track, cannot recover for his injuries received by being struck by a train upon the track where he stands. *Asche v. Harmon*, — Ind. App. —, 101 N. E. 615.

And where a sign is conspicuously placed at a point where workmen from a factory have a choice of routes to their homes in a nearby city as between a railroad right of way and a street, the sign reading: "Danger, beware. The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians, who are warned to use the public streets, and keep off these private tracks," and signed by the general manager of the railroad company, one who uses such right of way as a pathway, as others have done daily for many years, to the knowledge of the company and its servants, does so, not as the "invited guest" of the company, but as a bare li-

ensee; by the company's acquiescence in such use, he is only relieved from responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on by the railroad. The company owes him no duty of provision, but only the duty to use reasonable care to discover, and not to injure him when discovered. *Williamson v. Southern R. Co.* 104 Va. 146, 70 L.R.A. 1007, 113 Am. St. Rep. 1032, 51 S. E. 195.

—where signs habitually disregarded.

As suggested in the beginning, a second question often arises in these cases as to the effect of the habitual disregard of such signs on the part of the public upon the duty and responsibility of the railroad company, and in this connection is found the real conflict of opinion. At least, it appears to be such at first reading of the cases. For while many cases go upon the theory that one who goes upon railroad tracks in disregard of warning signs is not rendered less a trespasser by reason of the fact that others may also be trespassers, other cases follow the argument that by long-continued acquiescence on the part of the company in the common and habitual use of its tracks by the public, in disregard of its warning signs, a presumption of consent is raised, and the person thus disregarding the signs thereby loses his character of trespasser, and virtually becomes a licensee, and must be treated accordingly. But this seeming conflict of opinion largely disappears upon a closer examination of the cases, or at least, can be explained upon the ground that in the former group of cases the company's acquiescence had not been of such long duration as in the latter group, i. e., the acquiescence had not existed long enough to raise a presumption of consent. In some cases the exact length of time does not appear, but it is believed that this explanation is generally applicable.

Thus, while it has been said that the theory that one who goes upon railroad tracks in spite of railroad signs is a trespasser is especially applicable to one going

166 Ind. 490, 77 N. E. 945; Ablard v. Detroit United R. Co. 139 Mich. 248, 102 N. W. 741; Thompson v. Northern P. R. Co. 93 Fed. 384; Northern P. R. Co. v. Baxter, 109 C. C. A. 635, 187 Fed. 787.

The broad inference drawn from the posted notices was negated by the fact that the user remained unchanged.

De Haven v. Hennessey Bros. & E. Co. 69 C. C. A. 620, 137 Fed. 475, 18 Am. Neg. Rep. 695; Murrell v. Missouri P. R. Co. 105 Mo. App. 88, 79 S. W. 505; Thomp. Neg. 2d ed. § 1838.

Gilbert, Circuit Judge, delivered the opinion of the court:

Error is assigned to the refusal of the trial court to sustain the objection of the

plaintiff in error to testimony offered to show the common use of the tracks by pedestrians at and before the time of the accident. It is contended that, whatever may have been the implied license to pedestrians to walk on the main track prior thereto, the license had been revoked some two or three months before the accident by the posting of "no trespass" signs. The theory of the plaintiff in error seems to be that by posting such notices the plaintiff in error was absolved from all duty to observe reasonable care in the handling of its trains, notwithstanding that it knew that the inhabitants of the town still walked along the tracks, as had been their custom before the notices were posted. That contention cannot be sustained. The record does not show

upon a railroad trestle, where there is nothing to show that such trestle is used by the public generally as a walk way, and therefore no acquiescence by the company in such use appears (Smalley v. Southern R. Co. 57 S. C. 243, 36 S. E. 439), this theory has been held applicable to persons thus going upon a railroad bridge, although other persons may have trespassed upon the same bridge (Beiser v. Chesapeake & O. R. Co. 29 Ky. L. Rep. 249, 92 S. W. 928).

And in Lamb v. Southern R. Co. 86 S. C. 106, 138 Am. St. Rep. 1030, 67 S. E. 958, it was said that acquiescence by a railroad company in the use of its river bridges or trestles by pedestrians cannot be inferred from the fact that many persons choose to take the risk of using them as walk ways in disregard of the fact that the company has posted conspicuous notices forbidding them to do so. It cannot be inferred, from the fact that planks have been placed upon the bridge or trestle, to be used by its own employees, that the company intended others to cross thereon. When a railroad company warns persons against the use of such a dangerous structure, those who insist on incurring the peril of using it, however numerous they may be, have no right to charge the company with acquiescence in such use. Nor is the company bound to put signs along the trestle in anticipation that persons may climb up at a point between the approaches.

And this rule applies to one going upon tracks within railroad yards in disregard of warning signs, notwithstanding that, in spite of such warning signs, people have been in the habit of disregarding them, and crossing to and fro for years, both by day and by night, thereby making a path across the tracks at such point. Such crossing clearly amounts to contributory negligence, and no recovery can be had against the company for the resultant death of the pedestrian. Pulley v. Chicago, B. & Q. R. Co. 94 Iowa, 565, 63 N. W. 328.

And although people in general are in the habit of passing over tracks within railway yards in spite of warning signs, one who is injured in attempting so to do cannot re-

cover from the company; the company owes him no duty as a member of the traveling public rightfully there. Winnie v. Lake Shore & M. S. R. Co. 160 Mich. 334, 125 N. W. 351.

And this rule applies to one going upon railway tracks in a country district in disregard of warning signs posted near by, although many people are accustomed to use the tracks at that point as a walk way by day in spite of the notices, and although the tracks are used even at night in winter months by eight or ten mill men and by certain patrons of a saloon in a nearby town, who, after lingering until late in the night over their cups, walk the railroad back to their homes in spite of its dangers. Frye v. St. Louis, I. M. & S. R. Co. 200 Mo. 377, 8 L.R.A.(N.S.) 1069, 98 S. W. 566.

So, it has been held that the fact that others are accustomed to use the tracks within railroad yards as a walk way in disregard of warning signs affords no just foundation for the inference that the company has consented to such use. Hyde v. Missouri P. R. Co. 110 Mo. 272, 19 S. W. 483. Or for the claim of a license from the company that the tracks may be so used. Koegel v. Missouri P. R. Co. 181 Mo. 379, 80 S. W. 905.

And the fact that for a number of years the residents generally in a small village at that place have been in the habit of using the railroad track as a footpath does not change the rule. Hamlin v. Columbia & P. S. R. Co. 37 Wash. 448, 79 Pac. 991.

Thus, in the last case cited it was said that it is a matter of common knowledge that all railroads are used to a greater or less extent by foot passengers unless such passengers are absolutely excluded therefrom by barriers or by force. The very track itself is a continuing notice and warning against the danger of so doing. The track is constructed primarily for the purpose of carrying passengers and freight in cars, and its use as a footpath is always secondary. To permit its use as such greatly increases the danger to those traveling in cars, and it is not the policy of the law to encourage such use, and unless a clear right to be upon

us what was the language of the notices. We may assume that it was a notice forbidding trespass on the right of way. The evidence is that such notices were disregarded by the public, and that no effort whatever was made by the plaintiff in error to enforce the prohibition against trespass, and that no warnings of any kind, other than the notices, were ever given. By simply posting such a notice, which it knows is disregarded, a railroad company cannot wholly shift its responsibility. It is still obliged to move its trains with reasonable regard to the personal safety of those who its officers know are likely to be found on its tracks. In *Ft. Worth & D. C. R. Co. v. Longino*, 54 Tex. Civ. App. 87, 118 S. W. 198, the court said: "We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be; and in our judgment it

can make no difference, so far as the duty of the railroad company is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another, when the presence of and danger to such other person is reasonably to be anticipated."

In *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 402, 12 S. W. 764, it was held that the detaching of part of the train and allowing it to run into the town unattended on a dark night, with no lights in front and no signal, was such a departure from the defendant's duty to the public as to entitle the plaintiff to recover, though his intestate was a technical trespasser. Said the court: "By being technically a trespasser he does not forfeit all right to protection. . . . Why is he not ordinarily required to look out for trespassers in running his train? It is not because the trespasser has for-

the track at the given place is shown, a footman thereon is to be regarded as a trespasser.

On the other hand, as stated above, where the company's acquiescence has continued long enough to raise a presumption of consent, the pedestrian's disregard of warning signs will not render him a trespasser, but he will be treated as a licensee.

Thus, where a railroad is constructed upon what has been a public highway, and the public does not cease at any time to use it as such for foot travel, and the railroad company keeps a space 3 feet wide on both sides of the track smooth, level, and solid for a footway for a period of more than thirty years, such footway is a public highway for pedestrians, and the erection thereafter by the company of a warning board reading: "All persons are forbidden from using this track for foot passage" does not give the railroad company a right in the footway which it did not already possess, nor deprive the public of one which it did possess; and therefore a pedestrian has a right to be thereon, and is not a trespasser or a mere licensee, and, if free from contributory negligence, he may recover for an injury received while walking there by reason of the negligence of the company's servants. *Louisville, N. A. & C. R. Co. v. Downey*, 18 Ind. App. 140, 47 N. W. 404, 3 Am. Neg. Rep. 638.

And where for many years people have used railway tracks within a city as a pathway, and the company's sign warning them off has never been obeyed, but has been completely ignored, such use of the tracks is practically with the consent of the company, and one so using them is not a trespasser, but a licensee, and the company owes him a

lookout duty. *Murrell v. Missouri P. R. Co.* 105 Mo. App. 88, 79 S. W. 505.

And one walking upon railroad tracks within city limits at a place commonly and habitually used by the public as a pathway with the knowledge and acquiescence of the company is not a trespasser, but a licensee, notwithstanding the posting of warning notices forbidding all persons not having business with the company to sit or walk upon the tracks, and prohibiting walking upon or crossing the tracks except at regular crossings, and the fact that he is so walking when killed by a train will not constitute negligence such as to defeat a recovery for his death by his representative. *Gulf, C. & S. F. R. Co. v. Matthews*, 99 Tex. 160, 88 S. W. 192.

A person walking on a railroad track at a place which had been for years habitually used by the public as a pathway is not a trespasser, and the company owes him the duty of using ordinary care to discover him and to avoid injuring him, and it cannot change this duty or make him a trespasser by the mere posting of signboards, warning people not to trespass on those grounds. *Missouri, K. & T. R. Co. v. Sharp*, — Tex. Civ. App. —, 120 S. W. 263; *Gulf, C. & S. F. R. Co. v. Cohen*, — Tex. Civ. App. —, 126 S. W. 916.

Also where the track is commonly used by pedestrians in spite of "No Trespass" signs, as before their erection, to the knowledge of the company, and long enough to imply acquiescence on its part, and no effort is made by the latter to enforce the prohibition against trespass, such company is not absolved from the duty to use reasonable care in handling its trains; a person so going upon the track is not a trespasser, such as to be barred from recovery for injury except that which is wantonly or recklessly

feited his right to protection, but it is because he has the right to presume that he will not trespass upon the track."

In *Murrell v. Missouri P. R. Co.* 105 Mo. App. 88, 79 S. W. 505, the evidence was that for many years people had used the right of way and the tracks as a passway, and that this was with the consent of the company; for while a sign was shown to have been put up, warning people away, it was never obeyed, and the defendant knew that for many years it had been altogether ignored. The court said: "It follows that plaintiff was not a trespasser when walking along the track or on the right of way. *Morgan v. Wabash R. Co.* 159 Mo. 262, 80 S. W. 195. It was the duty of defendant's servants in charge of the engine to keep a lookout for persons on the track, and its liability is not limited to want of care after discovery of the danger."

In *International & G. N. R. Co. v. Brooks*, — Tex. Civ. App. —, 54 S. W. 1056, it was held that where a street which crossed a railroad track and ascended a bluff was used by pedestrians as a highway for many years,

and the railroad company maintained steps where the street ascended the bluff, and the track was used as a thoroughfare at all hours, one who passed along the track to ascend the steps is not a trespasser, although the company had put up signs forbidding all persons except employees to go upon the tracks.

The trial court did not err, therefore, in refusing the instruction requested by the plaintiff in error on the subject of the notice, the substance of which was that the plaintiff had no right to disregard such signs and go upon the right of way in spite of them; that if he did so he was a trespasser, and could not recover, unless he was wantonly or recklessly injured; and that this would be true, even if the public had been accustomed to use the right of way as a footpath for several years past, "as the placing of signs should be considered to revoke any permission that might previously have been given." The instructions so requested ignored the facts in the case, among which was the continued use of the property without objection or inter-

inflicted. *GREAT NORTHERN R. Co. v. THOMPSON*.

Also in *Dublin, W. & W. R. Co. v. Slatery*, L. R. 3 App. Cas. 1155, 39 L. T. N. S. 365, 27 Week. Rep. 191, where one who went with a passenger to see him off on the train was killed in crossing the tracks at a place where a sign was posted reading: "Beware of the trains; do not cross the road except at the road gates," it was held that his disregard of the sign was not a defense to the action for damages, since for three years it had been disregarded by the public in general, with the full knowledge of the company's servants, and without the least objection on their part; the deceased was therefore not a trespasser, but was rightfully there, and the company owed him the duty to use reasonable care to look out for and avoid injuring him.

And even though a pedestrian who goes upon a railroad track regardless of signboards warning people to keep off the track may, strictly speaking, be only a trespasser or a licensee, yet where the track at that point lies within the city limits and is prepared with cinders for a convenient walk way, and has been habitually used as such by the public for many years, the train operatives who are cognizant of this habit of the people must keep a lookout and use ordinary care to avoid injuring such pedestrians, and the company will be liable for injuring them if that care is not used. *Louisville & N. R. Co. v. Hoskins*, 32 Ky. L. Rep. 1263, 108 S. W. 305.

A sign posted at the entrance to a railway yard, warning trespassers to keep off the tracks and grounds, and warning and forbidding all persons "except employees and persons whose business requires their pres-

ence," does not apply to an employee of the railroad, although not on duty at the time, so that he is not a trespasser upon the tracks at that place, and may recover for injuries received by reason of the negligence of the company's servants, especially where, by long-continued and general use of such tracks by the public as a highway, the jury are warranted in finding that the company has acquiesced in such use. *International & G. N. R. Co. v. Brooks*, — Tex. Civ. App. —, 54 S. W. 1056.

And finally, under a statute intended to prevent a person injured on a railroad right of way from proving that he had a right to be there by evidence that he or others had been accustomed to use such right of way as he was using it when injured, and providing that the civil liability of railroads in such cases shall be limited to damages occasioned by their wilful or gross negligence when such railroads have posted notices forbidding such trespass, the notice, in order to benefit the company, must be posted at the time of the injury, and must be maintained in such condition that pedestrians, by the exercise of reasonable care, can know of it; and a notice posted under another statute relating to private crossings, and warning pedestrians that they must close the gate, and adding, "Trespassers are forbidden to enter or cross here," it seems is insufficient; and aside from such statutes, the company is liable for negligently injuring a person even though a trespasser upon the tracks, provided such person was in the exercise of ordinary care, and the company should have anticipated his presence there because of the habitual use of the tracks by pedestrians. *Brown v. Boston & M. R. Co.* 73 N. H. 568, 64 Atl. 194.

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ference on the part of the plaintiff in error, and that the posted notices were habitually disregarded to such an extent as to raise a presumption of acquiescence. In this connection the court properly charged on the subject of license, and said: "Such a license cannot be implied, unless the use by the public has been definite, long, open, and has continued for a considerable period of time. . . . In other words, you must find that the use has continued for a considerable period of time by a considerable number of persons, and has been acquiesced in by the defendant company."

The case of *Anderson v. Northern P. R. Co.* 19 Wash. 340, 53 Pac. 345, 4 Am. Neg. Rep. 235, cited by plaintiff in error, is not in point. In that case the railroad company had used a certain tract of land in a town as a yard and site for railroad shops. The shops were destroyed by fire, leaving exposed a pit, into which the plaintiff fell on a dark and stormy night. The evidence was that, immediately after the fire, the railroad company posted notices warning trespassers off the premises, and that it gave personal warning to the plaintiff. Under those circumstances the court properly held that the notice was effectual to rebut the presumption of a license.

The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that different minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking out for passing trains. There was evidence tending to show that there was not a perfectly safe and equally convenient path at the side of the track; that, while there was a pathway between the track and the ravine, it was a very rough pathway, made of loose cinders, which were being dumped on it at that time; and 47 L.R.A. (N.S.)

that at places the width of the path between the track and the gulch was very narrow, and that at one place it was obstructed by a pile of timbers. There was also at one side a wagon road, but it went down into the gulch to a distance of 100 yards from the railroad, and then ascended a steep hill to the town, and it was not used by foot passengers. In *Thompson v. Northern P. R. Co.* 35 C. C. A. 357, 93 Fed. 384, we said: "It was equally the duty of the plaintiff in error to keep his eyes open and a careful watch in both directions. Manifestly, he could not look in opposite directions constantly. Whether or not he exercised the degree of care required of him by the law ought, we think, to have been left to the jury, under appropriate instructions in respect to contributory negligence."

In *Northern P. R. Co. v. Baxter*, 109 C. C. A. 635, 187 Fed. 787, a case in which a flying switch was made, and a box car was allowed to run on the downgrade unattended and without a lookout, and without signal or warning, whereby the plaintiff was hurt, the latter having testified that he had looked back twice to ascertain if the engine was approaching and that he had seen it previously beyond the switch, and supposed there was no danger, we held that the evidence required the submission to the jury of the question of his contributory negligence. In view of all the evidence in the present case, we find no error in the refusal of the trial court to take the case from the jury on the ground of the contributory negligence of the defendant in error.

The judgment is affirmed.

Petition for rehearing denied.

WASHINGTON SUPREME COURT. (Department No. 1.)

E. E. SIEGLEY, Exr., etc., of M. J. Heney,
Deceased,

v.

HAMILTON ROSS SIMPSON, Respt.,
and
RICHARD H. SIMPSON, Appt.

(73 Wash. 69, 131 Pac. 479.)

Will — mistake in name — extrinsic evidence.

The legatee in a will may be shown by

Note. — Extrinsic evidence to establish identity of legatee or devisee.

I. General rule, 515.

II. Latent or patent ambiguity as a test, 520.

extrinsic evidence to be another than the person named as legatee, although the name used applied to an existing person.

(April 15, 1913.)

APPEAL by defendant Richard H. Simpson, from a judgment of the Superior Court for King County in an interpleader proceeding to determine the right to a legacy under the will of M. J. Heney, deceased. Affirmed.

The facts are stated in the opinion.

Mr. Solon T. Williams, for appellant: Parol testimony is admissible only in case of an ambiguity.

Page, Wills, § 820; Rood, Wills, § 437; 1 Jarman, Wills, 5th Am. ed. chap. 13.

III. Where name of beneficiary is inaccurately stated.

a. Admissibility of extrinsic evidence to identify individual.

1. In general, 522.

2. Name used by testator, 522.

b. Admissibility of extrinsic evidence to identify corporation.

1. In general, 523.

2. Educational societies, 524.

3. Missionary societies, 524.

4. Religious societies, 525.

5. Charitable societies, 525.

c. Where inaccurate name applies to more than one individual or corporation, 526.

d. Extrinsic evidence as to beneficiary to validate devise or bequest, 527.

IV. Where individual or corporation is designated with substantial accuracy.

a. In general, 527.

b. Individual, 528.

c. Corporation, 528.

V. When designation by name and description does not apply to same person.

a. Controlling effect of name versus description, 529.

b. Illustrative cases where name controlled, 529.

c. Illustrative cases where description controlled, 530.

VI. Where designation is by description, and not by name.

a. Where description is indefinite or inaccurate, 531.

b. Where there are persons in existence answering the description.

1. In general, 532.

2. Children.

(a) In general, 532.

(b) Extrinsic evidence to change order of devolution, 533.

3. Nephew or niece, 533.

4. Heirs or next of kin, 533.

In no case has a stranger to the will been permitted to claim against one who is named and described in the will.

30 Am. & Eng. Enc. Law, 2d ed. 673; Jones, Ev. §§ 485, 486, 497; Tucker v. Seaman's Aid Soc. 7 Met. 188.

Messrs. Dorr & Hadley, for respondent:

No person can be found to answer the description "my friend Richard H. Simpson." The words "Richard H." are therefore erroneous and must be stricken. This leaves a devisee described as "my friend — — Simpson," and, in view of the surrounding circumstances at the time the will was made, it is easy to determine that the devisee intended was Hamilton Ross Simpson.

Collins v. Capps, 235 Ill. 580, 126 Am.

VI. b—continued.

5. Legitimate and illegitimate children.

(a) Where there are legitimate children, 534.

(b) Where no legitimate children, 534.

c. Where there are more than one claimant, some of whom answer description only by reputation, 535.

d. Where one of the claimants has been referred to by testator by designation used in will, 535.

VII. Where name or description applies to more than one person, 536.

VIII. Where there is no sufficient name or description, 537.

IX. Character of evidence admissible.

a. The surrounding facts and circumstances, 537.

b. Use of name applied by public or by testator, 538.

c. Relations existing between testator and claimant, 538.

d. Knowledge of testator, 539.

e. Reference to other instruments, 540.

f. Miscellaneous, 540.

g. Declarations of testator.

1. In general, 540.

2. Character of declaration, 541.

3. Where purpose is to contradict terms of will, 542.

h. Testimony of the scrivener, 542.

I. General rule.

There is more or less conflict among the cases as to when there is such an ambiguity or uncertainty as to the person or corporation entitled to a bequest or devise as to render competent extrinsic evidence to show the intention of the testator, to aid in determining the person or corporation entitled thereto, and there is also conflict as to the character of evidence admissible, and this conflict has sometimes induced the be-

St. Rep. 232, 85 N. E. 934; *Acton v. Lloyd*, 37 N. J. Eq. 5; *Camoy's v. Blundell*, 1 H. L. Cas. 778; *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199, 53 L.R.A. 711, 48 Atl. 737; *Hineckley v. Thacher*, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840; *Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894; *Hockensmith v. Slusher*, 26 Mo. 237; *Reformed Presby. Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *Evans v. Hooper*, 3 N. J. Eq. 204; *Connolly v. Par-don*, 1 Paige, 291, 19 Am. Dec. 433.

Mount, J., delivered the opinion of the court:

The question in this case is whether parol evidence is admissible in the construction

of a will which devises "unto my friend Richard H. Simpson the sum of \$6,000," where the legacy is claimed by each of two persons, one named Richard H. Simpson and the other Hamilton Ross Simpson. The facts are briefly as follows: M. J. Heney, a bachelor, died on October 11, 1910, in San Francisco, California, leaving an estate valued at between \$750,000 and \$1,000,000. Prior to his death he made a will by which he left his estate to certain relatives and friends. The sixteenth clause thereof provided as follows: "I give, devise, and be-queath unto my friend Richard H. Simp-son the sum of \$6,000, and I direct that my executors and trustees hereinafter named pay the same to him as soon after my death as the condition of my estate, in the

lief that there is a conflict among the au-thorities as to the admissibility of extrinsic proof under any circumstances to identify a legatee or devisee. Nevertheless, an examina-tion of the cases makes it clear that what-ever conflict of authority there is, pertains to the application of the rule, and not to the general rule that whenever there exists, either from the language of the will or from the proof of extrinsic facts, an ambiguity or uncertainty as to the person entitled to a devise or legacy, which cannot be made clear by a construction of the will as a whole, recourse may be had to extrinsic facts to identify the devisee or legatee intended. The following cases sustain the right to resort to extrinsic evidence to ascertain the devisee or legatee intended, whenever, from the will itself or from the proof of extrinsic facts, the person or corporation entitled to the devise or legacy is uncertain. The develop-ment and application of this rule will illus-trate many exceptions to or modifications of it.

U. S.—*Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689 (bequest to charitable organization); *Powell v. Biddle*, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263 (be-quest to individual).

Ark.—*McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952.

Cal.—*Re Donnellan*, 164 Cal. 14, 127 Pac. 166 (bequest to individual); *Taylor v. Mc-Cowen*, 154 Cal. 798, 99 Pac. 351 (bequest to individual); *Re Dominici*, 151 Cal. 181, 90 Pac. 448 (bequest to individual).

Conn.—*Beardsley v. American Home Mis-sionary Soc.* 45 Conn. 327 (bequest to char-itable society); *Bond's Appeal*, 31 Conn. 183 (bequest to individuals as a class); *Brewster v. McCall*, 15 Conn. 274 (bequest to charitable organization); *Ayres v. Weed*, 16 Conn. 291.

Ga.—*Guerard v. Guerard*, 73 Ga. 506 (be-quest to testator's own right heirs).

Ill.—*Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422 (bequest to four boys); *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 361, 23 N. E. 603 (bequest to missionary so-ciety); *Goodwin v. New Church Bd. of Pub-lican*, 160 Ill. App. 483 (bequest to mis-

sionary society); *Missionary Soc. v. Cad-well*, 69 Ill. App. 280 (bequest to mission-ary society).

Ind.—*Dennis v. Holsapple*, 148 Ind. 297, 46 L.R.A. 168, 62 Am. St. Rep. 526, 47 N. E. 631 (bequest to whoever shall take good care of the testatrix in her last days); *Skinner v. Harrison Twp.* 116 Ind. 139, 2 L.R.A. 137, 18 N. E. 529 (bequest to public corporation); *Harness v. Harness*, — Ind. App. —, 98 N. E. 357 (bequest to children); *Chappell v. Missionary Soc.* 3 Ind. App. 356, 50 Am. St. Rep. 276, 29 N. E. 924 (bequest to missionary society).

Iowa.—*Chambers v. Watson*, 56 Iowa, 676, 10 N. W. 239 (doctrine stated).

Kan.—*Smith v. Holden*, 58 Kan. 535, 50 Pac. 447 (doctrine stated).

Me.—*Howard v. American Peace Soc.* 49 Me. 288 (bequest to religious and charitable societies); *Preachers' Aid Soc. v. Rich*, 45 Me. 552 (bequest to charitable society).

Mass.—*Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57 (rule stated); *Faulkner v. National Sailors' Home*, 155 Mass. 458, 29 N. E. 645 (bequest to charitable society); *Morse v. Stearns*, 131 Mass. 389 (bequest to individual); *Bodman v. American Tract Soc.* 9 Allen, 447 (bequest to religious so-ciety); *Thayer v. Boston*, 15 Gray, 347 (be-quest to individual).

Mich.—*Gilchrist v. Corliass*, 155 Mich. 126, 130 Am. St. Rep. 568, 118 N. W. 938 (be-quest to missionary society); *Cook v. Uni-versalist General Convention*, 138 Mich. 157, 101 N. W. 217 (bequest to missionary fund).

Minn.—*Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046 (general rule stated).

Mo.—*McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481 (general rule stated); *Gor-don v. Burris*, 141 Mo. 602, 43 S. W. 642 (be-quest to individuals); *Hockensmith v. Slush-er*, 26 Mo. 237 (bequest to individual).

Neb.—*Second United Presby. Church*, 71 Neb. 563, 99 N. W. 232 (bequest to religious society).

N. H.—*Smith v. Kimball*, 62 N. H. 606 (bequest to educational institutions); *Til-son v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321 (bequest to religious so-

discretion and judgment of my executors, will permit." Thereafter the will was duly probated in King county, in this state. Executors and trustees were appointed, and one Richard H. Simpson and one Hamilton Ross Simpson each claimed the legacy mentioned in the section of the will above quoted. The executor then filed a petition asking the court to bring the said claimants in and determine the disputed claims. This was accordingly done under the statute. Each of the claimants appeared and set up his claim. The lower court thereupon heard evidence, and determined that Hamilton Ross Simpson was intended as the beneficiary under the will, and directed the executor to pay the legacy

to him. Richard H. Simpson has appealed from that order.

He argues that parol evidence is not admissible to prove that the testator, when he used the name Richard H. Simpson, meant Hamilton Ross Simpson, when there is a Richard H. Simpson in existence who claims under the will. "It is well settled that parol evidence is not admissible to add to, vary, or contradict the words of a written will, not only because the will itself is the best evidence of the testator's intention, but also because wills are required by the statute of frauds to be in writing." 30 Am. & Eng. Enc. Law, 2d ed. 673. "It may be stated generally that, where the beneficiary under a will is not designated with precision, parol evidence is admissible

ciety); South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317 (bequest to educational institution).

N. J.—German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 63 Atl. 835, affirmed in 72 N. J. Eq. 954, 67 Atl. 23 (bequest to charitable society); Van Nostrand v. Domestic Missions, 59 N. J. Eq. 19, 44 Atl. 472 (bequest to missionary society); Moore v. Moore, 50 N. J. Eq. 554, 25 Atl. 403 (bequest to educational institution); Beatty v. Cory Universalist Soc. 39 N. J. Eq. 452; Taylor v. Tolen, 38 N. J. Eq. 91 (bequest to individual); Evans v. Hays, 3 N. J. Eq. 204 (bequest to individual).

N. Y.—Bowman v. Domestic & F. Missionary Soc. 182 N. Y. 494, 75 N. E. 535 (bequest to missionary society); Lawton v. Corlies, 127 N. Y. 100, 27 N. E. 847 (bequest to individuals of a class); Lefevre v. Lefevre, 59 N. Y. 434 (bequest to charitable society); Connolly v. Pardon, 1 Paige, 291, 19 Am. Dec. 433 (bequest to individual); Mann v. Mann, 1 Johns. Ch. 231 (general rule stated); Smith v. Smith, 1 Edw. Ch. 189, affirmed in 4 Paige, 271 (bequest to individual); Re Hansen, 72 Misc. 610, 132 N. Y. Supp. 257 (bequest to individual); Walter v. Walter, 133 App. Div. 893, 118 N. Y. Supp. 268, affirming 60 Misc. 383, 113 N. Y. Supp. 465 (bequest to art society or museum); Re Dickinson, 56 Misc. 232, 107 N. Y. Supp. 386 (bequest to library); Re Pearson, 52 Misc. 273, 102 N. Y. Supp. 965, affirmed in 124 App. Div. 929, 109 N. Y. Supp. 1127 (bequest to certain asylum or hospital); Re Stocum, 94 N. Y. Supp. 588 (bequest to grandchildren); Jay v. Lee, 41 Misc. 13, 83 N. Y. Supp. 579 (bequest to individuals in trust for legatees indicated); Re Wheeler, 32 App. Div. 183, 52 N. Y. Supp. 943 (bequest to missionary society); Brower v. Bowers, 1 Abb. App. Dec. 214 (bequest to nephews and nieces); Trustees of Fund of Episcopate v. Colegrove, 6 Thomp. & C. 614 (bequest to religious society); Hart v. Marks, 4 Bradf. 161 (bequest to individual); Gallup v. Wright, 61 How. Pr. 286 (bequest to individual); Leonard v. Davenport, 58 How. Pr. 384 (bequest to missionary society).
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N. C.—McLeod v. Jones, 159 N. C. 74, 74 S. E. 733 (bequest to missionary society); Tilley v. Ellis, 119 N. C. 233, 26 S. E. 29 (bequest to religious society).

Ohio.—Townsend v. Townsend, 25 Ohio St. 477 (bequest to heirs).

Pa.—Amberson's Estate, 204 Pa. 397, 54 Atl. 484 (bequest to missionary society); Cresson's Appeal, 30 Pa. 437 (bequest to agricultural society); Domestic & F. Missionary Society's Appeal, 30 Pa. 425 (bequest to religious and charitable institutions); Miller's Estate, 26 Pa. Super. Ct. 443 (bequest to individuals); Wampole's Estate, 3 Pa. Super. Ct. 414 (bequest to religious society); Knight's Estate, 10 Pa. Co. Ct. 225 (general rule stated).

R. I.—Peard v. Vose, 19 R. I. 654, 35 Atl. 1046 (bequest to individuals of a class); Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198 (bequest to nursery).

S. C.—Re Robb, 37 S. C. 19, 16 S. E. 24 (bequest to such person or persons as should be entitled to testator's property under laws of the state); Donald v. Dendy, 2 M'Mull. L. 123 (rule stated).

Tenn.—Gass v. Ross, 3 Sneed, 211 (bequest to school district).

Vt.—Re Welch, 78 Vt. 16, 61 Atl. 145 (bequest to individual); Button v. American Tract Soc. 23 Vt. 336 (bequest to missionary society).

Va.—Roy v. Rowzie, 25 Gratt. 599 (bequest to educational society); Wootton v. Redd, 12 Gratt. 196 (general rule stated); Maund v. M'Phail, 10 Leigh, 199 (bequest to charitable society).

Wash.—Reformed Presby. Church v. McMillan, 31 Wash. 643, 72 Pac. 502 (bequest to religious society).

W. Va.—Ross v. Kiger, 42 W. Va. 402, 26 S. E. 193 (bequest to religious society); Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302 (bequest to religious society).

Wis.—Re Paulson, 127 Wis. 612, 5 L.R.A. (N.S.) 804, 107 N. W. 484, 7 Ann. Cas. 652 (bequest to religious society); Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353 (bequest to society).

Eng.—Camoy's v. Blundell, 1 H. L. Cas. 778 (bequest to individual); Charter v.

to show who was intended. Thus, where a latent ambiguity results from the fact that the description of the legatee or devisee is perfectly answered by two or more persons, or is applicable in part to two or more persons, parol evidence to identify the person intended is admissible. But where there is no ambiguity, and the object of the testator's bounty is sufficiently designated by plain language, so that it is clear who was intended, the construction is for the court, and parol evidence is inadmissible, although it might be thereby shown that the testator's intention was entirely different from that expressed in the will." 30 Am. & Eng. Enc. Law, 2d ed. 682, 683. "Where the language of a will is doubtful or ambiguous, parol or extrinsic evidence is

admissible for the purpose of assisting the court in ascertaining its meaning. . . . Thus, where there are two things or persons both answering exactly to the thing or person described in the will, or where the person or thing does not answer precisely the description given, parol evidence may be received in order to ascertain which person or thing was intended." 40 Cyc. 1429, 1430. "In cases of equivocation, as where the will or a provision thereof applies equally as well to two or more objects or persons, evidence of statements or declarations made by the testator at the time of the execution, or about the time of the execution, of his will, is admissible for the purpose of identifying the person." 40 Cyc. 1435. Necessarily extrinsic evidence is ad-

Charter, L. R. 7 H. L. 377, 43 L. J. Prob. N. S. 73 (rule stated); Stringer v. Gardiner, 4 De G. & J. 468, 28 L. J. Ch. N. S. 758, 5 Jur. N. S. 260, 7 Week. Rep. 602 (bequest to individual); Ulrich v. Litchfield, 2 Atk. 372 (individual); Neathway v. Ham, Tamlyn, 316 (individual); Re Gregory, 34 Beav. 600, 6 New Reports, 282, 11 Jur. N. S. 364, 13 Week. Rep. 828 (individual); Pasmore v. Huggins, 21 Beav. 103, 25 L. J. Ch. N. S. 251, 1 Jur. N. S. 1060, 4 Week. Rep. 33 (individual); Masters v. Masters, 1 P. Wms. 425 (individual); Doe ex dem. Le Chevalier v. Huthwaite, 3 Barn. & Ald. 632 (individual); Brown v. Langley, 2 Barnard. Ch. 118 (bequest to the poor of a certain parish); Bernasconi v. Atkinson, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152 (individual); Hampshire v. Peirce, 2 Ves. Sr. 216 (devise to certain number of children of another); Pycroft v. Gregory, 4 Russ. ch. 525, 6 L. J. Ch. 121 (devise to next of kin of another); Re Vaughan, 17 Times L. R. 278 (bequest to educational society); Re Ofner [1908] W. N. 208 (bequest to individual); Hubbuck's Estate [1905] P. 129, 74 L. J. Prob. N. S. 58, 92 L. T. N. S. 665, 21 Times L. R. 333, 54 Week. Rep. 16 (bequest to individual); British Home & Hospital v. Royal Hospital, 90 L. T. N. S. 601 (bequest to charitable society); Re Hooper, 88 L. T. N. S. 160, 51 Week. Rep. 153 (bequest to individual); Re Waller, 68 L. J. Ch. N. S. 526, 80 L. T. N. S. 701, 47 Week. Rep. 563 (bequest to individual); Cloak v. Hammond, 56 L. J. Ch. N. S. 171, L. R. 36 Ch. Div. 255, 56 L. T. N. S. 648, 35 Week. Rep. 186 (bequest to individual); Laker v. Hordern, L. R. 1 Ch. Div. 644, 45 L. J. Ch. N. S. 315, 34 L. T. N. S. 88, 24 Week. Rep. 543 (bequest to daughters of the testator); Lepine v. Bean, L. R. 10 Eq. 160, 39 L. J. Ch. N. S. 847, 22 L. T. N. S. 833, 18 Week. Rep. 797 (devise to wife of testator); Re Ashton [1892] P. 83, 61 L. J. Prob. N. S. 85, 67 L. T. N. S. 325 (bequest to individual); Re Wrenn [1908] 2 I. R. 370 (individual).

Can.—Re Scaton, 8 D. L. R. 204 (bequest to individual); Re Smith, 8 D. L. R. 93 (bequest to charitable society); Van Wart v. Fredericton, 5 D. L. R. 776 (bequest to re-

ligious society); Marks v. Marks, 40 Can. S. C. 210, 12 Ann. Cas. 751 (bequest to wife of testator); Lobb v. Lobb, 22 Ont. L. Rep. 15 (devise to children of the testator).

But extrinsic evidence is not admissible to change the order of devolution, on the ground that a bequest was intended as a bequest to the beneficiaries as a class, and not in common. Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743.

And where there is no ambiguity on the face of the will taken in connection with all the surrounding facts, so that no doubt is raised as to the subject-matter of the bequest or the identity of the legatee, extrinsic evidence of the intention of the testator is not admissible to control or alter his legal intent as manifested by the will itself. Ibid.

Parol evidence is admissible to aid in ascertaining whether or not there is a society or person answering to the designation and description in a devise or bequest; if there is, other extrinsic evidence is inadmissible to show that another society or person was intended. Wilson v. Squire, 1 Younge & C. Ch. Cas. 654.

If the misdescription can be stricken out, and anything remain in the will to identify the person, the court will deal with it in that way; or if it is an obvious mistake, will read it as if correct, since the ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee. Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710. As to character of evidence admissible, see same case *infra*, IX. a.

In Doe ex dem. Hiscocks v. Hiscocks, 5 Mees. & W. 363, 9 L. J. Exch. N. S. 27, 2 Eng. Rul. Cas. 718, the doctrine is asserted that evidence of the intention of the testator as to the beneficiary in a devise or legacy is admissible only where the meaning of the testator, or the meaning of the testator's words, is neither ambiguous nor obscure, and where the devise on its face is perfect and intelligible, but where, from extrinsic evidence admitted, an ambiguity is created as to which of two or more persons, each answering the description in the will, the

missible to prove the identity of the beneficiary named in a will, especially when two or more persons are claiming to be beneficially named,—not for the purpose of varying the terms of the will, but to determine the person meant by the testator. *Connolly v. Pardon*, 1 Paige, 291, 19 Am. Dec. 433; *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903; *Collins v. Capps*, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934.

In *Acton v. Lloyd*, 37 N. J. Eq. 5, the court, after hearing extrinsic evidence as to the identity of the devisee, held that a bequest to Dickey Lloyd was intended for David S. Lloyd. In *Camoys v. Blundell*, 1 H. L. Cas. 778, the court, after examining extrinsic evidence, concluded that Thomas Weld Blundell was entitled to a legacy by

a will which named Edward Weld, his brother, as legatee. The court there said: "For if it be clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name." In *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199, 53 L.R.A. 711, 48 Atl. 737, the court said: "It is the identity of the individual, natural or artificial, that is material, and not the name, for that is simply one of the numerous means by which the identity is ascertained. The identity being established, the name is of no importance." In *Hocken-*

testator intended as his beneficiary. And see also "Latent or patent ambiguity as a test," *infra*, II. As to character of evidence admissible, see same case *infra*, IX. g. 1.

And it has been asserted that the only case in which evidence can be admitted to show the intention of the testator is where a description of the legatee is applicable equally to two persons, or where the description contained in the will is not strictly applicable to any person. *Bernasconi v. Atkinson*, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152. As to character of evidence admissible, see same case, IX. d. h.

And also that courts admit parol evidence to ascertain a person only where there are two persons of the same name as that used in a legacy or devise, or where there has been a mistake in the Christian or surname of the legatee or devisee. *Ulrich v. Litchfield*, 2 Atk. 372.

But where the testator fails correctly to designate the beneficiary, or where there are two or more individuals or corporations bearing the same designation, extrinsic evidence will be received to show the intention of the testator as to the individual intended. *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528, affirmed without opinion in 175 N. Y. 505, 67 N. E. 1090.

And the rule is stated in another case that where the context raises an obstacle to construing, in its strict sense, the terms descriptive of the object of a devise or bequest, or where more than one object exists to which the designation is clearly apposite, extrinsic evidence may be called in to remove the obscurity. *Knight's Estate*, 10 Pa. Co. Ct. 225.

So, where there is a misdescription in the will, either of the person to whom the devise or legacy is given, or of the subject-matter of the bequest or devise, extraneous evidence is always admissible to show who was the object of the testator's bounty. And when there is doubt as to whom the legacy or devise was intended for, extraneous evidence is admissible to show the real party to

whom the devise was made. *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

Whenever the identity of the person intended in a devise or bequest is the only question, parol evidence is admissible to aid in such identification. *Re Hansen*, 72 Misc. 610, 132 N. Y. Supp. 257. And parol evidence may be resorted to, to determine the existence of a person or society answering the designation or description in a devise or bequest (*Wilson v. Squire*, *supra*), or to show the subject of a testator bounty if not sufficiently identified in the instrument (*Smith v. Holden*, 58 Kan. 535, 50 Pac. 447).

As Lord Cairns remarked in *Charter v. Charter*, L. R. 7 H. L. 377, 43 L. J. Prob. N. S. 73, in all cases of testamentary disposition, the court has a right to ascertain all the facts known to the testator at the time he made his will, in order to ascertain the bearing and application of the language which he used, and to ascertain whether there exists any person or thing to which the description given in a will can be reasonably and with sufficient certainty applied.

Extrinsic evidence is always competent where the purpose of it is to place the court as far as possible in the situation in which the testator stood at the time he executed the will, and thus bring the words employed by him into contact with the circumstances attending the execution. Proof of this character does not contradict the terms of the instrument, or tend to wrest the words of the testator from their natural operation, since it serves only to identify the beneficiary described by him, and thus enable the court to avail itself of the light which the circumstances in which the testator was placed at the time he made the will throw upon his intention. *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689.

It is important to note in this connection that the only purpose or effect of parol evidence, so far as concerns the question under consideration, is to identify the beneficiary. It cannot be received to prove an intention on the part of the testator in this regard contrary to that expressed in the will, nor,

smith v. Slusher, 26 Mo. 237, the court said: "The general rule is 'that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described; and (2) to rebut a resulting trust.'" See also Reformed Presby. Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

In this case, if there had been two different persons by the name of Richard H. Simpson, and who in other respects answered the description in the will, and these two persons were claiming as legatees, clearly extrinsic evidence would be admissible

by the weight of authority, can it be received to establish a mistake on the part of the testator where the language, as it stands, is specifically applicable to some existing individual, corporation, or society. While some cases have been referred to, and cited in some text-books and by courts as holding contrary to this doctrine, yet an examination of these cases will show that there existed circumstances which placed the case outside the rule, although in some of these cases language is used indicative of an intention upon the part of the court to establish a doctrine contrary to that stated. A leading case of this character is Powell v. Biddle, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263. But in this case the bequest was both by name and description, a part of the description being to "my friend." The person answering to the name and a portion of the description did not answer to this portion of the description. In fact he was a complete stranger to the testator, while another person, who was a friend of the testator, in other respects also, answered the description, although his name differed from that used by the testator. It, however, was shown that the testator had frequently referred to this claimant by the name which he used in the bequest. Upon proof of these facts, it was held that the latter person was entitled to the bequest. A case very similar as to the facts and as to the holding is SIEGLEY v. SIMPSON.

The confusion with regard to the question as to the admissibility of extrinsic evidence to aid in identifying the devisee or legatee arises from the fact that while extrinsic evidence is always admissible to enable the court to apply the designation or description of a devisee or legatee to the individual or corporation, yet it is only where there exists a clear ambiguity as to the person or corporation intended that extrinsic evidence may be resorted to, to show the intentions of the testator in this regard. The language of the will as a whole, construed in the light of the surrounding facts and circumstances, may so clearly indicate the person designated by the testator as a beneficiary of a devise or legacy as to remove any am-

to determine the identity of the person named in the will. For the same reason and upon the same principle, where there are two persons each claiming to be the beneficiary because they are each described in the will, the court must decide from extrinsic evidence, if need be, which is the person intended. And that is what was done in this case. The evidence is plain that, by the words, "I give . . . unto my friend Richard H. Simpson the sum of \$6,000," the testator referred to his friend Hamilton Ross Simpson, the respondent here, for the latter was his employee, and had been so for several years in Alaska, and assisted the testator in railway work, where the testator accumulated his estate. Hamilton Ross Simpson was the testator's

biguity in regard thereto, and render inadmissible other and further evidence to prove that a different beneficiary was intended by the testator. See cases *infra*, under IV. and VI. b. And while the cases under the subdivision referred to may deny the admissibility of extrinsic evidence, it is for the reason already stated, and not on the theory that extrinsic evidence is inadmissible to apply the designation or description to some existing person or corporation. These cases do not assert a rule inconsistent with other cases sustaining the admissibility of extrinsic evidence to show the intention of the testator under other circumstances.

II. Latent or patent ambiguity as a test.

The courts have frequently attempted to dispose of the question whether extrinsic evidence is admissible to identify a devisee or legatee in an ambiguous devise or legacy, by the test whether the ambiguity was latent or patent.

Thus, it has been held that a latent ambiguity may arise in a will when it names a person as the object of a gift, and there are two persons who answer to the name; or it may arise when the will contains a misdescription of the person, as where there is no such person in existence, or if in existence, the person is not the one intended. Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710. As to character of evidence admissible, see same case *infra*, IX. a. Wheaton v. Pope, 91 Minn. 299, 97 N. W. 1046.

If there is a mistake in the name of the legatee, or there are two legatees of the same name, or if, from any other misdescription of the society or the person, there arises a latent ambiguity, it may and must be explained by parol proof; since a latent ambiguity is produced by parol evidence, it must be dissolved in the same way. Mann v. Mann, 1 Johns. Ch. 231.

In the case of latent ambiguity, extrinsic evidence is not only competent, but necessary, since a latent ambiguity involves a question of identity, a fitting of the designa-

personal associate much of the time in Alaska, and the testator had told different persons that he had made provision for him in his will. The testator, while he was intimate with H. R. Simpson, the respondent, did not in fact know his given name or the order of his initials, and always addressed him as "Mr. Simpson" or "Bill" or "Rotary Bill," as he was commonly known on account of his ability to handle a railroad rotary snowplow. Richard H. Simpson, the appellant, was not a friend of the testator, had met him only once in twenty years, and then merely spoke to him as they passed by. These and other facts not necessary to recount led the trial court to conclude that the testator used the name Richard H. Simpson when he referred to and

really intended the person and name of Hamilton Ross Simpson as his beneficiary. Under the rule as above stated, where the beneficiary is not precisely described, extrinsic evidence was proper, and we are satisfied that the trial court correctly interpreted the intent of the testator and the meaning of the will.

The judgment is therefore affirmed.

Crow, Ch. J., and Parker and Gose, JJ., concur.

Chadwick, J., concurring:

A most familiar rule of interpretation of wills is that effect should be given to every word contained therein. The testator, Heney, undertook to designate an object of

tion of the person or thing,—which can be done only by extrinsic evidence. *North Carolina Inst. v. Norwood*, 45 N. C. (Busbee, Eq.) 65.

Where there is a latent ambiguity arising from a misdescription of the name of the legatee, extrinsic evidence is properly received to remove the ambiguity. *Smith v. Kimball*, 62 N. H. 606.

These cases apply the familiar rule that a latent ambiguity is disclosed by extrinsic evidence, and it may be removed by evidence of the same character. *Brewster v. McCall*, 15 Conn. 274; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710 (as to character of evidence admissible, see this case *infra*, IX. a.); *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351 (as to character of evidence admissible, see same case *infra*, IX. f.); *Donald v. Dendy*, 2 M'Mull. L. 123; *Goodwin v. New Church Bd. of Publication*, 160 Ill. App. 493 (as to character of evidence admissible, see same case *infra*, IX. c, and IX. g, 2).

It has been asserted that parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator, except where there is a latent ambiguity arising *dehors* the will as to the person meant. *Hockensmith v. Slusher*, 26 Mo. 237.

If there is a patent ambiguity in a will, the will must speak for itself, for evidence *dehors* cannot be resorted to. A patent ambiguity raises a question of construction. The will must therefore speak for itself, and in case of doubt no extrinsic evidence can be called in aid. *North Carolina Inst. v. Norwood*, *supra*.

And parol evidence is not admissible to show the intention of the testator, to clear a patent ambiguity on the face of the will. *Mann v. Mann*, *supra*.

Where whatever ambiguity exists is apparent from the face of the will, it is not susceptible of explanation by extrinsic parol evidence. Thus, extrinsic proof is inadmissible to show that one of a class of relatives was unintentionally omitted from a devise to others of the same class. *Hyatt v. Pugle*, 23 Barb. 285.

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The difficulty with the test referred to is that it is misleading and frequently inapplicable. Without reference to whether the ambiguity is latent, *i. e.*, raised by extrinsic proof, or patent, *i. e.*, appearing from the face of the instrument itself, where the ambiguity is as to the identity of a beneficiary, extrinsic evidence may be resorted to. Indeed, this is true as to all devises and legacies which do not specifically designate by name the beneficiary. Thus, every devise or legacy to the beneficiary by description necessarily involves an inquiry into extrinsic facts in order to enable the court to apply the description to the individual, and in all such cases the ambiguity is apparent from the face of the instrument. See discussion of this point, *supra*, I.

And in cases where the ambiguity appears from the face of the will, extrinsic evidence to aid in applying the same is admissible: thus, extrinsic evidence is admissible to identify the devisees who the testator intended should participate in a devise to a designated person and his family. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302. As to character admissible, see same case *infra*, IX. a.

And although a bequest to Mrs. G., not otherwise indicating the person, is ambiguous upon its face, nevertheless extrinsic evidence is admissible to show whom the testator intended by this designation. *Abbott v. Massie*, 3 Ves. Jur. 148.

And so an ambiguity may be raised by a consideration of the will as a whole, as where from the whole will it appears that the testator has employed the term "nephew" both to legitimate and illegitimate nephews, and the term "niece" to illegitimate nieces. In such case bequest to his nephew G. A., where he has both a legitimate and illegitimate nephew of that name, raises an ambiguity requiring parol evidence to show who was intended. *Re Ashton* [1892] P. 83, 61 L. J. Prob. N. S. 85, 67 L. T. N. S. 325.

And a bequest to certain persons in trust for other persons whom the testator indicated as legatees during his lifetime may be made certain by parol evidence identify-

his bounty. He did not do it by name alone. He said, "I give to my friend." The word "friend" is a word of weight and meaning. In the light of all the evidence it fits Hamilton Ross Simpson, and it does not fit Richard H. Simpson. The record shows, as is said in the majority opinion, that Richard H. Simpson was never the friend of the testator. It is not shown that he was more than a casual acquaintance, and there is no independent evidence of that fact. Hamilton Ross Simpson was Heney's friend. They had occupied the same tent; they had met the hardships incident to pioneering a railway line into the wilds

of Alaska together; they had enjoyed the familiar fellowship of the camp. Hamilton Ross Simpson had been one of a few familiars from Mr. Heney was accustomed to refer to as his "staff." Heney did not, as other intimates did not, know that Simpson's name was Hamilton Ross; they knew him by the nickname of "Bill" or "Rotary Bill." Mr. Heney addressed his letters to Hamilton Ross Simpson either as "R. H. Simpson" or "H. R. Simpson." It is evident from the whole record that, in seeking to use formality in the preparation of a will, as men will do, Mr. Heney, instead of using, as he had theretofore, the initials "H. R." or

ing the persons referred to, although the ambiguity is apparent from the face of the instrument. *Jay v. Lee*, 41 Misc. 13, 83 N. Y. Supp. 579.

III. Where name of beneficiary is inaccurately stated.

a. Admissibility of extrinsic evidence to identify individual.

1. In general.

Extrinsic testimony is admissible to determine the object of a testator's bounty where a mistake occurs in the name or designation, or where the object is involved in ambiguity. *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

If the testator devises his estate to a person or class of persons by name or designation, and there is no one to whom the designation properly applies, parol evidence is admissible to show to whom the testator intended it to apply. *Donald v. Dendy*, 2 M'Mull. L. 123.

When there is no person or corporation in existence precisely answering to the name or description in a will, parol evidence may be given to ascertain who was intended by the testator. *Lefevre v. Lefevre*, 59 N. Y. 434.

Extrinsic proof may be resorted to, to show that a legacy to Cornelia Thompson was intended for a person named Caroline Thomas. *Thomas v. Stevens*, 4 Johns. Ch. 607.

A bequest to Samuel G., son of Captain John S. Slaughter, was shown by parol proof to be intended for Samuel G., son of Captain John F. Hawkins, where it appeared that there was no person by the name of Slaughter answering the description. *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

A legacy to Mrs. Sawyer was shown by extrinsic proof to be for Mrs. Swapper. *Masters v. Masters*, 1 P. Wms. 425.

Parol evidence was held admissible to show that a bequest to C. E. was intended for a person named G. Y. *Beaumont v. Fell*, 2 P. Wms. 141. As to character of evidence admissible see this case *infra*, IX. f, and g, 2.

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And to show which of two nephews of the testator, Jos. White Sprague or Jos. Sprague Stearns, was meant by a bequest "to my nephew J. S. Sprague." *Morse v. Stearns*, 131 Mass. 389.

And to show which of two sons was entitled to a legacy to Francis, youngest son of G., where G. has two sons, the eldest named Arthur Francis and the youngest Arthur Charles. *Re Gregory*, 34 Beav. 600, 6 New Reports, 282, 11 Jur. N. S. 364, 13 Week. Rep. 828.

In *Re Welch*, 78 Vt. 16, 61 Atl. 145, a bequest to the testatrix' niece Harriet Ellen Hubbard was held intended for her niece Harriet Ella Hubbard Field, who, at the time of the execution of the will, to the knowledge of the testatrix, was married, her married name being Field. In this case the testatrix also had a niece Harriet Anna Hubbard, and the question was which of these two nieces was entitled to the legacy. While the majority of the court, by the aid of extrinsic proof, decided in favor of the niece first mentioned, the minority dissented upon the ground that the other niece was intended. The case illustrates the tendency of the courts to determine the legatee or devisee as to whom there exists an ambiguity, although the evidence does not clearly designate which of the different claimants was the one really intended by the testator.

But in *Andrews v. Dobson*, 1 Cox, Ch. Cas. 425, the court refused to receive extrinsic evidence to show who was meant by a legacy to James, son of Thomas A., although there was no person of this description, and there was a person named Thomas, son of James A., who thus sought to show that he was the person.

2. Name used by testator.

It may be shown by parol that the testator usually, by mistake or by way of nickname, called a claimant to a legacy by the name used in the legacy, although that was not the true name of the claimant. *Powell v. Biddle*, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263. And see to the same effect, *Re Seaton*, 8 D. L. R. 204. See also *infra*, IX. b, and VI. d. As to character of evidence admissible, see same case *infra*, IX. b, f.

"R. H.," supplied a name that may have been in his mind because of his former acquaintanceship with Richard H. Simpson. If the record went no further than the name, we could say that the rights of the parties claimant are equally balanced. It goes further. There is in Hamilton Ross Simpson's favor the fact that he was the friend of Mr. Heney. This creates an uncertainty or ambiguity, and parol testimony is admissible to clear the doubt. It was admitted and shown beyond peradventure that Mr. Heney had said to various friends that he intended to reward all those who had stood by him and helped him to do the work out

of which he had realized his fortune, and it is significant, and to my mind a controlling circumstance, that he did remember all of them by name and by bequest. If there had been no qualifying word, there might be no room for construction; but when it is shown that Mr. Heney had but one friend Simpson, and that friend was known to him as "H. R.," or "R. H.," and by no familiar name other than "Bill," I have no hesitancy in holding that this case falls without the general rule quoted in the majority opinion.

Petition for rehearing denied.

A devise to a person by any name, however different the name used in the will may be from the true name of the person, is good providing it is shown that the name used was one by which the testator was accustomed to designate the person, and such showing may be made by parol proof. *Chambers v. Watson*, 56 Iowa, 676, 10 N. W. 239.

To show that a certain claimant was the beneficiary intended in a bequest to a person by a name which did not correctly designate anyone in existence, parol evidence is admissible to show that the testator was in the habit of calling the claimant by the name used in the bequest. *Lee v. Pain*, 4 Hare, 251, 14 L. J. Ch. N. S. 346, 9 Jur. 247.

Persons entitled to a bequest given under nicknames by which the testator habitually designated them, by extrinsic evidence, may establish this fact, and upon so doing, are entitled to the legacy. *Beatty v. Cory Universalist Soc.* 39 N. J. Eq. 452.

Thus, a bequest to Harrison H. may be shown by parol proof to have been intended for William H., a son-in-law of the testator, who was known and called by the name of Harrison H., there being no other person answering the description. *Hockensmith v. Slusher*, 26 Mo. 237.

A bequest to "Edward" may be shown to have been intended for a person named Samuel, by proof that the testator was in the habit of calling him Edward. *Parsons v. Parsons*, 1 Ves. Jr. 266, 5 Revised Rep. 120.

Parol evidence is admissible to show that a bequest to M. B., a cousin of the testator, was intended for M. H., who was called M. B. although not a cousin. *Neathway v. Ham, Tamlyn*, 316.

A devise to a person or society by the name by which he or it is known to the testator is a good devise to such person, although known to others by a different name. *Tilton v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321. As to character of evidence admissible, see same case *infra*, IX. b.

Evidence is admissible to show that the name applied to a legatee in a bequest was the popular and usual name by which the claimant was designated and known, and that the testator knew and called it by that name, and that there was no other

corporation answering that description. *Lefevre v. Lefevre*, 59 N. Y. 434.

A bequest to "the Nursery," where there is no existing society bearing that name, by extrinsic proof, was shown to be intended for a society named "St. Mary's Orphanage," which had taken over the operation of a society called "Providence Nursery," and generally referred to by the testator as "the Nursery," to which he had made contributions during his lifetime. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198. As to character of evidence admissible, see same case *infra*, IX. g. 3.

b. Admissibility of extrinsic evidence to identify corporation.

1. In general.

Extrinsic evidence is always admissible to identify a devisee, and beneficent bequests are not to be defeated by mere misnomers: it is enough if the testator uses language which is sufficiently clear to enable the court by extrinsic evidence to identify the beneficiary. *Cook v. Universalist General Convention*, 138 Mich. 157, 101 N. W. 217. And where no society is accurately named or described in a bequest, extrinsic proof is admissible to identify the society intended. *Faulkner v. National Sailors' Home*, 155 Mass. 458, 29 N. E. 645. So, where an estate is devised to a corporation, and the designation is imperfect or inaccurate, parol evidence is admissible to show the corporation intended, if there is sufficient designation in the instrument itself to justify the application of the evidence. *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317. As to character of evidence admissible, see same case *infra*, IX. g. 1.

A corporation may be designated by its corporate name, by the name by which it is usually or properly called and known, by the name by which it was named and called by the testator, or by any name or description by which it can be distinguished from every other corporation, and when any but the corporate name is used, any circumstances which will enable the court to apply the name or description to a particular corporation, and identify it as the body intended, and to distinguish it from all others

and bring it within the terms of the will, may be proved by parol. *Lefevre v. Lefevre*, supra.

Thus, evidence that there was and is no corporation bearing the charter name used in a will, and no unincorporated association of that name, but that there is an institution incorporated under another name, using and being known by the name used by the testator, opens the way for extrinsic evidence to remove the ambiguity thus raised. The evidence is simply to remove the difference arising from an inaccurate or mistaken description, and not to introduce new words in the will. *Ibid.*

The society intended by the testator in a bequest, and identified by competent evidence, is the legatee by whatever name described in the will, and notwithstanding any other name or names by which it might have been invariably or usually known to others. *Tilton v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321. As to character of evidence admissible, see same case *infra*, IX. b.

Where there is no corporation which corresponds to the description in the devise or legacy, extrinsic evidence is admissible to show that there is a corporation corresponding in many particulars, and that there is no other which could be intended; and where circumstances are proved indicating that such corporation was intended, and no similar conclusive circumstances appear to distinguish and identify any other, the one that is shown to be intended will take. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 644. As to character of evidence admissible, see same case *infra*, IX. g, 1. *Beardsley v. American Home Missionary Soc.* 45 Conn. 327 (holding that a bequest to the Home Mission Society was a bequest to the American Home Mission Society).

Where the name or designation used in the will does not designate with precision any corporation, but, when the circumstances come to be proved, so many of them concur to indicate that a particular corporation is intended, and no similar conclusive circumstances appear to distinguish and identify any other, the corporation thus shown to be intended will take. *Tucker v. Seaman's Aid Soc.* 7 Met. 188.

2. Educational societies.

A legacy to the Rochester, New York, Theological Seminary, by extrinsic proof, may be shown to have been intended for the New York Baptist Union for Ministerial Education, a corporation under the laws of the state of New York, located in the city of Rochester, which has established and owns a theological seminary in said city commonly known as the "Rochester, N. Y., Theological Seminary," which is the only theological seminary in the city. *Taylor v. Tolen*, 38 N. J. Eq. 91. As to character of evidence admissible, see same case *infra*, IX. b.

A bequest to "the Seminary of Literature and Science," located at a certain place, may be shown by parol evidence to have been

intended for a society located at such place whose correct and accurate name is "Southern Newmarket Methodist Seminary." *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317. As to character of evidence admissible, see same case *infra*, IX. g, 1.

A bequest to the "Baptist Theological Seminary in South Carolina" was shown by parol proof to have been intended for a seminary bearing the corporate name of "the Southern Baptist Theological Seminary," which was incorporated in South Carolina. *Roy v. Rowzie*, 25 Gratt. 599.

A bequest to the "Methodist Episcopal Church School," situated in Buckhannon, was shown by parol proof to be intended for the "West Virginia Foreign Seminary at Buckhannon." *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

A bequest to "British and Foreign Schools" was held to be intended for the "British and Foreign School Society." *Re Vaughan*, 17 Times L. R. 278.

A bequest to the "Pennsylvania Agricultural Society" was shown by extrinsic proof to be intended for the "Pennsylvania State Agricultural Society." *Cresson's Appeal*, 30 Pa. 437. As to character of evidence admissible, see same case *infra*, IX. g, 2.

A bequest to the "Art Museum of San Francisco" was shown by extrinsic proof to be intended for a society named the "San Francisco Art Association," there being no society by the name designated in the will. *Walter v. Walter*, 133 App. Div. 893, 118 N. Y. Supp. 268.

Extrinsic evidence is admissible to show the library intended by a bequest to a public library of a certain place, where there is no library at that place of the name used in the legacy. *Re Dickinson*, 56 Misc. 232, 107 N. Y. Supp. 386.

3. Missionary societies.

Extrinsic evidence is admissible to identify the missionary society intended in a bequest to a missionary society, where no existing missionary society is accurately described. *Gilchrist v. Corlias*, 155 Mich. 126, 130 Am. St. Rep. 568, 118 N. W. 938.

A bequest to the "Home for Foreign Missions" may be explained by extrinsic evidence and applied to the corporations or societies intended by testator. *Board of Missions v. Scovell*, 3 Dem. 516. As to character of evidence admissible, see same case *infra*, IX. g, 2.

A bequest to "the Foreign Missionary Society," by extrinsic evidence, was shown to have been intended for the "Missionary Society of the Methodist Episcopal Church." *Amberson's Estate*, 204 Pa. 397, 54 Atl. 484. As to character of evidence admissible, see same case *infra*, IX. c.

A bequest to "the Missions and Schools of the Episcopal Church," by parol proof, was shown to be intended for the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church." *Domestic & F. M.*

sionary Society's Appeal, 30 Pa. 425. As to character of evidence admissible, see same case *infra*, IX. g. 2.

A bequest to the "Foreign Missions of the Baptist Denomination" was shown by parol proof to be intended for the "Foreign Missionary Board of South Baptist Convention." *McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733. As to character of evidence admissible, see same case *infra*, IX. g. 1.

A bequest to the "Methodist Episcopal Church Foreign Missionary Society" was shown by extrinsic proof to be intended for the "Missionary Society of the Methodist Episcopal Church." *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

In *Re Paulson*, 127 Wis. 612, 5 L.R.A. (N.S.) 804, 107 N. W. 484, 7 Ann. Cas. 652, a bequest to the "Norwegian Lutheran Home Foreign Missionary Society" was shown by extrinsic proof to be intended for a society known as the "Home of Foreign Missions of the United Norwegian Lutheran Church of America," which was connected with the church of which the testatrix was a member, and to which society she had made contributions.

A bequest to the Indian Missions and the Domestic Missions of the United States may be shown by extrinsic proof to have been intended for the Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States. *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535.

Parol evidence is admissible to show that, by the term "Christian Missionary Society" in a bequest, the testator meant a missionary society of the Churches of Christ in Indiana. *Chappell v. Missionary Soc.* 3 Ind. App. 356, 50 Am. St. Rep. 276, 29 N. E. 924. As to the character of evidence admissible, see same case *infra*, IX. c.

Extrinsic evidence is admissible to show that a bequest to the "American Home Missionary Tract Society" was intended for the "American Tract Society." *Button v. American Tract Soc.* 23 Vt. 336. As to character of evidence admissible, see same case *infra*, IX. c, and h.

Parol evidence was admitted to show that a bequest to the agent of the "New Colonization Society in Africa" was intended for the "American Colonization Society." *Maund v. M'Phail*, 10 Leigh, 199. As to character of evidence admissible, see same case *infra*, IX. g. 1.

4. Religious societies.

A bequest to "the Presbyterian Committee of Publication" was shown to be intended for the "Trustees of the Presbyterian Committee of Publication." *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

A bequest to "the Board of Trustees for the Society of Disabled Ministers of the Reformed Presbyterian Church" was shown by extrinsic evidence to be intended for "the Reformed Presbyterian Church of North America General Synod," which had established a fund for disabled Presbyterian min- 47 L.R.A. (N.S.)

isters. *Reformed Presby. Church v. Mc-Millan*, 31 Wash. 643, 72 Pac. 502.

A bequest to the "Episcopal Denomination" was held to be intended for the "Diocesan Synod of Fredericktown of the Church of England," which was usually spoken of as the "Episcopal Denomination." *Van Wart v. Fredericton*, 5 D. L. R. 776.

5. Charitable societies.

The legatee, a charitable institution, may be shown by parol evidence if the name or designation in the will does not designate any organization or society with precision. *Preachers' Aid Soc. v. Rich*, 45 Me. 552.

A bequest to the German Turner Home, by extrinsic proof, was shown to have been intended for the German Pioneer Verein, in German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 63 Atl. 835, affirmed without opinion in 72 N. J. Eq. 954, 67 Atl. 23. As to character of evidence admissible, see same case *infra*, IX. c.

A bequest for the "Refuge of Decayed Merchants" was shown by extrinsic proof to have been intended for a society incorporated under the name of the "Merchants' Fund." *Cresson's Appeal*, 30 Pa. 437. As to character of evidence admissible, see same case *infra*, IX. g. 2.

A legacy to the "Home for the Friendless" was shown by extrinsic proof to have been intended for the "American Family Guardian Society," which conducted a home for the friendless as a part of its work. *Lefevre v. Lefevre*, 59 N. Y. 434.

A bequest to "the Deaf and Dumb Institution," by extrinsic evidence, was shown to have been intended for a corporation whose technical and accurate name was the president and directors of the North Carolina Institute for the Education of the Deaf and Dumb, it appearing that it was commonly spoken of as the "Deaf and Dumb Institution or Institute." *North Carolina Inst. v. Norwood*, 45 N. C. (Busbee, Eq.) 65, overruling *Taylor v. American Bible Soc.* 42 N. C. (7 Ired. Eq.) 201.

Construing a bequest to the "German Protestant Orphan Asylum," in view of the testator's nativity, religion, and association, and in view of the general and local appellation given to a particular institution, it was held that the testator intended to designate as the legatee the "German General Protestant Reform Asylum." *McCormick v. Dunker*, 24 Ohio C. C. 553.

A bequest to the "Sailors' Home in Boston" was shown by extrinsic proof to be intended for the "Sailors' Home Fund of the Boston Ladies Bethel Society." *Faulkner v. National Sailors' Home*, 155 Mass. 458, 29 N. E. 645.

A bequest to the poor of the parish of Kettering in the county of L., by parol evidence, was shown to be intended for the poor of the parish of Kettering in the county of Ann, there being no such parish in the county of L. *Brown v. Langley*, 2 Barnard. Ch. 118.

A bequest to "the Old Peoples' Home" was

shown by extrinsic proof to be intended for a society called "the Old Folks' Home." *Re Smith*, 8 D. L. R. 93. As to character of evidence admissible, see same case *infra*, IX. b, c.

And a bequest to "Thomasville Orphanage" for the "Thomasville Baptist Orphanage." *McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733. As to character of evidence admissible, see same case *infra*, IX. g, 1.

c. Where inaccurate name applies to more than one individual or corporation.

Parol evidence is competent to aid in determining the intention of the testator where a bequest is claimed by different societies, none of which have a name similar to the one used in a bequest. *Leonard v. Davenport*, 58 How. Pr. 384. As to character of evidence admissible, see same case *infra*, IX. g, 1.

If the description of the devise or legatee is not strictly applicable to any person or corporation, but is partly applicable to one person or corporation, and partly to another, the court, in determining the sense in which the name or term was used by the testator, will inquire into extrinsic facts which may have a bearing upon the question. *Bernasconi v. Atkinson*, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152. As to character of evidence admissible, see same case *infra*, IX. d, h.

When a devise or bequest is expressed in terms which apply indifferently to two or more persons or institutions claiming the benefit thereof, extrinsic testimony may be resorted to, to show which of them is intended. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198. As to character of evidence admissible, see same case *infra*, IX. g, 3.

And when the language used by the testator in describing asylums and hospitals to which he made bequests does not technically and accurately name any institutions in existence, and there are several institutions having a name approximating that used by the testator, extrinsic evidence is admissible to show which he intended. *Re Pearson*, 52 Misc. 273, 102 N. Y. Supp. 965, affirmed in 124 App. Div. 929, 109 N. Y. Supp. 1127.

And where a bequest to a religious corporation does not accurately and technically name any existing corporation, but two different corporations are known by the name used, and come within the description, extrinsic evidence is admissible to determine which of the two the testator referred to. *Tilley v. Ellis*, 119 N. C. 233, 26 S. E. 29.

Where two religious societies own in common and use alternately a house of worship in the village of T., a bequest to the T. church may be shown by parol evidence to have been intended for the one of which the testatrix was a member. *Wampole's Estate*, 3 Pa. Super. Ct. 414.

A bequest to a missionary society which does not accurately designate any society, but which is applicable to several, may be 47 L.R.A. (N.S.)

made clear by extrinsic proof showing which was intended by the testator. *Van Nostrand v. Domestic Missions*, 59 N. J. Eq. 19, 44 Atl. 472. As to character of evidence admissible, see same case *infra*, IX. g, 2.

Where a bequest is to an association by a name not accurately designating any existing society, but there are two associations which answer the designation, extrinsic evidence is admissible to show which of the two was intended by the testator as the legatee. *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353.

Where there are several societies pursuing the same object as that of the society mentioned in a devise, all of which were in existence when the will was executed, oral testimony is admissible to show which of them was intended by the testator. *Brewster v. McCall*, 15 Conn. 274; *Ayres v. Weed*, 16 Conn. 291; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848.

In *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278, a bequest to the "Omrow and Algoma Union Cemetery Association" was shown by extrinsic proof to be intended for a society going by the name of "Union Cemetery Association," rather than the one going by the name of the "Omrow Association," these being the only two associations which answered the description of the bequest.

Where the evidence shows that there is no society bearing the name designated in a devise, but that there are several whose object and character are correctly designated by these words considered as words of designation, and there is nothing in the will to show the testator intended to designate any particular society by name, extrinsic proof is admissible to show the society intended. *Brewster v. McCall*, 15 Conn. 274 (bequest to the Missionary Society for Foreign Missions, shown to have been intended for American Board of Commissioners for Foreign Missions).

When there are two corporations neither of which can claim under the precise name used by the testator, the question, if the name rather than the description is to control, is which of the two is best or most nearly described by the name; and if the designation is to prevail, then the question is which of the two will the most nearly answer to the delineation of the corporation by the testator. If, from the will and the charters of the two corporations, the court can determine which of the two was intended by the testator, there can be no resort to other evidence in aid of interpretation. *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191, 11 Am. Rep. 697.

And where there is no hospital precisely answering the description, but there are two hospitals located at the place mentioned, one of which is a general hospital and the other intended only for the reception of persons suffering from a particular complaint, which appears from the name, which forms the most important part of the de-

scription, the former will be held to be the one intended by the testator. *Bradshaw v. Thompson*, 2 Younge & C. Ch. Cas. 295, 7 Jur. 386.

d. Extrinsic evidence as to beneficiary to validate devise or bequest.

In addition to the cases included under this heading, it may be said that all the cases included herein which sustain the admissibility of extrinsic evidence to identify a devisee or legatee are also authority for the rule that such evidence is admissible to save from invalidity a bequest or devise otherwise invalid for uncertainty as to the beneficiary. In cases where extrinsic evidence has been offered for this purpose, it has been held that a misnomer or misdescription of the legatee or devisee will not invalidate a devise or legacy if, either from the will itself or evidence *dehors* the will, the object of the testator's bounty can be ascertained. *Smith v. Kimball*, 62 N. H. 606.

A mistake in the name or designation of the legatee, whether an individual or a corporation, will not render the bequest void if the name or description used in the will, as applied to the facts and circumstances proved, will identify such person or corporation from others. *Missionary Soc. v. Cadwell*, 69 Ill. App. 280. As to character of evidence admissible, see same case *infra*, IX. a. *Goodwin v. New Church Bd. of Publication*, 160 Ill. App. 483.

A bequest or devise will not fail because of a mere inaccuracy in the designation of the beneficiary, where the meaning of the testator can be gathered with reasonable certainty from the instrument itself, or where the identity of the object of his bounty can be shown by extrinsic evidence; and such evidence is always admissible for the purpose of identifying the beneficiary where there is uncertainty or ambiguity in the description. *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952 (holding that a bequest to the Convent of the Sisters of Mercy, known as St. Anne's Convent, to mean and refer to the Sisters of Mercy of the Female Academy of Fort Smith).

IV. Where individual or corporation is designated with substantial accuracy.

a. In general.

Where the language of the will as a whole, construed in the light of surrounding facts and circumstances, clearly indicates the person designated by the testator as the beneficiary of a devise or legacy, other evidence to prove that a different beneficiary was intended by the testator is inadmissible. *Doe ex dem. Westlake v. Westlake*, 4 Barn. & Ald. 57. As to character of evidence admissible, see same case *infra*, IX. g. 1.

Even where extrinsic evidence is admitted to explain latent ambiguities, and to perfect imperfect designations of beneficiaries, no evidence is admissible to change or vary the 47 L.R.A. (N.S.)

testator's expressed intent. This must always be adduced from the will itself, assisted by extrinsic evidence. The proofs offered by such evidence are to be employed merely as an aid in determining the expressed intent of the testator, and if that intent may not be so found, the devise or bequest must lapse. *Re Dominici*, 151 Cal. 181, 90 Pac. 448. And see discussion of this point *supra*, I. As to character of evidence admissible, see same case *infra*, IX. g. 2.

For the highest and best evidence is always to be sought for, and when a man deliberately puts his intention in writing under testamentary safeguards, and carefully preserves that writing for the guidance of those who represent him after his death, courts regard it as revealing his thoughts and intents with more accuracy than would any parol declarations which extrinsic evidence could substitute for it. Under any other rule, that which might come at last to be accepted as the will would be not what the testator wrote, but what others have said since his death; indeed, he being silent, the rule is the sole support and defense of a will where there are disappointed heirs or legatees. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642. As to character of evidence admissible, see same case *infra*, IX. g. 1.

Applying this doctrine, it is held that parol evidence cannot be deduced to change or supply any intent not expressed in a will, although admissible to identify the property and the legatee named. *Gaston's Estate*, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

And while extrinsic evidence of intention may be admitted whenever the instrument is so insufficiently expressed as to raise a doubt as to the object intended, and, in order to give effect to the clause, yet it is not admissible where its tendency is to establish an essentially different intention from that expressed in the will. *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023. As to character of evidence admissible, see same case *infra*, IX. h.

And parol evidence cannot be admitted to supply, contradict, enlarge, or vary the words of a will, or to explain the intentions of the testator, except where there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described. *Mann v. Mann*, 1 Johns. Ch. 231. As heretofore pointed out, however, the determination of the admissibility of extrinsic proof, by the question whether the ambiguity is latent or patent, is not an accurate or satisfactory test.

Where a will without latent ambiguity expresses a clear intent, extrinsic evidence should never be permitted to show that the intent expressed was a mistaken one. It is only where the designation of the person or property, by extrinsic evidence, is shown to be doubtful or imperfect, that such evidence may be employed in the effort of the court to arrive at and declare the meaning and intent which the testator by the terms of his

will attempted, however irregularly, to declare. *Re Dominici*, 151 Cal. 181, 90 Pac. 448. As to character of evidence admissible, see same case *infra*, IX. g, 2.

b. Individual.

The words of the will are so controlling that if they apply with exactitude to one person, such person will take the legacy although parol and extrinsic evidence might make it perfectly clear that another person less exactly described was the one intended. *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Root's Estate*, 187 Pa. 118, 40 Atl. 818.

Thus, extrinsic evidence is not admissible to show that the testator did not intend to devise his property to the person mentioned therein, but intended to give it to other persons, since such evidence tends to contradict the terms of the will, or to show that the testator's intentions were different from those expressed in the will. *Rapp v. Reehling*, 124 Ind. 36, 7 L.R.A. 498, 23 N. E. 777.

And where the beneficiary in a will is clearly designated, evidence to show some other person was intended is incompetent. *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528, affirmed without opinion in 175 N. Y. 505, 67 N. Y. 1090.

So, where there is a person exactly answering the name given in a bequest, parol evidence is inadmissible to show that the testator made a mistake in the will in naming this person, and really intended to name someone else as his legatee. *Re Chenoweth*, 17 Times L. R. 515.

A bequest to a sister of the testator, naming her, cannot be changed by extrinsic evidence where the testator had a sister of this name, although she had changed her religion, became a nun, and had been baptized in her newly adopted faith by a different name, and the testator had another sister living of a different name, for whom he had made no provision in his will. *Delmare v. Robello*, 1 Ves. Jr. 415. For another case applying the same doctrine, see *Holmes v. Custance*, 12 Ves. Jr. 279.

A legacy to the testator's nephew, William Root, where the testator has a nephew of that name, cannot by parol proof be shown to have been intended for his wife's nephew of the same name, but not of kin to him; and this is true although there is evidence tending to show that the wife's nephew was a favorite of the testator, while his own nephew was not, and there existed strained relations between the father of the testator's nephew and himself. *Root's Estate*, *supra*.

But in an English decision it was held that a bequest to the testator's nephew J. G. by parol evidence might be shown to be intended for his wife's nephew named J. G., although the testator also had a nephew named J. G. *Grant v. Grant*, L. R. 2 Prob. 8, L. R. 5 C. P. 380, 39 L. J. Prob. N. S. 17, 47 L.R.A. (N.S.)

21 L. T. N. S. 645, 18 Week. Rep. 230. As to character of evidence admissible, see same case *infra*, IX. b and c.

If there are persons answering the description of a devise or a bequest, extrinsic evidence is inadmissible to show that the testator intended to include other persons not coming within the description. *Donald v. Dendy*, 2 M'Mull. L. 123.

Parol evidence cannot be received to prove an additional or different subject-matter or some other donee. To be admissible, the proof must be strictly explanatory, and cannot be used to create a new devise or bequest. *Hyatt v. Pugsley*, 23 Barb. 285.

Thus, extrinsic evidence is inadmissible to show that a legacy was intended for two brothers who conducted a partnership, where the legacy is plainly and explicitly to but one of them. *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628.

And a bequest to "my nephew and his sister, my niece," residing at a certain place, cannot be changed by parol proof that the testator also intended to include a niece residing at another place. *Re Dominici*, 151 Cal. 181, 90 Pac. 448. As to character of evidence admissible, see same case *infra*, IX. g, 2.

And extrinsic proof is inadmissible to show that by a bequest to her granddaughter and her heirs and assigns, the testatrix intended the devise for the benefit of the son and heir of the granddaughter in event of the death of the latter during the life of the testatrix. *Sword v. Adams*, 3 Yeates, 34.

A legacy to a designated person and her heirs and assigns forever cannot be shown by parol declarations of the testatrix to have been intended for the heirs of such person in the event that she predeceased the testatrix. *Comfort v. Mather*, 2 Watts & S. 450, 37 Am. Dec. 523. As to character of evidence admissible, see same case *infra*, IX. g, 3.

Extrinsic evidence is inadmissible to show that a legacy to a person, his heirs and assigns, was intended for the heirs and assigns of such a person, although the latter was dead at the time of the execution of the will, to the knowledge of the testator. *Mabank v. Brooks*, 2 Dick. 577.

Extrinsic evidence is inadmissible to show that, upon a devise to a parent, the testator meant a devise to the children of such parent, although the parent was dead at the time of the execution of the will, to the knowledge of the testator. *Judy v. Williams*, 2 Ind. 449.

c. Corporation.

Where a bequest to educational or charitable institutions departs slightly from the names under which they are chartered, but the description of the legatees is sufficient to enable the court, with the aid of extrinsic evidence, with certainty to identify the legatees intended, extrinsic evidence for this purpose is competent. *Moore v. Moore*, 30 N. J. Eq. 554, 25 Atl. 403.

But parol evidence is not admissible to contradict the plain expression in a will, by showing that, although the testator named one person or corporation, he did so by mistake, supposing he had named the correct name of another. *Board of Missions v. Scoville*, 3 Dem. 516. As to character of evidence admissible, see same case *infra*, IX. g, 2.

And extrinsic evidence is not admissible to show that a bequest was not intended for a society clearly and distinctly designated in the will, and that another society with the same aims and objects, but with a different name, was intended. *Tucker v. Seaman's Aid Soc.* 7 Met. 188.

Before retort may be had to extrinsic evidence to aid in determining the intention of the testator, there must be difficulty in determining from the will and the charter of the different corporations claiming the legacy, which of them was in the mind of the testator. *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528, affirmed without opinion in 175 N. Y. 505, 67 N. E. 1090.

Where there are two corporations practically residing in the neighborhood of the testator, and each doing that which he desired done, and the name of one of them is plainly written in a bequest as the legatee, extrinsic proof is inadmissible to control or vary the language for the purpose of striking out the name perfectly descriptive, and substituting therefor another; and this is true although it is admitted that in the description the testator made a mistake, since the law will not permit the court to intermeddle; it insists that what the testator has so plainly written shall stand as best proof of his thoughts at the moment. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 644. As to character of evidence admissible, see same case *infra*, IX. g, 1.

A designation of a legatee as the "Skin and Cancer Hospital" is not ambiguous where there is located at the place designated a hospital bearing the name of the "New York Skin and Cancer Hospital," and hence parol evidence of the declarations of the testator is inadmissible to show that he intended the legacy for another hospital named "the New York Cancer Hospital," and usually called and known as the "Cancer Hospital." *Union Trust Co. v. St. Luke's Hospital*, *supra*.

A bequest to the "Philadelphia Paid Fire Department Relief Association," while not accurately designating any existing society, is nevertheless so nearly identical with an association whose accurate name is "the Philadelphia Fire Department Relief Association," as to preclude parol proof that the society intended was an association named "the Firemens' Pension Fund of Philadelphia." *Jeanes's Estate*, 3 Pa. Dist. R. 314.

A bequest to the Foreign Missionary Society of the Episcopal Church does not raise such an ambiguity as to warrant admission of extrinsic evidence to explain it. *Domestic & F. Missionary Soc. v. Reynolds*, 9 Md. 341, 47 J.R.A. (N.S.)

V. When designation by name and description does not apply to same person.

a. Controlling effect of name versus description.

Where a devisee or legatee is referred to both by name and description, and they refer to different claimants of the devise or legacy, even though extrinsic evidence is received to aid in determining the person entitled, it becomes a matter of importance as to whether the name or the description is the more persuasive and of greater effect in connection with the extrinsic facts, in determining the intention of the testator as expressed in the will.

It has been asserted that a designation of a legatee or devisee by name is more worthy in certainty than a description, and hence in case of a discrepancy it will be presumed that the falsity is in the description, and not in the name. *Vernor v. Henry*, 3 Watts, 385. As to character of evidence admissible, see same case *infra*, IX. c.

And it has been reasoned that a man's name is a thing by which he is usually called, and when one wants to speak of a man, one is usually exact in his name, although perhaps inexact in a description given either of his parentage, residence, or other incidents or accidents which attach to him. *Garland v. Beverley*, L. R. 9 Ch. Div. 213, 47 L. J. Ch. N. S. 711, 38 L. T. N. S. 911, 26 Week. Rep. 718.

And that where a devisee is described by his Christian name and his surname, and by some other distinctive circumstances, and no person answers both descriptions, and there is nothing in the rest of the will or the admitted evidence to show who is meant, the name will prevail, and the descriptive circumstances will be rejected. *Camoy's v. Blundell*, 1 H. L. Cas. 778.

In *Doe ex dem. Allen v. Allen*, 12 Ad. & El. 451, 4 Perry & D. 320, 9 L. J. Q. B. N. S. 395, it is held that a description of a devisee or legatee, where he is also named, is merely evidence as to the person intended, to be considered with other extrinsic facts received in determining the person intended as devisee or legatee, and is not conclusive upon that point. As to character of evidence admissible, see same case *infra*, IX. g, 1.

However, in *Drake v. Drake*, 8 H. L. Cas. 172, 29 L. J. Ch. N. S. 850, 3 L. T. N. S. 193, the lord chancellor said that there is no presumption in favor of the name more than any other description, and that a reference to the numerous cases on the question will show that there are more instances in which the description prevailed than in which the name prevailed. As to character of evidence admissible, see same case *infra*, IX. h.

b. Illustrative cases where name controlled.

In the following cases, with the aid of extrinsic evidence, the person whose name answered the description of the clause or

bequest was held entitled to the legacy, and not the person who answered the description, but not the name:

A bequest to Mary Smith, wife of Nathaniel Smith, was held to raise a latent ambiguity authorizing the reception of extrinsic proof, where it was shown by extrinsic proof that Mary Smith's husband was named Abraham Smith, and Nathaniel Smith's wife was named Sarah. The court said the question to be settled is whether the mistake is in the description or in the name of the legatee. *Smith v. Smith*, 1 Edw. Ch. 189. As to character of evidence admissible, see same case *infra*, IX. c.

A devise "to my daughter Elizabeth," by extrinsic proof, may be shown to have been intended for an adopted daughter of the testator of that name, although she was never formally adopted according to the provisions of the statute, it not appearing that the deceased had a daughter who answered the description in the will, and it appearing that the person mentioned had been treated as an adopted daughter. *Re Cahn*, 3 Redf. 31.

A bequest to E. S., niece of the testator, may be shown by parol evidence to be intended for his grandniece, E. J. S., where, at the time of the execution of the will, she was the only person at all answering the description of the bequest. *Stringer v. Gardiner*, 4 De G. & J. 468, 28 L. J. Ch. N. S. 758, 5 Jur. N. S. 260, 7 Week. Rep. 602.

A legacy "to my nephew J. V. H., son of my deceased sister E.," by the aid of parol evidence, was held to be intended for a grandnephew of the testator bearing that name, he being the grandson of the sister named E., and not a nephew of the testator, who was the son of the sister named E., and whose initials were R. R. H., it appearing that the testator knew and had an affectionate regard for the first mentioned, and, while he knew the last mentioned, he did not esteem him and had avowed his determination to give him nothing. *Vernor v. Henry*, 3 Watts, 585. As to character of evidence admissible, see same case *infra*, IX. c.

A bequest to the "Royal Home for Incurables, Streatham, S. W.," was held to be intended for the "Royal Hospital for Incurables," which was not located at the place mentioned, and not for the "British Hospital for Incurables," which was located at the place mentioned. *British Home & Hospital v. Royal Hospital*, 90 L. T. N. S. 601. As to character of evidence admissible, see same case *infra*, IX. c.

In *Garland v. Beverley*, L. R. 9 Ch. Div. 213, 47 L. J. Ch. N. S. 711, 38 L. T. N. S. 911, 26 Week. Rep. 718, a devise to William, eldest son of a designated person, was held to be intended for a son named William, although not the eldest son, and this without the aid of parol evidence. Cases are not included herein where a bequest ambiguous as to the devisee or legatee is construed with reference to the entire language of the will without the aid of extrinsic proof.

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c. Illustrative cases where description controlled.

In the following cases, the person answering the description, and not the person answering the name, by the aid of extrinsic facts, was held entitled to an ambiguous bequest or devise which referred to the beneficiary both by name and description.

An interesting case upon this point is *Powell v. Biddle*, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263, holding that parol evidence is admissible to show that a bequest to the testator's friend S. P., son of S. P., of a certain place, carpenter, was intended for a person whose Christian name was William, whom the testator, however, frequently referred to by the name of Samuel, and this although Samuel Powell had another son actually named Samuel, it further appearing, however, that the son named William was the issue of a marriage between the testator's deceased daughter and Samuel Powell the carpenter, and was well known to the testator, and their relations were friendly, while the son Samuel was the issue of a second marriage and was unknown to the testator. As to character of evidence admissible, see same case *infra*, IX. b. f. For a very similar case, see *SIEGLEY v. SIMPSON*.

Where, upon construing the will with reference to evidence of the state of the family with which the devisee or legatee was connected, as known to the testator, it appears that the meaning of the testator expressed in the will is that the person described, and not the person named, was intended, the designation will prevail over the name. *Camoys v. Blundell*, 1 H. L. Cas. 778.

A devise to the second son of a designated person is a devise by description, and not to a person by name, and where the name and balance of the description do not apply to any existing person, extrinsic proof may be resorted to, to determine whether the testator intended the devise for a person answering the description so far as concerns the name used, or a person answering the remainder of the description, but not the name, and where it appears from the will and the extrinsic evidence that the devise was intended for a person answering the description, rather than for a person bearing a certain name, the description will control. *Ibid*.

So, where a devise was to "my well-beloved nephews John and William Willard," although the testator had two nephews of that name, who, however, were practically unknown to him, it was shown by parol that he intended the devise for his two grandsons of that name, who were well known to and beloved by him. *Willard v. Darrah*, 168 Mo. 660, 40 Am. St. Rep. 468, 68 S. W. 1023. As to character of evidence admissible, see same case *infra*, IX. h.

A bequest to "my grandniece, Fannie R. Gibson," where the testator had a niece by that name and a grandniece by the name of Fannie Gibson, raises a latent ambiguity as to the person intended, and extrinsic evi-

dence is admissible to establish the identity. *Gallup v. Wright*, 61 How. Pr. 286. As to character of evidence admissible, see same case *infra*, IX. g, 1.

A legacy to Catherine Earneley may be shown to have been intended for Gertrude Yardleigh, where the legacy contained a description of the legatee, and it is shown by extrinsic proof that the latter answers this description, and there is no other person to whom it will apply at all. *Beaumont v. Fell*, 2 P. Wms. 141. As to character of evidence admissible, see same case *infra* IX. f and g, 2.

A bequest to Elizabeth, natural daughter of Elizabeth A., a single woman, was held intended for John, the natural son of Elizabeth A., a single woman, where he was the only illegitimate child of said Elizabeth, and where, by extrinsic evidence, peculiar reasons were shown why such a bequest would be made to the son named John. *Ryan v. Hannam*, 10 Beav. 536, 16 L. J. Ch. N. S. 491, 11 Jur. 761.

A bequest to a stepson of the testatrix, H. S. Covert, upon it appearing that the testatrix has no stepson of that name, may be shown by parol to have been intended for a stepson named John Harvey Covert. *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636.

A gift to P. H., son of C. H., was held to be intended for a son named B. H., where C. H. had no son named P. H. *Re Hooper*, 88 L. T. N. S. 160, 51 Week. Rep. 153.

A legacy to a grandnephew, Robert O., by extrinsic proof, was shown to have been intended for a grandnephew named Richard O., where the testator had no nephew named Robert O. *Re Ofner* [1908] W. N. 208. As to character of evidence admissible, see same case *infra*, IX. e.

And a bequest to the testator's brother Edward for life, and the remainder to his children by his present wife, where, at the date of the will, both Edward and his wife were dead, and the will contained other legacies for their children, was shown by parol proof to be intended for the testator's brother Samuel, who was the only brother he had living at the time of the execution of the will who had children living. *Parsons v. Parsons*, 1 Ves. Jr. 266, 5 Revised Rep. 120.

Parol evidence was resorted to, to show that a bequest to a certain named sister of the testator, of a certain place, was intended for a sister of a different name living at such place, where the sister named had never lived at this place, and was dead at the time of the execution of the will, to his knowledge. *Thayer v. Boston*, 15 Gray, 347.

A devise to "my niece Mary, who resides in the state of New York, daughter of my sister Mary," by the aid of extrinsic evidence, was shown to be intended for the testatrix, niece Anna, who resided in the state of New York, and not her niece Mary, who resided in Ireland. *Re Donnellan*, 164 47 L.R.A. (N.S.)

Cal. 14, 127 Pac. 166. As to character of evidence admissible, see same case *infra*, IX. h.

A legacy to Jas. Hooper Evans, a son of the nephew of the testator, was shown to be intended for John Evans, the only son of the only nephew of the testator, who was a favorite of his. *Evans v. Hays*, 3 N. J. Eq. 204. As to character of evidence admissible, see same case *infra*, IX. h.

A bequest to a granddaughter Alice May, by extrinsic evidence, was shown to have been intended for Mary J., where the testator had but one granddaughter. *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

A bequest to the testator's cousin Paris Piccard, by extrinsic proof, was shown to be intended for his cousin Priscilla Piccard, whom he usually called Paris. *Hart v. Marks*, 4 Bradf. 161.

Extrinsic evidence was held admissible to show which of two persons the testatrix intended by bequest to "my cousin Harriet C.," where the wife of the testatrix's cousin was named Harriet C., and the testatrix had an own cousin of that maiden name, who, however, was married, and whose married name was essentially different. *Cloak v. Hammond*, 56 L. J. Ch. N. S. 171, L. R. 34 Ch. Div. 255, 56 L. T. N. S. 648, 35 Week. Rep. 186. Compare with *Drake v. Drake*, 8 H. L. Cas. 172, 25 Beav. 642, 4 Jur. N. S. 727, 29 L. J. Ch. N. S. 850, 6 Week. Rep. 791, denying the right to resort to parol evidence for the purpose of showing that a bequest to the testator's sister was intended for a sister-in-law, who was accurately named in a bequest, although the testator had no sister of that name. As to character of evidence admissible, see same case *infra*, IX. h.

A bequest to "my nephew James Hornby, son of my brother Frederick," by extrinsic proof, was shown to have been intended for a nephew named Frederick, son of the testator's brother James. *Ex parte Hornby*, 2 Bradf. 420. As to character of evidence admissible, see same case *infra*, IX. h.

Extrinsic evidence was held admissible to show that the testator, in devising property to his nephew, naming him, and "to his sister, my niece," naming her, and also her residence, intended a niece of that name residing at the place mentioned, although not a sister of the nephew mentioned, and did not intend a sister of such nephew of a different name and residing at another place. *Re Dominici*, 161 Cal. 181, 90 Pac. 448. As to character of evidence admissible, see same case *infra*, IX. g, 2.

VI. Where designation is by description, and not by name.

a. Where description is indefinite or inaccurate.

There is no rule applicable to devises which require the names of the devisees to be mentioned. It is necessary only that the designation of the devisee be by words suffi-

cient to denote the person intended by the testator, and to distinguish him from all others. It is sufficient in this regard if the intention of the testator can be discovered by the language he used, in connection with extrinsic evidence for the purpose of applying the same. *Brewster v. McCall*, 15 Conn. 274.

If a description of a devisee or legatee is not applicable to any particular person, it may be aided by extrinsic evidence identifying the beneficiary intended.

Thus, a bequest to the granddaughter of the testatrix may be aided by extrinsic proof identifying the legatee intended, although the testatrix had more than one granddaughter. *Hubbuck's Estate* [1905] P. 129, 74 L. J. Prob. N. S. 58, 92 L. T. N. S. 665, 21 Times L. R. 333, 54 Week. Rep. 16. As to character of evidence admissible, see same case *infra*, IX. c.

By the aid of extrinsic proof, a bequest to the grandchildren of the testator's grandchildren was construed to mean his grandchildren, the children of his children, it appearing that there were no grandchildren of his children. *Re Stocum*, 94 N. Y. Supp. 588.

A bequest to the testator's three nieces, the daughters of a deceased sister, by parol evidence, was shown to be intended for the daughters of a son of such sister, where the sister never had any daughters, of which fact the testator was aware. *Beard v. Vose*, 19 R. I. 654, 35 Atl. 1046.

A bequest to the daughters of Ignatius S. was shown by parol evidence to be intended for the daughters of J. S., where Ignatius S. was a Jesuit priest and had no daughters, and under the rules of his church was precluded from marrying. *Re Waller*, 68 L. J. Ch. N. S. 526, 80 L. T. N. S. 701, 47 Week. Rep. 563. As to character of evidence admissible, see same case *infra*, IX. d, e.

d. Where there are persons in existence answering the description.

1. In general.

Subject to some exceptions herein referred to, the general rule is that if there are persons answering the description of the beneficiary in a devise or legacy, extrinsic evidence is inadmissible to show that some other person not answering the description was intended.

Thus, a legacy to legatees already named being plain and the meaning unmistakable, parol testimony is not admissible to show that only certain of the legatees theretofore named were intended by the testator as beneficiaries. *Carson v. Searey*, 66 Ga. 550.

A devise to the oldest daughter of another cannot be explained or changed by parol proof that the testator intended the oldest daughter of such person by his second wife, and not an older daughter by his first wife. *Ward v. Epsy*, 6 Humph. 447.

The term "sons" cannot be substituted for the term "children," where the testator has both sons and daughters; and extrinsic

proof is inadmissible for this purpose. *Den ex dem. Weatherhead v. Baskerville*, 11 How. 329, 13 L. ed. 717.

A bequest to the children of a deceased son of the testator's father's sister, share and share alike, where there are three such sons, cannot be aided by parol evidence that the testator intended the legacy for the children of all three sons. *Donaldson v. Bamber*, 66 L. J. Ch. N. S. 93, [1897] 1 Ch. 75, 75 L. T. N. S. 495, 45 Week. Rep. 162.

In *Bentham v. Wilson*, 50 L. J. Ch. N. S. 639, L. R. 17 Ch. Div. 262, 44 L. T. N. S. 885, 29 Week. Rep. 855, Cotton, L. J., remarked that there is no such latent ambiguity in a bequest to the testator's second cousin as to make admissible parol evidence to show that the testator was accustomed to call his first cousin once removed his second cousin. Compare with cases *supra*, III. a, 2.

2. Children.

(a) In general.

Extrinsic evidence is inadmissible to show that in a bequest of the income of property for the support of his children, the testator intended only a portion of his children, although he had a family of children who were living at home and still in need of support, and also another family of children who had grown up and gone for themselves. *Whilden v. Whilden*, *Riley*, Eq. 205.

Testimony as to declarations of the testator before the execution of his will, as to the manner in which he wished to dispose of his property, is inadmissible to show that, in using the word "children" to designate the devisees in a devise, the testator meant "sons." *Weatherhead v. Sewell*, 9 Humph. 272.

Extrinsic evidence is admissible to show that the testator at the time of executing his will, and at his death, had children living and also children who had deceased leaving children, in order to ascertain his meaning in the use in a devise of the term, "the remainder I give and devise to my children and their heirs respectively," and to determine whether the words were used as mere words of limitation for the purpose of indicating that his living children would take the fee and the residue of his property, or to designate a class of persons standing in the relation of grandchildren, whose claims upon him in consequence of their parents' death were equally strong with those of his surviving children. *Bond's Appeal*, 31 Conn. 183. As to character of evidence admissible see same case *infra*, IX. a.

Extrinsic evidence is inadmissible to limit the persons entitled under a bequest to the children of a designated individual, to the children living at the time of making the will, although the individual mentioned was related to the testator merely by marrying the latter's niece, the result of such marriage being three children, who were living at the time of the execution of the will, and thereafter, before the death of the testa-

tor, the niece had died and the husband remarried, and, as a result of this second marriage, had several more children, who, of course, were in no way related to the testator; and hence these latter children are also entitled to participate in the legacy. *Gray v. Pash*, 24 Ky. L. Rep. 963, 66 S. W. 1026.

Where a devise is to a certain number of children of another, and the latter has more than this number of children, parol evidence is admissible to show which of the children are intended; but where the devise is to the children of another, parol evidence is inadmissible to show that only a portion of the children are intended. *Hampshire v. Peirce*, 2 Ves. Sr. 216.

A devise of property to be divided between the children of a son and a daughter of the testator presents no case of ambiguity authorizing explanation by extrinsic proof. *Senger v. Senger*, 81 Va. 687.

Where a testator has children of his own and also stepchildren, a devise to his children will include only his own children, and parol proof is not admissible to show an intent to include his stepchildren. *Fouke v. Kemp*, 5 Harr. & J. 135.

(b) *Extrinsic evidence to change order of devolution.*

Extrinsic evidence is inadmissible to show that a residuary bequest to children, naming them, was intended for them as a class, so that upon the death of one of them the share of the deceased devolved to the survivors, rather than to the testator's heirs. *Best v. Berry*, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743.

3. *Nephew or niece.*

While the terms "nephews" and "nieces" in a primary and ordinary sense mean the immediate descendants of brothers and sisters of the person named, and do not include grandnephews and grandnieces or more remote descendants, yet it may be shown by extrinsic proof that, in using the terms, the testator used them in a secondary sense and intended to include grandnephews and nieces. *Cromer v. Pinckney*, 3 Barb. Ch. 466. To same effect is *Brower v. Bowers*, 1 Abb. App. Dec. 214. As to character of evidence admissible, see same case *infra*, IX, g, 1.

A bequest to the nephews of the testator, where he had no nephews by consanguinity, was construed to intend nephews by affinity, and extrinsic evidence was held inadmissible to show that it was improbable that the testator intended these parties, where no offer was made to show that any other class was intended. *Sherratt v. Mountford*, L. R. 8 Ch. 923, 42 L. J. Ch. N. S. 688, 29 L. T. N. S. 284, 21 Week. Rep. 818. As to character of evidence admissible, see same case *infra*, IX, f.

But a bequest to all the testator's nephews and nieces cannot by parol proof be shown to include also his wife's nephews and nieces. *Green's Appeal*, 42 Pa. 25. 47 L.R.A. (N.S.)

4. *Heirs or next of kin.*

In considering the cases construing the terms "heirs at law," "legal heirs," and "next of kin," to determine the persons intended thereby, it should be remembered that this note includes only such cases as pass upon the question of admissibility of extrinsic proof to aid the court in ascertaining the testator's intention in this regard, and cases are not included which construe such terms in view of the light of, and as controlled by, other language in the will.

No latent ambiguity arises from the use of the term "heir at law" to designate the beneficiary of a devise or bequest, and hence extrinsic evidence is not admissible to establish the testator's intention in the use of that term; the fact that the testator never knew, or labored under a mistake as to, the person answering that description, cannot affect the construction of the will. *Aspden's Estate*, 2 Wall Jr. 368, Fed. Cas. No. 589.

The words "lawful heirs" are free from ambiguity, and no evidence is admissible to prove the testator's intentions in the use of the term. *Sharp v. Klienpeter*, 7 La. Ann. 264.

A devise to heirs at law of the testator cannot be changed by parol evidence of the intention of the testator as to who should constitute his heirs at law. *Suman v. Harvey*, 114 Md. 241, 79 Atl. 197.

Under a devise to the heirs of another, the heirs are to be determined according to the law of the state, and where the husband of the person named, according to such laws, is one of her heirs, extrinsic proof is not admissible to show that the testator did not intend the husband to receive anything under the devise. *Lincoln v. Aldrich*, 149 Mass. 368, 4 L.R.A. 215, 21 N. E. 671.

To the same effect is *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379, holding that extrinsic proof is not admissible to show that the testatrix did not intend that her husband should take any part of the residue of her estate, under a devise of the residue to her lawful heirs.

It has, however, been held that extrinsic evidence is admissible to show that the testatrix did not intend to include her husband as one of her heirs in a bequest to her legal heirs, although, under the statutes regulating descent and distribution, the husband is a legal heir of the wife. *Peet v. Commerce E. Street R. Co.* 70 Tex. 522, 8 S. W. 203. As to character of evidence admissible, see same case *infra*, IX, a, g, 3.

Where, in a residuary disposition of the remainder of the testator's estate, real and personal, he designates as the devisees and legatees his heirs at law and his next of kin, it is clear that the term "heirs at law" relates to the real estate, and the term "next of kin" to the personal estate, and since the technical terms used are accurately applicable, the terms cannot be construed in any other than their strict and primary sense. *Luce v. Dunham*, 69 N. Y. 36.

And construing the term "legal heirs" according to the same rule, in *Woodward v.*

James, 115 N. Y. 346, 22 N. E. 150, it is held that the testator meant by the phrase "legal heirs" those persons who would take as in case of intestacy.

Extrinsic evidence may be received to aid in determining the meaning of the word "heirs herein named" as the devisees in a residuary devise. *Townsend v. Townsend*, 25 Ohio St. 477.

Extrinsic evidence is admissible to identify a person intended by a devise of property to the testator's own right heirs. And where his heirs were descendants of the whole blood and brothers and sisters of the half blood, it may be shown that the testator intended to include only his brothers of the whole blood. *Guerard v. Guerard*, 73 Ga. 506.

A devise to the next of kin of the testatrix' father and mother may be shown by extrinsic proof to be intended for the next of kin of each, and not their joint next of kin, where they had deceased prior to the execution of the will, to the knowledge of the testatrix. *Pycroft v. Gregory*, 4 Russ. 526, 6 L. J. Ch. 121.

5. Legitimate and illegitimate children.

(a) Where there are legitimate children.

Where there are legitimate claimants who answer the designation or description in a will, they will be held entitled to take as the beneficiaries to the exclusion of illegitimate claimants, who also answer the description. (For an exception to this rule see *infra*, under heading, "Where there are more than one claimant some of whom answer the description only by reputation;" also under heading, "Where one of the claimants has been referred to by testator by designation used in will.")

One of the leading cases on this question is *Cartwright v. Vawdry*, 5 Ves. Jr. 530, 5 Revised Rep. 108, holding that parol evidence is inadmissible to show that testator intended to include his illegitimate children in a devise to his children, where he had legitimate children living; and the lord chancellor remarked that it was impossible in a court of justice to hold that an illegitimate child can take equally with lawful children by a devise to children, and this was true although evidence was offered clearly showing the intention of the testator to include an illegitimate child in a bequest to his children.

Parol or extrinsic evidence is not admissible to show that a testator, in devising to a person and her children, intended to include illegitimate children of the beneficiary, although the beneficiary was the mother of the testator, and her illegitimate child was his sister. *Shearman v. Angel*, Bail. Eq. 351, 23 Am. Dec. 166. And see cases *infra*, b.

The gift to the issue, or the issue of the body, is limited to legitimate issue, and no ambiguity is created by the use of the term, which authorizes extrinsic evidence to show that the testator intended a devise to a

person and to the issue of his body, to devolve to an illegitimate issue of the deviser, although the latter had no legitimate issue. *Flora v. Anderson*, 67 Fed. 182.

A bequest to the children of another is not a bequest to the illegitimate children of such person, if there are legitimate children answering the description, and parol evidence is inadmissible to show an intent upon the part of the testator to include illegitimate children. *Ellis v. Houston*, L. R. 10 Ch. Div. 236, 27 Week. Rep. 501.

A bequest to the children of the testator's daughter cannot be shown by extrinsic proof to be intended to include illegitimate children, where there are legitimate children. *Crosby v. Lewis*, 2 Edm. Sel. Cas. 26.

The word "children" in a will *prima facie* means legitimate children, unless, when the facts are ascertained, some repugnancy would result from so interpreting the will using that term. The probable intention of the testator cannot be taken into account. *Dorin v. Dorin*, L. R. 7 H. L. Cas. 568, 45 L. J. Ch. N. S. 652, 31 L. T. N. S. 281, 23 Week. Rep. 570.

A gift to the nephew of the testator means a legitimate nephew; hence, where the testator had both a legitimate and illegitimate nephew of the same name, a bequest to his nephew of such name cannot be shown by extrinsic proof to be intended for the illegitimate nephew. *Appel v. Byers*, 98 Pa. 479.

Parol evidence is inadmissible to show that the testator included in a devise to his nephews his illegitimate nephews, where he also had legitimate nephews. *Brower v. Bowers*, 1 Abb. App. Dec. 214.

(b) Where no legitimate children.

A devise to children without any other designation means legitimate descendants if there are any, and parol evidence cannot be received to show that a different class of persons is intended. In this case, however, as in all others, it is proper to look into circumstances *dehors* the will, to ascertain whether there are any persons answering the description in the legal sense of the term, and if there are none, it is then allowable to resort to extrinsic proof to identify the persons intended by the designation "children." *Re Cahn*, 3 Redf. 31.

Any implication of an intent on the part of the testator to include illegitimate children within a designation in a devise to the children of a certain person must appear from the face of the will itself, and cannot be shown by extrinsic evidence, when there are legitimate children. Extrinsic evidence is admissible only where there are no legitimate children at the time of the making of the will to satisfy the terms of the bequest. *Heater v. VanAuken*, 14 N. J. Eq. 159.

However, in *Laker v. Hordern*, L. R. 1 Ch. Div. 644, 45 L. J. Ch. N. S. 315, 34 L. T. N. S. 88, 24 Week. Rep. 543, by the aid of extrinsic proof a bequest to the daughters of the testator was held to be intended for his illegitimate daughters, where he had no legitimate daughters, although at the

time of the execution of the will the testator was married. This case was disapproved in *Ellis v. Houston*, L. R. 10 Ch. Div. 236, 27 Week. Rep. 501, on the ground that, the testator being married at the time of the execution of the will, there was a presumption that, in referring to his daughters, he intended any legitimate daughters who might be born to him; and on this point the case is apparently regarded as in conflict with *Dorin v. Dorin*, L. R. 7 H. L. Cas. 568, 4 L. J. Ch. N. S. 652, 31 L. T. N. S. 281, 23 Week. Rep. 570, referred to *supra*, although the court attempted to distinguish the two cases.

c. Where there are more than one claimant, some of whom answer description only by reputation.

To the general rule referred to, that extrinsic evidence is inadmissible to show that some other person or class of persons was intended in a devise or bequest by description, there is the exception that if there are in existence persons answering the description as a matter of law, who claim as beneficiaries, and also persons claiming as beneficiaries who answer the description by general reputation, to the knowledge of the testator, even though, as a matter of law, they do not come within the designation, extrinsic evidence is admissible to show whom the testator intended, and the latter class of persons may be thus found to be entitled to the devise or bequest notwithstanding the existence and claims of the former class, who as a matter of law answers the description.

Thus, it may be shown by parol proof that the testator lived with a woman named Margaret as his wife, and that she was addressed and recognized as his wife, although he had another wife living, in order to show that she was the legatee intended in a legacy to his wife "Margaret," this Christian name not being the name of his real wife. *Lepine v. Bean*, L. R. 10 Eq. 160, 39 L. J. Ch. N. S. 847, 22 L. T. N. S. 833, 18 Week. Rep. 797.

So, a devise to the wife of the testator was shown by the surrounding circumstances to be intended for a woman with whom the testator was living at the time of the execution of his will, although he had formerly lived with another woman in the relationship of husband and wife. *Marks v. Marks*, 40 Can. S. C. 210, 12 Ann. Cas. 751.

Evidence that there were illegitimate children of the testator who had gained by reputation the name and character of his children is admissible to show that a bequest to the children which the testator might have by a designated woman to whom he was not married, where he was married to another, was intended for the illegitimate children then living which such woman had borne to the testator, it also appearing that the testator's wife had never borne him any children, and was incapacitated from so doing. *Wilkinson v. Adam*, 1 Ves. & B. 422, 12 Revised Rep. 255, 25 Eng. Rul. Cas. 506. And 47 L.R.A. (N.S.)

see, to the same effect, *Metham v. Devonshire*, 1 P. Wms. 529.

Parol evidence is admissible to show that the testator always called children living with him his children, although they were illegitimate, in order to show that by reputation they were the children he referred to in a bequest to his children by a certain woman. *Lepine v. Bean*, *supra*.

Parol evidence is admissible to show that a testator intended to include in a devise to the children of another, an illegitimate child, where the father and mother had intermarried, and where the child had been recognized as legitimate by the father. *Harness v. Harness*, — Ind. App. —, 98 N. E. 357.

Compare with *Godfrey v. Davis*, 6 Ves. Jr. 43, 5 Revised Rep. 204, holding that, although it was shown by parol evidence that the testator knew of the situation of the family of a person referred to in his will, in which he made a bequest to the eldest child of such person, and knew that the only children of this person were illegitimate children, and also knew that they were treated and recognized by their father as his children, nevertheless the bequest would not be construed as intending an illegitimate child.

The *Godfrey Case* is referred to in *Wilkinson v. Adam*, *supra*, and it is said that there the reference to a child of a designated individual was *persona designata*, and that such use of the term was sufficient to enable the court to say that the will particularly pointed out, and manifestly and incontrovertibly showed, that the testator intended a legitimate child.

It has been held that even where there are no legitimate children answering the description, a bequest to the children of the testator will be held not to include illegitimate children, although it appears from extrinsic evidence that the testator had two illegitimate sons, who had been brought up by the testator as his own children, and that he had caused them to be baptised by his name. This decision was reached on the ground that it appeared that the testator, shortly prior to the execution of the will, married the mother of the illegitimate children, and hence it was possible that legitimate children might be born who would answer the description. In such case, said the court, parol evidence will not be considered in determining the intent of the testator. *Dorin v. Dorin*, L. R. 7 H. L. Cas. 568, 45 L. J. Ch. N. S. 652, 31 L. T. N. S. 281, 23 Week Rep. 570.

d. Where one of the claimants has been referred to by testator by designation used in will.

A bequest to William Wilson's children may be shown by parol evidence to be intended for Seth Wilson's children, although there is a person by the name of William Wilson who has children, it appearing, however, that Seth Wilson's children are blood relatives of the testator, while William Wil-

son's children are utter strangers, and also that the testator occasionally called Seth Wilson, William Wilson. *Miller's Estate*, 26 Pa. Super. Ct. 443.

And where, from the will as a whole, it appeared that the testator employed the term "nephew" to designate both legitimate and illegitimate nephews, and the term "niece" to designate an illegitimate niece, a bequest to his "nephew G. A.," where there was both a legitimate and illegitimate nephew of that name, was ambiguous, and parol evidence was held admissible to show which of the two was intended. *Re Ashton*, [1892] P. 83, 61 L. J. Prob. N. S. 85, 67 L. T. N. S. 325.

In *Lobb v. Lobb*, 22 Ont. L. Rep. 15, a devise to the children of the testator is held, in view of the surrounding circumstances and his relationship with his legitimate and illegitimate children, together with the consideration of the terms of the will as a whole, including prior references therein to his illegitimate children as his son and his daughter, as intending to include only the illegitimate children of the testator.

VII. Where name or description applies to more than one person.

If the will applies definitely to two or more persons, so that either would be entitled to take thereunder but for the existence and claim of the other, parol evidence is admissible to prove the one intended. *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; as to character of evidence admissible, see same case *infra*, IX. a. *Tucker v. Seaman's Aid Soc.* 7 Met. 188; *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *Smith v. Kimball*, 62 N. H. 606; *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. Supp. 528, affirmed without opinion in 175 N. Y. 505, 67 N. E. 1090; *Knight's Estate*, 10 Pa. Co. Ct. 225; *Bernasconi v. Atkinson*, 10 Hare, 348, 17 Jur. 128, 1 Week. Rep. 152; as to character of evidence admissible, see same case *infra*, IX. d. and *h. Ulrich v. Litchfield*, 2 Atk. 372.

It has been asserted that it is only where the designation of the person intended in a bequest is applicable with equal certainty to several, that extrinsic evidence, including proof of the testator's declarations as to his intentions made at the time of drawing the will, is admissible for the purpose of establishing which of such persons or things was intended by him. The words of the will must be such as to render it a matter of necessity to have recourse to extrinsic evidence to explain them; if no such necessity exists, the evidence is not admissible. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642. As to character of evidence admissible, see same case *infra*, IX. g. 1.

Where, from extrinsic evidence, it appears that there are two persons of the name of the devisee or legatee, extrinsic evidence is admissible to show which person was intended. *Doe ex dem. Allen v. Allen*, 12 Ad. & El. 451, 4 Perry & D. 320, 9 L. J. 47 L.R.A. (N.S.)

Q. B. N. S. 395. As to character of evidence admissible, see same case *infra*, IX. g. 1.

Where a devise to J. C., of a certain place, is ambiguous because there were both a father and a son of the place mentioned bearing that name, parol evidence is admissible to show that, at the time of the execution of the will, the father was dead, and the son was the person referred to. *Jones v. Newman*, 1 W. Bl. 60.

Where a bequest is to the testator's son named John, and he had two sons named John, parol evidence is admissible to show that, at the time of the execution of the will, he believed his eldest son named John had deceased. *Cheyney's Case*, 5 Coke, 68a; *Bennett v. Marshall*, 2 Kay & J. 740.

Where a bequest was to "Robert Careless, my nephew," and the testator had two nephews of that name, it was shown by extrinsic proof that he was intimately acquainted with one of them, and very little acquainted with the other, and that it was uncertain whether he knew that the Christian name of the latter was Robert. *Careless v. Careless*, 19 Ves. Jr. 601, 1 Meriv. 384, 15 Revised Rep. 134.

A devise to W. M., "my second cousin," where the testator had no second cousin of that name, but had two cousins once removed each bearing the name, was ambiguous, and parol evidence was admissible to show which of the two persons was meant by the testator. *Bennett v. Marshall*, *supra*.

A latent ambiguity is raised by parol evidence which discloses that there are several societies answering the designation in a devise, that may be removed by the same species of evidence. *Brewster v. McCall*, 15 Conn. 274.

Where there are two societies bearing the same corporate name as that inserted in the will, the meaning of the bequest is rendered doubtful. This ambiguity is latent, and on well-established principles it may be helped and explained by evidence *dehors* the instrument. Such evidence does not vary the written language; it only enables the court to reject one of the two subjects to which the description applies, and to ascertain which of them the testator understood to be signified by the words used in the will. The law permits oral evidence to be introduced in such cases for the purpose of showing which subject was known to the testator, or which he had in mind when he inserted the name in his will. *Bodman v. American Tract Soc.* 9 Allen, 447. As to character of evidence admissible, see same case *infra*, IX. h.

Where there are several charitable organizations answering the description of a bequest in a will, extrinsic evidence is admissible to identify the one intended by the testator. *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689.

Where there are several religious corporations answering the general description of a bequest, extrinsic evidence is admissible to identify the one intended. *Trustees of Fund of Episcopate v. Colegrove*, 6 Thomp. & C.

614. As to character of evidence admissible, see same case *infra*, IX. g, 1.

The existence of more than one society answering the description of a legatee raises a latent ambiguity explainable by extrinsic proof. *Tilton v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321. As to character of evidence admissible, see same case *infra*, IX. b.

A bequest to the American Tract Society, where there were two societies of that name in existence, raised a latent ambiguity making competent evidence of the knowledge that the testator had of one of the societies, which was a domestic corporation, and his apparent lack of knowledge of the existence of another society of a similar name, which was a foreign corporation. *Bodman v. American Tract Soc.* 9 Allen, 447. As to character of evidence admissible, see same case *infra*, IX. c, and h.

Where there are two claimants to a bequest, both incorporated institutions, and neither bearing precisely the name used in the bequest, but each administering a worthy charity more or less closely simulating that indicated by the terms of the bequest, extrinsic evidence is not admissible to show the intention of the testator, where the description in the will imperfectly applies to one and more perfectly to another, as where a bequest was to the society for the relief of indigent females, and the name so closely resembled a society known as an association for the relief of respectable, ancient, indigent females, as to render incompetent parol proof that the testator by the description meant St. Luke's Home for Indigent Christian Females. *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191, 11 Am. Rep. 697.

VIII. *Where there is no sufficient name or description.*

See *supra*, III. d.

In the construction of wills, effect will be given, if possible, to the intention of a testator, but his intention must be in some way manifested by the will itself. It cannot be gathered wholly from facts *dehors* the will. *Judy v. Williams*, 2 Ind. 449.

Parol testimony to identify the association intended by an indefinite designation in a legacy is not admissible, where there does not appear upon the face of the will sufficient indication of the intention to justify the application of the evidence. *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669 (holding that a bequest to the Freedman's Association cannot by parol proof be shown to mean "Freedman's Aid Society of the Methodist Episcopal Church").

IX. *Character of evidence admissible.*

a. *The surrounding facts and circumstances.*

The intention of the testatrix in a bequest to her legal heirs must be ascertained from the meaning of the words in the instrument, 47 L.R.A. (N.S.)

and from these words alone. Nevertheless, as she may be supposed to have used the language with reference to the situation in which she was placed, and the state of her family, her property, and other circumstances relating to herself individually, and to her affairs, extrinsic evidence of these facts and circumstances is admissible to enable the court to discover the meaning of the terms, and ascertain whether or not she intended thereby to include her husband, where, under the statutes regulating descent and distribution, he would be one of her legal heirs. *Pect v. Commerce & E. Street Ry. Co.* 70 Tex. 522, 8 S. W. 203, holding the husband not to be included within the term "legal heirs."

Where there is a latent ambiguity as to the identity of a devisee or legatee, extrinsic evidence is admissible to show the situation of the testator, his family, and his property, and of the existing and surrounding circumstances at or about the time of making the will, to aid in identifying the person intended. *Trustees of Fund of Episcopate v. Colegrove*, 6 Thomp. & C. 614; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710.

It is competent to show every material fact relative to a person claiming any interest under a will, the subject-matter of the disposition, the circumstances of the testator, his family, and affairs, in order to identify the devisee or legatee intended by the testator, where there exists as to such person a latent ambiguity. *Bond's Appeal*, 31 Conn. 183.

The surrounding circumstances and the state of the parties are proper subjects for consideration in ascertaining the persons intended in an ambiguous devise or legacy. *Pasmore v. Huggins*, 21 Beav. 103, 25 L. J. Ch. N. S. 251, 1 Jur. N. S. 1060, 4 Week. Rep. 33.

Whenever parol evidence becomes necessary to remove any uncertainty as to the identity of a devisee or legatee, inquiry may be made into any material fact relating to the person claiming under the will, and to the property claimed as the subject of the disposition, to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person intended by the testator. *Women's Union Missionary Soc. v. Mead*, 131 Ill. 361, 23 N. E. 603; *Missionary Soc. v. Cadwell*, 69 Ill. App. 280.

It is the province and duty of the court to ascertain what the testator meant and intended in a devise to his heirs, and when so ascertained, to give to such meaning and intent full force and effect, and such meaning may be learned from the words themselves, the context, the will considered as a whole, and all the circumstances surrounding the particular case. *Armstrong v. Galusha*, 43 App. Div. 248, 60 N. Y. Supp. 1.

Evidence of the surrounding circumstances, the subject-matter of the devise, and of the persons to be benefited thereby, is admissible in order to place the court, so far

as may be, in the situation of the testator, and to enable it, looking from his standpoint, to determine the objects of his bounty. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

In *Lawton v. Corlies*, 127 N. Y. 100, 27 N. E. 847, it is held that the persons meant by the testator in a devise of his estate to his "heirs at law," according to the laws of New York, are to be ascertained from the words of the will considered in the light of the circumstances surrounding him when he used them; and it is held that thus construed the testator intended the devisees of his real estate should be those persons entitled thereto according to the laws of descent, and that the legatees in a bequest of his personalty should be those persons entitled thereto according to statutes for the distribution of personalty.

Where there is a mistake, either in the name or designation of the devisee, evidence of the state of the testator's family and the circumstances surrounding him at the time of the execution of the will is admissible to show whether the mistake was in the name or the description of the devisee. *Doe ex dem. Le Chevalier v. Huthwaite*, 3 Barn. & Ald. 632.

In such case, the receipt of evidence of the state of the testator's family and the circumstances surrounding him at the time of the execution of the will raises a question for the jury to determine, whether or not the mistake was in the name of the devisee or in the description. *Ibid.*

b. Use of name applied by public or by testator.

In ascertaining the beneficiary intended, the popular use of a word used in designating a legatee or devisee is to be considered. *Grant v. Grant*, L. R. 2 Prob. & Div. 8, L. R. 5 C. P. 380.

Evidence that a society is frequently referred to by a name used in a bequest is admissible to identify it as the society mentioned. *Re Smith*, 8 D. L. R. 93.

And it may be shown by extrinsic proof that a society claiming a bequest is popularly known and designated by the name used in the bequest to designate the legatee. *Cresson's Appeal*, 30 Pa. 437.

A legacy to the testator's nephews *Joseph Baldwin and Harmon Baldwin*, by extrinsic proof, was shown to be intended for his nephews *Josiah M. Baldwin and Samuel Harmon Baldwin*. Evidence was received that the former usually went by the name of *Josey*, and the latter by the name of *Harmon*, and there were no nephews of the testator bearing the names designated in the bequest. *Taylor v. Tolen*, 38 N. J. Eq. 91.

Evidence showing the name given to a society in its charter, a name it used or recognized as its own, and the name or names by which it was known to others, is competent as tending to prove a name by which the legatee might have been known to the testator, and a name which he might have used in his will to have expressed his

intention. *Tilton v. America Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321.

To ascertain the devisee intended by an ambiguous bequest, extrinsic evidence is admissible to show that a testator frequently referred to a person by the name used in the bequest, although this was not the correct name of the person. *Re Seaton*, 8 D. L. R. 204; *Powell v. Biddle*, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263. And see *supra*, III. a, 2, and VI. d.

c. Relations existing between testator and claimant.

Evidence is admissible to show the relation and circumstances in which the claimants to an ambiguous bequest stood to the testator, and the sense in which he habitually used the word "nephew" when referring to his wife's nephew, one of the claimants. *Grant v. Grant*, L. R. 2 Prob. & Div. 8, L. R. 5 C. P. 380.

Evidence of relationship of the claimants and their standing with, and friendship for, the testator, is admissible as bearing upon the question of identity. *Smith v. Smith*, 1 Edw. Ch. 189.

Parol evidence is admissible to show the situation and surroundings of the testator, and the objects and person with whom he was familiar and upon whom his affections were resting, in order to make clear a latent ambiguity as to the identity of a devisee or legatee. Such evidence does not contravene the general rule of law against the use of parol evidence to supplement wills, since it does not attempt to show what the testator meant to say, but simply to show what he meant by what he did say. *German Pioneer Verein v. Meyer*, 70 N. J. Eq. 192, 63 Atl. 835, affirmed without opinion in 72 N. J. Eq. 954, 67 Atl. 23.

The persons intended by a devise to the "four boys" may be shown by parol evidence to the effect that the testator had seven sons, three of whom were married with families of their own, with whom they respectively resided away from the parental roof, and that the other four sons were minors, living at home with their father, the testator, and constituted part of his household. *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

Extrinsic proof is admissible to show that a certain granddaughter of the testatrix lived with her at the time of the execution of the will, and had lived with her for some time prior thereto, and that such granddaughter was held in very affectionate regard by the testatrix, in order to identify her as the granddaughter intended in a bequest by the testatrix to her granddaughter. *Hubbuck's Estate* [1905] P. 129, 74 L. J. Prob. N. S. 58, 92 L. T. N. S. 665, 21 Times L. R. 333, 54 Week. Rep. 16.

Where there is a devise to a township of which there are many of the same name in the state, it is competent to show that the testator resided in a township of that name, and that he sustained peculiar relations to that township, different from all the others

of a like name, in order to identify that particular township as the one intended as the devisee. *Skinner v. Harrison Twp.* 116 Ind. 139, 2 L.R.A. 137, 18 N. E. 529.

In order to identify a legatee where the person whose name is mentioned in the legacy does not answer the description, while another person answers the description, but his name is dissimilar, parol evidence is admissible to show that the testator knew, but did not esteem, the person whose claim rested upon the efficacy of the description, and that he had avowed his determination to give him nothing, and that he knew, esteemed, and praised as the most worthy of the family the person whose claim was founded on the name; that he received letters from him when absent, made him welcome when present, and received at his hands the care and attention of a favorite relative in his last moments. *Verner v. Henry*, 3 Watts. 385.

It is competent for all the claimants as legatees to prove their corporate existence and the object and purpose of their organization, the knowledge the testator had of them, his feelings toward and relations with them, and the name or names by which he and others were accustomed to designate them; and that no other corporation, association, or society corresponded to the designation given in the will at the time it was executed; and also the family, church, and social relations of the testator, and other facts and circumstances surrounding him and claimants that would aid the court in reaching a conclusion as to the testator's intention and purpose in using the name used in the will. *Goodwin v. New Church Bd. of Publication*, 160 Ill. App. 483.

In order to determine the society meant by a bequest ambiguous in this regard, testimony is admissible to show that the testator was acquainted with the objects and operations of a claimant society, that those operations were mainly confined to purposes described in the legacy, and that the testator took a lively interest in the society, contributed to its funds in his lifetime, and expressed his preference for it over other institutions. *Button v. American Tract Soc.* 23 Vt. 336.

To identify a legatee, extrinsic evidence is admissible to show that a testatrix, prior to and at the time of making the will involved, was a member of a certain church, and that during that time a certain missionary society was the only missionary society of the church, and that it was well known by the name used by the testatrix in the bequest, although its true and legal name was different. *Chappell v. Missionary Soc.* 3 Ind. App. 356, 50 Am. St. Rep. 276, 29 N. E. 924.

Where no missionary society or societies are shown to exist which conform accurately to the name or designation of such a society contained in a will, it is competent to show the facts known to the testator at the time he executed the will, the names by which he was accustomed to call missionary

societies, or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions, if any, made by him for missionary purposes. *Hinckley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840.

Evidence is admissible to show that a testator was well acquainted with a certain "home" which answered the description of a bequest in his will, although not bearing exactly the same name, and that he had contributed thereto and expressed his intention to bequeath something to it. *Re Smith*, 8 D. L. R. 93.

To aid the court in determining the missionary society intended as the legatee in an ambiguous bequest, parol evidence is admissible to show the testator's interest in a certain missionary society which claimed to be the one intended. *Amberson's Estate*, 204 Pa. 397, 54 Atl. 484.

d. Knowledge of testator.

When a bequest contains a description which does not accurately apply to anyone, evidence of the testator's knowledge is admissible to aid in applying the description. *Re Waller*, 68 L. J. Ch. N. S. 526, 80 L. T. N. S. 701, 47 Week. Rep. 563.

Where the description in a will is not strictly applicable to any person, the identity of the legatee cannot be ascertained by parol evidence of the intention of the testator, but the court has the right to ascertain all the facts which were known to the testator at the time he made his will, to aid in determining the identity. *Bernasconi v. Atkinson*, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152.

In *Bernasconi v. Atkinson*, supra, a distinction is made between cases where a description is applicable equally to two persons, and where it is not entirely applicable to any person. In the former case, it is held that the intention of the testator may be shown by parol evidence in order to show which of the two is intended. In the latter case, however, parol evidence of intention is inadmissible, although the court may have recourse to sufficient facts to place itself in the testator's position, in order to ascertain whether there exists any person to whom the description can be reasonably and with sufficient certainty applied.

Proof is admissible not only of previous facts which were known to the testator, and of present circumstances in the midst of which he made his will, but his declarations made at the time of making his will, as well as before and after the making of the will, may be resorted to, to remove any equivocation and identify the objects of his bounty. *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

In identification of the devisee in a devise to the testator's son John, where he had two sons named John, it may be shown at the time of making the will that the tes-

tator believed one of them was dead. *Cheyney's Case*, 5 Coke, 68.

To establish a mistake by a testator in devising property to his brother Cormac, and other property to his nephew, the son of his brother, extrinsic evidence is admissible to show that the testator had had only two brothers, one named James and the other Henry, and that the testator, during his lifetime, had made inquiries for his brother Henry, and had been unable to find him, and that he had not been heard from for over thirty years; and upon this showing the brother James will be held to be the beneficiary intended by the testator. *Connolly v. Pardon*, 1 Paige, 291, 19 Am. Dec. 433.

Where a legacy was to the children of the testator's daughter by any man who might marry her other than Mr. Thomas Fisher of a certain place, and at the time of the execution of the will there lived at the place mentioned a Mr. Thomas Fisher, who was a married man with a wife and family, and he had an adult son named Henry Tom Fisher, who had paid addresses to the testator's daughter prior to the death of the testator, and following his death the legatee intermarried with this son of the elder Fisher, it was held by the aid of extrinsic proof showing, among other things, that the testator knew of Henry Tom Fisher under the name of Tom Fisher, that the latter was the person referred to in the bequest. *Re Wolverton Mortgaged Estates*, L. R. 7 Ch. Div. 197.

c. Reference to other instruments.

In *British Home & Hospital v. Royal Hospital*, 90 L. T. N. S. 601, reference was had to an account book kept by the testatrix, in which she entered her contributions to different charities, for the purpose of ascertaining the particular societies meant in bequests which did not accurately designate any society.

A contemporaneous writing by the testator containing instructions for a will is admissible to show that in describing a grandnephew as "Robert O.," the testator meant "Richard O." *Re Ofner* [1908] W. N. 208.

Prior wills of the testator are admissible in order to establish the identity of legatees in a subsequent will which does not accurately describe the legatees therein. *Re Waller*, 68 L. J. Ch. N. S. 526, 80 L. T. N. S. 701, 47 Week. Rep. 563.

Where the residuary clause of a will is ambiguous and uncertain as to whom the testator meant by the words "my heirs," a paper written by the testator at about the time of the execution of the will, containing a list of all of the testator's heirs, is admissible in evidence for the purpose of explaining whom the testator meant by that term. *Armstrong v. Galusha*, 43 App. Div. 248, 60 N. Y. Supp. 1.

The person intended in a devise to whoever should take good care of the testatrix may be established by the extrinsic proof 47 L.R.A. (N.S.)

including a letter from the testatrix to such person. *Dennis v. Holsapple*, 148 Ind. 297, 46 L.R.A. 168, 62 Am. St. Rep. 526, 47 N. E. 631.

f. Miscellaneous.

Parol evidence is admissible to show that the testator, in bequeathing property to a certain person of a designated relationship, living at a certain place, was mistaken in the name, but that he had a relative of the degree mentioned living at such place, of a slightly different name; and upon such showing this relative will be held the person intended. *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351.

In *Beaumont v. Fell*, 2 P. Wms. 141, extrinsic evidence was admitted to show that the testator's voice when he made his will was very low and hardly intelligible, that the testator usually called a legatee Gatty, and that the scrivener who drew the will mistook this for Katy.

Parol evidence is admissible to show that a bequest to the testator's friend Samuel Powell, son of Samuel Powell of a certain city, carpenter, was in fact intended for a person whose Christian name was William, that William was the son of the testator's daughter, who had married Samuel Powell, and was friendly with the testator. *Powell v. Biddle*, 2 Dall. 70, 1 L. ed. 293, 1 Am. Dec. 263.

It has been asserted that evidence of the acts, feelings, and intentions of the testator is not admissible for the purpose of construing his will, although evidence is admissible to show who constitute the class of takers thereunder. *Sherratt v. Mountford*, L. R. 8 Ch. 928, 42 L. J. Ch. N. S. 688, 29 L. T. N. S. 284, 21 Week. Rep. 818.

g. Declarations of testator.

1. In general.

Evidence of declarations of the testator at the time of making his will is admissible to explain any latent ambiguity raised by extrinsic proof with reference to the identity of any devisee or legatee. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422; *Farrar v. Ayres*, 5 Pick. 409; *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317; *Whitaker v. Tatham*, 7 Bing. 628, 5 Moore & P. 628, 9 L. J. C. P. 189; *Harris v. Lincoln*, 2 P. Wms. 135; *Rutland v. Rutland*, 2 P. Wms. 215; *Thomas v. Thomas*, 6 T. R. 671; *Hodgson v. Hodgson*, 2 Vern. 593; *Maund v. M'Phail*, 10 Leigh, 199.

When the question is whom has the testator named in a bequest, and a claimant, by extrinsic evidence, has brought that question to depend on whom the testator intended to name, the latter's declaration of intention in this regard, if consistent with the name in the will, is light from the very source of intention, and is therefore admissible. *Re Wheeler*, 32 App. Div. 183, 52 N. Y. Supp. 943.

Declarations of the testator as to the person to whom he had devised property are admissible to show whom the testator intended, where, from extrinsic evidence, it appears that there are two persons each bearing the name of the legatee. And this is true although one of them answers the description more nearly than the other, since this fact furnishes an argument only in the same manner as evidence of other extrinsic facts, and is not conclusive. *Doe ex dem. Allen v. Allen*, 12 Ad. & El. 451, 4 Perry & D. 320, 9 L. J. Q. B. N. S. 395.

It has been held that declarations of the testator cannot be received as evidence of what he intended by the term "nephews and nieces." But the situation of the testator's family relatives, and the facts that he had grandnephews and nieces, and that these, together with a child of a deceased niece, were, at the time of the making of the will, the only representatives of a deceased sister, are properly to be considered in determining the persons meant by the term "nephews and nieces." *Cromer v. Pinckney*, 3 Barb. Ch. 460.

Evidence is admissible of declarations of the testatrix at and before the time she made the will, in order to determine the society she intended in an ambiguous bequest to a "Missionary Society." *Re Wheeler*, 32 App. Div. 183, 52 N. Y. Supp. 943.

The declarations of the testator are admissible especially where made at the time the will was executed, for the purpose of showing the society intended in an ambiguous bequest to a "Missionary Society." *McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733.

Statements of the testator prior to making his will, of an intention to aid a certain missionary society, are admissible to explain a latent ambiguity as to the missionary society intended in a bequest which accurately named no existing society. *Leonard v. Davenport*, 58 How. Pr. 384.

Declarations and acts of the testator indicative of the purpose of his mind in respect to the legatee mentioned in his will, as to whom there is a latent ambiguity, and also declarations not contemporaneous with the will, may be received as evidence of the intention of the testator in this regard. *Trustees of Fund of Episcopate v. Colegrove*, 6 Thomp. & Co. 614.

Statements of the testator made subsequently to the execution of the will are admissible to aid in establishing the identity of a devisee or legatee as to whom there exists a latent ambiguity. *Gallup v. Wright*, 61 How. Pr. 286.

In *Doe ex dem. Hiscocks v. Hiscocks*, 5 Mees. & W. 363, 2 Eng. Rul. Cas. 718, it is held that evidence of the declarations of the testator after the execution of his will, and also of the instructions for the draft of his will, is inadmissible to show which of two of his grandsons were intended in a bequest ambiguous in this regard. This conclusion is reached upon the theory that

evidence of the intention of the testator is admissible, to explain the words or meaning of a will, only to supply some deficiency or remove some obscurity or ambiguity raised by extrinsic evidence. Other cases will be found throughout the note denying the admissibility in evidence of declarations of the testator to show the beneficiary he intended, but, like the above case, these cases are disposed of on some ground other than the competency in general of evidence of declarations by the testator.

It may happen that the surrounding facts and circumstances, together with the language of the will as a whole, so clearly indicate the person intended by the testator that evidence of his declarations, to prove a different beneficiary, is inadmissible. *Doe ex dem. Westlake v. Westlake*, 4 Barn. & Ald. 57. And see also *Jefferies v. Michell*, 20 Beav. 15.

2. Character of declaration.

There is a broad difference between testimony of the casual remark of a man as to his intention to leave a portion of his estate to a designated person, and the positive instructions which he has given his attorney in the very performance of the testamentary act. *Re Dominici*, 151 Cal. 181, 90 Pac. 448.

Evidence of declarations by the testator to outsiders after the execution of his will, as to his intention with reference to his property, is not admissible to identify a devisee or legatee. *Lehnoff v. Theine*, 184 Mo. 346, 83 S. W. 469.

The testator's declarations of intention, and statements of fact uttered at the execution of the will, are admissible to identify a devisee or legatee, but not any general declarations or wishes expressed for the disposition of his property. *Goodwin v. New Church Bd. of Publication*, 160 Ill. App. 483.

Declarations of the testator that he had provided or would provide for a claimant, and had left him something in his will, are admissible to prove that the claimant was the person intended in an ambiguous devise. *Price v. Page*, 4 Ves. Jr. 679.

Extrinsic evidence of declarations of the testator made at or before the time of the execution of the will, relative to his intention of giving a legacy to an individual or corporation, or a declaration of a testator after the execution of the will of the disposition he has made of his property, is admissible to aid in identifying a devisee or legatee as to whom there exists a latent ambiguity. *Board of Missions v. Scovell*, 3 Dem. 516.

Doe ex dem. Gord v. Needs, 2 Mees. & W. 129, holds to be admissible declarations of the testator that he intended a devise to G. C., son of C., for G. C., son of G. C.

In *Harris v. Lincoln*, 1 P. Wms. 136, parol evidence was held admissible to show what the testator said or directed when he ordered his will to be made, in order to determine whom the testator intended by a

bequest to his own right heirs of his mother's side, whether the heirs of the mother's father or the heirs of the mother's mother.

Declarations of the testator that he had a sister and a niece living at a certain place, who would inherit his property, are admissible to establish the identity of such persons as the devisees under a devise to such person or persons, and in such shares as they shall be entitled to under the laws of the state. *Re Robb*, 37 S. C. 19, 16 S. E. 241.

In *Beaumont v. Fell*, 2 P. Wms. 141, declarations of a testator in his lifetime, to the effect that he would do well by a claimant in his will, are held admissible to show that such claimant was the person intended in a bequest which did not correctly designate anyone.

Declarations of the testator are admissible to show the sense in which he used the name of a certain place as the location of a society which he made a legatee in a bequest in his will, the purpose being to identify the society. *Domestic & F. Missionary Society's Appeal*, 30 Pa. 425.

Declarations of the testator of interest in, and an intention to bequeath money to, a certain charity, are admissible to identify a society representing such charity as the legatee intended by an inaccurate designation in a bequest. *Cresson's Appeal*, 30 Pa. 437; *Re Smith*, 8 D. L. R. 93.

Evidence of the statements of the testator is admissible to show that he habitually used certain words, even where the description is not equivocal, provided the sense thus sought to be put upon them does not contravene their ordinary legitimate meaning, this being distinct from evidence adduced to show the sense in which he used the words on the particular occasion of writing the will. *Van Nostrand v. Domestic Missions*, 59 N. J. Eq. 19, 44 Atl. 472.

3. Where purpose is to contradict terms of will.

Parol evidence cannot be used to contradict, add to, or explain the contents of a will, by proof of declarations made by the testator before, at the time of, or subsequently to the making of the will. *Peet v. Commerce & E. Street R. Co.* 70 Tex. 522, 8 S. W. 203.

Evidence of the declarations of the testator at the time he executed his will is not admissible to show whom he intended as his devisees in a devise to his heir at law, where not explained or qualified by other language in the will, as such language constitutes a perfectly definite meaning which cannot be changed outside of the will itself. *Re Lester*, 115 Iowa, 1, 87 N. W. 654.

Oral declarations of the testator are inadmissible to prove that he did not intend that one of the devisees in his will should have any part of his estate, where the devise was to the children of his brothers and sisters. *Chenault v. Chenault*, 88 Ky. 83, 9 S. W. 775, 11 S. W. 424, 47 L.R.A. (N.S.)

The legal construction of a written will as to a devisee or legatee cannot be explained or altered by parol declarations of the testator as to his understanding of the meaning of a devise, or his intention to do something different from what the terms thereof imply. *Comfort v. Mather*, 2 Waits & S. 450, 37 Am. Dec. 523.

Statements of a testator as to the society intended as a legatee in a certain bequest are inadmissible to impose upon the will by extrinsic testimony a meaning which, taking it as it naturally applies to existing facts and circumstances, it does not express, since it is an effort to contravene the fundamental requirements of the law that a will should be in writing. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

b. Testimony of the scrivener.

Testimony of the draughtsman of the will is admissible to show whom the testator meant by a designation in a bequest or devise which does not accurately describe or name anyone. *Ex parte Hornby*, 2 Bradf. 420.

Testimony of a scrivener by whom a will was written is competent although it relates to the declarations of the testator as to the society he intended in a bequest which is ambiguous in this respect. *Bodman v. American Tract Soc.* 9 Allen, 447.

Such testimony of the scrivener is admissible to show the person intended by the testator in a devise or bequest, and to show that, in writing the devise or legacy, he mistook the name. *Evans v. Hays*, 3 N. J. Eq. 204.

It may be shown by the scrivener who drew the will that he was directed to make a devise to designated persons, the grandchildren of the testator, and that by mistake he wrote the word "nephews" instead of "grandchildren." *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023.

The scrivener who wrote the will is competent to testify that the testatrix, in instructing him to prepare the will and the items thereof which are involved in doubt as to the person entitled, designated the beneficiary and directed him to prepare the will devising and bequeathing the property specified in these items to such beneficiary; that he supposed and believed that he had correctly stated the beneficiary's name, although, in designating the beneficiary to him, the testatrix used a name by which the beneficiary was commonly known. *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636.

In *Re Donnellan*, 164 Cal. 14, 127 Pac. 166, evidence of the scrivener who drew the will was received as to the instructions given him by the testatrix with reference to a devise to the testatrix' niece Mary, a resident of New York, "daughter of my sister Mary," where the testatrix had two nieces who were daughters of this sister, one of whom, named Mary, resided in Ireland, and the other, named Anna, resided in New York.

Instructions of the testator to the scrivener drawing the will, as to whom he meant by the word "mother," are admissible where the term is ambiguous. *Wrenn's Goods* [1908] 2 I. R. 370.

But it has been held that testimony of the scrivener as to the instructions of the testator at the time he drew the will, as to the legatee intended, is inadmissible to clear an ambiguity in this regard. *Button v. American Tract Soc.* 23 Vt. 336.

Although the name and description of a legatee do not apply to any person, the affidavit of the solicitor who had prepared the will, as to the instructions he received from the testator, is inadmissible for the purpose of showing that he made a mistake in the name of the legatee, and of showing whom the testator intended. *Drake v. Drake*, 8 H. L. Cas. 172, 29 L. J. Ch. N. S. 850, 3 L. T. N. S. 193.

Evidence of the solicitor who prepared the will is inadmissible to prove that the description of the legatee was introduced by him, and not by the testator. *Bernasconi v. Atkinson*, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152.

Evidence of the solicitor who prepared the will as to the affection which the testator had for claimants to an ambiguous devise is inadmissible. *Drake v. Drake*, supra. A. G. S.

ALABAMA SUPREME COURT.

EX PARTE H. H. McFERREN.

(— Ala. —, 63 So. 159.)

Infant — lease — right to recover payments made.

1. An infant who leases real estate under a contract by which he is to pay rent

Note. — Infants as lessees.

The purpose of this note is to collect the cases upon an infant who has contracted as lessee. In view of the comparatively few cases upon infant lessees, the reader will see that a comprehensive treatment of the subject would necessarily require the inclusion of cases upon other contracts of infants of similar character. So that, in the absence, in a jurisdiction, of cases fully settling the law as to an infant lessee, the practitioner must, perforce, examine into the law of infants' contracts generally; particularly those which deal with the liability of an infant to pay for articles which he has bought, and which in their nature are necessarily consumed by use and have been so consumed, and of his right to recover back what he has paid for such articles. So the full discussion of some of the cases on infant lessees (such, for example, as *Holmes v. Blogg*, 8 Taunt. 508) would require a notice of the many cases on other contracts in which those cases have been discussed. Some of the difficulties of 47 L.R.A. (N.S.)

for a certain number of months, after which he is to receive a deed for the premises, and under which failure to make payments will create a forfeiture of his rights, may, in case he never takes possession of the property, and his contract is forfeited during his minority, recover the payments which he has made under the contract.

Same — when may avoid contracts.

2. An infant may avoid his contracts either before or after he arrives at lawful age.

(*Dowdell, Ch. J., and McClellan, J., dissent.*)

(June 30, 1913.)

PETITION for a writ of certiorari to the Court of Appeals to review a judgment reversing a judgment of the City Court of Birmingham in plaintiff's favor in an action to recover money paid by him as rent during infancy. Reversed.

The facts are stated in the opinion.

Messrs. Etheridge & Lamar, for petitioner:

The contract between the appellee and appellant was a sale, and not a lease.

Lytle v. Scottish American Mortg. Co. 122 Ga. 458, 50 S. E. 402; *A. D. Puffer & Sons Mfg. Co. v. Lucas*, 112 N. C. 377, 19 L.R.A. 682, 17 S. E. 174; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683; *Prather v. Brandon*, 44 Ind. App. 45, 88 N. E. 700; *Hays v. Jordan*, 9 L.R.A. 373, note; *Summerson v. Hicks*, 134 Pa. 566, 19 Atl. 808; *Gorham v. Holden*, 79 Me. 317, 9 Atl. 894; *Hill v. Sidie*, 116 Wis. 602, 96 Am. St. Rep. 1011, 93 N. W. 446; *Hervey v. Rhode Island Locomotive Works*, 93 U. S.

the general subject are indicated in the note to *Englebert v. Pritchett*, 26 L.R.A. 177, which relates particularly to the question of necessity of returning consideration in order to disaffirm infant's contracts. Upon the general question of the infant's right to recover back money paid on a contract, the reader should not omit to examine the opinions in *Johnson v. Northwestern Mut. L. Ins. Co.* 26 L.R.A. 187.

It is the rule, at least in this country, that a lease to an infant is not void, but voidable, at his election. *Griffith v. Schwen-derman*, 27 Mo. 412; *Flexner v. Dickerson*, 72 Ala. 318.

The definite solidifying of the law on the question of infants' contracts as voidable rather than void has been a matter of growth. There are old cases which make the distinction rest in benefit to the infant. Thus, in *Lloyd v. Gregory*, Cro. Car. 501, it was held that an infant cannot surrender a term to begin in the future by taking a new lease for the same rent, for the same period, as his surrender is void, where there is no increase of his term or

664, 23 L. ed. 1003; Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531.

In the construction of contracts, the whole instrument must be considered, and no detached part of a contract can be considered as stating the agreement of the parties, but it is necessary that the whole contract be read and construed in its entirety in order that the court may fully understand the intention of each part thereof.

9 Cyc. 579; Ashley v. Cathcart, 159 Ala. 474, 49 So. 75; Phelan v. Tomlin, 164 Ala. 383, 51 So. 382.

Appellee should not be denied the right to recover, even if the court should construe the contract to be a lease.

Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732.

decrease of his rent, or some benefit to him; and in Zouch v. Parsons, 3 Burr. 1794, the court seems to have been of the opinion that a favorable surrender by an infant lessee would be voidable at the option of the infant.

Liability of infant lessee for rent.

While there are *dicta* in some of the earlier cases that an infant lessee ought to pay the rent, and this has been held in one reported case (Blake v. Concannon Ir. Rep. 4 C. L. 323), that is not the law. He is not liable to pay the rent unless it is a necessary.

The earliest authority on the infant's liability on his contract for rent seems to be the *obiter* remarks of Newton, J., in Year Book, 21 Hen. VI. 31b, where he said: "If one lease for a term of years, rendering certain rent *in fait* to an infant within age, if he manures the land, a writ of debt is maintainable against him for the rent; the cause is, he has a *quid pro quo*."

It may well be doubted if this was ever the law. The earliest case on the subject occurred in the time of James I., and is variously reported as Kirton v. Elliott, 2 Bulstr. 69, Ketsey's Case, Cro. Jac. 320, and Keteley's Case, 1 Brownl. & G. 120; for the authorities are agreed that these are all reports of the same case.

In the report in Croke (Ketsey's Case, Cro. Jac. 320), an action of debt was brought upon a lease for years for arrears of rent, and it was contended that the defendant, at the time of making the lease, was an infant, and it was claimed that the lease was void, as the rent might be greater than the value of the land. "But the Court held it to be voidable only at his election; for if it were for his benefit, it shall be no ways void; but the infant, at his election, may make it void, by refusing and waiving the land before the rent day comes; for then no action of debt will lie against him. But in the principal case it was not shewed that the rent was of greater value, and the defendant was of full age before the rent day came; therefore it was adjudged for the plaintiff."

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An infant is not liable for rent which falls due before he disaffirms his contract and which are for the use of lands while he was in possession of same.

Flaxner v. Dickerson, 72 Ala. 318.

An infant is not deprived of his right to recover the consideration paid by him merely because he has used, wasted, squandered, or lost the consideration received.

Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; McCarty v. Woodstock Iron Co. 92 Ala. 463, 12 L.R.A. 136, 8 So. 417; American Freehold Land-Mortg. Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292; McCarthy v. Henderson, 138 Mass. 310; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Miles v. Lingerman, 24

The report in Brownlow & G. (Keteley's Case, 1 Brownl. & G. 120) is similar as to the facts, and there also it is suggested that if the infant does not "refuse and waive the land" before rent day, he shall be holden in an action of debt, provided the rent be not greater than the reasonable value.

But the report in Bulstrode omits all mention of the infant's coming of age, and as there reported (Kirton v. Elliott, 2 Bulstr. 69), where an action of debt for rent was brought against an infant upon a lease, "the court were all clear of opinion, that the infant lessee was liable to pay the rent; and the action was well brought, and so judgment given for the plaintiff." Haughton, J., said that if the infant doth occupy and enjoy, "he shall be charged with rent, he being here to be taken as a purchaser." But Dodderidge, J., observed that "if a greater rent was reserved than the land was worth, there peradventure the infant shall not be charged with it."

In Bacon's Abr. "Infancy," (1) 8, p. 141, this case is explained as solely due to the ratification after majority, *viz.*: "For though at full age, he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority; yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made."

(Judge Haughton's statement in Bulstrode, "that if he occupy and enjoy he shall be charged with the rent," is cited in *obiter* remarks of Yates, J., in Evelyn v. Chichester, 3 Burr. 1717.)

(Parke, B., refers to the above reports in Bulstrode and Croke, in Leeds & T. R. Co. v. Fearnley, 4 Exch. 26; and again in Northwestern R. Co. v. McMichael, 5 Exch. 126, 20 L. J. Exch. N. S. 97, 15 Jur. 132, he discusses the various reports of the case, and expresses himself as not understanding how the reports could justify the reference to the case in Bacon's Abridgment, "Infancy," [1] 8, p. 141, which treats the in-

Ind. 385; *Bullock v. Sprowls*, 93 Tex. 188, 47 L.R.A. 326, 77 Am. St. Rep. 849, 54 S. W. 661; *Dube v. Beaudry*, 150 Mass. 448, 6 L.R.A. 146, 15 Am. St. Rep. 228, 23 N. E. 222; *Englebert v. Troxell* (*Englebert v. Prichett*), 40 Neb. 195, 26 L.R.A. 177, 42 Am. St. Rep. 665, 58 N. W. 852; *Bullock v. Sprowls*, 93 Tex. 188, 47 L.R.A. 326, 77 Am. St. Rep. 849, 54 S. W. 661; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 509, 13 S. W. 906; *Devlin, Deeds*, 3d ed. §§ 94, 96.

Messrs. A. G. Smith and E. D. Smith, opposed:

The contract between plaintiff and defendant was a lease, and not a sale.

Heard v. Heard, 148 Ala. 673, 41 So. 827.

Plaintiff having had possession of the premises and the enjoyment and use of them from the time he made the contract with the defendant until the time of its disaffirmance, is not entitled to recover back rent paid by him during the continuance of the contract for the premises.

22 Cyc. 530, note 75, 76; 16 Am. & Eng. Enc. Law, 2d ed. 290; *Rice v. Butler*, 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275; 2 Kent, Com. p. 240; 1 Taylor, Land. & T. 9th ed. ¶ 96.

De Graffenried, J., delivered the opinion of the court:

The law seems to be well settled in all jurisdictions that an infant lessee, who receives no benefit as such lessee from rent-

infant as being bound by reason of acquiescence after full age.)

This seems to be the only case on the subject until after the time of Lord Mansfield, who, in *Buckinghamshire v. Drury*, 2 Eden, 72, said, *obiter*, that if an infant "took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of rent by pretense of infancy." Of this *dictum* Jessel, M. R., in *Lempriere v. Lange*, L. R. 12 Ch. Div. 675, said: "That is not the law." But it seems to have been adopted (2 Kent, Com. 240), where it is said: "If an infant takes an estate, and agrees to pay rent, he cannot protect himself from the rent by pretense of infancy, after enjoying the estate, when of age" (unless indeed, by adding the words "when of age" it is intended that there has been a ratification by continuance of tenancy after the infant's majority). While in *Kelly v. Coote*, Ir. Rep. 5 C. L. 469, it was held that an infant succeeding to a leasehold must pay the rent until he disclaimed or got rid in some way of the liability. The only case found where, in the absence of affirmance after majority, an infant contracting for rent has been held liable for rent, is *Blake v. Concannon*, Ir. Rep. 4 C. L. 323, where an infant had hired land in May, 1866, and a payment of rent became due November 1, 1866, and he remained in possession until April 20, 1867, being at that time still under age, and shortly afterwards, on becoming of age, repudiated the contract. It was held that he was liable for the rent which came due on the 1st of November, 1866; for while he might repudiate his contract, he could not repudiate the occupation of the land.

But the law is now settled that an infant who has contracted for rent is not liable for it (unless it is a necessary) (*Gregory v. Lee*, 64 Conn. 407, 25 L.R.A. 618, 30 Atl. 53; *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177); even though he has had the use and occupation of the premises (*Lowe v. Griffiths*, 1 Scott, 458, 1 Hodges, 30; *Flexner v. Dickerson*, 72 Ala. 318).

In *Flexner v. Dickerson*, *supra*, where two

infants entered into a contract to pay the rent of land for a year in cotton, and occupied the land and enjoyed the crops, the court, in holding that they were not liable upon the contract, said, besides what is quoted in *Ex parte McFerren*: It cannot be maintained that the appropriation by defendants of the fruits of their labor was such a positive and unequivocal act as to indicate an intention to bind themselves for the rent. Nor is it an act at all inconsistent with the right to repudiate such liability. (It appears that the landlord levied on the crops, which were replevied by the infants, but the court, in its opinion, does not refer to this.)

In *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177, where a married infant took a lease of a house for two years, paid a month in advance, and before the month had expired abandoned the premises, the court, in holding that no recovery could be had against him for rent after he abandoned the premises, did not give judgment for him for the rent paid beyond the time of his occupancy, as he did not ask it.

But a bond by a surety to pay to a university such money as may be charged to an infant for a room assigned to him on his application is a good bond, and may be enforced by the university so secured, although the infant, after having the room assigned to him, did not come to the college that year. *Harvard College v. Kempner*, 131 App. Div. 848, 116 N. Y. Supp. 437.

It has been held that trover would lie for converting the crop against an infant lessee whose lease gave a lien upon the crop. Thus, in *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429, where a lease was made to an infant of a farm for one year from the 1st of April, with a provision that the landlord should have a full lien upon the crops for the payment of the rent, and the infant became of age in September and converted the crops, which had been demanded during his infancy, it was held that the landlord might have trover against him. The court said: "It appears that he came of age in September, 1853, but con-

ed premises, can recover back from the lessor any money which he may pay such lessor as rent. In all cases in which he has been held liable for rent or in which he has been denied to recover rents paid, he has received some actual benefit from the use of the property as a tenant.

"The law," says Parsons, Ch. J., in *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88, "has drawn no line between an infant of six years old and one of twenty years old, for all infants are entitled to equal protection." Certainly an infant of six years of age could not, by any court, be denied the right to recover rents paid out by him on a lease from which he, as a tenant, did not, and under his situation could not, have received any benefit whatsoever. "A

minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years." *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

In the case of *Holmes v. Blogg*, 8 Taunt. 508, an infant was not permitted to recover rents paid by him during minority, upon the ground that he had actually occupied the property, and had received value from the use of that property.

tinued in the occupation of the premises during that year. His conversion of this property was a tortious act. His liability in this case does not arise from any breach of contract, but for an unlawful appropriation to his own use of the plaintiff's property. In such cases infancy is no defense to the action of trover or trespass. *Green v. Sperry*, 16 Vt. 392, 42 Am. Dec. 519. The fact, also, that he continued in possession of the premises during the year, and long after he came of age, is a ratification of the tenancy, and renders obligatory upon him the provisions of the lease."

There seems to be only a single case reported where an effort was made to hold an infant for use and occupation, as having fraudulently misrepresented his age. In *Lempriere v. Lange*, L. R. 12 Ch. Div. 675, 41 L. T. N. S. 378, 27 Week. Rep. 879, where the landlord, upon the ground of false representation as to the lessee's majority, sought to have the lease canceled, and to recover mesne profits and damages, the court held, in canceling the lease, that the landlord could not at the same time claim to have the lease declared void and also to have the lessee declared liable for use and occupation. (Generally as to estoppel of infant by fraud in misrepresenting his age, see notes in 57 L.R.A. 684, and 35 L.R.A.(N.S.) 574.

Infant's recovery back of rent paid.

In *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 365, 26 L.R.A. 187, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992, the court, in discussing the question of recovery back by an infant of what he has paid for something which he is unable to restore, considered that under what it termed the "English rule," if the contract was free from fraud or unfairness, the infant could not recover; but that in many of the American courts this rule was repudiated, and that some of our courts hold that, notwithstanding the contract was fair and the infant had the benefit of it, he could nevertheless recover back whatever he had paid. The few cases on infant lessees afford but 47 L.R.A.(N.S.)

a fragmentary view of this subject. The view of Lord Mansfield, that an infant could not recover back what he had paid without consideration, while at first adopted in a case of an infant lessee where there actually was consideration, is now exploded.

It will be seen that in *Ex Parte McFERRIN*, the court does not place its decision solely upon the fact that the infant had derived no benefit, but took the broader ground that the infant may at law always recover back what he has paid. It must be confessed that logically this position seems to be unassailable. And taking the case of an attempt to recoup a claim for rent paid with a demand for use and occupation, how can the landlord enforce by way of recoupment a claim he could not enforce by a direct suit? (See *McCarthy v. Henderson*, 138 Mass. 310.)

Lord Mansfield followed his statement heretofore given (in *Buckinghamshire v. Drury*, 2 Eden, 72) with the further obiter remark that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again."

And upon the authority of this *dictum* went the decision in *Holmes v. Blogg*, 8 Taunt, 508, where a partnership having an infant partner rented certain premises, and the infant having paid part of the rent (his partner paying nothing), it was held that he could not recover it back from the landlord. The court said: "He cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the law does not enable him to do that. I cannot find this decided; for I cannot find that any such action as this has ever been brought; but Lord Mansfield has incidentally said that such an action cannot be brought." And after quoting the foregoing *dictum* of Lord Mansfield, he continues: "What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back." (He then gives a possible reason for thinking that *Wilmot, J.*, had approved of the *dictum*, and says): "We therefore think that this action cannot be maintained, upon the

In the case of *Kirton v. Elliott*, 2 Bulstr. 69, we find the following from Haughton, J.: "If a lease be made of an acre of land, to an infant rendering a 100l. rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent." In the same case we find the following from Dodderidge, J.: "If a greater rent be reserved than the land is worth, there, peradventure, the infant shall not be charged with it."

In the case of *Corpe v. Overton*, 10 Bing. 252, Tindal, Ch. J., said: "I think we may arrive at a right determination of this case without impeaching the decision in *Holmes v. Blogg*, because the facts in the two cases are manifestly distinguishable. . . . The ground, therefore, of the judgment in *Holmes v. Blogg*, was, that the infant had

received something of value for the money he had paid, and that he could not put the defendant in the same position as before." In the same case Bosanquet, J., said: "I am also of opinion that this rule ought to be discharged; but we are far from impeaching the judgment of the court in *Holmes v. Blogg*, as applicable to the facts of that case. There the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but, if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage. . . .

ground that the infant, having paid the money with his own hand, cannot recover it back again."

The above *dictum* and the *Blogg Case* are followed in 2 Kent, Com. 240, where it is said that if an infant "receives rents, he cannot demand them again when of age, according to the doctrine as now understood. If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid."

But, as pointed out in the *MCFERREN CASE*, the decision in *Holmes v. Blogg*, was limited in *Corpe v. Overton*, 10 Bing. 252, to the point actually decided, that a recovery would not be allowed where there had been a valuable consideration.

While the limits of this note do not include an examination of other contracts than leases, it may be noted that *McCoy v. Huffman*, 8 Cow. 84, cited in 2 Kent, Com. 240, was overruled in *Medbury v. Watrous*, 7 Hill, 110, on the ground that, as the infant had derived no benefit, he was entitled to recover. And in *Vent v. Osgood*, 19 Pick. 572, it is considered that the judgment in the *Holmes Case* ought to have allowed a recovery of any money, if any, above a reasonable rent.

In *Valentini v. Canali*, L. R. 24 Q. B. Div. 166, quoted in the *MCFERREN CASE*, an infant demanded that his contract to pay a certain amount for furniture and to become a tenant of a house be declared void, and the money paid on account delivered up. The court declared the contract void and that it should be canceled, and that a promissory note given for the balance of the amount which the infant was to pay must be delivered up, but declined to restore to the infant what he had paid on account, on the ground that he had had occupation of the house and use of the furniture for several months. The court considered the contract to have been to the infant's advantage, and said as to the statute of 1874, declaring infants' contracts void, etc., that "the object of the statute would seem to have been to restore the law for the protection of infants, upon which 47 L.R.A.(N.S.)

judicial decisions were considered to have imposed qualifications. The legislature never intended, in making provisions for this purpose, to sanction a cruel injustice. The defendant, therefore, could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right."

Similarly in *Aldrich v. Abrahams, Lelor's Supp.* 423, it was held that where a minor makes a contract for a lease to himself, he agreeing to build buildings at once, which will be security for the rent, that after building such buildings and occupying the premises over a year, he cannot recover against the landlord for work, labor, and materials. (It may be said that the instrument here in question was a combination apparently of a sale and a lease, but the court considers it as above.)

Possession after majority as affirmance.

Where an infant has taken a lease of real estate subject to the payment of a rent, it is obvious that when he becomes of age, common justice imposes upon him as his duty to make his election within a reasonable time, for he cannot enjoy the estate after he becomes of age for years, and then avoid payment of the stipulated rent. (*Boody v. McKenney*, 23 Me. 517, *obiter*.)

See also, in this connection, *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429, *supra*, and other cases cited *supra* in the subdivision, "Liability of infant lessee for rent."

In *Mahon v. O'Farrell*, 10 Ir. L. R. 527, it was held that an infant assignee of a lease, who remained in possession after he attained his majority, was liable for the rent accruing while he was an infant.

In *Evelyn v. Chichester*, 3 Burr. 1719, where an infant had for sixteen years enjoyed the rent of a copyhold estate, and had continued therein for two years after his majority, it was held that an action was properly brought against him for the amount of the fine which had been levied upon his succession to the copyhold estate; but at least one of the judges thought the

Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. It has been urged, indeed, that it failed by the act of the plaintiff himself; but, if the law allows him to rescind a contract from which he has derived no benefit, he must be allowed to rescind it to all intents and purposes; and, if so, for the purpose of recovering money paid without consideration." In this same case Alderson, J., said: "This . . . case is clearly distinguishable from [the case of] *Holmes v. Blogg*. Here the infant has had no enjoyment of any advantage from the contract; in *Holmes v. Blogg* he had enjoyment for a period, of premises demised to him." In this same case Tindal, Ch. J., in another part of the opinion, said: "But there is another ground on which the plaintiff is entitled to recover in this action. According to the old law, as laid down in *Coke, Littleton, 172a*, an infant is not bound by any forfeiture annexed to a contract, and his obligation with a penalty, even for necessities, is absolutely void."

We have quoted at length from the above case for the purpose of calling attention to the fact that the English judges, at an early period, drew a distinction between cases of this character, in which the infant received some benefit for the money paid out by him, and those cases in which he received no benefit for the money paid out by him, and that, in all cases, whether he re-

ceived benefit for the money which he paid out or not, if the contract under which it was paid provided for a forfeiture, then he could invariably recover his money. In the instant case it is admitted that the infant never was in the actual possession of the property, and the contract of lease—if the court of appeals was correct in holding that it was a lease—was put an end to by the lessor, while the lessee was still an infant. In other words, it is admitted that the plaintiff, as lessee, received nothing whatever from the use of the property. The situation of the plaintiff in this case, in which, by an affirmative act of the defendant, *viz.*, the cancellation by the defendant of the instrument under its forfeiture clause, the plaintiff has been denied the only thing of value which the instrument provided for him, *viz.*, the right to demand a conveyance of the property upon paying all the notes described in the instrument, strongly illustrates the wisdom of the rule laid down by Lord Coke, and which has above been quoted. This forfeiture occurred while the plaintiff was still an infant, and before he had reached the age when he could legally say that the contract should bind him.

In the case of *Valentini v. Canali, L. R. 24 Q. B. Div. 166, Coleridge, Ch. J.*, said: "When an infant has paid for something, and has consumed or used it, it is contrary to natural justice that he should re-

infant would have been liable before his majority.

—holding over after original term.

The cases are not agreed as to whether a holding over after the original term, by one who has attained majority, will ratify the original term.

In *Harris v. Knowles, 26 W. N. C. 249*, where an infant lessee in a month to month tenancy had remained in possession until about three and a half months after he became twenty-one years of age, leaving five months' rent unpaid, it was held that having remained in possession after he was twenty-one, he was liable for the rent of these five months.

Where an infant and another had premises leased to them under a written lease, and over a year afterwards the same was done under a verbal lease, the infant becoming of age about the time of executing the verbal lease, or its negotiation, but whether before or after does not appear,—it was held that his retaining possession for ten months after he became of age was a ratification of the original contract. *McClure v. McClure, 74 Ind. 108*.

But, on the other hand, in *Flexner v. Dickerson, 72 Ala. 318, supra*, it was held that an infant's holding over after his year of lease for two succeeding years, in the

first of which succeeding years he became of age, was no evidence of ratification of his lease made in infancy.

Lodging as a necessary.

Lodging is a necessary. *Chapple v. Cooper, 13 Mees. & W. 252, 13 L. J. Exch. N. S. 286 (obiter)*; *Price v. Sanders, '60 Ind. 310 (obiter)*; *Simons v. South Western R. Bank, 5 Rich. Eq. 270 (obiter)*. See also *Crisp v. Churchill, 34 Geo. III, cited by counsel in Lloyd v. Johnson, 1 Bos. & P. 340, 4 Revised Rep. 822*.

A house may be a necessary for a married infant. *Peck v. Cain, 27 Tex. Civ. App. 38, 63 S. W. 177*. And in Texas, where an infant contracts for a necessary, a recovery will lie against him upon the contract if the price of the necessary is reasonable. *Ibid*.

In *Everett v. Wilkins, 29 L. T. N. S. 846*, where an infant contracted to buy a one-half interest in a public house, and it was also part of the agreement that he and his wife were to board with the defendant, the owner, and to pay for it, it was held that the arrangement for board and lodging was collateral to the main agreement, and that the infant might decline to go on with his contract, and might recover what he had paid on account, from which would be deducted the proper cost

cover back the money which he has paid." In Ketley's Case, the rule is stated as follows: "A lease to an infant is not void, but voidable only, and, if it be beneficial to him, he is liable to an action for the rent thereof." Cro. Jac. 320.

In all of the English cases in which the right of an infant to recover rent which had already been paid was denied, or in which he was required to pay the rent, the courts proceeded upon the theory that the infant had, from the use and occupancy of the property, received a substantial benefit, and that, being unable to place the landlord in *statu quo*, he should, *ex æquo et bono*, be required to pay for the use of that from which he had received a substantial benefit. And all the courts in England and America, in dealing with this subject, have in all well-considered cases applied the same legal principles in actions at law, and whether the suit was by the landlord against his tenant for rent past due, or whether it was a suit by the infant for money already paid.

In the case of *Riley v. Mallory*, 33 Conn. 201, we find the following: "The privilege of an infant to avoid contracts which are injurious to him, and rescind those which are not, is not an exception to a general rule, but a general rule with exceptions. The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbi-

trary; that it is indispensably necessary that an infant should be at liberty to contract for necessities; and that he may happen to make other contracts which will be beneficial to him. It does not, therefore, forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age,—excepting from the operation of the privilege only contracts for necessities, contracts which he may be compelled in equity to execute, and executed contracts, where he has enjoyed the benefit of them, and cannot restore the other party to his original position. These exceptions are founded in the necessities of the infant, or required by a just regard for the equitable rights of others. The exception which the defendant claims to exist, founded on the simple fact that the infant has paid money in the purchase of an article not a necessary, or upon a contract which would be otherwise avoidable, has no element of necessity or equity to require or sustain it, and no settled recognition in the law. Fifty years ago the Hon. Tapping Reeve, who had been for many years a judge of the superior court and for one year chief justice of the state, and who conducted one of the earliest law schools in the country, published his carefully prepared lectures on the law relative

of the board and lodging for himself and his wife.

But in *Lowe v. Griffiths*, 1 Scott, 458, 1 Hodges, 30, it was held that an action against an infant of assumpsit for use and occupation of a house hired by him for lodging and the barber business, and part of which he let for lodgings, could not be maintained, the jury having held that the premises were not a necessary for the defendant.

Miscellaneous.

A person renewing a lease in which an infant was interested with him is a trustee. *Ex parte Grace*, 1 Bos. & P. 376.

Where an infant is a tenant in common, and another tenant in common occupies the estate, the latter must account to the infant for his reasonable share of the rents. *Pascoe v. Swan*, 27 Beav. 508, 29 L. J. Ch. N. S. 169, 5 Jur. N. S. 1235, 1 L. T. N. S. 17, 8 Week. Rep. 130.

Where an infant sues in ejectment, claiming under a lease from a third party, the defendant cannot set up that the lease is void on account of the infancy of the plaintiff. *Griffith v. Schwederman*, 27 Mo. 412.

An infant sued in ejectment is not estopped to deny the plaintiff's title, although he had attorned as tenant to him and paid him rent. *McCoon v. Smith*, 3 Hill, 147, 47 L.R.A. (N.S.)

38 Am. Dec. 623, where the court said: "Even in a suit brought on the contract directly against the infant, he might have avoided its effect completely by showing his nonage. I think he may do the same *a fortiori*, where his contract is set up as an estoppel to conclude him in an action of ejectment."

In *Jessurun v. Mackie*, 24 Hun, 624, where a summary proceeding to remove a tenant was begun against him before a justice in a district court, and he thereupon filed an answer setting up that he was an infant, and the court decided that he was not entitled to a guardian *ad litem*, and entered judgment, it was held that while the decision of the court was erroneous, the remedy of the infant in such case was by appeal, and that he might not bring an action against the justice and the landlord and the court marshal by injunction.

In *Rothschild v. Hudson*, 8 Ohio Dec. Reprint, 259, where an infant lessee assigned his lease to the defendant, and on coming of age disaffirmed the assignment, it was held that the defendant was liable to the landlord for rent up to the time of the disaffirmance by the infant.

As to old learning upon the question of attornment by an infant heir, see *Conny's Case*, 9 Coke, 34. B. B. B.

to the domestic relations. In his chapter on infants he states the law in relation to their privilege thus:—"It is the privilege of an infant that he may rescind his contracts at pleasure. In ordinary cases he can avail himself of this privilege. It is not a matter of any moment whether the contract is a fair one or not, the infant may rescind it." Page 227. Again, on page 254, he says: "It is an universal rule that all executory contracts which are voidable on the ground of infancy may be avoided during infancy by the infant as well as afterwards,—as when a minor promises to pay, etc. So, too, all contracts respecting property, which are executed by delivery of some article on payment of money, may be rescinded by the minor both before and after the time of his coming of age." To these general rules he states the three exceptions; *viz.*: Contracts for necessities; contracts, if not unequal, to effect what the infant is compellable in chancery to do, as making partition, releasing a mortgage, executing a trust, etc.; and contracts under which the infant has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position. He states no other exceptions, and there were no others then known in the law."

In the subsequent case of *Gregory v. Lee*, 64 Conn. 407, 25 L.R.A. 618, 30 Atl. 53, the court said: "Under the facts stated, it must be conceded that this room, at the time the defendant hired it and during the time he occupied it, came within the class called 'necessaries,' and also that to him during said period it was an actual necessary, for lodging comes clearly within the class of necessities, and the room in question was a suitable and proper one, and, during the period he occupied it, was his only lodging room. 'Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt.' *Chapple v. Cooper*, 13 Mees. & W. 252, 13 L. J. Exch. N. S. 286; 1 *Swift's Dig.* 52. So long, then, as the defendant actually occupied the room as his sole lodging room, it was clearly a necessary to him, for the use of which the law would compel him to pay; but, as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties. The question now is whether he is bound to pay for the room after December 20, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi contractual nature; for it may be imposed on

an infant too young to understand the nature of a contract at all. *Hyman v. Cain*, 48 N. C. (3 Jones, L.) 111. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessities. *Earle v. Reed*, 10 Met. 387; *Barnes v. Barnes*, 50 Conn. 572; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Keener, Quasi Contr.* p. 20. This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant, and he cannot make a binding executory agreement to purchase necessities. For the purposes of this case perhaps we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week, or we may regard it as, what on the whole it appears the parties intended to be, a parol lease under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense, for in that case the suit is upon an executory contract to pay for necessities which the defendant refused to take and never has had, and which therefore he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense. As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory."

We have quoted copiously from the above cases for the purpose of fully illustrating the proposition that in all jurisdictions an infant may avoid an executed contract from which he has derived no actual benefit, and, in an action at law, recover any moneys which he has paid out on account of such contract. In the above case of *Riley v. Mallory*, the supreme court of Connecticut points out that, even in England, the broad language of the court in *Holmes v. Blogg*, supra, had been repudiated, and that the true foundation for the decision in that case was the fact that the infant had received something of value to him in the use of the leased premises. The rule in Alabama, which is in accord with the great weight of American authorities, is more restricted than is indicated even in the above Connecticut cases.

In the case of *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314, this court, through Stone, J., said: "A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant, on becoming of age, disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is that, if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or anyone asserting claim in his right, must become the actor, and, coming into a court in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief.—*Roof v. Stafford*, 7 Cow. 179; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Bartholomew v. Finnemore*, 17 Barb. 428; *Smith v. Evans*, 5 Humph. 70; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Gratt. 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during his minority. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Wash v. Young*, 110 Mass. 396; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Dill v. Bowen*, 34 Ind. 204; *Phillips v. Green*, 5 T. B. Mon. 345; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38."

In the case of *Flexner v. Dickerson*, 72 Ala. 318, 322, this court, through Somerville, J., said: "The following propositions we consider to be settled by the modern decisions in this country, including our own adjudged cases: (1) Infants are not liable

on any of their contracts, excepting only for necessities,—the sum to be recovered in such cases being the just value of the necessities, and not what was agreed to be paid. (2) The only act which an infant is legally incapacitated to perform is the appointment of an attorney. (3) All other contracts of infants, whether executory or executed, may be avoided or ratified at the election of the infant, being considered voidable, and not absolutely void. *Philpot v. Bingham*, 55 Ala. 435; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; *Vasse v. Smith*, 6 Cranch, 226-233, 3 L. ed. 207-209, 1 Am. Lead. Cas. (Hare & W.) 5th ed. 242, 300; *Bishop, Contr.* §§ 260-266; 2 Greenl. Ev. §§ 364 et seq.; 7 Wait, Act. & Def. 131; *Rainwater v. Durham*, 2 Nott & M'C. 524, 10 Am. Dec. 637; *Boal v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Wheaton v. East*, 5 Yerg. 41, 26 Am. Dec. 251; *Taylor, Land. & T.* §§ 93, 96; 2 *Brickell's Dig.* 109, §§ 8 et seq. The obligation here sued on was executed by the appellees while they were minors under the age of twenty-one years. It was given for rent of land for the year 1878, being payable to their mother, and was afterwards assigned to plaintiff. Under this state of facts, the plea of infancy was good, and the court did not err in giving the charge requested by the defendants."

In the case last cited this court was dealing with the question of rent past due, and from the rented lands the defendants retained and sold the crops raised by them thereon during their tenancy. True, in that case, the rent had not been paid; but, as already stated, we find no distinction drawn by the courts with reference to the respective rights of the infant and his lessor in cases in which the rent is past due and not paid and when it has been paid, unless the rent paid could be held to be a payment by an infant for necessities.

In the instant case, if the instrument is a lease,—upon which we express no opinion,—the plaintiff was entitled to the judgment which in this case he obtained. The lease represented nothing that was necessary for the infant, and he, in fact, derived no benefit whatever from it. It seems to us that the opinion of the court of appeals in this case is in irreconcilable conflict with the doctrine announced by this court in *Eureka Co. v. Edwards*, and in *Flexner v. Dickerson*, *supra*. We take it that the rule is well established in this state, in keeping with the rule which applies in most of the states, that an infant's disaffirmance of his contract makes it void, and that at law he may always recover back what he has paid out on such contract, unless the money

paid was for necessities, without being required to make a tender of what he has received under the contract, or to even attempt to put his adversary *in statu quo*. 1 Parsons on Contracts, 9th ed. pages 364, 365, 366 and 367, and authorities cited in the notes.

The above rule may, at times, work a hardship. The law must, however, have a definite policy, and its rules must be fixed. The law has fixed its policy with reference to the protection of infants with regard to their contracts, and those who deal with them, except when actually supplying them with necessities, deal with them at their peril. In the instant case the wisdom of the law on the subject finds its justification, for this minor received nothing whatever from his bargain with the defendant.

2. There are some loose expressions in the books about when an infant may avoid or affirm his contracts. An infant may avoid his contracts either before or after he arrives at lawful age. He can affirm his contracts only after he arrives at lawful age.

3. The judgment of the court below was rendered upon an agreed statement of the facts. Upon those undisputed facts the plaintiff is entitled, as matter of law, to the judgment which, in the court below, was rendered in his favor. The judgment of the Court of Appeals is therefore reversed, and a judgment is here rendered affirming the judgment of the Birmingham City Court.

4. The above opinion was prepared under the orders of this court, to meet the views of all the members of this court on the questions discussed, except Dowdell, Ch. J., and McClellan, J., who dissent.

Reversed and rendered.

CALIFORNIA SUPREME COURT. (Department No. 2.)

PLUMAS COUNTY BANK, Appt.,
v.

BANK OF RIDEOUT, SMITH, & COMPANY, Respt.

(— Cal. —, 131 Pac. 360.)

Bank — transfer of deposit — receipt of draft — insolvency — loss.

The loss caused by the closing of the

Note. — Title of check, drawn on another bank, which has been credited to depositor.

This subject was covered by the note to Fayette Nat. Bank v. Summers, 7 L.R.A. 47 L.R.A. (N.S.)

doors of an insolvent bank after a check in its favor to transfer to it a deposit in another bank has been honored by a draft upon it by the former depository, which has been received, but not carried through its books, falls upon the depositor, and not upon the former depository, where the deposit had been placed to his credit, and the small overdraft which the transaction caused was subsequently made good, although the first check to cover the draft, received before the doors were closed, was returned by an agent of the bank without authority.

(March 19, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for Butte County in defendant's favor, and from an order denying a motion for new trial, in an action brought to recover an amount alleged to have been deposited to plaintiff's credit in the defendant bank. Affirmed.

The facts are stated in the opinion.

Messrs. U. S. Webb, Jesse W. Lillenthal, and Raymond Benjamin for appellant.

Messrs. F. C. Lusk and A. F. Jones, for respondent:

The California Safe Deposit & Trust Company held check 215 as the owner, and not as an agent of plaintiff, for collection, when it sent it to the defendant bank.

5 Cyc. 494; 2 Bolles, Bkg. 261; Morse, Banks & Bkg. § 451; Hutchinson v. Manhattan Co. 150 N. Y. 250, 44 N. E. 775; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Whiting v. City Bank, 77 N. Y. 363; People v. Merchants' & M. Bank, 78 N. Y. 269, 34 Am. Rep. 532; Cragie v. Hadley, 99 N. Y. 133, 52 Am. Rep. 9, 1 N. E. 537; Kirkham v. Bank of America, 165 N. Y. 132, 80 Am. St. Rep. 714, 58 N. E. 753; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; 3 Am. & Eng. Enc. Law, 2d ed. 817; Tyson v. Western Nat. Bank, 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520; City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138; Security Bank v. Northwestern Fuel Co. 58 Minn. 143, 59 N. W. 987; 2 Morse, Banks & Bkg. § 573; Shawmut Nat. Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Aebi v. Bank of Evansville, 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329; American Exch.

(N.S.) 694, and the present note contains only cases decided later.

Courts are in harmony upon the proposition that title to a check credited by a bank other than the one upon which it is drawn, to the account of a depositor after

Nat. Bank v. Gregg, 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; Ayres v. Farmers' & M. Bank, 79 Mo. 421, 49 Am. Rep. 235; Flannery v. Coates, 80 Mo. 444; Hendley v. Globe Refining Co. 106 Mo. App. 20, 79 S. W. 1163; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Ditch v. Western Nat. Bank, 79 Md. 142, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138; Morris v. First Nat. Bank, 201 Pa. 160, 50 Atl. 1000; Reeves v. State Bank, 8 Ohio St. 466; Hoffman v. First Nat. Bank, 46 N. J. L. 604; St. Louis & S. F. R. R. Co. v. Johnson, 23 Blatchf. 489, 27 Fed. 245; Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Hobart Nat. Bank v. McMurrough, 24 Okla. 210, 103 Pac. 601; Noble v. Doughton,

72 Kan. 336, 3 L.R.A. (N.S.) 1167, 83 Pac. 1048.

If the California Safe Deposit & Trust Company was plaintiff's agent to collect this check, and did not complete its collection till after the insolvency, then the claim of the plaintiff was a preferred claim against the receiver in insolvency, and should have been presented and collected from him.

Hutchinson v. National Bank, 145 Ala. 196, 41 So. 143; Re Armstrong, 33 Fed. 405; Jones v. Kilbreth, 49 Ohio St. 409, 31 N. E. 346; 2 Bolles, Bkg. 513, 565; Armstrong v. National Bank, 90 Ky. 431, 9 L.R.A. 553, 14 S. W. 411; 5 Cyc. 512; 3 Am. & Eng. Enc. Law, 2d ed. 804; Dana v. Third Nat. Bank, 13 Allen, 445, 90 Am. Dec. 218; Commercial Nat. Bank v. Arm-

its indorsement in blank by him, passes or does not pass to the bank, according to agreement, express or implied, between the parties, and that all presumptions in favor of either the bank's title or that of the depositor yield to such agreement. But they are not in harmony as to what facts in the transaction indicate an implied agreement or an intention to pass or not to pass title. Accordingly it has been held, by the weight of authority, that the bare transaction, *i. e.*, the passing of credit to the depositor after indorsement and delivery, creates a presumption in favor of the passing of title to the bank, which presumption, of course, yields if there are other facts sufficiently strong to overcome it. While other courts hold that the check is presumed to have been transferred only for collection, and that it requires stronger circumstances than the mere transaction of indorsement and credit to overcome the presumption. For full discussion see note above cited, 7 L.R.A. (N.S.) 694.

Restrictive indorsements, words spoken at the time of the transaction, rule that bank reserves the right to charge back the credit if the check is not paid, fact that depositor was allowed to draw upon the deposit before check was collected, the subsequent acts of the parties with reference to the matter,—are all considered as facts or circumstances indicative of the intention of the parties if any such facts are elements in the case. It is evident, therefore, that under a given set of facts courts holding opposite views as to the presumption may reach the same conclusion, and sometimes the case is decided wholly with reference to the facts involved without any indication of what the decision would have been had there been only a blank indorsement and credit entered. But, as a rule, the presumption is stated as the basic principle, even though the presumption is not regarded as very strong, slight evidence of the real intention being sufficient to overcome either presumption.

The following later cases support the view that upon blank indorsement and delivery of the check, with credit passed to the de-

positor, *prima facie* the title to the check passes to the bank. *Dirnfield v. 14th Street Sav. Bank*, 37 App. D. C. 11 (citing and following as binding, *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; see quotation from this case in *PLUMAS COUNTY BANK v. BANK OF RIDEOUT, S. & Co.*); *Downey v. National Exch. Bank*. — Ind. App. —, 96 N. E. 403; *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank*, 116 Md. 179, 81 Atl. 294; *Jefferson Bank v. Merchants' Refrigerating Co.* 236 Mo. 407, 139 S. W. 545; *Southwest Nat. Bank v. House*, — Mo. App. —, 157 S. W. 809 (principle affirmed, but not applied); *Krafft v. Citizens' Bank*, 139 App. Div. 610, 124 N. Y. Supp. 214 (as between the depositor and the bank); *King v. Bowling Green Trust Co.* 145 App. Div. 398, 129 N. Y. Supp. 977 (presumption was overcome; see *infra*); *Jaffe v. Weld*, 132 N. Y. Supp. 505, order affirmed in 133 N. Y. Supp. 1127; *Lyons v. Union Exch. Nat. Bank*, 150 App. Div. 403, 135 N. Y. Supp. 121 (depositor's check drawn on another bank).

In *Dirnfield v. 14th Street Sav. Bank*, *supra*, there was a credit entered in favor of the depositor, the check having been indorsed in blank, and there was a dispute as to other facts bearing upon the intention of the parties. The action was by the depositor against the bank for damages caused by its refusal to honor a negotiable note depositor had drawn upon it, the amount of which was covered by the credit he had obtained upon the check, which check had not been paid at the time the note was presented. It was held error to direct a verdict for defendant, since the presumption on the undisputed facts was that title to the check passed to the bank, and the disputed questions should have been left to the jury. As indicated *supra*, the supreme court case was considered binding on the appellate district court.

In *Downey v. National Exch. Bank*, — Ind. App. —, 96 N. E. 403, the check had been indorsed in blank and the amount credited to deposit account of payee; the check was forwarded through other banks for collection; the drawer stopped payment

strong, 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. Rep. 533.

Melvin, J., delivered the opinion of the court:

Plaintiff sued for the sum of \$15,000, alleged to be a deposit properly to its credit in the bank of defendant corporation. From a judgment against it and from an order denying its motion for a new trial the Plumas County Bank appeals.

Regarding the facts of this case, there is very little dispute. Indeed, the bill of exceptions is made up in part of an agreed statement of facts, those essential to this opinion being as follows: "On October 28, 1907, the plaintiff bank had on deposit, subject to check, in the defendant bank, over

\$15,000, and the defendant bank had on deposit in California Safe Deposit & Trust Company the sum of \$12,505.29, and for several years prior thereto had kept an account with said California Safe Deposit & Trust Company to the credit of which it from time to time made deposits and from time to time drew checks or drafts on the same." On October 24, 1907, plaintiff, desiring to open an account with the California Safe Deposit & Trust Company drew its check No. 215 on defendant, payable to that corporation (which we will hereafter for the sake of brevity call the Trust Company), for the sum of \$15,000, and on the same day deposited the said check in the mail at Quincy, directed to the Trust Company. With the check was a letter contain-

thereon and it was returned in due course, and the depositor received the same, and his account was charged with the amount; his action was against one of the banks through which it had been forwarded on the allegation of negligence; it was held that since title passed to the forwarding bank when it credited depositor with the check, there was no privity of contract between depositor and defendant; that when he received the check again there was a resale.

The paper in question in *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank*, 116 Md. 179, 81 Atl. 294, was a draft with bill of lading attached which the bank had credited to depositor, and allowed him to check against the account. It forwarded the draft, etc., to defendant for collection; after defendant had collected the amount, but before forwarding proceeds, the fund was attached as that of the depositor. The decision went in favor of the garnishee on the ground that a check indorsed in blank, and passed to the credit of the depositor, at once becomes the property of the bank. See *Krafft v. Citizens' Bank*, *infra*, for comment on a similar state of facts.

In *Jefferson Bank v. Merchants' Refrigerating Co.* 236 Mo. 407, 139 S. W. 545, the indorsement was in blank and the check was deposited to the credit of payee, who was permitted to check out the whole amount the same day before the bank had collected the check; throughout their business relations the payee had been permitted to draw out the amount of checks drawn on other banks before the collection thereof had been made; by this course of dealing and this particular transaction, the bank was held to have waived a notice printed upon depositor's pass book, to the effect that it accepted deposits of checks on other banks for collection only, and that the bank, being the absolute owner of the check, could collect the amount of the check from the drawer, who had stopped payment thereon, and that the bank, being the holder in due course, was not affected by any equities between the drawer and payee.

In *Southwest Nat. Bank v. House*, — Mo. 47 L.R.A. (N.S.)

App. —, 157 S. W. 809, the bank accepted for deposit a large check from the payee who had been a depositor for a period of only nine days, immediately sent the check to the bank upon which it was drawn, to learn if it was good, but allowed the depositor to draw part of the proceeds out before getting a reply, which it received in fifteen minutes; he absconded and it turned out that his title to the check was fraudulent. It was held that the bank had not intended that title to the check should immediately pass to it, so that it had no standing to collect its loss from the maker of the check.

In *Krafft v. Citizens' Bank*, 139 App. Div. 610, 124 N. Y. Supp. 214, a distinction is made as to the parties. The draft with bill of lading attached had been passed to the credit of the depositor, the same forwarded to another bank for collection, collected by it, and the proceeds were attached in the hands of the collecting bank. The court holds that the doctrine announced in *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33, that "the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course," is inapplicable for the reason that, as between the depositor and the bank, there was no question that title passed to the bank. See *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank*, *supra*, where there were similar facts.

The principles involved in *King v. Bowling Green Trust Co.* 145 App. Div. 398, 129 N. Y. Supp. 977, are identical with those involved in *PLUMAS COUNTY BANK v. BANK OF RIDEOUT, S. & Co.* but the facts differ in two particulars. While the indorsement was in blank and the check was credited to the depositor, there was sufficient notice on the depositor's pass book and on the deposit slip to constitute an agreement to the effect that the bank acted only as agent, and the depositor remained owner of the check until collected; then the relation of

ing, among other things, the following language: "We have thought the matter over and have concluded to open an account with you, for the present at least. Inclosed herewith you will find our draft on the Bank of Rideout, Smith, & Company, or Oroville, in your favor for the sum of \$15,000, which amount you will please place to our credit and send us receipt for the same." This check and letter were received by the Trust Company on October 28, 1907. Shortly after 2 o'clock on October 30, 1907, the Trust Company closed its doors. It is also true that (we quote from the stipulated statement) "for and during thirty days prior to October 30, 1907, the said California Safe Deposit & Trust Company was insolvent, but neither party to this action

had any knowledge or notice of such insolvency at that time. That said bank, while in fact insolvent during said thirty days, paid all its obligations as presented, and as payment was demanded from said bank. That each of the parties to this action had notice and knowledge of the suspension of said bank from and after the 31st day of October, 1907, and that it never resumed business after it suspended on the 30th day of October, 1907. That it has never since resumed business, and has been at all times from that date insolvent." E. J. Le Breton was appointed receiver of the insolvent corporation January 14, 1908. During the following month plaintiff demanded \$15,000 from the defendant corporation, but said demand was refused on the ground that pay-

debtor and creditor would be created. The check was forwarded "for collection and credit," and the collecting bank collected the check, and credited the proceeds to the forwarding bank, after the closing of the forwarding bank, but without knowledge of the fact of closing, and of the fact that the forwarding bank held the check for collection only, and the checking account of the forwarding bank with the collecting bank was overdrawn to a very large amount, greatly exceeding the amount of the check; the action was by the assignee of the deposition, against the collecting bank, and it was held that, notwithstanding the fact that, by virtue of the contract on the pass book and deposit slip, the depositor was owner of the check until collected, title to the proceeds vested in the collecting bank as soon as it had collected the check and passed it in good faith to the credit of the forwarding bank, according to directions, it having allowed part of the overdraft, presumably upon the warranted assumption that the check belonged to the forwarding bank.

But in the same case another check had been received "for collection" and forwarded in the same way; it was held that title to it never passed out of the depositor, and since it was not collected until the forwarding bank had closed, title to the proceeds never passed, and the depositor could recover the amount from the collecting bank.

In *Lyons v. Union Exch. Nat. Bank*, 150 App. Div. 493, 135 N. Y. Supp. 121, it was contended that the rule that title passes to the bank by the crediting of the check on the books of the bank and on depositor's pass book does not apply where the depositor was the drawer of the check, but the contention was not sustained, and it was further held that the bank lost its right to charge back the check to the depositor, or to hold him liable on his indorsement, by accepting a certification of the check by the drawee bank instead of protesting it, where the drawee bank refused the cash, but offered to certify the check; hence on failure of the drawee bank the next day, the 47 L.R.A. (N.S.)

loss fell upon the bank, and not upon the depositor.

In *Murchison Nat. Bank v. Dunn Oil Mills Co.* 150 N. C. 718, 64 S. E. 885, it was held that a restrictive agreement that the bank takes the draft for collection only is not available to the depositor as a defense against another bank that accepted the draft in due course, without notice of the agreement, and as against such holder in due course the depositor has no right to stop payment of the draft; otherwise if the holder had notice by means of the restrictive nature of depositor's indorsement, or by any other means.

The passing of credit to a depositor, and allowing him to check out the proceeds, of a draft drawn in favor of the bank, not at the time the draft was given, but after the bank had received acknowledgment of the receipt of the draft from its out of town correspondent, in which the correspondent stated that the bank had been given credit for the draft, subject to its collection, amounts only to a loan to the depositor on the faith of the bank as to the collectability of the draft, and if the draft is not collected, the depositor is liable for the amount thereof unless he shows that the negligence of the banker caused the failure to collect. *Farmers' Nat. Bank v. Merchants' Nat. Bank*, — Tex. Civ. App. —, 136 S. W. 1120.

PLUMAS COUNTY BANK v. BANK OF RIDEOUT, S. & CO. is cited with approval in *Newmark Grain Co. v. Merchants' Nat. Bank*, — Cal. —, 135 Pac. 958.

But the following later cases support the opposite doctrine, *i. e.*, that *prima facie* title remains in depositor unless circumstances other than credit to and indorsement by depositor indicate intention to pass title: *Cronheim v. Postal Teleg. Cable Co.* 10 Ga. App. 716, 74 S. E. 78 (see this case, *infra*); *Latham v. Spragins*, — N. C. —, 78 S. E. 282 (but the title of the depositor seems to be dependent upon the right of the bank to charge back the item if the check is not paid; see same case, *infra*); *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. 386 (facts not wholly in

ment had theretofore been made. On October 28, 1907, the manager of the Trust Company wrote to the cashier of the Plumas County Bank. One paragraph of his letter was as follows: "I desire to acknowledge with thanks your esteemed favor of 24th inst., in which you inclose your check on the Bank of Rideout, Smith, & Company, Oroville, for \$15,000, and instruct us to place same to your credit. This has been done and a formal acknowledgment will be sent you." On November 1, 1907, the cashier of the Plumas County Bank telegraphed the defendant to stop payment on the \$15,000 draft drawn in favor of the Trust Company.

In addition to the stipulated facts the court found: "That upon the receipt by said California Safe Deposit & Trust Company of said check No. 215 in favor of California Safe Deposit & Trust Company and said let-

ter from said Plumas County Bank to said California Safe Deposit & Trust Company, the said California Safe Deposit & Trust Company credited the same in its cash book, being its book of original entry, to the plaintiff bank, and on the same day this credit to the plaintiff bank of said sum in the cash book of the California Safe Deposit & Trust Company was posted from the cash book into individual ledger No. 2 of said California Safe Deposit & Trust Company. said entries showing that the plaintiff bank was upon that day, October 28, 1907, credited with \$15,000 on the books of the California Safe Deposit & Trust Company." That a deposit tag marked "New," and showing a credit of \$15,000 in favor of the Plumas County Bank, was filed among the papers of the Trust Company on October 28, 1907, and that said tag contained, among other things, the following: "In receiving

point, but decided on same principle; see *infra*); *Bank of Commerce v. Ingram*, 33 Okla. 46, 124 Pac. 64 (the bank was agent for collection, but was held liable for negligence in the matter); *Miller v. Norton & Smith*, 114 Va. 609, 77 S. E. 452 (check not drawn upon; see *infra*); *Hilsinger v. Trickett*, 86 Ohio St. 286, 90 N. E. 305, Ann. Cas. 1913 D, 421 (not a check, but a certificate of deposit drawn by another bank. There were some admissions by depositor that may have influenced the decision, so that the authority of the case on this point is not strong).

In *Cronheim v. Postal Teleg. Cable Co.* *supra*, the check was indorsed, "for collection and credit to his individual account with said Neal Bank for deposit;" but the court said: "Where it is deposited generally, upon an indorsement in blank, and nothing more appears, it will be presumed that the deposit was made in the usual course of business, and that the depositor intended to appoint the bank as his agent to collect the proceeds and deposit them to his credit;" and the language used in the indorsement was said to strengthen the presumption of agency rather than weaken it. The particular question was as to depositor's right to stop payment on the check on learning of the insolvency of the bank, and the suit was against a telegraph company for damages caused by its negligent failure to transmit his message stopping payment of the check.

In *Latham v. Spragins*, *supra*, the depositor had overdrawn to the amount of the draft; hence the credit he received paid a pre-existing debt, when the draft, with bill of lading attached, was not paid, the bank, as a mere matter of bookkeeping, charged the item back, but held the draft and bill of lading as its own; it was held that the bank was the owner of the draft and bill of lading as between it and the attaching credit of the depositor, if the jury should find the facts as here stated, but 47 L.R.A.(N.S.)

if it be found that the depositor, not being indebted to the bank, merely received credit, and the bank had authority to charge back the item, which it did, the title never passed to the bank. See *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365, another North Carolina case cited in note in 7 L.R.A.(N.S.) 698.

In *Bank of Big Cabin v. English*, *supra*, the defendant bank had entered credit on its books and in plaintiff's pass book upon receiving advice from a distant bank that the defendant bank had been given credit with its correspondent bank for the amount of a draft for the use of the plaintiff. On the principle here considered, it was held that the defendant bank had the right to charge back the item upon discovering the insolvency of the correspondent bank.

In *Miller v. Norton & Smith*, 114 Va. 609, 77 S. E. 452, the indorsement was in blank and the credit properly entered, but not drawn upon; the draft was collected by a correspondent bank after the appointment of a receiver for the home bank, and the receiver had collected the amount from the correspondent as assets of the insolvent bank; there were some conditions as to the bank's not being liable for acts of its agents, etc., on the notice of the deposit, but the decision rests upon the broad proposition that "the mere giving of credit to a depositor's account of a check does not constitute the bank a holder for value; but in order to have that effect, the credit must be drawn upon." The court holds that this is not inconsistent with its former holdings in *Fayette Nat. Bank v. Summers*, 105 Va. 689, 7 L.R.A.(N.S.) 694, 54 S. E. 862, and *Greenburg Nat. Bank v. C. Syer & Co.* 113 Va. 53, 73 S. E. 438, where it was held that all of the circumstances should be considered by the jury in determining the intention of the parties, since in the instant case there were no circumstances to take the case out of the rule of law.

J. W. M.

checks on deposit, payable elsewhere than in San Francisco, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions, items previously credited may be charged back to the depositor's account. In making this deposit, the depositor hereby assents to the foregoing conditions." That on the same day the said check No. 215 was mailed to the defendant, attached to the following memorandum: "California Safe Deposit & Trust Company. San Francisco, October 28, 1907. To Bank of Rideout, Smith, & Company, Oroville: Herewith for collection and credit, drawn on you: Amount, \$15,000." That on October 29th the check and memorandum were received by defendant, marked "Paid," and defendant debited plaintiff on its books with check No. 215. "That the plaintiff bank sent the said check No. 215 for \$15,000 to California Safe Deposit & Trust Company for the purpose of transferring the sum of money for which it had credit at the Bank of Rideout, Smith, & Company to California Safe Deposit & Trust Company, and giving the plaintiff bank credit therefor said sum. . . . That when said check No. 215 was received by said defendant bank and said transfer had been made upon the books of said defendant bank, and the said sum of \$15,000 credited to the California Safe Deposit & Trust Company, said defendant bank knew that its account with California Safe Deposit & Trust Company would be overdrawn in an approximate sum of \$2,500, and desiring to have no overdraft at the California Safe Deposit & Trust Company's bank, and to keep a balance continually there, it sent to that bank on the 29th day of October, 1907, not only its draft on said California Safe Deposit & Trust Company for the \$15,000 item and \$48.73 additional thereto to cover other small items, but also sent a cash draft for \$5,000 in favor of California Safe Deposit Trust Company on the Mercantile Trust Company of San Francisco." That on the same day both drafts were placed in the postoffice at Oroville, contained in envelopes properly addressed to the Trust Company in San Francisco, and having the postage thereon prepaid. "That said draft No. 307 for \$15,048.73 was received by the California Safe Deposit & Trust Company at or before the hour of noon on October 30, 1907, and the said draft for \$5,000 was received by the California Safe Deposit & Trust Company about the hour of noon on October 30, 1907, but the exact time of its receipt cannot be ascertained." That the draft on the Mercantile

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Trust Company was not cashed by the California Safe Deposit & Trust Company, but two days after the suspension of said last-named bank the said draft for \$5,000 was returned uncashed to the defendant bank. That subsequently the receiver of the Trust Company demanded and received from the defendant bank \$2,543.44, being the difference between its draft No. 307 and the amount of its former balance with the Trust Company. "That upon the receipt by said California Safe Deposit & Trust Company of said draft No. 307 at about the hour of noon on said October 30, 1907, said draft was passed into the hands of a clerk of said California Safe Deposit & Trust Company, who, upon examining the books of said California Safe Deposit & Trust Company, found that said books showed at that time a credit to the account of the defendant bank of the sum of \$12,705.29 only, and thereupon reported to the manager of said California Safe Deposit & Trust Company the amount of balance shown on said books to be due to the defendant bank, and was then and there instructed by the manager of said California Safe Deposit & Trust Company to hold said draft No. 307 for \$15,048.73 over. That thereupon an entry was made upon the pages of the interior collection book of said California Safe Deposit & Trust Company, which showed a copy of the remittance slip accompanying draft No. 307 of the defendant bank, noted as follows: 'Dft. Held Over.' That said draft No. 307 was not, before the closing of the doors of the California Safe Deposit & Trust Company, canceled, stamped, or in any manner marked, nor was any entry, marking, or notation of any kind or character made thereon until after the doors of the California Safe Deposit & Trust Company were closed, to wit, on the 14th day of March, 1908." That defendant bank was not debited with draft No. 307 on the books of the Trust Company. "That during the entire months of October and November, 1907, and for more than two years prior thereto, it was the custom in the city of San Francisco of the California Safe Deposit & Trust Company and of all other banks in said city, by recommendation of their clearing house, that in receiving notes, drafts, and checks on points other than said city of San Francisco, either for collection or credit, that the bank at which said check was deposited for collection should transmit the same in the usual manner for collection, either to the bank on which it was drawn, or to such banks or persons as it might deem reliable, and that the bank to which it was sent might remit by check, draft, certificate, or cash for the proceeds of any collection.

instead of remitting the exact money collected." That the draft for \$5,000 on the Mercantile Trust Company, in favor of the California Safe Deposit & Trust Company, was good, and would have been paid if presented. That "during more than two years prior to October 30, 1907, the defendant bank maintained a deposit with the California Safe Deposit & Trust Company, but at no time did the California Safe Deposit & Trust Company have a deposit with the defendant bank. That during said two years the California Safe Deposit & Trust Company frequently sent checks and drafts to the defendant bank, and the letters accompanying some of them read 'for collection and credit,' and the letters accompanying others of them read for 'collection and returns,' and the letters accompanying still others did not state whether they were sent for 'collections' or 'returns,' but in every such case the defendant bank immediately remitted the amount of said collections to the California Safe Deposit & Trust Company, and in all such cases the same practice was pursued as was followed in the case of check No. 215."

At the outset it may be well to say that we do not think the insolvency of the Trust Company before the actual closing of its doors was a material factor in this case. It is highly probable that some of the officers of that corporation knew of its insolvent condition long before the doors were closed to the public; and, if this action were against such officers or someone in privity with them, their fraud would be available to plaintiff if he desired to set aside any transaction with the bank. For example, if the check for \$15,000 sent by the Plumas County Bank had reached San Francisco after the Trust Company had closed its doors, doubtless it could have been recovered from the receiver. But we are considering the respective rights of two equally innocent parties, both dealing with an apparently solvent corporation. As between the plaintiff and the Trust Company, the acceptance of the former's deposit by the latter while it was insolvent was a fraud; but it was also a fraud against the defendant. Neither of these innocent parties can gain any advantage over the other by reason of the fraud of a third party practised upon both of them. The rule is thus stated by a distinguished author: "It is a fraud for an insolvent depository to receive paper for collection, and, no matter what may be the indorsement, the bank acquires no title. But if a check indorsed in blank is transferred to another bank, and advances are made thereon in good faith, it can hold the check. The depositor in such a case must suffer that the great rule whereby a bona

fide holder of paper is protected in taking it may be preserved." 2 Bolles, Bkg. § 17.

The principal and indeed the crucial question in this case is whether the relation between the Plumas County Bank and the Trust Company was one of principal and agent or creditor and debtor. In this behalf appellant cites certain authorities, which we will proceed to examine.

In *Hazlett v. Commercial Nat. Bank*, 132 Pa. 119, 19 Atl. 55, the plaintiff had deposited his check for \$5,000 to his account with the Commercial National Bank of Philadelphia. This was drawn against the Penn Bank of Pittsburgh. He was credited with \$5,000, and the check was sent to the Penn Bank. It was charged to the account of Mr. Hazlett, and the draft of the Penn Bank on the Bank of the Republic was sent to the Commercial National Bank. This was refused payment on presentation, and Mr. Hazlett was notified of that fact. He then wired the Commercial National Bank that the Penn Bank was "all right" and that its draft "would be paid in a day or two." He added: "Please hold for a few days and if not honored, return to me." The court held that the defendant bank was his agent, and that his order to hold the draft excused and condoned the delay which prevented its collection. The court did use this language which plaintiff here cites: "When the plaintiff drew his check for \$5,000 on the Penn Bank of Pittsburgh, and deposited said check with the Commercial National Bank of Philadelphia for collection, he made the latter bank his agent. The mere fact that the collecting bank credited him with the check as cash did not alter that relation. This is done daily,—indeed, it is the almost universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit. If the check is unpaid, it is charged off again, and the unpaid check returned to the depositor." The case, however, scarcely solves the problem presented by the one at bar. There the conduct of the parties indicated that the contract was one of agency, and that the deposit of the check with the defendant bank did not create the relationship of debtor and creditor. In the case before us the Plumas County Bank deposited its own check, payable to the Trust Company, with a request to place the amount to its credit. This was done, and, after the manager of the Trust Company had apprised plaintiff of that fact, both parties treated the transaction as completed. Plaintiff's sworn statement to the bank commissioners contained this language: "On October 29, 1907, the California Safe Deposit & Trust Company received from O'Rourke Eubanks Hat Com-

pany check No. 788, drawn by W. J. Miller, on the Plumas County Bank and in favor of the O'Rourke Eubanks Hat Company for \$13.26, and in due course of mail this check was forwarded by the California Safe Deposit & Trust Company to the Plumas County Bank for collection and credit, and the books of the Plumas County Bank show that this check was paid on October 31, 1907, and the amount thereof placed to the credit of the California Safe Deposit & Trust Company, thus reducing the amount of their supposed indebtedness to the Plumas County Bank to the sum of \$14,986.74." That transaction showed as clearly that the plaintiff did not send its check merely for collection, as Hazlett's direction in the cited case from Pennsylvania indicated his understanding that the defendant bank was merely his agent.

Rapp v. National Security Bank, 136 Pa. 435, 20 Atl. 508, was a case in which the check had been refused except for collection. It was a raised check. The drawee paid it, but when the forgery was discovered, the amount paid because of the alteration of the instrument was refunded by the collecting bank, and it was held that said bank should not bear the loss, although the firm that had sent the check by the defendant bank for collection had been credited with the full amount shown by the face of the forged instrument. The case merely announces the undoubted rule that, where a worthless check left for collection has been credited to a depositor, the amount involved may be charged back to him when the worthlessness of the paper is discovered. Unquestionably, if the check in the case at bar had been valueless, the Trust Company might have charged it back to the Plumas County Bank; but it was perfectly good, as it was drawn on a solvent bank in which the drawer had a balance more than sufficient for the payment of the amount called for.

Richardson v. Denegre, 35 C. C. A. 452, 93 Fed. 572, contains an admitted *obiter dictum* that "the checks of depositors in the ordinary course of business with the bank do not become the property of the bank, and the relation of debtor and creditor is not established, but that of principal and agent prevails up to the time the check is collected and money is received by the bank." The case was decided upon entirely different principles, and is of no great authoritative force. In Henderson v. O'Connor, 106 Cal. 388, 39 Pac. 786, the bank had refused to accept the draft in question as a deposit. After the failure of the bank the receiver collected the amount due upon the draft. The court held that the only relation between the plaintiff and the bank

was that of principal and agent, and that the latter had no title to the draft nor to the collected funds. National Gold Bank & T. Co. v. McDonald, 51 Cal. 66, 21 Am. Rep. 697, was a case in which a depositor presented a check drawn in his favor upon the plaintiff bank. He was credited in his bank book for the amount of the check; but, when the day's business was reviewed, it was discovered that the drawer had no funds on deposit. Accordingly the bank charged the depositor's amount with the amount of the check. It was held that the transaction of itself did not import an agreement by the bank to accept the check as cash. The substance of that decision is that a bank has until the close of business hours for the day to determine whether or not final credit will be given for a check drawn upon and payable by itself. The facts of that case and Ocean Park Bank v. Rogers, 6 Cal. App. 678, 92 Pac. 879, are almost identical. Neither case goes so far as to hold that no agreement is possible whereby the bank in which a check is deposited may receive it as cash.

In the case at bar, not only had the plaintiff been given full credit by the Trust Company for the check, but the check itself was good, and immediately upon its presentation to the solvent drawee was honored. It was never refused payment as were the checks in the cases discussed. The plaintiff bank knew nothing of the condition of defendant's account with the Trust Company. What it wanted was credit with the Trust Company for \$15,000. That is what it received, and the details of the collection of the amount from the drawee of the check are therefore immaterial.

But plaintiff contends that, although the Trust Company opened a deposit account with it, the relation of principal and agent subsisted between them because of the rule announced upon the deposit slip that items previously credited might be charged back to the depositor's account upon the failure of any of its direct or indirect collecting agents, and that it would only be liable when "proceeds in actual funds or solvent credits" should have come into its possession. Respondent concedes that the rule announced exists without any such written evidence, but that the right to charge off bad checks does not affect the bank's title. While the courts are divided upon this question, it is generally held that this right to return checks if they are unpaid does not affect their ownership. 2 Bolles, Bkg. § 22; First Nat. Bank v. Armstrong (C. C.) 30 Fed. 233.

Respondent contends, and we think correctly, that the contract between the plaintiff and the Trust Company made the latter

the owner of check No. 215. We have seen that plaintiff sent it for the purpose of opening a new account, and that it recognized the validity of the deposit by crediting the Trust Company with the Miller check. Defendant received the check with an indorsement indicating that the Trust Company was the owner of the paper. This was as follows: "Pay to the order of yourself, previous indorsement guaranteed. California Safe Deposit & Trust Company, San Francisco, California, J. Dalzell Brown, Manager." The check was also accompanied by the slip announcing that it was sent "for collection and credit." All of these things, as well as the opening of the new account with plaintiff by the Trust Company, evidence a contemporary construction of the relations between plaintiff and the Trust Company totally at variance with plaintiff's assertion that the check was sent merely for collection.

The matter of receiving and crediting checks has recently been considered by the Supreme Court of the United States in *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243. It became important in a criminal case to know whether checks drawn on a St. Louis bank, but credited to the defendant by Riggs National Bank of Washington, District of Columbia, should be regarded as having been received and paid in St. Louis. Mr. Justice Peckham, delivering the opinion of the court, said: "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to

the custom of the bank when a check was not paid of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent. . . . The general transactions between the bank and a customer in the way of deposits to a customer's credit and drawing against the account by the customer constitute the relation of creditor and debtor. As is said by Mr. Justice Davis, in delivering the opinion of the court in *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897, in speaking of this relationship, page 155: 'It is an important part of the business of banking to receive deposits; but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell in the House of Lords in the case of *Foley v. Hill*, 2 Clark & F. 28, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect.' When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704, and also in *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. ed. 785. See also *Scammon v. Kimball*, 92 U. S. 362, 369, 23 L. ed. 483, 485; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 288, 40 L. ed. 700, 702, 16 Sup. Ct. Rep. 502. The case of

Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, contains a statement of the rule as follows, per Andrews, J.: 'The general doctrine that upon a deposit made by a customer in a bank in the ordinary course of business, or of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. Commercial Bank v. Hughes, 17 Wend. 94; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530. The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business.' In Metropolitan Nat. Bank v. Loyd, supra, one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that 'the title passed to the bank, and they (the checks) were not again subject to his control. [See Scott v. Ocean Bank, 23 N. Y. 289, and other cases cited in the opinion.]'

The supreme court of Oklahoma cited the above-quoted case and other valuable authorities in Hobart Nat. Bank v. McMurrugh, 24 Okla. 210, 103 Pac. 601.

We conclude that the judgment of the lower court must be sustained; but, even if we should hold that the check in question was sent to the Trust Company for collection, we would be compelled to decide that it was collected.

The court found upon sufficient evidence that both the check of the defendant bank upon the Trust Company for an amount exceeding \$15,000, and the other draft for \$5,000 (which was a solvent credit), reached the Trust Company before noon on October 30, 1907, before the latter institution closed its doors. That they were not duly passed through the books to defendant's credit at once is no fault of the defendant. It cannot be prejudiced by mere omissions in bookkeeping. It had complied with every possible requirement by paying the check in the manner usual to the course of business between banks. It is immaterial that subsequently, without authority or right, some official of the insolvent bank returned the uncollected draft for \$5,000 to the Bank of Rideout, Smith, & Co. Defendant had promptly sent that draft in good faith to meet its overdraft. That was enough. 47 L.R.A.(N.S.)

And, since plaintiff must look to the assets of the insolvent corporation for the recovery of its proportion of its deposit, it cannot now complain of the return of the \$5,000, for the very good reason that the overdraft of defendant has since been paid to the receiver.

The judgment and order are affirmed.

We concur: Henshaw, J.; Lorigan, J.

Petition for rehearing denied April 18, 1913.

GEORGIA SUPREME COURT.

W. H. ROWE, Plff. in Err.,
v.
E. A. SPENCER.

(— Ga. —, 79 S. E. 144.)

Sale — failure to execute notes — resale by vendee — effect.

Spencer and Humphrey entered into an agreement, by the terms of which Spencer was to sell to Humphrey a certain pair of mules at a given price, a specified part of which Humphrey was to pay in cash, and for the balance he was to give his two promissory notes, with his father as surety, to Spencer in equal amounts, maturing at designated times. The notes were to contain a stipulation that title to the mules was to remain in Spencer until the notes should be fully paid. The notes were prepared in accordance with the agreement; but as no official was present to attest their execution, and as Humphrey's father was not present it was agreed that Humphrey should take them to the county where he said he resided, and there execute them, with his father as surety, in the presence of an officer, and return them by mail to Spencer. At the time of this transaction Humphrey made the cash payment, and Spencer delivered to him the possession of the mules. Subsequently, and on the same day, Humphrey traded the mules to Rowe for a fair consideration, which he received from Rowe at the time, and delivered to

Headnote by FISH, Ch. J.

Note. — Rights of purchaser from, or creditors of, buyer to whom goods are delivered before perfecting reservation of title or lien to secure purchase price according to contract.

The question herein raised is, to a great extent controlled by and involves a principle quite similar to that considered in notes in 11 L.R.A.(N.S.) 948, and 23 L.R.A.(N.S.) 824, on the question of delay in attempting to regain property obtained under agreement to pay therefor on delivery, as waiver of that condition; and a note in 13 L.R.A.(N.S.) 696, supplemented in 29 L.R.A.(N.S.) 709, as to the right of pur-

him the mules. Rowe at the time had no notice of the agreement between Spencer and Humphrey. The notes were executed by Humphrey the next morning before a notary public, who officially attested them, and they were delivered to Spencer that day, Humphrey's father not having signed them. Three or four days thereafter Spencer informed Rowe of the agreement between Humphrey and Spencer, and of the latter's claim of title to the mules, and Rowe a short time afterwards disposed of them to his own use. The notes were recorded within less than thirty days after their execution. Held, that Rowe, as against Spencer, obtained no title to the mules.

(Lumpkin, J., dissents.)

(August 14, 1913.)

ERROR to the Superior Court for Gwinnett County to review a judgment in

chasers of, or creditors levying on, goods sold for cash, but delivered without payment.

In *E. I. Du Pont Co. v. John Shields Constr. Co.* 162 Fed. 198, the property was sold to be settled for on delivery, partly in cash and the balance in notes. No settlement was made until some months after delivery, although in the meantime the seller was constantly seeking a settlement. When the settlement was finally made, it was on the basis of the purchaser executing notes in which the seller reserved title to the property, and giving the purchaser a lease thereof. It was a disputed question as to whether or not this settlement was according to the original contract, and upon the theory that it was not, title to the property was held to have vested in the purchaser, and hence in a receiver subsequently appointed for it in insolvency proceedings.

Where property was sold under an agreement that the seller should retain the title until the buyer either paid for the property or gave a chattel mortgage thereon, and also on other property, to secure the purchase price, and the property was delivered under this agreement, which was not carried out by the purchaser, the title was held to still remain in the seller as against a subsequent purchaser from the buyer. *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640.

And as against a subsequent purchaser, title to property did not pass where it was delivered to the original buyer upon condition that he execute to the original seller a mortgage thereon to secure the payment of the purchase money. *Jones v. Southern Cooperage Co.* — Ark. —, 127 S. W. 704.

And in *Amundson v. Standard Printing & Mfg. Co.* 140 Iowa, 464, 118 N. W. 789, where, by the terms of the contract of sale, title to the property was not to pass until paid for in money or notes secured by a mortgage on the property, and there was considerable delay in accepting the property after its delivery, and also a delay in executing the mortgage, it was held that the

plaintiff's favor in an action brought to recover possession of certain mules sold on condition and resold by the vendee without complying therewith. Affirmed.

Statement by Fish, J.:

Spencer brought trover against Rowe. There was a verdict for the plaintiff. The defendant was refused a new trial, and he excepted.

The testimony of the plaintiff was as follows: On June 19, 1906, he agreed to sell the mules in controversy to one Humphrey for the price of \$450, of which the sum of \$100 was to be paid cash, and for the balance Humphrey was to give Spencer two promissory notes, each for \$175, payable respectively September 1 and November 1, 1906. Title to the mules was to be retained by Spencer until the entire purchase

delivery of the property did not operate to pass title, since the delivery, as well as the sale, was conditional, and until the condition with respect to payment and security had been complied with, the title remained with the seller as against a lien of the landlord in whose building the property, a printing press, had been set by the purchaser, who was a lessee thereof.

But where a purchaser received property under an agreement on his part to secure the purchase price by a chattel mortgage on the property, which he did not do, but the seller permitted him to retain the property for a considerable period thereafter, and until after judgment creditors of the buyer had levied thereon, title to the property vested in the buyer by the delivery, so that the rights of the creditors are superior to the claim of the seller. *Van Duzer v. Allen*, 90 Ill. 499.

And where the seller made delivery of goods sold upon condition that the purchase price be secured by a chattel mortgage to be executed at the time of the delivery, without insisting upon the delivery of the chattel mortgage or otherwise making the delivery conditional, title to the property vested by the sale and delivery, since the omission to demand the mortgage simultaneously with the delivery of the property, or to make the delivery conditional upon the execution of the mortgage, and the subsequent delay in demanding the mortgage, are sufficient to preclude the seller from denying that the property has been delivered. *Husted v. Ingraham*, 75 N. Y. 251.

But where the property was delivered under an agreement that the purchase price should be secured by a mortgage thereon, this agreement is capable of specific enforcement in equity, and hence constitutes an equitable lien upon the property as against the purchaser and all persons claiming through or under him, except bona fide purchasers having no notice of the lien. *Ibid.*

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price should be paid. This agreement was entered into at Flowery Branch, Hall county, this state. At that place and on the day of the agreement two promissory notes were written or filled out, embodying all the terms of the agreement, as to date, times of payment, and amounts to be paid; and each note contained the following stipulation: "This note having been given to said E. A. Spencer, as per contract, for two black mare mules, named Mame and Maud, it is hereby agreed that the ownership of title to said mules shall remain to said E. A. Spencer until this note is fully paid." Humphrey made the cash payment. The notes were written out in accordance with the agreement at Flowery Branch, where the plaintiff was engaged in business, and where the transaction took place. As no officer was there to witness Humphrey's signature to the notes, and as his father lived at Buford, Gwinnett county, where plaintiff was informed by Humphrey he also resided, it was agreed between plaintiff and Humphrey that the latter should take the notes to Buford, where he, and his father as surety, would execute them in the presence of an officer, and that Humphrey would then return them by mail to plaintiff. In accordance with this agreement, the notes were given to Humphrey for the purpose just stated, and plaintiff also delivered to him the possession of the mules. Humphrey left Flowery Branch, with the notes and the mules in his possession, about noon on June 19, 1906. The next day plaintiff received the notes by mail, which appeared to have been signed by Humphrey in the presence of a notary public, but had not been signed by Humphrey's father. Within two or three days thereafter, the plaintiff went to Buford to investigate the matter, and ascertained that Humphrey had sold the mules to the defendant, Rowe. Plaintiff thereupon exhibited to the defendant Humphrey's notes, and at the same time informed the defendant that title to the mules was in him, the plaintiff. The notes were put in evidence by the plaintiff. They were dated June 19, 1906, and contained a reservation of title to the mules in Spencer. They appeared to have been executed by Humphrey in the presence of a notary public, and were filed for record and recorded in Gwinnett county on July 14, 1906. They were not signed by Humphrey's father.

The notary testified that Humphrey signed the notes in his presence in Buford. He could not remember the date, but did remember that the notes were executed "late one evening or early one morning," as he recalled that he had to take them to the front of the store in order to get sufficient light to write his signature. He further testified:

"Charlie Humphrey was driving a pair of gray ponies at the time. Mr. Rowe had previously had these ponies in his possession. . . . I had never seen Humphrey driving these ponies before this time."

The defendant admitted in his answer that he purchased the mules in controversy from Humphrey on June 19, 1906; and his testimony was to the following effect: He gave Humphrey, in exchange for the mules, a pair of ponies, a set of harness, a buggy pole, and \$100 in cash, all being of the value of \$425. He traded with Humphrey for the mules about 6:20 o'clock P. M., Eastern time, which was an hour, or an hour and a half, before sunset. At the time of this trade, he did not know from whom Humphrey had bought the mules, and had no notice of the contract of sale between Humphrey and Spencer. Humphrey never drove the ponies given him in exchange for the mules until the day following this trade. Witness sold the mules a short time after he learned that plaintiff claimed title to them, and before this action was brought.

Messrs. J. V. Pool and J. A. Perry, for plaintiff in error:

Rowe came into possession of the mules in controversy for full value and before the notes were executed and delivered to Spencer, the vendor of Charlie Humphrey, and without notice of such an effort to retain title by said Spencer.

One selling property under such circumstances, to be protected against the interests of a third party, must evidence such contract providing for a retention of title "in writing, and not otherwise;" and this must be done before a delivery of the personality so sold.

Wood v. Evans, 98 Ga. 455, 25 S. E. 559; Rowe v. Spencer, 132 Ga. 429, 64 S. E. 468; Harp v. Patapsco Guano Co. 99 Ga. 755, 27 S. E. 181; Derrick v. Pierce, 94 Ga. 467, 19 S. E. 246.

Messrs. E. O. Dobbs and I. L. Oakes, for defendant in error:

Unsigned writing, if assented to, becomes a binding contract between the parties, and not subject to change by parol evidence.

Goldsmith v. Marcus, 7 Ga. App. 849, 68 S. E. 462; Delaware Ins. Co. v. Pennsylvania F. Ins. Co. 126 Ga. 386, 55 S. E. 330, 7 Ann. Cas. 1134; 21 Am. & Eng. Enc. Law, 1119; Farmer v. Gregory, 78 Ky. 475; Cohen v. Jackboice, 101 Mich. 409, 59 N. W. 665.

Such contracts, to be good as against third parties, need not necessarily be attested by an officer.

Hill v. Ludden & B. Southern Music House, 113 Ga. 320, 38 S. E. 752.

The reservation of title would be good as

against one with actual notice, although there were no attesting witnesses.

Ibid.; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420; *Wheeler & W. Mfg. Co. v. Irish American Dime Sav. Bank*, 105 Ga. 57, 31 S. E. 48.

The section of the Code requiring the reservation of title in contracts of conditional sales, to be in writing and attested, means this must be done when the contract of purchase and sale is completed, and there is no other act of the vendee to be performed to complete the contract.

Wiggins v. Tumlin, 96 Ga. 753, 23 S. E. 75; *Mathewson v. Belmont Flouring Mills Co.* 76 Ga. 357; *Wilson v. Comer*, 125 Ga. 500, 114 Am. St. Rep. 245, 54 S. E. 355; *Bergan v. Magnus*, 98 Ga. 514, 25 S. E. 570; *Boyd v. McArthur*, 120 Ga. 974, 48 S. E. 358; *Wheeler & W. Mfg. Co. v. Irish American Dime Sav. Bank*, 105 Ga. 57, 31 S. E. 48; *Evans v. Napier, W. & Co.* 111 Ga. 102, 36 S. E. 426.

Fish, Ch. J., delivered the opinion of the court:

"Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid and may be enforced, whether evidenced in writing or not." Civil Code, § 3318. "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." *Id.* § 3319. Mortgages on personal property must be executed in the presence of, and attested by, or proved before, a notary public or judge of any court in this state, or a clerk of the superior court, and recorded. *Id.* § 3257. A mortgage on personalty must be recorded in the county where the mortgagor resided at the time of its execution, if a resident of this state. *Id.* § 3259. According to the undisputed evidence, all the requirements of the above-quoted sections of the Code were complied with, relatively to the notes given by Humphrey to the plaintiff for the balance of the purchase price of the mules bought by Humphrey, from the plaintiff, there being in the notes a condition that the title to the mules should remain

in the plaintiff until the notes should be fully paid. The notes were, of course, in writing; they were executed in the presence of and attested by a notary public, and were recorded within less than thirty days from the date of their execution. There was, moreover, ample evidence to sustain a finding that the notes were recorded in the county where Humphrey resided at the time of their execution, which the jury necessarily found to be true in rendering a verdict for the plaintiff; the court having properly instructed them on this point. There were some circumstances testified to by the defendant himself, which seemingly might have authorized the jury to find that at the time he traded for the mules he had notice sufficient to excite attention, and to put him on inquiry as to Humphrey's title to them, or as to who had legal title, and that such inquiry would probably have developed the fact that the title was in the plaintiff; but in the view we take of the case we have not deemed it necessary to set forth such circumstances.

Aside from the matter just referred to, and considering the evidence from the view point most favorable to the defendant, how stands the case? This way: Defendant traded with Humphrey for the mules on the same day the latter contracted to purchase them from the plaintiff, and within a few hours after that transaction. At the time of his trade with Humphrey the defendant had no notice of the plaintiff's title to the mules, and the property given by defendant in exchange for them amounted to a fair price. The agreement between the plaintiff and Humphrey, or rather so much thereof as remained to be executed, had been reduced to writing, in the form of the two notes, which written agreement Humphrey had in his possession at the time he traded the mules to the defendant, which possession was for the purpose, and in pursuance of the agreement with the plaintiff, of executing them before an officer, and thereafter returning them by mail to the plaintiff. At the same time Humphrey had possession of the mules, also with the consent of the plaintiff, as Humphrey was taking the notes for the balance of the purchase price to Gwinnett county to be properly executed by him and his father as surety, and to be returned to the plaintiff. The notes were duly executed by Humphrey alone early the next morning after the trade between defendant and Humphrey, and were received that same day by the plaintiff and were recorded within less than thirty days after their execution.

Taking all this to be true, did the defendant obtain a valid title to the mules, or one superior to that of the plaintiff? The view

of the case just presented does not show a case where a vendor sold and delivered personalty under an agreement entered into at the time of the sale and delivery of the property, that the vendee would, at a time subsequent to the completion of the sale, execute and deliver to the vendor a note for the purchase price of the personalty with a condition that the title to the personalty should remain in the vendor until the note should be paid. In § 3318 of the Civil Code, where personalty is sold and delivered with a condition affixed to the sale that the title to the property is to remain in the vendor until the purchase price thereof shall have been paid, in order for the reservation of title to be valid against third parties it must be in writing, and the contract executed and attested as the statute requires in cases of chattel mortgages, and recorded within thirty days after the date of the sale. This statute contemplates a sale and delivery of the property in pursuance thereof. The general rule is: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." 1 Benjamin, Sales, 6th Am. ed. § 366, p. 359.

This principle has been recognized by this court in several cases wherein it was announced that "if personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." *Bergan v. Magnus*, 98 Ga. 514, 516, 25 S. E. 570; *Wilson v. Comer*, 125 Ga. 500, 114 Am. St. Rep. 245, 54 S. E. 355; *Susong v. McKenna*, 126 Ga. 433, 55 S. E. 236; *Starnes v. Roberts*, 128 Ga. 718, 58 S. E. 348; *Walker v. O'Neill Mfg. Co.* 128 Ga. 831, 58 S. E. 475. In these cases, however, the action was by the vendor against the vendee, and the interest of a third person was not involved, except in *Bergan v. Magnus*, where the contest was between the vendor and an attaching creditor of the vendee, it not appearing, however, that the vendee had obtained possession of the goods with the consent of the vendor, and in *Walker v. O'Neill Mfg. Co.*, where the contest was between two parties each claiming to have purchased the article in controversy from the same vendor. In *Wheeler & W. Mfg. Co. v. Irish American Dime Sav. Bank*, 105 Ga. 57, 31 S. E. 48, it was held: "Where a purchaser agrees to pay for goods

on delivery, either in cash at a named discount or by note due in six months, the contract of sale is conditional, and the payment of the cash or the giving of the note is a condition precedent to the passing of title. Where, however, the goods are delivered by the seller and left for some time in the possession of the purchaser, no steps for their reclamation being taken by the seller, and the purchaser mortgages them to an innocent third party, such conduct may amount to a waiver of the condition, and operate to pass the title to the goods into the purchaser." It was there further held: "Even if, in this case, the condition was not waived, still, under the provisions of our Code, the reservation of title was not valid as against a third party without notice, the conditional contract of sale having been neither executed and attested nor recorded as provided by law." In that case the contest was between the vendor and the subsequent innocent mortgagee. In the opinion it was said: "An absolute and unconditional delivery of the goods may waive the reservation of title, and a vendor cannot rely upon his reservation of title as against innocent third persons, where they have been injured by his waiting an unreasonable length of time, after breach of the condition precedent, before taking any steps to reclaim his goods."

It is obvious that the first ruling made in that case necessarily carries with it the implication that, had the vendor taken steps to reclaim his goods within a reasonable time after breach of the condition precedent, there would have been no waiver of his title, even as against an innocent mortgagee to whom the goods may have been mortgaged by the purchaser prior to any move taken by the seller for the reclamation of the goods. The second ruling expressly held that where a purchaser agrees to pay for goods on delivery, either in cash or by note maturing at a given time, such transaction falls within the provisions of Civil Code, § 3318, as to conditional sales. In *Penland v. Cathey*, 110 Ga. 431, 35 S. E. 659, it was said: "The evidence in the record makes a clear case of such a conditional sale of personal property as is contemplated in § 2776 [now 3318] of the Civil Code. The property sold and the price to be paid were ascertained and determined; there was no act of the vendee to be performed before the sale was completed; and the delivery was unconditional." The language, "there was no act of the vendee to be performed before the sale was completed," implies, of course, that, had there been some act of the vendee to be performed before, then the transaction would not have been such a conditional sale

of personal property as is contemplated by the section of the Code referred to.

Even if none of the cases to which we have referred is in principle controlling, when applied to the facts of the case now in hand, under its own facts, the plaintiff's title was superior to any rights of the defendant obtained by the trade he made with Humphrey. This is true for the reason that at the time the defendant traded with Humphrey the contract between the plaintiff and Humphrey rested *in fieri*, as one of the essential acts to be done by Humphrey in order to complete the contract between him and the plaintiff remained unperformed; that is, the proper execution of his notes for the balance of the purchase price of the mules and the delivery of the notes to the plaintiff. According to the agreement between plaintiff and Humphrey, this most important act was to be done as a part of the contract for the purchase of the mules by Humphrey, before there should be a complete sale; and under the evidence it was clearly the intention of both Humphrey and the plaintiff that this act should be performed by Humphrey at once or presently. The only reason that it was not done at the time the notes were written, according to the undisputed evidence, was that there was no officer before whom the notes could be executed in accordance with the statute. Moreover, they were executed early the next morning and on the same date returned to the plaintiff. There was no delay in the execution and return of the notes, no laches on the part of the plaintiff, and we are decidedly confident that the defendant did not obtain a valid title to the mules by his trade with Humphrey, made during what we may call the making of the contract for the sale of the mules by the plaintiff to Humphrey, although the latter was in possession of the mules under the circumstances stated at the time he traded them to the defendant.

Counsel for plaintiff in error strongly relies upon the case of Harp v. Patapsco Guano Co. 99 Ga. 752, 27 S. E. 181. That case, however, is not binding authority for anything contrary to what we have here ruled, and for two reasons, namely: (1) Only two justices participated in the decision; and (2) whatever was said in the opinion contrary to our ruling here was purely *obiter*. Moreover, the facts of that case were essentially different from those in the case now in hand. The judgment there under review by this court was the overruling of a certiorari by the judge of the superior court, the case having been originally tried before a jury in a magistrate's court. We make the following quotations from the opinion in that case:

"An execution in favor of the Patapsco Guano Company against Gouch, founded on a judgment rendered February 9, 1895, was, on October 15 of that year, levied upon a mule which was claimed by Harp. . . . From the evidence as set forth in the magistrate's answer, it appears that Gouch bought the mule from Harp in January, 1895, under a parol contract, by the terms of which the title was to remain in Harp until the mule was paid for, and the mule was immediately delivered in Gouch in pursuance of this contract. So far as can be gathered from the answer to the certiorari [which was not traversed], the trade between Harp and Gouch was complete when the delivery of the mule took place. It does appear, as an independent fact, that Gouch subsequently [May 23, 1895, some four months after his parol contract with Harp] executed and delivered to Harp a promissory note for the purchase money of the mule, reciting that Harp had reserved the title; . . . but the evidence, as reported by the magistrate, contains no intimation that the note and mortgage were given in pursuance of any agreement or stipulation made at the time of the sale, and therefore constituting a part of the original contract. The petition for certiorari does so allege; but, in this respect, it is not verified by the answer. . . . Under the facts set out in the magistrate's answer, which must control our decision in the case, it seems clear that the contract of sale between Harp and Gouch was . . . complete on the day the latter took the mule into his possession, without reference to the subsequent execution and delivery of the note and mortgage. In this view, it is obvious that the parol reservation of title in Harp amounted to nothing, as affecting the rights of third persons." Even on the theory set up in the petition, which was not verified by the answer of the magistrate, there was no written agreement at the time of the transaction between Harp and Gouch that the title to the mule should remain in Harp, and no such agreement was executed for some four months after such transaction, and it does not appear that it was attested by an officer and recorded. In the case at bar, the terms of the contract for sale were reduced to writing, in the form of the two notes, at the time the contract was entered into, and were made an essential part thereof, which notes were to be presently executed, as is necessarily inferable from the undisputed evidence of Spencer.

We have not overlooked the case of Schofield's Sons Co. v. Woodward, 137 Ga. 65, 72 S. E. 509, wherein it was held: "Where one sells and delivers personally to a contract-

or, and retains title thereto, but before the writing evidencing the contract retaining title in the seller is recorded or executed, the contractor uses the personality in the permanent improvement of the real estate of another, the seller cannot recover such personality from the latter. This is true, though the contract between the owner of the real estate and the contractor for the improvement of the former's property has not been completed, and though the real estate owner has not paid the contractor the full contract price for the improvement of the property, at the time the contract retaining title to the property in the seller is recorded." This ruling rests upon the principle that the material sold to the contractor was evidently intended by both parties to the sale to be used in the erection of a building, and, after being so used, it became a part of the realty, and could not be recovered as personality.

This opinion sufficiently covers the grounds of the motion for new trial, and renders it unnecessary to specifically deal with them.

Judgment affirmed.

All the Justices concur, except —

Lumpkin, J., dissenting:

I am unable to concur in the decision in this case. By Civil Code, § 3318, it is required that, to render a reservation of title effectual against third persons, the contract must be in writing and properly attested. To hold that a delivery under a sale of personality could be made by the seller to the purchaser, with an agreement on the part of the latter to go to another town and execute a note and obtain a surety thereon, and that a day's interval could elapse, and the seller could still retain title as against a third party acting in good faith and without notice, would be to destroy the very purpose of the statute. This is not the case of a seller who does not make a complete delivery. He made delivery, not for examination, or the like, or on any agreement that the buyer should hold as a bailee until execution of the written contract, but in pursuance of the contract of sale. The seller merely delivered the property to the purchaser and trusted to the latter to execute and return a proper written contract. If the decision should be rested on the theory of a parol agreement that title should not pass, it would be in the teeth of the statute. If it should be rested on the idea of allowing the purchaser a reasonable time to execute and return the note, what is a reasonable time? Does each case stand on its own facts? Suppose the desired security were out of the way, would the title be in suspense till his

47 L.R.A. (N.S.)

return, or a reasonable time to seek to procure his signature? Or if the purchaser should be taken sick, would he have a reasonable time to get well? And in the meantime would the public take the chance in case of buying the property?

The fact that no security was in fact obtained in this case makes no difference. The purchaser was allowed time in which to endeavor to obtain one. Under the old law, title could be reserved by parol, though the property was delivered to the purchaser. The great frauds and dangers accruing against a purchaser from one clothed with the apparent title caused the enactment of the law embodied in the section of the Code above cited. To hold it subject to parol agreements, or the lapse of a reasonable time after delivery, would soon destroy the purpose of the law. The statute is clear, simple and imperative. If, instead of following it, a seller delivers possession to the purchaser and allows the latter to carry the property away, on a promise to execute and return a contract later, he takes the chances. His plain right is not to deliver the property until the statutory contract is executed. Whether the reasoning in *Harp v. Patapsco Guano Co.* 99 Ga. 752, 27 S. E. 181, was absolutely necessary to the decision or not, it is strong, sound, and not easily answered. See also *Brundage v. Camp*, 21 Ill. 330.

The analogy sought to be drawn between this case and those involving sales for cash is not good. The present case rests on a mandatory statute. Where a statute requires a contract to be reduced to writing and executed in a certain way, a parol agreement to do it in that way is not a compliance with the statute. Without our statute, the decision of the majority of the court would be right. With such statute, I think the decision is wrong. An unexecuted writing is no compliance with the statute.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ESSEX TRUST COMPANY

v.

FREDERICK W. ENWRIGHT et al.

(214 Mass. 507, 102 N. E. 441.)

Principal and agent — right of agent to secure lease of property where business is conducted.

1. A newspaper employee cannot, upon

Note. — Right of agent or attorney to purchase or lease in his own behalf property which he was under no duty to purchase or lease for his principal.

As to right of agent to purchase subject

learning in the course of, or by reason of, his employment, that the premises on which the paper is published are of peculiar value to the business, secure without his employer's knowledge the leasehold himself, and hold it as his own, to the injury of the employer.

Same — compelling surrender of lease — reimbursement.

2. An employee of a mortgaged business, who secures a lease of the property on which the business is conducted, is, upon being compelled to turn the lease over to the purchasers at the foreclosure sale, entitled to the rent which he has paid under the lease,

of agency, see notes in 4 L.R.A. 219, 12 L.R.A. 396.

As to whether such a purchase inures to the benefit of the principal, see note in 9 L.R.A. 796.

As to right of principal to retain property purchased through the agent, who is secretly interested therein, and seek relief against the agent, see note in 34 L.R.A. (N.S.) 1210.

As to right of an attorney to purchase subject-matter of litigation or retainer from client, and his duty in relation thereto, see notes in 23 L.R.A. (N.S.) 679, 28 L.R.A. (N.S.) 723.

As indicated in the title, it is not intended to include cases involving the right of attorneys, agents, or other employees, to purchase in their own behalf property they are employed to purchase or sell, or the right of a person employed generally to look after property to purchase tax titles or other adverse titles thereto.

Cases considering this question protect the client, principal, or employer against any acts or conduct of the attorney, agent, or employee, by which the latter, through knowledge obtained during his employment, seeks a personal benefit at the expense of the former. A case of this character, which, as to the facts and the result, is very similar to *ESSEX TRUST CO. v. ENWRIGHT*, is *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541. One distinction between the cases is that in the *ESSEX TRUST CO. CASE*, the employee was a reporter, while in the *Davis Case* the employee was the general manager. In the latter case the general manager of a theater leased the property prior to the expiration of the lease of his employer, and it was held that as to this lease he was the trustee of his employer, and hence his employment precluded him from securing a lease for his own benefit. It is said that the obtaining of the lease amounted to a virtual destruction of the employers' business at the termination of his lease, which by years of labor had been established upon a profitable basis, and there was a good will attached to it which was also valuable; that to sustain the lease to the employee, this business would come to an end, and pass the good will and all from the employer to the employee, and it is remarked that public policy must condemn such a transaction.

In *Gower v. Andrew*, 59 Cal. 119, 43 Am. 47 L.R.A. (N.S.)

but not to arrears which he paid on behalf of his employer.

(May 23, 1913.)

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court of a question arising in a suit to enjoin defendant from evicting plaintiff from leased premises, and from transferring a lease of such premises, and to have defendant declared constructive trustee, holding the lease for the benefit of plaintiff, and that he be ordered to assign

Rep. 242, where the clerk of the lessee of a warehouse, taking advantage of knowledge he obtained in his employment, leased the warehouse for his own benefit, to take effect at the expiration of the lease of the principal, he was held to hold the lease for the benefit of his employer, and this although the obtaining of the renewal of the lease was not within the scope of the employment or of his duty. The general doctrine is asserted that by virtue of his employment the employee was charged with the duty of furthering his employers' interests, and with the duty of not using information obtained by him in his employment to their detriment. Three judges dissented, one of whom in the dissenting opinion based his dissent upon the fact that the employer had refused to renew the lease on the ground that he could not afford to pay the rent, before the employee undertook to and did secure his lease.

In *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304, it is held that an agent to collect rents from houses built by his principal upon leased land cannot for himself lawfully lease the land upon the expiration of the lease of his principal, and that as to such a lease, the agent will be held trustee for his principal. In this case, however, by other tortious and fraudulent acts toward his principal in reference to this property, the agent had already placed himself in a position where the law would hold and treat him as a trustee for his principal.

An employee working for a commission cannot, by purchasing the interest of another employee, also working for a commission, and concealing this fact from the principal, obtain the benefit of the commission allowed such employee, where he subsequently accounts to the latter on a salary basis, which is less than the commission allowed by the principal. *Amory v. Wood*, 51 N. Y. 644.

A person employed to do the necessary annual work on a mining claim to prevent the lapse or forfeiture of the same, who neglects to do the work, and permits the claim to lapse, cannot relocate same for his own benefit, although in the name of a third person; but such relocation will inure to the benefit of his employer. *O'Neill v. Otero*, 15 N. M. 707, 113 Pac. 614. As

the lease to the plaintiff. Decree for plaintiff.

The material facts in substance appear in the opinion.

Messrs. Johnson, Clapp, & Underwood, for plaintiff:

The law imposes upon a servant the obligation of loyalty to his master's interests so long as the employment continues.

31 Cyc. 1444; Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; American Circular Loom Co. v. Wilson, 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; Trice v.

Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; Keech v. Sandford, 1 White & T. Lead. Cas. in Eq. 4th Am. ed. 693; Hill v. Coburn, 105 Me. 456, 75 Atl. 67; Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420; Church v. Sterling, 16 Conn. 388; Blake v. Buffalo Creek R. Co. 56 N. Y. 485; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; Trenton Bkg. Co. v. McKelway, 8 N. J. Eq. 84; Galbraith v. Elder, 8 Watts, 81; Garinger v. Palmer, 61 C. C. A. 436, 126 Fed. 906; Collins v. Sullivan, 135 Mass. 461; Clark v. Delano, 205 Mass. 224, 29 L.R.A.(N.S.) 595, 91 N. E. 299; Nichol v.

to the right of agent or employee to relocate mining claim for his own benefit, see note in 50 L.R.A. 186.

An agent to sell mining property cannot defeat the rights of his principal therein by relocating it for himself, and such a relocation will inure to the benefit of his principal. Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413, 16 Mor. Min. Rep. 16.

The holder in escrow of an assignment of a horse car franchise, the assignor agreeing also to assign a franchise for the use of electric motor cars when granted to him, is not such an agent of the parties to the assignment as to preclude him from obtaining the electric motive power franchise after the assignment had been canceled because of the inability of the parties thereto to obtain for themselves the latter franchise. Havana City R. Co. v. Ceballos, 71 C. C. A. 326, 139 Fed. 538.

An agent discovering a defect in the title of the land of his principal, in the course of his agency in relation thereto, cannot make use of this discovery to acquire title for himself. Rogers v. Lockett, 28 Ark. 290.

The rule that an agent who is informed of a defect in his principal's title to land cannot acquire the title for himself, and, if he acquires the title, will be held as trustee for his principal, applies although the purchase is not in the line of the agency. It is sufficient if the act in acquiring the title has a direct bearing upon the interest of the principal. Hardenbergh v. Bacon, 33 Cal. 356, 1 Mor. Min. Rep. 352.

Thus, a person employed to survey land, who, during the survey, discovers a defect in the title of his principal, and instead of informing his principal thereof, practises artifices to prevent his principal from curing the defect in his title, and acquires the title for his own benefit, will be held as to such title to be a trustee for the principal. Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420. See to same effect, Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203.

An agreement by an agent or attorney to furnish his client or principal information acquired while acting as attorney or agent, and for which he had received full compensation, has no consideration to support it. Dorr v. Camden, 55 W. Va. 226, 65 L.R.A. 348, 46 S. E. 1014. 47 L.R.A.(N.S.)

An attorney cannot for himself purchase an outstanding adverse interest in property with reference to which he is employed. Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

Thus, an attorney employed by judgment debtors after the termination of his employment cannot purchase judgments against them, and attack as fraudulent transfers made by them of their property, with his assistance during the time of his employment. Garinger v. Palmer, 61 C. C. A. 436, 126 Fed. 906.

So, an attorney employed to clear up the title to real estate cannot acquire an outstanding adverse title for his own benefit, and if he acquires such a title, he will be held to be a trustee for his client with reference thereto. Home Invest. Co. v. Strange, — Tex. Civ. App. —, 152 S. W. 510.

And a lawyer employed to collect a claim cannot thereafter lawfully acquire the property of the debtor which he should have subjected to the claim of his client, and where he does so, the property will be impressed with the trust in the client's favor. Stanwood v. Wishard, 134 Fed. 959.

But the rule that the obligation of fidelity which an attorney owes to his client is a continuing one, and he cannot make use of any knowledge acquired from his client or through his professional relation for his own advantage, opposed to the interests of the client or those claiming through him, even after the relation has terminated, does not apply so as to preclude an attorney from purchasing a strip of land on the boundary line of his client's property, and which was held against the client, under claim of adverse possession, where his employment was wholly disconnected with this boundary line. Sanford v. Flint, 108 Minn. 399, 122 N. W. 315.

And where the relation of attorney and client existed between an attorney and the vendor of land, but not the vendee, and in the course of this relation the attorney gained knowledge of a title to the land adverse to the grantor, which he advised the grantee to purchase, and the latter refused to make the purchase, the attorney may make the purchase in his own behalf. Webber v. Wannemaker, 39 Colo. 425, 89 Pac. 780.

A. G. S.

Martyn, 2 Esq. 732, 5 Revised Rep. 770; Williams v. Williams, 3 Meriv. 157, 17 Revised Rep. 49; Yovatt v. Winyard, 1 Jac. & W. 394; Abernethy v. Hutchinson, 3 L. J. Ch. 209, 1 Hall & Tw. 28; Morison v. Moat, 9 Hare, 257, 20 L. J. Ch. N. S. 513, 15 Jur. 787; Tipping v. Clarke, 2 Hare, 383; Tuck v. Priestner, L. R. 19 Q. B. Div. 629, 56 L. J. Q. B. N. S. 553, 36 Week. Rep. 93, 52 J. P. 213; Helmore v. Smith, L. R. 35 Ch. Div. 449, 56 L. J. Ch. N. S. 145, 56 L. T. N. S. 72, 35 Week. Rep. 157; Pollard v. Photographic Co. L. R. 40 Ch. Div. 345, 58 L. J. Ch. N. S. 251, 60 L. T. N. S. 418, 37 Week. Rep. 266; Merryweather v. Moore [1892] 2 Ch. 518, 61 L. J. Ch. N. S. 505, 66 L. T. N. S. 719, 40 Week. Rep. 540; Lamb v. Evans [1893] 1 Ch. 218, 62 L. J. Ch. N. S. 404, 2 Reports, 189, 68 L. T. N. S. 131, 41 Week. Rep. 405; Robb v. Green [1895] 2 Q. B. 1; Louis v. Smellie, 73 L. T. N. S. 226; Kirchner v. Gruban [1909] 1 Ch. 413, 78 L. L. Ch. N. S. 117, 99 L. T. N. S. 932, 53 Sol. Jo. 151.

The court did right in declining to dismiss the suit, and in allowing the bondholders' committee to come in and prosecute it.

Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775; Pitts v. Holmes, 10 Cush. 92.

Mr. Charles S. Hill, for defendants:

Defendant Enwright having, as far as the evidence shows, no fiduciary relation to either the paper or the plaintiff, cannot be declared a constructive trustee simply by reason of his incidental employment, and nothing more.

The words "fiduciary relations" are not all-embracing.

Robins v. Hope, 57 Cal. 497; Pickler v. Pickler, 180 Ill. 168, 54 N. E. 311; Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. 159; Sandy River R. Co. v. Stubbs, 77 Me. 594, 2 Atl. 9; Loring v. Palmer, 118 U. S. 321, 30 L. ed. 211, 6 Sup. Ct. Rep. 1073; Fletcher v. Bartlett, 157 Mass. 113, 31 N. E. 760.

Loring, J., delivered the opinion of the court:

The question on which the decision in this case depends is this: In case a reporter on a newspaper, in the course or by reason of his employment, learns that the premises on which the business of publishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right, without his employer's knowledge, to take a lease of the premises and hold them as his own, to the injury of his employer's property?

The case comes before us on a report without the evidence. The statement in the report of the facts of the case is in one or more material points somewhat meager. 47 L.R.A.(N.S.)

The material facts stated in the report were in substance as follows: The defendant Enwright, hereinafter called the defendant, was a reporter on a daily newspaper published in Lynn, which was mortgaged to the plaintiff trust company to secure an issue of bonds the amount of which is not stated. The business of making up and printing the newspaper was carried on in two stories and in the basement of a building in Lynn, of which two stories and basement the Lynn Publishing Company (the mortgagor) was a tenant at will. The printing press of the Publishing Company was "situated in the basement, upon a foundation of concrete, imbedded in the earth underneath the building, and could not be removed from said basement and set up in some other place in less than two weeks' time, and at a very considerable expense. While the press was being taken down and being set up in another place, the paper could not be published unless it made arrangements for its printing from some other press, and it appeared in evidence that no press was in Lynn that could be used for that purpose in connection with the electrotyping plant of the company except after expensive alterations in the electrotyping plant." "Outside of its machinery, type, fixtures, and furniture, it depended for the value of its property on the good will of the business, and upon the ability to get out its paper daily."

On July 1, 1911, the Publishing Company defaulted on the mortgage interest. By the terms of the mortgage the mortgage trustee could not take possession until ninety days after the default. On Tuesday, October 3, 1911, the plaintiff trust company took possession and proceeded to take the necessary steps to foreclose its mortgage by a sale in accordance with its terms. The trust company continued the publication of the paper.

The defendant had been employed as a reporter by the mortgagor for a period not stated. He did not devote his whole time to the business, and was paid "at the rate of \$5 to \$7 a week for such services as he rendered in gathering and reporting news." When the plaintiff trust company took possession on October 3, 1911, it continued to employ the defendant as a reporter. And "about" that time the defendant applied to one Porter for a lease of the premises in which the business of publishing was conducted by his employer. Porter sold him that he was the lessor of the second story only, and that the International Trust Company was the lessor of the first floor and the basement. Porter refused to give the defendant a lease of the second story, the premises owned by him. Thereupon, on

October 4, 1911, the defendant applied to the agent of the trust company for a lease of the first floor and basement, telling the agent "that he represented parties who were going to take over the paper." "A few days later" a written lease from October 2d (October 1st being a Sunday) was delivered to the defendant for a term not stated, and on October 31st the defendant gave the plaintiff notice to quit on the following Friday, which was November 3d.

The findings already stated establish the peculiar value which these premises had to the defendant's employer or to anyone carrying on the employer's business of publishing this newspaper. And it is evident from the facts found by the judge who heard the case in the superior court that the defendant realized that. It is found that "during the summer after the interest had been defaulted, the defendant went to various bondholders and endeavored to buy their bonds," and that "he offered them 50 cents upon the dollar therefor," and that "after obtaining the lease he went to various bondholders and offered them 25 cents on the dollar" for the same bonds. It is further found that "he stated to various persons that the person who had secured the lease would be the winner in the long run, and asked some of these persons if they were going to the funeral, meaning the funeral of the paper published by the Publishing Company.

It is not found directly as a fact, but it is the fair inference to be drawn from the facts found, that the defendant learned in the course or by reason of his employment of the peculiar value which these premises had for his employer. It was found directly (in effect) that knowledge of the fact that his employer was in arrears in the payment of rent came to the defendant by reason of his employment. That fact, however, is a fact of secondary importance.

The doctrine invoked by the plaintiff in this suit had its origin in two decisions by Lord Eldon. In *Yovatt v. Winyard*, 1 Jac. & W. 394, the defendant (formerly employed as a clerk by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In *Abernethy v. Hutchinson*, 3 L. J. Ch. 209, the publication in the *Lancet* of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. The ground on which Lord Eldon went in this case was subsequently stated by Turner, V. C. in these words: "I will remember that upon the first argument

he refused to grant the injunction on the ground of copyright, Mr. Abernethy not being able to swear that the whole lecture was written; but that afterwards on a second argument he granted it on the ground of breach of confidence." See *Turner, V. C.*, in *Morison v. Moat*, 9 Hare, 241, 257, 20 L. J. Ch. N. S. 513, 15 Jur. 787.

Since then the doctrine has been applied in England in a number of cases. In *Morison v. Moat*, *supra*, the defendant was enjoined from using a secret formula for compounding a medicine which had been disclosed to him, in violation of a contract made with the originator of the formula. In *Tuck v. Priester*, L. R. 19 Q. B. Div. 629, 56 L. J. Q. B. N. S. 553, 36 Week. Rep. 93, 52 J. P. 213, the defendant, who had been employed by the plaintiff to print two thousand copies of a picture belonging to him, was enjoined from selling further copies of it which he had taken surreptitiously. In *Pollard v. Photographic Co. L. R. 40 Ch. Div. 345*, 58 L. J. Ch. N. S. 251, 60 L. T. N. S. 418, 37 Week. Rep. 266, a similar decision was made; in that case the defendant printed for his own use further likenesses of the plaintiff from a negative which he had made when photographing the plaintiff in the ordinary course of his business as a photographer. In *Helmores v. Smith*, L. R. 35 Ch. Div. 449, 56 L. J. Ch. N. S. 145, 56 L. T. N. S. 72, 35 Week Rep. 157, a clerk was committed for contempt on its being shown that he had taken a copy of the customers of a business conducted by a receiver appointed by the court, and that he had solicited their custom for a competing business which he had set up for himself. A similar decision as to the use of a list of the plaintiff's customers surreptitiously copied by a clerk was made in *Robb v. Green* [1895] 2 Q. B. 1. In *Merryweather v. Moore* [1892] 2 Ch. 518, 61 L. J. Ch. N. S. 505, 66 L. T. N. S. 719, 40 Week. Rep. 540, a clerk was enjoined from communicating to a subsequent employer the details of machinery manufactured by his former employer, the plaintiff; and in *Lamb v. Evans* [1893] 1 Ch. 218, 62 L. J. Ch. N. S. 404, 2 Reports, 189, 68 L. T. N. S. 131, 41 Week. Rep. 406, the defendants, who had been employed to secure advertisements for the plaintiff's Trades Directory, and who, by the terms of their employment, furnished at their own expense the blocks and materials necessary for producing the advertisements, were enjoined from using the blocks and materials so obtained in aid of a competing directory. For two other cases where the doctrine was applied, see *Tipping v. Clark*, 2 Hare, 382, 393, and *Kirchner v. Gruban* [1909] 1 Ch. 413, 422. In the latest of these cases, *Kirchner v. Gruban* [1909]

1 Ch. 413, 422, Eve, J., states the doctrine of these cases in these words: "I think it is abundantly clear upon the authority of *Robb v. Green* [1895] 2 Q. B. 315, 64 L. J. Q. B. N. S. 593, 14 Reports, 580, 73 L. T. N. S. 15, 44-Week. Rep. 25, 59 J. P. 695, that the real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person is that there is in the contract of service subsisting between the employer and employee an implied contract on the part of the employee that he will not, after the service is determined, use information which he has gained while the service has been subsisting, to the detriment of his former employer."

This doctrine was applied by this court in *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664. In that case the plaintiff, having invented a process of manufacturing gunny cloth from jute butts, had built a factory where gunny cloth had been so manufactured. The defendant Norfolk had been employed by him as an engineer in his factory, and had agreed not to disclose to others the construction of the machinery. On leaving the plaintiff's employ, Norfolk imparted the nature of the machinery to one Cook, who knew of Norfolk's agreement. Both were enjoined. The doctrine was recognized by this court in *Chadwick v. Covell*, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068, and *Covell v. Chadwick*, 153 Mass. 263, 25 Am. St. Rep. 625, 26 N. E. 856, which had to do with formulas for compounding medicines, and in the recent case of *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913 B, 509.

There are two cases, one in California and the other in Illinois, which have gone as far in the application of this doctrine as we are asked to go in the case at bar. In *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242, the defendant, a clerk employed by the plaintiffs, who were warehousemen, secured a lease of the warehouse in which the business was conducted, behind his employers' backs, by telling the owner of it that the "plaintiffs would probably give up the warehouse," and offering an advance of \$50 a month in the rent. The defendant then began soliciting custom for himself as the successor of his employers. On this becoming known, he was discharged by his employers, and was ordered by the court to assign the lease to the plaintiffs. In *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541, Davis, who was the defendant in the court below, was hired by Hamlin, the lessee of one of four important theaters in Chicago, as his business manager. A year and three

months before Hamlin's lease expired, Davis, behind Hamlin's back, secured for himself a lease (to begin on the expiration of Hamlin's lease) by giving \$4,500 more rent a year. It appeared in evidence that Hamlin had built up a good will in connection with his theater by ten year's occupancy. Davis was directed to hold the lease which he had secured as trustee for Hamlin.

The defendant has argued that he was not within this rule because the duty of securing a lease was not intrusted by his employer to him. The same contention was the main argument put forward in *Davis v. Hamlin* and was true of the clerk in *Gower v. Andrew*. The complaint against the defendant is that he has made use of information which has come to him in his employment to the detriment of his employer. In our opinion that is enough to entitle the employer to equitable relief.

We find nothing in the case cited by the defendant which calls for notice. There is one case not cited by the defendant which requires a word of explanation. We refer to *Clark v. Delano*, 205 Mass. 224, 29 L.R.A. (N.S.) 595, 91 N. E. 299. The facts found by the master in that case were as follows: The plaintiff had employed the defendant as one of several brokers to secure a loan of the money necessary to prevent the foreclosure of a mortgage on his (the plaintiff's) land. The defendant was employed before the end of May. A foreclosure sale of the land was advertised for June 26th. On June 18th the defendant learned from someone other than the plaintiff of the impending foreclosure sale. On June 18th or 19th he reported to the plaintiff that he had not been able to secure the loan. The plaintiff asked him to continue his efforts, to which the defendant made no answer, but the master found that the plaintiff was justified in believing that he intended to continue them. The plaintiff did not attend the foreclosure sale, relying on a statement by the mortgagee that he supposed that no one would attend, and that he, the mortgagee, would have to bid the property in, "in his own interest and that of the plaintiff." The defendant bought the property for himself at the foreclosure sale, having conceived the idea of doing so the day before the sale. It was held that he had a right to do so. Of this case it is to be remarked in the first place that the defendant (the broker) did not forestall his employer by buying behind his back, but bought at a foreclosure sale in no way brought about by him, at which he had to compete with the plaintiff (his former employer) on equal terms. And what is of more importance, the land had no peculiar value to the employer, as

the premises in question in the case at bar have to this plaintiff, and as the buildings in question in *Gower v. Andrew and Davis v. Hamlin* had to the plaintiffs in those cases. For these two reasons the defendant in *Clark v. Delano* was not taking advantage of information obtained in the course of his employment as to the peculiar value of the property to his employer by securing it for himself behind his employer's back, to his (the employer's) detriment.

The bill which was originally filed by the trustee named in the mortgage is now being prosecuted, by leave of court, in its name by the bondholders who bought in the property at the foreclosure sale. The foreclosure sale was had after the hearing in the superior court, but before the case was reported to this court. The defendant originally objected to this, but the objection has not been argued on the brief or at the bar and we treat it as waived.

The plaintiff is entitled to a decree directing the defendant to assign to the plaintiff the lease obtained by him on being paid the amount of the rent, if any, paid by him under it, and to its costs. See *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 206, 126 Am. St. Rep. 409, 84 N. E. 133. But the plaintiff is under no obligation to the defendant as to the rent due from the Lynn Publishing Company (the mortgagor) to the International Trust Company, and paid by the defendant to it.

A decree for the plaintiff on these terms must be settled in the Superior Court.

So ordered.

MICHIGAN SUPREME COURT.

THOMAS PELLOW et al., Trustees, Appts.,
v.

ARCTIC IRON COMPANY et al.

(164 Mich. 87, 128 N. W. 918.)

Joint tenant — conveyance by one — effect.

1. One of two cotenants cannot carve out a parcel of the estate and convey it by

Note. — Validity and effect of a deed by one cotenant, purporting to convey a parcel in severalty to a third person.

I. Validity and effect of conveyance, in general, as against cotenants of grantor.

a. Conveyance held void, 574.

b. Rule that deed will be given effect so far as not prejudicial, 574.

c. Conveyance held valid, 576.

d. Effect of cotenants' ratification, 577.

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warranty deed to a stranger, so as to vest the absolute title in him, or render him a cotenant with the nonconsenting co-owner in the parcel conveyed.

Same — warranty deed — protection of grantee.

2. The warranty deed of one cotenant, of a parcel of the common property by metes and bounds, is not void, but creates equities in the grantee which will be protected so far as possible without injury to his non-granting cotenant, and the remaining interest, if any, of the grantor, will be charged in a partition proceeding to make good the warranties contained in the deed.

Same — ratification by co-owner.

3. A nonconsenting cotenant may, by a course of dealing with the remaining property after an attempted grant of a parcel of the property by the other cotenant, effect a ratification of the grant so as to establish the rights of the grantee thereunder.

Same — acts constituting ratification.

4. Ratification by one of two cotenants of minerals underlying a tract of land, of an absolute grant by his cotenant of a parcel of the property, is effected by co-operating in leases of the minerals under the remaining property, and permitting the mines to be worked under them, and the resulting ore to be partitioned for a long series of years, until the equities of the grantees could no longer be protected in case he demanded partition of the parcels so granted.

Laches — grant by cotenant — proceeding to establish rights.

5. Persons taking an absolute grant from one cotenant of a parcel of the common property are not guilty of laches in failing to take steps to establish their rights against the nongranting cotenant, so long as his conduct indicates that he acquiesces in and ratifies the grant.

(Ostrander and Blair, JJ., dissent.)

(December 7, 1910.)

APPEAL by complainants from a decree of the Circuit Court for Marquette County in defendants' favor in a suit to quiet title to certain mineral rights. Reversed.

The facts are stated in the opinion.

II. Grantee as cotenant in whole estate, 577.

III. Grantee as cotenant in parcel conveyed, 577.

IV. Right of grantee, upon partition, to have parcel conveyed assigned to him, 578.

V. Estoppel of cotenants to dispute grantee's title, 580.

As to the effect of a conveyance by one cotenant to a third person to found adverse possession against the others, see note to *Lloyd v. Mills*, 32 L.R.A. (N.S.) 702.

Messrs. Ball & Ball, A. C. Dustin, and Horace Andrews for appellants.

Messrs. A. B. Eldredge and Moses Hooper, with Mr. S. W. Shaull for appellees.

Brooke, J., delivered the opinion of the court:

The decision in the court below contains the following language: "There seems to be force in the position of the defendants, that, because of the manner of dealing with the property herein involved by the complainants and their grantors for over forty years, these lots 1 to 13 should be treated now as separate and independent estates."

What the grantees of Harvey actually did was to enter into possession of the specific

parcels conveyed to them with full warranties of title by Harvey. They cultivated the lands, paid taxes upon them for upwards of forty years, conveyed rights of way to railroads crossing them, reserving title in themselves to all the minerals thereunder, and finally conveyed them with the same warranties as to title they had received from Harvey. These acts, so far from indicating an intention on the part of Harvey's grantees to acquiesce in a new cotenancy with Reynolds in the individual parcels, clearly show that they intended to buy from Harvey the whole title to the lands described, believed they had so purchased, and constantly asserted ownership to the whole thereof. Aside from the record testimony upon this point, the oral testi-

I. Validity and effect of conveyance, in general, as against cotenants of grantor.

a. Conveyance held void.

In some cases, as in *Griswold v. Johnson*, 5 Conn. 363, it has been said that a deed by one cotenant of a specific part of the common estate by metes and bounds, without any co-operation by the other cotenants, is void, and conveys no title whatever to the grantee.

And while this general statement is undoubtedly too broad, as such a conveyance is good, at least, by estoppel, as against the grantor (see 38 Cyc. 115), the Connecticut court further said, in *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667: "Deeds and other conveyances of such property [a specific part of a common estate by metes and bounds] are not merely inoperative against the rights of other tenants, when a partition is made, but they are, as remarked by Judge Hosmer, undoubtedly void, and the other cotenants may at all times so treat them."

And it has been expressly held that a conveyance made by one tenant in common, of a portion of the common estate by metes and bounds, is void as against a cotenant, and is not merely voidable by the latter, and valid until he gives notice to the grantor that he elects to avoid it. And the cotenant may entirely disregard such a conveyance, and proceed to occupy any portion of the estate as freely as before it was made, "because it can have no legal effect upon his rights." *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

And "it is also settled in New Hampshire that the conveyance by one tenant in common of a part of the land by metes and bounds is not valid as against the other tenant in common, unless his assent to it is manifested by some proper act." *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438.

So, it has been held that a deed by one tenant in common, purporting to convey a part of the common estate by metes and bounds, cannot be held good as against the

other tenant in common, for any portion of the land described, without a partition (*Great Falls Co. v. Worster*, 15 N. H. 412); and that, as one cotenant cannot convey a part of the common estate by metes and bounds to a stranger, if he attempts so to do, and his grantee takes possession, the latter acquires no seisin by entry under the deed (*Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22), and is liable to the other owners for the use and occupation of the premises (*Mattox v. Hightshue*, 39 Ind. 95).

And there are other cases to the effect that such a conveyance is inoperative and void as against the cotenants of the grantor. *Hartford & S. Ore. Co. v. Miller*, 41 Conn. 112, 30 Mor. Min. Rep. 353 (*obiter*); *Adam v. Briggs Iron Co.* 7 Cush. 361, 13 Mor. Min. Rep. 225 (*obiter*); *Richardson v. Miller*, 48 Miss. 311; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394, 17 Mor. Min. Rep. 301 (*obiter*).

b. Rule that deed will be given effect so far as not prejudicial.

On the other hand, while one cotenant cannot convey a distinct portion of the common estate by metes and bounds to the prejudice of his cotenants (*McKey v. Welch*, 22 Tex. 390; *Dorn v. Dunham*, 24 Tex. 366; *Worthington v. Staunton*, 16 W. Va. 208), the better rule seems to be that a deed made by one cotenant, which purports to convey a distinct parcel of the estate, being valid as against the grantor, is also valid as against his cotenants, in so far as not prejudicial in any way to their rights, and is merely voidable by them, rather than absolutely void as against them.

As said in *Soutter v. Porter*, 27 Me. 405, while a conveyance by a tenant in common of a portion of the common estate by metes and bounds cannot impair or vary the rights of a cotenant, "The law will give effect to that conveyance so far as it may do so consistently with a preservation of the entire rights of the cotenant, and no further. It may prove to be effectual to convey the title of the grantor to his gran-

mony of Caesar Charles, one of the original grantees of Harvey, and the only one whose testimony was taken, places the matter beyond dispute, and I think it is equally clear that neither Reynolds nor his grantees considered that a new cotenancy had been created by Harvey's deeds, for the record fails to show that during the entire period elapsing since those deeds were made, any effort had been made by any of the owners of the Reynolds interest to pay their just proportion of the taxes. These facts are adverted to, not as in any manner bearing upon the claim of complainants to title by adverse possession, which is untenable, but as indicating the acquiescence of Reynolds in the acts of Harvey. Again the learned trial judge says: "If Harvey had the right

to plat the property and sell what he owned, as it seems to me he had, this operated to segregate the property from the mass, without any act on the part of Reynolds." This statement of the law is quoted by my Brother Ostrander, and upon it he says decision may be safely rested. No authority is cited either by the learned trial judge nor by my Brother in support of this proposition.

By what right may a tenant in common carve out a parcel of the common estate and convey his interest therein to a stranger, thus creating a separate freehold and a new cotenancy between his grantee and his nongranting cotenant? I know of none. If Harvey could subdivide a small tract of the common estate into 6-acre lots, and by con-

tee, or it may not. That must depend upon a fact to be yet ascertained, whether the estate so conveyed by metes and bounds shall, upon partition of the premises, be assigned to the right of the grantor or his assignee. Upon so much of the estate as may be hereafter thus assigned, that conveyance embracing it may operate and convey the title of the grantor to the grantee. If no part should be thus assigned, it will prove to be wholly inoperative."

Thus, it has been held that a deed from one tenant in common of a distinct parcel of the common estate by metes and bounds can be avoided only by a cotenant, "and then only so far as necessary to enable him to procure an equitable partition." *Wells v. Heddenderg*, 11 Tex. Civ. App. 3, 30 S. W. 702.

The grantee has the same rights in respect to the possession and profits of the parcel as the grantor himself had, so long as the other cotenants do not choose to ask for a partition. *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438.

He is entitled, until partition, to the use and possession of the parcel conveyed, as cotenant with the other owners. *Stark v. Barrett*, 15 Cal. 361.

And where two cotenants have, by agreement, laid off the common estate into town lots, a grantee of a lot from one of the cotenants is entitled, as against the other cotenant, to enjoy with him the fruits of the undivided lot, to the extent of the grantor's interest. *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765.

But the grantee's right of possession is subject to the contingency of the loss of the premises, if, upon a partition of the whole estate, they should not be allotted to the grantor,—the conveyance being inoperative to impair any of the rights of the grantor's cotenants. *Stark v. Barrett*, supra; *Kenoye v. Brown*, 82 Miss. 607, 100 Am. St. Rep. 645, 35 So. 163.

But if, on a partition of the common estate, the part conveyed, or any portion thereof, falls to the title of the granting cotenant, to that extent, his grantee may

claim the title acquired on the partition. *Great Falls Co. v. Worster*, 15 N. H. 412.

As said in *Kenoye v. Brown*, supra, "the true principle to be deduced from the authorities is that, where one tenant in common makes a conveyance by specific metes and bounds of a part of the common estate, such deed is voidable in so far forth as it operates to the prejudice of his cotenants, at their election, but will convey the interest of the grantor in the parcels specifically conveyed, as against the grantor, and if, in the subsequent partition, the particular tract thus conveyed by metes and bounds should be assigned to the cotenant conveying, the title will inure, by virtue of the doctrine of estoppel, to his grantee."

And in *Ballou v. Hale*, supra, the court further said: "At the same time it is well settled that such a deed is not void or wholly inoperative, as respects the grantor; but will be effective to convey such land, if . . . there be a subsequent valid partition by which the land so granted is assigned to the share of the grantor."

And accordingly, while a conveyance by one joint tenant or tenant in common, of a part of the common estate by metes and bounds to a stranger, can have no legal effect to the prejudice of a cotenant, yet, such cotenant cannot object to the conveyance, after he has had his interest set off to him on a partition, and his share has been so assigned as not to include any part of what was conveyed by his cotenant. *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87.

But "the limitation is always strictly observed, that such deed shall not be permitted to operate to the prejudice of the cotenants of the grantor." *Kenoye v. Brown*, supra.

"As to them the well-settled rule is that they are not to be prejudiced by conveyances made by their cotenants to specific parcels, and that their titles remain unaffected thereby, the conveyances passing only such interest in the parcels conveyed as the cotenants could convey." *Broom v. Pearson*, 98 Tex. 469, 85 S. W. 790, 86 S.

veying his interest therein to third persons thus create independent cotenancies between each of his grantees and his own cotenant, it is entirely obvious that he might subdivide the entire 1,400-acre tract into lots, not of 6 acres, but of 1 acre, or even less, and by conveying each separate lot to a different individual, he could thus create 1,400 or more new cotenancies between his grantees and his cotenant. Simply to state such a proposition is to refute it, and yet, in principle, such a course would in no wise differ from the course he followed. Harvey's deeds warranted the title, not to his interest, but to the whole estate described therein. Those deeds, as between his grantees and Reynolds, were just as ineffectual to pass his interest in the specific

parcels described as they were to pass the entire title. To give them effect as conveyances of Harvey's interest in the parcels described, Reynolds' assent would be just as necessary as it would be to give them effect according to their tenor.

Defendants now say they are operative to convey the individual interest of Harvey. How did they become so? No act of Reynolds is pointed out as recognizing Harvey's right to convey his interest in these parcels by him carved out of the common estate, which cannot with equal force be urged as a ratification in fact of the entire transaction.

The bill of complaint alleges and the answer admits the cotenancy of Harvey and Reynolds in the minerals underlying the

W. 733, rehearing denied in 98 Tex. 476, 86 S. W. 733.

So, while a deed of a part of common property by metes and bounds, by one of several tenants in common, is voidable only by the other cotenants or some of them, and is valid against all other persons (Nichols v. Smith, 22 Pick. 316; Dall v. Brown, 5 Cush. 289; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515), "the general rule seems to be well settled, that one tenant in common cannot, as against his cotenants, convey a part of the property in severalty by metes and bounds . . . The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner as to compel his cotenants to take their shares in several distinct parcels, such as he may please." Great Falls Co. v. Worster, 15 N. H. 412.

That is, the grantee acquires no rights to the prejudice of any right of the cotenants of the grantor, but his rights, as against such cotenants, are precisely those pertaining to the grantor in the specific tract conveyed. He acquires all the interest of his grantor, which is a tenancy in common with the cotenants of the grantor in the tract conveyed; but the conveyance does not sever the specific tract from the whole estate, as against the cotenants, and the whole estate remains liable, in their favor, to a partition, as it would have been had a conveyance not been made, and the grantee's interest is therefore subject to the contingency of the loss of it, if, on a partition of the whole estate, the specific tract is allotted to one of the cotenants of the grantor. Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139.

And accordingly, a conveyance by one tenant in common, of a specific part of the common estate by metes and bounds, is void as against a cotenant of the grantor, to whom the part conveyed has been assigned upon a subsequent partition. Jewett v. Stockton, 3 Yerg. 492, 24 Am. Dec. 594.

And a deed from one cotenant, which purports to convey a defined and designated portion of the tract of land held in com-

mon, is inoperative and void as against cotenants of the grantor, who would be prejudiced thereby. Good v. Coombs, 28 Tex. 34.

Thus, a deed by one cotenant of a farm, purporting to convey the timber on a certain portion of the farm, described by metes and bounds, is inoperative as to the cotenants of the grantor. Lee v. Follenaby, 83 Vt. 35, 138 Am. St. Rep. 1061, 74 Atl. 327.

And a lease by one tenant in common of a distinct portion of the common estate by metes and bounds is inoperative as against his cotenant. Shepardson v. Rowland, 26 Wis. 108.

While the grantee under a conveyance by one tenant in common of a specific portion of the common estate may occupy the position of the grantor, and the conveyance may be valid as against the grantor, at least, by way of estoppel, this is not so when the conveyance is prejudicial to the rights of the cotenants, but, in such case, the conveyance is void in so far as it is thus prejudicial. Fredrick v. Fredrick, 219 Ill. 568, 76 N. W. 856.

And a grantee from one tenant in common, of a specific part of the common estate by metes and bounds, has not a good title to such part for the purpose of a sale by him, where the cotenant of his grantor has never acquiesced in or authorized the conveyance, or accepted the remainder of the property as his interest therein, and it is not shown that such conveyance is not to the prejudice of the cotenant. Talkin v. Anderson, — Tex. —, 19 S. W. 350.

c. Conveyance held valid.

In Missouri it has been held, overruling prior *obiter* statements to the contrary in Primm v. Walker, 38 Mo. 94, that, as the statute concerning partitions provides for a sale of the land and division of the proceeds, if partition in kind would prejudice the rights of the parties, the reason for the rule that a conveyance by one tenant

entire 1,400-acre tract. The southeast quarter of section 6, from which Harvey sold, by metes and bounds, the three 6-acre parcels here in question, lies in the heart of this tract, wholly surrounded by other lands held in common. This situation is wholly at variance with the facts in *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218, upon which defendant relies, and which was followed in the lower court. There the court said: "The lots in question in these actions of ejectment all belong to the governor and judges plat of the city of Detroit, and are separate freeholds." There the subdivision was an ancient one with the making of which none of the parties had anything to do. It is not to be questioned that cotenants, acting in concert, may subdivide a

portion of the common estate, and thus create separate freeholds, an interest in any one of which might be sold. See authorities cited in *Butler v. Roys*, supra; but this is no authority for saying that one of two cotenants may alone accomplish such a severance.

A cotenant may sell and convey the whole or any aliquot part of his undivided interest in the whole property, but he cannot, without the consent of the other, convey an undivided interest in any specific parcel of the common holding, nor can he, without such consent or subsequent ratification by his cotenant, convey by metes and bounds a specific parcel of the common estate, and thus sever it so as to bind the nongranting cotenant. *Freeman, Coten-*

in common of a part of the common estate by metes and bounds is void as to a non-consenting cotenant does not exist, and that, in that state, such a conveyance is valid, not only as to the grantor, but as to his cotenants. *Barnhart v. Campbell*, 50 Mo. 597.

And in *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463, although the question was as to the sufficiency of the conveyance as a foundation for constructive adverse possession, the court said that the rule that a conveyance by a tenant in common of a specific part of the common property to a stranger can have no legal effect, or operate to the prejudice of a cotenant, has no application to a conveyance which does not attempt to carve out a specific parcel from a larger tract, but conveys one of two separate and distinct parcels into which the common property has already been divided.

d. Effect of cotenants' ratification.

Although a deed from one cotenant, of a specific portion of the common estate, by metes and bounds, is voidable by the cotenants of the grantor, in so far as it is prejudicial to their rights, their subsequent release to him of all their title in the premises conveyed operates as a confirmation of the grantee's title. *Johnson v. Stevens*, 7 Cush. 431.

"Such deed will become operative and pass to the purchaser of such lands by metes and bounds if the other tenants in common before partition confirm and ratify it" (*Worthington v. Staunton*, 16 W. Va. 208), and it "will be effective to convey such land if the cotenants shall afterward, by release or other proper act, assent" (*Bal-lou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438); and "if the cotenants then or subsequently, by a suitable conveyance, confirm the grant, the grantee still holding under his deed, it becomes, in effect, operative and binding upon all concerned" (*Hartford & S. Ore. Co. v. Miller*, 41 Conn. 112, 3 Mor. Min. Rep. 353).

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II. Grantee as cotenant in whole estate.

A deed by one tenant in common of a part of the common estate by metes and bounds cannot, as against his cotenants, operate to convey to the grantee such a proportion of the whole estate as the specific part bears to the whole. It cannot be extended so as to include lands not described. *Great Falls Co. v. Worster*, 15 N. H. 412.

And in no event can such a deed operate contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. *Soutter v. Porter*, 27 Me. 405.

III. Grantee as cotenant in parcel conveyed.

One tenant in common of land cannot, by his own deed, and without the co-operation of his cotenants, select and dispose of his own several interest in the common property, as a distinct parcel, by metes and bounds; and if he attempts so to do, even though the distinct parcel conveyed is equal in value to his undivided interest in the whole tract, the interests of his cotenants in the parcel remain the same as before, and his grantee takes only his undivided interest in that parcel. *Warthen v. Siefert*, 139 Ind. 233, 38 N. E. 464; *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 63.

But the grantee does not become a cotenant in the parcel conveyed, with the cotenants of the grantor, so as to give him an absolute right to sue for a partition of that parcel. *Bogges v. Meredith*, 16 W. Va. 1.

Nor can the cotenants of the grantor in a deed purporting to convey a distinct parcel of the common estate enforce partition of such parcel against the grantee, leaving the remainder of the common estate unpartitioned, for, while it is well settled that a deed of a portion of a common estate by metes and bounds, even where the estate in common is composed of separate parcels, may be treated as void by the other co-

ancy, § 199; Tiffany, Real Prop. § 170; Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22; De Witt v. Harvey, 4 Gray, 486; Adam v. Briggs Iron Co. 7 Cush. 361, 13 Mor. Min. Rep. 225; Staniford v. Fullerton, 18 Me. 229; White v. Sayre, 2 Ohio, 110. But where one cotenant assumes to convey in fee, by metes and bounds, a parcel of the common estate, as Harvey did in the case at bar, his deed is not void, but it creates equities in his grantee which will be protected and enforced so far as is possible without injury to the nongranting cotenant.

Mr. Justice Montgomery speaking for the majority of the court in *Mee v. Benedict*, 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175, said: "But it

seems to me the more correct way to state the result of the authorities is that such a conveyance is good as between the parties to it, but that it is not to be permitted to affect injuriously the rights of the cotenants. This results in nothing more than that, on partition, the cotenant should be entitled to partition precisely as though no conveyance had been made. But it seems to me a manifest perversion of justice to say that, because the law declares that the cotenant may not have his rights injuriously affected by such a conveyance, he may profit by the fact that he is a cotenant, and that circumstance shall enable him to defeat the right vested in the grantees of his cotenant."

Freeman on Cotenancy, § 199, says: "Al-

tenants, they cannot, without recognizing the full validity of the deed as an operative conveyance, recognize it to the limited extent of conveying the interest of the grantor in the parcel therein described, and thus treat the grantee as their cotenant in this parcel only. The grantee "has a legal right that the tenants in common shall recognize the deed as valid which purported to convey to him by metes and bounds a parcel of the common estate, or that they should treat it as invalid and deal only with his grantor." The grantee has the right that the whole share of his grantor in the common estate be considered in any partition, and that he should not be required to limit himself to the grantor's proportion of the tract which he has assumed to convey in severalty. And "while partition is to be made with reference to the rights of cotenants, there is no reason why, these being regarded, it should not be made so as to protect those who may be protected and benefited incidentally." If, as a result of a partition between the other cotenants and the grantor, the parcel of land conveyed should be assigned to the grantor, then the conveyance might operate by way of estoppel against him, and the grantee is entitled to the chance that such a partition may be made, and that he may thus be invested with a title. *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470, 24 N. E. 783.

But in Ohio, while one cotenant cannot work a division of the common estate by conveying, as his share, a specific part of the common property by metes and bounds, it has been held that, even against the cotenants of the grantor, a deed purporting so to convey a distinct parcel vests in the grantee the proportional undivided interest of the grantor in that parcel. *White v. Sayre*, 2 Ohio, 110; *Prentiss' Case*, 7 Ohio pt. 2, p. 129, 30 Am. Dec. 203; *Dennison v. Foster*, 9 Ohio, 128, 34 Am. Dec. 429.

And the grantee may maintain ejectment against the cotenants of the grantor, if they keep him out of possession. *White v. Sayre*, supra.

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IV. Right of grantee, upon partition, to have parcel conveyed assigned to him.

As one cotenant has no right, on partition, to select any particular portion of the land, and insist on having his part set off in that specific portion, so he cannot convey such a right to his grantee. *McKey v. Welch*, 22 Tex. 390.

And notwithstanding an attempted conveyance by one cotenant of a specific portion of the common estate by metes and bounds, the other cotenants may have the portion sought to be conveyed set apart to them in a partition. *Dorn v. Dunham*, 24 Tex. 366.

As said in *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667: "It is well settled that one tenant in common can neither sell nor encumber any part of the estate by metes and bounds, so as to prevent such a division or distribution as would give the other tenants in common an unencumbered title to the part thus sold or encumbered."

But "while a cotenant has no power to divest the title of his co-owners by selling a specific part of the common property, yet it is well established that a court of equity will protect such a purchaser, if this can be done without injury to the other owners, by setting apart to the vendee of the cotenant the particular tract bought." *Furrr v. Winston*, 66 Tex. 521, 1 S. W. 527.

While a deed by one cotenant, of a specific part of the common estate, is not good as a conveyance of a legal estate therein as against the cotenants of the grantor, it should be regarded as conveying the equitable interest of the grantor, and equity, in decreeing partition, will have regard not merely to the legal rights of the original tenants in common, but to the equitable rights of one to whom such equitable interest has been conveyed. *Hunt v. Crowell*, 2 Edm. Sel. Cas. 385.

And accordingly, while a deed from one cotenant, of a specific portion of the common estate, by metes and bounds, will not

though the deed does not impair the rights of the other cotenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee. The latter acquires rights which the cotenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest in the property."

Again at § 205, the same author says: "But while no such grantee has an absolute legal right to have the part granted to him set off to him or his grantor upon partition, yet he has rights which will receive the consideration of the Court, and will be respect-

ed as far as they can be without prejudice to the rights of the other part owners. The court, wherever the interests of the other owners will not be impaired thereby, will set off to grantees of specified parcels the tracts included within their respective deeds."

If Reynolds had instituted proceedings for partition of the common estate after Harvey had conveyed the several parcels in dispute, Harvey's grantees in those conveyances would have been necessary parties, and the equities created by their deeds would have been worked out and protected. See authorities cited in *Mee v. Benedict*, supra. In such a proceeding, Harvey's interest in the balance of the cotenancy, or so much thereof as might be necessary,

be suffered to prejudice the rights of other cotenants, it will be respected so far as it can, consistently with the rights of the others; and a court of equity, upon partition of the common estate, will set apart to the grantee, as, or on account of, his grantor's share, the particular tract conveyed to him, if this can be done without prejudice to the cotenants of the grantor (*Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Young v. Edwards*, 33 S. C. 404, 10 L.R.A. 55, 26 Am. St. Rep. 689, 11 S. E. 1066; *Camoron v. Thurmond*, 56 Tex. 22; *Beale v. Johnson*, 45 Tex. Civ. App. 119, 99 S. W. 1045; *Hitt v. Caney Fork Gulf Coal Co.* 124 Tenn. 334, 139 S. W. 693; *Boggeas v. Meredith*, 16 W. Va. 1; *Worthington v. Staunton*, 16 W. Va. 208),—as where all the land is of like quality and value, and the grantor owns enough to make good to the grantee upon his warranty in the deed, the full amount conveyed (*Beale v. Johnson*, supra); or where the common estate consists of 2,160 acres of land in one body, and the part sold consists of 6 acres thereof, and the interest held by the grantor in the common estate far exceeds in value the interest of his cotenants in the part sold by him (*Furrh v. Winston*, supra); though if it should be necessary, in order to protect their interests, the deed will be disregarded, and a portion or all of the lot described therein may be assigned to the other cotenants (*Young v. Edwards*, supra); for, while "it is well established that under certain circumstances equity will set off to the vendee of a tenant in common the particular part of the whole conveyed to him," this will not be done to the prejudice of the rights of other cotenants or of their grantees; and, as against cotenants and their grantees, a deed by one cotenant, of a distinct parcel, is effective to the extent of the grantor's interest in the parcel conveyed only (*Hawkins v. Hobson*, 57 Tex. Civ. App. 118, 123 S. W. 183).

And the grantee in such a conveyance has no right to call in question, or interfere with, a legal partition which has been made 47 L.R.A. (N.S.)

of the common estate, or to claim any of the land described in the decree, which has been allotted to the cotenants of his grantor. *Richardson v. Miller*, 48 Miss. 311.

Nor has the grantee from one cotenant, of a distinct parcel of a common estate, any right to complain of the setting apart of this parcel to the cotenants of his grantor, upon a partition, if this was necessary to do justice to them in making the division. The cotenants have the right to have the land divided without regard to the rights of the grantee of a distinct parcel of the common estate from one tenant in common, to the extent that such disregard may be necessary to give them their full share in the land in the partition, and to that extent the conveyance of such distinct parcel is voidable, though it is not necessarily void, and should be respected so far as can be practically done, consistently with the rights of the cotenants in making the partition, by setting apart to the grantor the part of the land conveyed, so that the grantee may remain in possession, and his deed mature into a good title by estoppel against his grantor. *Arnold v. Cauble*, 49 Tex. 527.

In *McNeil v. McDougall*, 28 N. S. 296, it is held that where one tenant in common has conveyed by metes and bounds a parcel of the common estate, and the grantee has made improvements upon such parcel, a court of equity, in an action by a cotenant of the grantor for partition, will set off to the grantor, if it may be done without detriment to the interests of the cotenants, a portion of the whole estate which will include the parcel conveyed by him.

And in *Rosborough v. Cook*, — Tex. Civ. App. —, 148 S. W. 1120, although the case turned upon the adverse possession of the grantee, the court said that she "had the right to intervene in the partition proceedings, and to ask to have the property which had been conveyed to her set apart to one or both of her grantors in the general distribution; and this should have been done if it would not have operated to the prejudice of the other co-owners."

would be charged to make good the warranties contained in his deeds of the several parcels here in dispute:

Mr. Justice Hooker, in his opinion in *Mee v. Benedict*, supra, uses the following language: "But while the conveyance of a portion by one tenant in common may be disregarded by his cotenant, if such cotenant or any other person shall, with notice of the grantee's interest, choose to unite the different titles by purchasing the remaining interest of the grantor, he may be held to assent thereby to such conveyance by recognizing the right of the grantor to deed in parcels, and he will take the title of the grantor subject to the rights of the prior grantee, which equity may compel him to recognize and satisfy. While a tenant in common may insist upon his own, he will not be permitted, in such a case, to collude with his cotenant, or profit by his fraud,"—citing cases. See also *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133, and cases cited, where Mr. Justice Christiancy said: "On the other hand, the lands held by the same tenancy may be so situated, or the amount of them so great, that in many cases the interest of the cotenants would not be prejudiced, on partition, by giving full effect to such conveyance. And this might sometimes happen in the case of a single tract only, especially of a large one, or so situated as to admit of a perfectly fair partition into such parts as might

be required to give effect to the deed. And whenever, upon a fair partition, that part of the property in which an interest had been conveyed should be set off to the party selling or to his grantee, the other cotenants receiving their full share in as advantageous a form as if the conveyance had not been made, the whole ground of objection to the conveyance would seem to fail."

In *Worthington v. Stanton*, 16 W. Va. 209, the court says: "Such deed will become operative and pass to the purchaser of such lands by metes and bounds, if the other tenants in common before partition confirm and ratify it; and after partition if that portion is allotted to the purchaser; and in either case said deed will be binding on both the grantor and grantee."

Particular attention is directed to the case of *Young v. Edwards*, 33 S. C. 404, 10 L.R.A. 55, 26 Am. St. Rep. 689, 11 S. E. 1066, where, as here, the nongranting cotenant claimed that the deed of his cotenant in fee conveyed, at most, the interest of the grantor in the parcel particularly described. This claim was denied by the court, and it was decreed that inasmuch as the parcel deeded in severalty by one of the owners could be set off to the grantee of such owner without prejudice to the other owners, that course should be followed.

In *Cook v. International & G. N. R. Co.* 3 Tex. Civ. App. 125, 22 S. W. 1012, one of four cotenants conveyed in fee a right of

V. Estoppel of cotenants to dispute grantee's title.

As a deed from one tenant in common for a portion of the common estate by metes and bounds will convey an equity which the grantee has the right to assert in a suit for partition, giving him the right to have the land conveyed set apart to him, if it can be done without prejudice to the other tenants in common,—if the latter, after such a conveyance, proceed to partition the remainder of the estate, exclusive of the land conveyed, without making the grantee a party to the partition, thus cutting themselves off from the right to have any other partition with him such as would recognize his right to have the land sold set apart to him, such proceedings are equivalent to a recognition of the grantee's right to hold such land. *Cook v. International & G. N. R. Co.* 3 Tex. Civ. App. 125, 22 S. W. 1012.

And the cotenant of the grantor of a part of a common estate by metes and bounds is estopped to set up his title to any interest in such part, where he has stood by for over forty years without objection to the conveyance, which was duly recorded, and has seen the grantee, his heirs and assigns, pay taxes on the property, transfer it to purchasers, and exercise acts of dominion over it, without asserting any title to the property himself; and where, more than

thirty years after the conveyance, he entered into a written stipulation with the heirs and assigns of his cotenant, the grantor, to partition the common estate, and in the stipulation agreed that the land sold by the grantor should be deducted and not included in the partition, and ten years have elapsed since the judicial confirmation of the partition proceedings, during which time both he and the heirs of his cotenant have sold and conveyed to innocent purchasers the land allotted to each of them, so that another partition of the land would be wholly impracticable. *Currens v. Lauderdale*, 118 Tenn. 496, 101 S. W. 431.

Where the proprietors of certain lands owned by them in common effected a parcel division thereof by dividing the lands into lots, and entering upon their records the result of a distribution of the respective lots among the several proprietors at auction; and one of the proprietors, before the execution of the deed of division by them, conveying the several lots, according to the records, to the several individual proprietors, conveyed a portion of the lot assigned to him to a stranger by warranty deed, and fled from the country, after which another of the proprietors took the remainder of this lot on an execution against the first proprietor, the deed of the latter is confirmed and established by the proprietors, under such circumstances, by their subse-

way across the common estate, to the railroad company. After this deed was made, the four cotenants divided the balance of the estate equally. Thereafter, the three nongranting cotenants brought suit against the railroad to recover their interest in the right of way. Their right to recover was denied by the court, which, after adverting to the fact that the cotenants had partitioned the balance of the common estate among themselves without making the railroad a party, said: "Such proceedings were equivalent to a recognition of the right of the defendant to have the land set apart to it, because all of the rest of the land was appropriated by plaintiffs, and the defendant could not have a proportional part of the land set apart to it elsewhere in the tract, if it should appear inequitable for it to retain the identical tract conveyed to it by the plaintiffs' cotenant." See also *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470, 24 N. E. 783, and *Soutter v. Porter*, 27 Me. 405.

We have seen that the nongranting cotenant may not disregard the deed of his granting cotenant and treat it as a nullity. While such deed cannot be permitted to operate to his prejudice, nevertheless it imposes upon him an obligation to do no act which would impair the equities created by his cotenant by the execution of the deed. If dissatisfied with the act of his cotenant, he can at once commence proceedings in

partition, making the individual grantees of his cotenant parties thereto. In such proceeding, his rights will be fully protected and the rights of the individual grantees will not suffer, if they can be preserved without injury to the interest of the nongranting cotenant. This right of the nongranting cotenant is clear, while the right of the grantee of a specific parcel to demand partition of the entire estate is, at least, doubtful. See *Campau v. Godfrey and Mee v. Benedict*, supra. The nongranting cotenant may, of course, give formal assent to the unwarranted act of his granting cotenant, in which event the individual grantees take exactly what the deed purports to convey. Or he may, by a course of dealing with the balance of the common estate, in which he totally disregards the equitable rights created by his cotenant's deed, be held to have so acted in recognition and ratification thereof. This ratification, if clearly made out, would and ought to have the same effect as a formal assent.

My Brother Ostrander holds that ratification has not been made out. To this I cannot assent. Harvey's deeds to complainants' grantors were made and recorded in 1867 and 1869, and the grantees therein named immediately went into possession thereunder. The title to the balance of the common estate appears to have remained in Harvey and Reynolds until about February 1, 1871. On that day, by separate in-

quent execution of the deed of division, conveying the lot set off to the first proprietor, on the record, to the second proprietor, who took the part thereof on execution,—their intention to confirm the former's deed of the part to the stranger being made further manifest by the fact that the proprietor receiving the conveyance never made any claim to the part of the lot covered by such deed. *Dall v. Brown*, 5 Cush. 289.

And if, after one of two tenants in common has conveyed a specific part of the common estate, as his share thereof, the other acquiesces and accepts the remainder of the property as his share, by conveying that specifically, the two conveyances will operate as a complete and binding partition. *Eaton v. Tallmadge*, 24 Wis. 217.

But the fact that cotenants of the grantor have not objected cannot show that the conveyance was not to their prejudice, or that they have assented. They were not bound to assert their title by an objection to an unlawful conveyance. *Great Falls Co. v. Worster*, 15 N. H. 412.

And where two of three tenants in common have sold specific portions of the common estate by metes and bounds, an action brought by the third cotenant to recover the entire estate, in which action he may recover the whole or any part thereof, according to his proof of title, legal or equitable, cannot be construed either as a

repudiation or as an affirmation of what has been done by his cotenants. *Zimpelman v. Power*, 38 Tex. Civ. App. 263, 85 S. W. 69.

And where one of two tenants in common of a ranch, in consideration of the boring of an artesian well thereon, has conveyed to a third person a specific tract in the ranch, the grantor's cotenant is not estopped from claiming his undivided interest in the parcel conveyed, in an action of ejectment against the grantee, by the facts that he was present when the well was being bored, and knew that his cotenant had agreed to convey the land in consideration of the boring of it; that at the time of a partition between himself and his cotenant, by which the specific tract conveyed to the third person fell into the portion assigned to him, he knew that his cotenant had conveyed the land to the third person for boring the well; and that he further knew that the grantee was occupying the land and had made valuable improvements upon it, and made no objections to the agreement, or the deed, or to the well or the boring of it, and gave the grantee no notice of any objection to the agreement, or the well, or deed,—all such facts being consistent with a cotenancy between the grantee and the grantor's cotenant in the parcel conveyed. *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 63.

A. C. W.

struments, Harvey and Reynolds leased the mineral rights in a very large proportion of the balance of the cotenancy to one Edward Breitung for a long term of years, upon royalty. These leases refer to each other and in effect amount to a joint conveyance. They affect only the mineral estate, title to which was common in the grantors, and under them millions of tons of ore have been removed and the royalty thereon paid to either Harvey or Reynolds, or their respective successors in title. This amounted in fact to a partition of the common (mineral) estate to the extent said estate was reduced by the removal of ore. In joining in this lease, Reynolds acted with constructive notice, and, in my opinion, actual knowledge, of Harvey's deeds of the parcels here in dispute. Harvey's grantees were in possession, which possession put all parties in interest upon inquiry. *Edwards v. McKernan*, 55 Mich. 520, 22 N. W. 20. See also *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; *Campau v. Barnard*, 25 Mich. 381; *Tharp v. Allen*, 46 Mich. 389, 9 N. W. 443.

He likewise had knowledge of the infirmity of a conveyance by one of two cotenants, as is indicated by the letter written by his son and attorney in fact, William C. Reynolds, in his interest, to Edward Breitung during the negotiations for the lease. Harvey had already executed a lease to Breitung, covering his interest in the minerals underlying the common estate. Reynolds writes: "Your present lease from Harvey is, of course, not worth anything, standing by itself, because a tenant in common cannot thus dispose of his interest in a specific part of the common property. This rule of law is well settled. But if father and Harvey join, it would make you secure." This letter is dated December 13, 1870, more than three years after the first of Harvey's deeds to complainants' grantors had been recorded.

In 1870 or 1871 Reynolds, desiring to partition the estate held by himself and Harvey, had two courses open to him. He might give his assent to Harvey's conveyances, or he might resort to the court for a partition, making Harvey's grantees parties to his proceeding. He chose the former alternative, and there appears to have been every reason why he should do so. In the first place, he had no interest in the surface of the lands conveyed by Harvey. Secondly, the record clearly establishes the fact that the mineral deposit was not supposed to underlie those parcels; and lastly, by ratifying Harvey's deeds and surrendering his rights (then supposed to be valueless) in the minerals underlying those

lands, he placed himself in a position to deal with the remainder of the common estate, known to be of great value, unhampered by the necessity of determining the nature and extent of the equitable rights created therein by the warranties in Harvey's deeds.

It is clearly established, upon the record, that if Reynolds had chosen to repudiate Harvey's deeds and demand partition of the common estate, the interests of Harvey's grantees would have been fully protected, for his interest in the balance of the cotenancy was many times greater than Reynolds' interest in the small parcels conveyed by him to complainants' grantors. There is no doubt that in such a proceeding, taking into consideration the large area of the common holding, the parcels conveyed by Harvey would have been set off to his grantees according to the description contained in his deeds. The mere fact that it was difficult or even impossible to partition the mineral estate by metes and bounds with absolute equity in no wise changed or lessened the legal obligation resting upon Reynolds to recognize, and, so far as was possible without injury to himself, protect, the equities created by the deeds of his cotenant.

The acts of Reynolds and Harvey and their several successors in the title which accomplished the removal of the ore, and partition *pro tanto* of the common estate, were matters of record of which Harvey's individual grantees had constructive notice. They must likewise have had actual notice or the diminution of the estate, for many mines were opened and enormous quantities of ore removed therefrom in their immediate vicinity. Inasmuch as these acts were inconsistent with a repudiation by Reynolds of Harvey's deeds, complainants' grantors doubtless believed, and they were justified in believing, that Reynolds had ratified the grants made by Harvey to them and was acting in recognition thereof. This disposes of the question of laches. Reynolds could, by his acts, perfect the title of Harvey's grantees. If he did so, no action on the part of the complainants or their grantors was necessary until a claim was set up by Reynolds' grantees to an interest in their lands.

The defendants together hold a very large part of the interest of both Reynolds and Harvey in the common estate, as it stood after Harvey's deeds to complainants' grantors, less, of course, the ore removed. The defendant, the Arctic Iron Company, acquired title to Reynolds' mineral interest in a part of the lands here in question, by quitclaim deed from Edward Breitung, in 1883. Breitung and one William P. Healy

had, in 1882, jointly purchased from Reynolds his interest in a large tract, including the parcels here in dispute. Instead of deeding to Healy his half of the interest so purchased, the defendant, the Arctic Iron Company, was organized, and the stock divided equally between Breitung and Healy. The grantee in a quitclaim deed is not a bona fide purchaser, and takes no more interest than his grantor has to convey. *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209, and cases cited. Healy was sworn and testified that, at the time of the purchase in 1872, he knew from an examination of the title, of the Harvey deeds and their warranties. At that time, Edward Breitung had, by various conveyances, become the owner of the entire interest of Harvey in a large part of the common estate. This interest he had acquired long after the making and recording of Harvey's individual deeds, and with constructive notice and probably actual knowledge of the warranties therein contained.

Defendants Mary Kaufman and Edward N. Breitung are respectively widow and sole heir of Edward Breitung, deceased, and are now the owners of his interests by inheritance. They set up a claim to one half of the minerals underlying that portion of the lands in dispute, not deeded by quitclaim by Edward Breitung to the Arctic Iron Company. The position of these defendants is no stronger than that of their ancestor, and if he could not assert such a claim, they will not be permitted to do so. Quite aside from the legal considerations involved, which are conclusive against the contention of the defendants, I am of opinion that, inasmuch as, by the acts of defendants' grantors, a partition in which the equitable rights of complainants can be protected has now become impossible, it would be grossly inequitable to permit them to take advantage of those acts and maintain the claims now asserted by them.

The decree of the court below should be reversed, and a decree entered in this court in accordance with the prayer of complainants, with costs of both courts.

Bird, Ch. J., and Hooker, Moore, and McAlvay, JJ., concurred with Brooke, J.

Ostrander, J., dissenting:

On February 26, 1857, James L. Reynolds, who was owner in fee simple of a large tract of land, sold and conveyed a portion thereof, situated on sections 1, 2, 3, 4, 5, 6, 7, and 8, in township 47 north, of range 26 west, on sections 31 and 32 in township 48 north, of range 26 west, and on section 6, township 47 north, of range 25 47 I.R.A. (N.S.)

west, to Charles T. Harvey. His deed of the said lands recited: "Which lands are sold with full warranty, subject, however, to the conditions and agreements of the contract marked 'A' herewith appended between the parties hereto concerning the undiscovered minerals on said lands."

The contract A referred to reads as follows:

This memorandum of agreement, made this 26th day of February, by and between James L. Reynolds, of Chicago, state of Illinois, of the first part, and Charles T. Harvey, of Marquette county, state of Michigan, of the second part, witnesseth:

That the party of the first part has this day conveyed by warranty deed (to which this contract is attached), to the party of the second part, certain lands therein described, amounting to four thousand one hundred and sixty-two $\frac{46}{100}$ acres, for the consideration of the sum therein named, and also in the further consideration of reserving to himself an undivided half interest in and to all the minerals which have been or may be discovered on the premises referred to as conveyed, together with the right of having or acquiring so much of the surface privileges as may be necessary to mine or develop the same, by paying one half of the equitable or appraised valuation per acre, for the surface thus used or acquired: Provided not more than \$12 per acre shall be adjudged to be the value of unimproved lands taken for such mining purposes, besides which, however, full compensation shall be paid to the party of the second part or his assigns for damages, which may by such mining or occupancy ensue to the business connected with or improvements placed upon such land, by the party of the second part or his assigns, such payment to be made by the party of the first part on an equitable, agreed value, or upon an appraised valuation made by disinterested referees, one designated by each party (hereto) and they choosing a third, and the decision of the three thus chosen to be final, and when such payment is made, he of the first part shall be entitled to enter upon and occupy any portion of said lands for mining purposes as aforesaid solely. Provided, and it is agreed, however, that the party of the second part, or his assigns, shall have the sole right, free of cost or compensation to the party of the first part, to mine for their own use or for manufacturing purposes within the present limits of Marquette county, any mineral ores or marble found on any of the premises herein referred to, but shall have no right to sell to other parties for exportation as aforesaid without accounting to the party

of the first part for his joint half interest therein.

In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

Charles T. Harvey.
Jas. L. Reynolds.

The deed and the contract were duly recorded in the office of the register of deeds for Marquette county in July, 1857. In February, 1871, a further instrument was executed by these parties, in explanation of the contract A, but in no way changing the provisions which are of importance here. It was duly acknowledged and was recorded March 4, 1871.

After receiving his deed, and in April, 1857, Harvey conveyed more than 2,600 acres of this land to one grantee and in the succeeding year conveyed another and smaller portion to the same grantee, subject to the reserved rights of Reynolds in the minerals. He also platted some of the land on section 6, township 47 north, of range 26 west, but without recording any plat, into parcels known as lots 1 to 13, inclusive. They were each 10 rods wide, bounded on the north by the quarter line through center of the section, and were not all of the same length. In April, 1866, he conveyed by warranty deed to Edward Breitung lots 10 and 12 and other lands. Later, Breitung and wife, by quitclaim deed, reconveyed all claim under the warranty as against the reserved rights of Reynolds, "inadvertently omitted to be mentioned" in the deeds of warranty. In January, 1867, Harvey sold and conveyed, by metes and bounds, for an actual and expressed consideration of \$100 each, to three grantees, three of these lots, viz., lots 8, 9, and 11. He executed to the purchasers, respectively, warranty deeds containing no reservations or exceptions. These deeds were duly recorded, the purchasers entered into possession and cleared, improved, and built upon the premises. The parcels contain, respectively, $6\frac{2}{10}$ acres, $6\frac{4}{10}$ acres, and $6\frac{8}{10}$ acres, and for some forty years have been assessed for taxation as lots 8, 9, 11. It was not supposed at the time that there were ore deposits in the platted lands. Large bodies of ore have been opened in some of the lands conveyed by Reynolds to Harvey, some of them in the 1,400 acres of which Harvey remained owner in 1858, a number of mines have been and are being worked, and large quantities of iron ore have been taken therefrom. The property in question in this suit is the undivided one half of such minerals as are contained in the three parcels of land (lots 8, 9, 11) conveyed by Harvey by his warranty deeds 47, L.R.A. (N.S.)

in 1867. Complainants have acquired the rights of Harvey's grantees. The defendant Arctic Mining Company has succeeded to such rights as Reynolds had in a portion of said lands and minerals, and the defendants Breitung and Kaufman have acquired like rights in the remainder. It is charged in the bill of complaint that the lands contain valuable deposits of iron ore which could be profitably mined by complainants but for the asserted right of defendants to an undivided one half of such ore. The answers of defendants admit complainants' ownership of an undivided one half of the mineral deposits. They assert that defendants own the other undivided half thereof, with such rights in the surface of the land as are stated and secured in the said contract A. In each of the answers, also, the source and devolution of the defendants' title are set out with prayers for affirmative relief. The prayer of the bill and the relief prayed for in the answers is that said mineral rights may be quieted.

In the answer of the complainants to the cross bill of the defendant Arctic Iron Company, after reciting various dealings with the Reynolds-Harvey tract, the said platting of a portion of the lands, the sale and conveyance of the particular parcels here in question and others, it is alleged: "On large portions of said original tract of land embraced in said sections five (5), six (6), seven (7), and eight (8), other than the lands and lots in controversy in this cause, claimed by complainants, and similar lots sold by said Harvey as aforesaid, and other than the lands so conveyed to the Pioneer Iron Company, as hereinbefore stated, there exist and for a long time have been known to exist large, extensive, and valuable deposits and mines of iron ore, and such mines have been especially discovered, located, and developed upon the property conveyed by and through said Harvey to said Breitung, and upon the lands claimed and held by said Breitung, his heirs, representatives, and grantees, as well as upon the lands conveyed to the Negaunee Iron Company, as aforesaid; that the deposits and mines of iron ore so existing upon those portions of said lands which were acquired by said Edward Breitung, as aforesaid, and which were acquired by said Negaunee Iron Company (being lands other than those claimed by these complainants and similar lots conveyed by said Harvey, as aforesaid), far exceed in extent and value the value or extent of any minerals or deposits of ore upon the lands claimed by these complainants, and the other lots so sold by said Harvey; and upon any partition of said lands between said Charles T. Harvey

and said James L. Reynolds and his heirs and devisees, said Cæsar Charles, Maxime Perin, and Jean Blais (grantees of said Charles T. Harvey, as aforesaid), and their grantees, would have been entitled to have said parcels of land so conveyed to them set off to said Charles T. Harvey, so that his title to the lands so set off to him would inure to their benefit under and through said warranty deeds of said Charles T. Harvey to them. Said James L. Reynolds, said Edward Breitung, and the said Arctic Iron Company have long acquiesced in and consented to the rights of complainants and their grantors, as owners in fee simple of the property described in the bill of complaint, and by their acts and dealings herebefore set forth, they have recognized the said ownership of these complainants in such lots and lands. By reason of the conveyances aforesaid, and the aforesaid dealing with said lands by Charles T. Harvey and his grantees, and said James L. Reynolds, his devisees and their grantees, a partition of said lands, whereby the equities of said parties could be so adjusted as to protect the rights and interests of complainants otherwise than in the specific lots themselves, has become impossible, and to deprive these complainants of said property or any interest therein would constitute a fraud upon their rights, by reason of which all of said parties, and particularly said Arctic Iron Company, are estopped to deny that said parcels of land and all interests and rights therein belong to these complainants in fee simple."

At the circuit it was held that the ores were owned in common by complainants and defendants, and a decree was made dismissing the bill. Complainants have appealed.

Upon this record and the applicable rules of law, is the contention of complainants that they are owners of all minerals in the particular parcels of land, viz., lots 8, 9, 11, of Harvey's plat, sustained?

It will be convenient to first ascertain and state the relations between Reynolds and Harvey which resulted from the conveyance and the contract which have been referred to. In presenting this case in the court below and in this court the term "estate in fee" has been applied to the mineral estate, and the terms, "cotenancy" and "tenants in common," have been employed to denote the manner in which the mineral estate was held, and the relations of those interested therein to the said estate and to each other. Indeed, complainants' case depends upon the application to the facts of rules of law controlling and affecting estates owned by tenants in common.

The deed from Reynolds to Harvey and the accompanying agreement were examined 47 L.R.A. (N.S.)

in this court in *Negaunee Iron Co. v. Iron Cliffs Co.* 134 Mich. 264, 270, 96 N. W. 468, and it was held that the contract was a part of the deed, the two should be construed as one instrument, and that Reynolds did not convey the entire fee to Harvey and then repurchase by the contract an interest in the lands, but that he carved the estate into two parts, conveying one and retaining the other. Ordinarily a deed of land conveys the soil and all which it contains, within the boundaries of the particular description. The owner of the fee of land may, however, convey the surface rights and reserve a fee in the mineral rights, and, having done so, each estate will be subject to the law of descent, devise, and conveyance. *Kincaid v. McGowan*, 13 L.R.A. 289, and note (88 Ky. 91, 4 S. W. 802). Such a severance of estates may be worked, also, by a grant or a reservation of less than a fee estate in the minerals (*Armstrong v. Caldwell*, 53 Pa. 284, 13 Mor. Min. Rep. 252), and when such severance, however brought about, takes place, possession of the surface does not, as to the minerals, give rise to the presumptions usually attendant upon such possession. 1 Cyc. 994; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 322, 13 Mor. Min. Rep. 40; *Seaman v. Vawdrey*, 16 Ves. Jr. 390, 10 Revised Rep. 207, 17 Eng. Rul. Cas. 585, 13 Mor. Min. Rep. 62. It is said (*Freeman, Cotenancy*, § 88) that a "tenancy in common may exist in every species of property, real, personal, or mixed," and undoubtedly this is literally true. It has been held, too (*Canfield v. Ford*, 16 How. Pr. 473; s. c. 28 Barb. 336, 11 Mor. Min. Rep. 201; *Hughes v. Devlin*, 23 Cal. 505, 12 Mor. Min. Rep. 241), that an estate in minerals, being an estate in fee, may be partitioned.

It is nevertheless important to keep in mind, in cases where severance of the mineral from the surface estate has been brought about in a large tract of land, not only the terms of the instrument by which the severance is worked, but also the character and extent of the mineral estate. It is manifest that if but two or three deposits of ore existed in 1,400 acres of land, each deposit lying at a considerable distance from the others, while an estate in fee in all the mineral might exist, it would be substantially like an estate of inheritance in widely separated parcels of land, and each might be treated as a distinct freehold. The sale by a tenant in common of his undivided interest in one deposit would not necessarily, in such a case, make the purchaser a tenant in common in the whole mineral estate, and partition might

proceed as to each deposit of ore. See *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218. It is not claimed that there is ore in all of the land deeded by Reynolds to Harvey, or in all of the 1,400 acres remaining unsold in 1867. It is matter of common knowledge, too, and if it were not, it is made apparent by the record in this case, that ores lie at different levels below the surface, are of different qualities and values. The instrument called "A," to which reference has been made, anticipates and provides for the dealing with the mineral estate by either party. It is apparent that the enjoyment of the estate by mining and removing the ores is contemplated, and, so long as the right of the other to compensation is recognized, either was at liberty to mine and to sell ore. Indeed, for certain uses, Harvey and his assigns were entitled to mine ores without accounting to Reynolds. If Reynolds, his lessees, or grantees, desired use of the surface in conducting mining operations, it might be acquired upon terms. In the size of the tract of land, ignorance of the extent and value of the deposits of ore, the usual methods of enjoying such an estate, and convenience, may be found reasons for the terms of the contract by which, and by the deed, the severance of the estates, the relations of the parties and their assigns, were established. Therefore, while the estate in the minerals may be considered as an estate in fee for the purposes of conveyance, of devise, and descent, and as an estate of which Harvey and Reynolds owned each an undivided one half, it was one expressly intended to be divided, from time to time, by either, and the terms, "tenancy in common" and "tenants in common," are apt terms to denote the character of the estate and the relations existing between Reynolds and Harvey only when their ordinary meaning, in the law, is somewhat modified.

The pleadings and the arguments of counsel proceed upon the theory that the deeds of Harvey which are relied upon conveyed some interest in the minerals. Defendants contend that they conveyed to the grantees no more than an (his) undivided one half of the ores which are contained in the land described in the deeds. Complainants, as already appears, contend that the earlier deeds made by Harvey, they having been ratified and confirmed by Reynolds, severed from the original tenancy the lands described therein, leaving Reynolds and Harvey tenants in common in such mineral as was contained in the remainder of the land; that as to the purchasers of the lots in question, while they had constructive notice of the existing cotenancy, and in law took subject to the rights of Reynolds as 47 L.R.A. (N.S.)

shown by the record, yet they received rights as against Harvey and his share in the tenancy in common, "that the title as conveyed by the deeds from Harvey be made good, which rights could not be disregarded by Reynolds." It is further claimed [I quote from the brief] "that with such right the grantees openly occupied the premises and claimed the entire title there-to for more than forty years, and that with notice of these deeds and the rights conveyed thereby, Reynolds and his grantees had recognized and ratified and consented to the conveyances so made; and they had so dealt with the remaining parts of the cotenancy as to preclude them from denying that they had ratified and made good the conveyances by Harvey to his said grantees."

No one questions the soundness of the rule which accords to the purchaser from a cotenant, in severalty, of a portion of the common estate, the right, in equity, to succeed upon partition to some share in the estate. And the rule that cotenants may, after notice of such a purchase, so deal with the estate as to ratify and confirm the attempted severance and partition by one cotenant is one familiar to the profession. See *Freeman, Cotenancy*, §§ 205, 207; *Campan v. Godfrey*, 18 Mich. 38, 100 Am. Dec. 133; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Mee v. Benedict*, 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175; *Young v. Edwards*, 33 S. C. 404, 10 L.R.A. 55, 26 Am. St. Rep. 689, 11 S. E. 1066. These rules cannot properly be applied in this case. One reason for not applying them has been given. It arises out of the original agreement of the parties, which, in substance and effect, provides that each, and the assigns of each, may deal with portions of discovered ore bodies,—with the mineral estate. It was contemplated that as mines were opened and worked corresponding partition should take place. They subdivided the estate into separate parcels, not by metes and bounds, or by particular description, or in advance of the use of particular portions thereof, but none the less actually. In this sense partition—division—of the mineral estate has been going on for years, with the knowledge of which fact, as well as of the original recorded agreement, all parties in interest are chargeable. The learned trial judge said: "If Harvey had the right to plat the property and sell what he owned, as it seems to me he had, this operated to segregate the property from the mass, without any act on the part of Reynolds."

Decision may be safely rested here. There are, however, other considerations which compel me to reach the conclusion that

complainants are not entitled to more than the deeds of Harvey gave them.

No obligation rests upon one tenant in common more than upon another to bring about a partition of the common estate. Ratification, in fact, by Reynolds or by anyone representing his interest, of a conveyance by Harvey of a larger estate in the minerals than he owned, is not made out. As has been stated, complainants as well as defendants are chargeable with knowledge of the actual course and sequence of events affecting the property. The proposition that the vendees of Harvey may sit by for thirty years before discovering that they have any interest in the mineral estate, and for years thereafter before attempting to enforce such rights as they now allege in the common estate, is not one which appeals to a court of equity. Indeed, it appearing that but \$100 was paid for each of the parcels of land in dispute, and that it was supposed by no one that there was mineral in the land conveyed, equity should, after this lapse of time, leave the grantees of Harvey to such remedies as the law affords them.

The decree should be affirmed, with costs.

Blair, J., concurred with Ostrander, J.

Petition for rehearing denied April 1, 1911.

MONTANA SUPREME COURT.

MATTHEW CALLAHAN, Appt.,

v.

CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY, Resp't.

(47 Mont. 401, 133 Pac. 687.)

Evidence — res gestæ — remote declarations.

1. A statement by the conductor of a train which broke in two and injured an

employee thereon, as to the cause of the break, made a half hour after he had ascertained it, in response to a question by the injured person, is not admissible in evidence in an action to hold the railroad company liable for the injury, under a statute making admissible declarations which form part of the transaction which is itself the fact in dispute or evidence of such fact.

Same — admissions by employees — admissibility.

2. Statements to an employee injured on a train, by the conductor and roadmaster, whose duties are to ascertain the cause of the accident and the nature and extent of the injuries caused by it, and report the same to their superior officers, made while attempting to ascertain the extent of his injuries, as to the cause of the accident, are admissible in evidence against the railroad company in an action to hold it liable for the injury, as admissions in the line of their duty.

Same — parting of train — proof of negligence.

3. That a coupler on a railroad car was so worn and defective as to permit the train to part indicates negligence on the part of the railroad company, in an action by an employee to hold it liable for injuries caused by such parting, which, unless explained, will justify the jury in holding it responsible for the injury.

(May 17, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Yellowstone County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. T. J. Walsh, with Messrs. Enterline & LaFleiche and Walsh & Nolan, for appellant:

The declarations of the conductor and the roadmaster were admissible.

Note. — For admissibility of statements made some time after accident as *res gestæ*, see note to *Walters v. Spokane International R. Co.* 42 L.R.A.(N.S.) 917; and later case, *Greener v. General Electric Co.* 46 L.R.A.(N.S.) 975.

The admissibility of reports by agent or employee to employer, to prove fact in issue, is considered in notes to *Atchison, T. & S. F. R. Co. v. Burks*, 18 L.R.A.(N.S.) 231, and *Conner v. Seattle, B. & S. R. Co.* 25 L.R.A.(N.S.) 930.

The question whether the maxim, *res ipsa loquitur*, ever applies between master and servant, is discussed in notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A.(N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A.(N.S.) 214. The following later cases may be consulted profitably on that general question: *Henson v. Lehigh Valley R. Co.* 19 47 L.R.A.(N.S.)

L.R.A.(N.S.) 790; *Jenkins v. St. Paul City R. Co.* 20 L.R.A.(N.S.) 401; *LaBee v. Sultan Logging Co.* 20 L.R.A.(N.S.) 406 (see especially dissenting opinion); *Knudsen v. La Crosse Stone Co.* 33 L.R.A.(N.S.) 223; *Phoenix Printing Co. v. Durham*, 38 L.R.A.(N.S.) 191. There are other cases discussing merely the question whether the facts were such as to bring the case within the operation of the maxim. In that connection, see note to *Johns v. Pennsylvania R. Co.* 28 L.R.A.(N.S.) 591, as to the applicability of the doctrine in case of the fall of a bridge; note to *Robinson v. Consolidated Gas Co.* 28 L.R.A.(N.S.) 586, as to the applicability of the doctrine to the fall of a scaffold; and note to *Chiuccariello v. Campbell*, 44 L.R.A.(N.S.) 1050, as to unexplained starting of machinery as evidence of negligence.

Walters v. Spokane International R. Co. 58 Wash. 293, 42 L.R.A.(N.S.) 917, 108 Pac. 593; Roberts v. Port Blakely Mill Co. 30 Wash. 25, 70 Pac. 111, 12 Am. Neg. Rep. 372; Keyser v. Chicago & G. T. R. Co. 66 Mich. 390, 33 N. W. 867; New York & C. Min. Syndicate & Co. v. Rogers, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719, 17 Mor. Min. Rep. 123; Dixon v. Northern P. R. Co. 37 Wash. 310, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; Starr v. Etna L. Ins. Co. 41 Wash. 199, 4 L.R.A.(N.S.) 636, 83 Pac. 113; Chapman v. State, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 874, 65 S. W. 1098; Lewis v. State, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642; Missouri, K. & T. R. Co. v. Vance, — Tex. Civ. App. —, 41 S. W. 167; Rothrock v. Cedar Rapids, 128 Iowa, 252, 103 N. W. 475; Murray v. Boston & M. R. Co. 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289; Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 227; Johnson v. State, 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374; Hyvonen v. Hector Iron Co. 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167; McNicholas v. New England Teleph. & Teleg. Co. 196 Mass. 138, 81 N. E. 889; Lynchburg Teleph. Co. v. Booker, 103 Va. 594, 50 S. E. 148; Anderson v. Great Northern R. Co. 15 Idaho, 513, 99 Pac. 91.

The proposition will be found to have been repeatedly asserted incautiously, that the rule *res ipsa loquitur* has no application to cases between master and servant, but that idea has been thoroughly exploded.

Hardesty v. Largey Lumber Co. 34 Mont. 151, 86 Pac. 29; Hunter v. Illinois C. R. Co. 110 C. C. A. 459, 188 Fed. 645; Byers v. Carnegie Steel Co. 16 L.R.A.(N.S.) 214, 86 C. C. A. 347, 159 Fed. 347; 2 Labatt, Mast. & S. 834; 6 Thomp. Neg. 7649; Fitzgerald v. Southern R. Co. 141 N. C. 530, 6 L.R.A.(N.S.) 337, 54 S. E. 391; St. Clair v. St. Louis & S. F. R. Co. 122 Mo. App. 519, 99 S. W. 775; Haas v. St. Louis & Suburban R. Co. 111 Mo. App. 706, 90 S. W. 1155; Cahill v. Illinois C. R. Co. 148 Iowa, 241, 28 L.R.A.(N.S.) 1121, 125 N. W. 331; Hamilton v. Kansas City Southern R. Co. 123 Mo. App. 619, 100 S. W. 671; Walters v. Seattle, R. & S. R. Co. 48 Wash. 233, 24 L.R.A.(N.S.) 788, 93 Pac. 419; Hoskins v. Northern P. R. Co. 39 Mont. 394, 102 Pac. 988.

Messrs. O. F. Goddard, E. T. Clark, and Gunn, Rasch, & Hall for respondent.

Brantly, Ch. J., delivered the opinion of the court:

Action by the plaintiff for damages for personal injuries suffered by him during 47 L.R.A.(N.S.)

the course of his employment by the defendant. The accident occurred on September 20, 1909. The defendant owned and was operating a line of railway extending through the states of South Dakota, Wyoming, and into and through portions of the state of Montana, and was engaged as a common carrier in interstate commerce. The plaintiff was in its employ as extra gang foreman, having under his charge a crew of laborers engaged in making repairs upon its tracks. He and the crew were required to occupy and live in outfit cars, so that they could be readily moved from place to place as the exigencies of their service required. One of these cars was occupied by plaintiff and his wife. It was fitted up with a stove, bedding, and other household furniture necessary to make it habitable. On the day of the accident the cars were being transferred from Dewey, South Dakota, to New Castle, Wyoming, so that the crew could effect repairs near the latter place. They were attached to the rear end of a freight train consisting of fifty-one cars. At a point about 7 miles east of Dewey, while ascending a grade, the train parted, with the result that by the sudden stoppage occasioned by the automatic setting of the air brakes the plaintiff was thrown violently back and against a box in the rear end of the car, and thereby suffered the injuries complained of. It is alleged that the defendant was negligent in placing in the train a car equipped with a coupler which was unsafe, defective, and insecure, in that the part thereof known as the lock block had become worn and loose, a fact which was known to the defendant, or, by the exercise of ordinary diligence on its part, ought to have been known to it, but was not known to the plaintiff. The complaint then alleges:

"Sixth. That on the said 20th day of September, 1909, while said train was being moved by the defendant along and upon its said track and railroad from Dewey, South Dakota, to New Castle, Wyoming, at a rate of speed of about 20 miles per hour, the said coupler upon said car in said train, by reason of its being defective, worn, and insecure, and because the defendant carelessly and negligently failed and neglected to keep the same in good repair and in a safe and sound condition, and because of the negligent and careless operation of said train by said defendant, loosened and came apart, causing the said train instantly to part, thereby breaking the air hose of said train, which controlled the brakes upon the cars. That the parting of said train and the breaking and separating of said air hose caused the brakes upon the cars to which said outfit

car was still attached, including the brakes on said outfit car, to become suddenly and violently set, thereby causing said train and cars last mentioned violently and suddenly to stop, whereby the said plaintiff was thrown with great force and violence backward a distance of about 12 feet along and in the interior of said car, wherein he was then riding, against and upon a box in said car."

The answer denies all of the allegations of the complaint, except that it admits that at the time of the accident the defendant was engaged in interstate commerce. It alleges certain matters as affirmative defenses, upon which there was issue by reply. The issues presented on this branch of the case do not require notice. At the close of plaintiff's case the court sustained a motion for nonsuit and directed judgment for the defendant. This appeal is from the judgment. The two questions presented for decision are whether the exclusion of certain evidence was error, and whether the evidence was sufficient to take the case to the jury.

1. During his examination in chief, counsel for plaintiff inquired of him whether he was acquainted with the duties of a conductor on the defendant's road. He was not permitted to answer. Counsel then offered to have him testify, in substance, that when such an accident as the one in question occurs, it is the duty of a conductor to ascertain its cause, to restore the connection, if possible, and proceed with the train, to ascertain if any person has been injured, and, if so, also the nature and extent of the injury, and to make full report of the facts to his superior officers; that when the train parted, the conductor at once proceeded forward from the caboose, where he then was, to ascertain the cause; that in passing the car in which plaintiff and his wife were, he ascertained that plaintiff had been injured; that he then said that he was going forward to inquire the cause of the accident; that, the connection being restored, the train proceeded immediately to New Castle, arriving there thirty or forty minutes later; that the conductor then returned to the plaintiff's car and made inquiry as to the extent of the injury, in order to make his report of it; and that during the course of the inquiry, in response to a question by plaintiff as to the cause of the accident, he said that the train had parted "because of a defective coupler,—a worn lock block." An offer was also made to show by this witness that a similar duty to investigate and make report is required of a roadmaster; that when the train arrived at New Castle, defendant's roadmas-

ter came to plaintiff's car and, after inquiry as to the nature and extent of the injury, wrote out his report; and that while so doing he stated to plaintiff that the parting of the train was caused by a "defective coupling,—a worn lock block." This evidence was excluded, on the ground that the declarations were not part of the *res gestæ*, and were therefore incompetent.

The statute provides that where "the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction." Rev. Codes, § 7867. This provision was not intended to embody the statement of a rule by which to determine the competency of such declarations as those in question, but to be a mere direction that they must be deemed competent when they are so connected with the main transaction as to form a part of it. It states one of the exceptions to the general rule recognized by all the courts in common-law jurisdictions, which requires the exclusion of hearsay statements, *viz.*, that when declarations by the participant in or an observer of the litigated act are so nearly connected with it in point of time that they may be regarded as a spontaneous, necessary incident, explaining and characterizing it, they may be proved as a part of it without calling the person who made them. The principle upon which the exception is founded is that the declarations were made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate, and hence the solemnity of the oath is not necessary to give it probative value. Such statements need not be strictly contemporaneous with the main incident. They may be in the form of narrative; yet if the circumstances show they were made while the excitement produced by the incident still dominated the mind and was the producing cause, they are nevertheless part of the main incident and competent. On the contrary, if they are in fact mere narrative, they are not competent. In *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384, the court said: "If the declarations are a mere narration of a past occurrence, they are not admissible as *res gestæ*. . . . When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case there can be no hard and fast rule as to the precise time near an occur-

rence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. . . . Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be." The tendency of recent decisions is to relax the rule of admissibility rather than to restrict it, and to consider the weight to which the evidence is entitled. *Jack v. Mutual Reserve Fund Life Assn.* 51 C. C. A. 36, 113 Fed. 49, and cases cited. Accordingly, this court, in *State v. Tighe*, 27 Mont. 339, 71 Pac. 3, held that, as in case of confessions, it is the province of the trial judge to determine *in limine* the admissibility of declarations, and leave the question of their weight to the jury, in view of the circumstances under which they were made. This must necessarily be the case whenever a question of fact arises upon conflicting evidence as to whether they are part of the *res gestæ*, or depends upon contradictory inferences, either of which may fairly be drawn from uncontradicted evidence; and since this is so, the solution of the question of the admissibility of such evidence must in every case be left largely to the sound legal discretion of the trial court, subject to review only in cases of manifest abuse. 3 Wigmore, Ev. § 1750; *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384; *Walters v. Spokane International R. Co.* 58 Wash. 293, 42 L.R.A.(N.S.) 917, 108 Pac. 593.

Even under this liberal rule, however, we do not think the declarations admissible on the theory that they were prompted by the excitement produced by the accident itself. The conductor did not return to plaintiff's car until the train had reached New Castle, some half hour or more after the accident. Apparently he would not have spoken on the subject at all, if he had not been questioned by the plaintiff. His statement assumed the form of narrative, rather than that of a spontaneous utterance as a necessary incident of the accident itself, explaining and character-

izing it. The roadmaster did not witness the accident, but learned of it after the train had reached New Castle. His statement, therefore, could not have been due to any excitement aroused by his witnessing the accident or his presence when it occurred.

But we think the evidence competent upon another theory, *viz.*, as admissions by the agents of the defendant within the scope of their employment, while engaged in the discharge of their duties. Whether it was in fact among the duties of these employees to ascertain the cause of the accident and the nature and extent of any injury caused by it, and make report to their superior officers, we need not stop to inquire. The plaintiff offered to show that this was so. If such was the case, the statements were made while these employees were in the discharge of their duties. Now, it is a well-settled rule that when an agent is vested with authority to perform any act for his principal his words—his verbal acts—while engaged in that business are a part of the *res gestæ* of that business. They are therefore the words and acts of the principal, and may be proved against him. *Hogan v. Kelly*, 29 Mont. 485, 75 Pac. 81; *Hupfer v. National Distilling Co.* 119 Wis. 417, 96 N. W. 809; *Hyvonen v. Hector Iron Co.* 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167; *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 76, 50 S. E. 969; *Lynchburg Teleph. Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Baker v. Westmoreland & C. Natural Gas Co.* 157 Pa. 593, 27 Atl. 789; *Anderson v. Great Northern R. Co.* 15 Idaho. 513, 99 Pac. 91; *Leach v. Oregon Short Line R. Co.* 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 90; *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *McNicholas v. New England Teleph. & Teleg. Co.* 196 Mass. 138, 81 N. E. 889. For the time being, the agent is the *alter ego* of the principal; and while he is not employed to talk about the business of his principal, or to admit away the rights of the latter, declarations and admissions by him touching the business in hand, *dum ferveret opus*, are those of the principal. "This rule is especially applicable to corporations, which can speak and act only through agents. Justice to the rights of others requires that acts of such intangible entities must be significant, and the basis for conduct by others, as in the case of individuals. When, therefore, a corporation selects an individual to do an act in its behalf, the individual, in doing that act—i. e., within the scope of his authority,—is, in legal effect, the corporation." *Hupfer v. National Distilling Co.*

119 Wis. 417, 96 N. W. 809. If, however, the appointed work has been completed, any statement made by the agent with reference to it is, under all the authorities (2 Chamberlayne, Ev. § 1346), a mere narrative of a past transaction, and is not admissible under the *res gestæ* rule. It is, as to the principal, mere hearsay.

Counsel for defendant cite and rely on the cases of Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744, and Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. 33 Mont. 338, 83 Pac. 886. In the latter of these cases the person whose declaration was held incompetent was not the agent of the corporation to do the act with reference to which the declaration in question was made. With reference to the former, it may be noted that the admission held incompetent was made by the driver of a vehicle immediately after it had been overturned, the accident resulting in injury to a passenger, and while the driver was still in charge of it. Under the more liberal rule observed by many of the courts, the evidence was competent. The case serves only to illustrate the difficulty the courts have experienced in ascertaining and declaring any definite rule by which to determine whether the admission under consideration was or was not made while the agent was acting within the scope of his authority. It is not in point because, as we have shown, the declarations in question here were made while the conductor and roadmaster were in the actual discharge of the duties delegated to them. The exclusion of the evidence was error.

2. Counsel contend that, inasmuch as the parting of a train is not an ordinary occurrence in the operation of railroads, the fact that such an accident occurred in this instance, there being no explanation of the cause of it, was sufficient to raise a presumption of negligence by the defendant or some of its servants, and therefore that a case was made for the jury without regard to the excluded evidence. They insist upon two propositions, either of which, if accepted as sound, they say, will require a reversal of the judgment in this case, viz.: (1) That plaintiff for the time being occupied the position of a passenger; hence the presumption of negligence arising from the happening of the accident made out a *prima facie* case; (2) that the reason for indulging this presumption in favor of a passenger, and not in favor of a servant, is that an accident may be due as well to the negligence of a fellow servant as to the lapse of duty by the carrier with reference to some nondelegable duty; that this action was brought under the 47 L.R.A. (N.S.)

Federal employers' liability act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, Fed. Stat. Anno. Supp. 1909, p. 584), which cuts off the defense of negligence by a fellow servant; and that, since this is so, logically the same presumption must be indulged in favor of the servant as in favor of the passenger. We shall not undertake to determine at this time whether these contentions are maintainable. We think both of them involve questions which are at least debatable. Upon the presumption that the plaintiff proved his case according to his offer, however, we think he was entitled to go to the jury without regard to the theory advanced by counsel in either of these contentions.

For present purposes we shall assume that it is settled law that, in an action by a servant against his employer for an injury caused by the negligence of the latter, proof of the accident alone does not furnish a basis for an inference of culpable negligence, but that the servant must go further and show by direct proof, or by circumstances, that his injury sprang wholly or partly from some omission of duty by his employer. If he fails to do this, he has failed to make a case for the jury. If, however, in proving the injury, the facts and circumstances disclosed tend to show that the instrumentality which caused the injury was exclusively in the control of the employer, and the injury occurred by reason of some defect therein, the existence of which is attributable to a negligent omission of duty by the employer rather than to any other cause, he has made a case justifying a presumption of culpable negligence. The burden then devolves upon the employer to rebut the presumption by explaining the circumstances so as to render their existence consistent with the exercise of due care. The general rule applicable to this class of cases, viz., that the plaintiff must prove negligence, is qualified by way of exception by what is termed the doctrine of *res ipsa loquitur*, which means merely that the circumstances under which the accident occurred charged the defendant with culpable negligence. In Hardesty v. Largey Lumber Co. 34 Mont. 151, 86 Pac. 29, the rule is stated thus: "Of course, the general rule of law is that negligence is not inferable from the mere occurrence of the accident; but to this rule is the well-understood exception that, where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have such management and control use proper care,

it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of ordinary care by the defendant. 1 Shearm. & Redf. Neg. § 59. Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised. This rule has been invoked in numerous similar cases." The train upon which plaintiff was riding was under the control and management of the defendant. The defendant knew, or ought to have known, by whom it was made up, how it was made up, how it was equipped, and what degree of care had been exercised in making it safe to run. The duty to see that it was properly equipped was a primary, nondelegable duty of defendant. It separated because of a "defective coupler or worn lock block." Ordinarily, when a train is equipped with couplers which are sound and suitable for use, it does not part. Therefore the fact that one of those in use at the time of the accident was defective and worn to such an extent as to permit the train to part points to neglect by defendant to perform a primary duty, rather than to any other cause, and properly calls for explanation. In the absence of such explanation, the jury would be justified in holding it responsible for the accident and the injury resulting from it. *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L.R.A. 698, 12 Am. St. Rep. 526, 19 N. E. 166, and cases cited.

The judgment is reversed and the cause remanded for a new trial.

Holloway and Sanner, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES LANHAM, Plff. in Err.,

v.

EVA I. MEADOWS.

(— W. Va. —, 78 S. E. 750.)

Contract — illegal — proof in defense.

1. If a party to an illegal agreement, by

Headnotes by POTTENBARGER, P.

Note. — Right to recover what has been paid or transferred in consideration of illicit relations.

As to right to invoke aid of court to determine rights of property accumulated in common by parties living in illicit relations, see note to *Mitchell v. Fish*, 36 L.R.A. (N.S.) 838.
47 L.R.A. (N.S.)

proof of part of the facts constituting the transaction out of which it grew, make a prima facie case for recovery against the other party without disclosing the illegality, the defendant's guilty participation in the transaction does not preclude him from proving as matter of defense the illegal part of the contract.

Bills and notes — gift of note.

2. A promissory note may be the subject of a gift *inter vivos* from the promisee to the promisor. Surrender of the note with intent to forgive the debt is a sufficient delivery.

Trial — verdict — setting aside.

3. A verdict founded upon conflicting oral testimony cannot be set aside by the court.

(June 17, 1913.)

ERROR to the Circuit Court for Braxton County to review a judgment in defendant's favor in an action brought to recover a certain sum of money alleged to have been lent to and paid for the use and benefit of defendant at her request. Affirmed.

The facts are stated in the opinion.

Mr. Charles G. Coffman, for plaintiff in error:

A prior lawful contract entered into as these notes were, will not be affected by a subsequent illegal, collateral agreement, relative thereto.

9 Cyc. 564, § 8; *Wilcoxon v. Logan*, 91 N. C. 449; *Pond v. Smith*, 4 Conn. 297; 1 Page, Contr. 619, § 400; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282; *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Lytle v. Newell*, 24 Ky. L. Rep. 188, 68 S. W. 118; *McDonald v. Fleming*, 12 B. Mon. 285.

But before courts will hold contracts void on the ground of immorality or public policy, the evidence must be free from doubt and convincing.

Richmond v. Dubuque & S. C. R. Co. 26 Iowa, 191; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Pierce v. Randolph*, 12 Tex. 290.

The verdict of the jury was wrong, and the court erred in refusing to sustain the motion of the plaintiff to set aside said verdict and award him a new trial.

Davidson v. Pittsburgh, C. C. & St. L. R. Co. 41 W. Va. 407, 23 S. E. 593; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752;

As to injunction against enforcing contract for illicit intercourse, see note in 48 L.R.A. 844.

While there are numerous cases in which actions upon promissory notes or other executory contracts have been defeated upon the ground that the real consideration for defendant's promise was illicit relations. *LANHAM v. MEADOWS* is the only case re-

Coalmer v. Barrett, 61 W. Va. 237, 56 S. E. 385.

Messrs. C. F. Greene, Morrison, & Rider and Hall Brothers, for defendant in error:

The order of attachment should have been quashed on the ground that the affidavit was insufficient.

Roberts v. Burns, 48 W. Va. 92, 86 Am. St. Rep. 17, 35 S. E. 922; **Sandheger v. Hosey**, 26 W. Va. 221; **Delaplain v. Armstrong**, 21 W. Va. 211; **Hale v. Donahue & Co.** 25 W. Va. 414; **Goodman v. Henry**, 42 W. Va. 526, 35 L.R.A. 847, 26 S. E. 528.

When money is paid on an illegal contract, or personal property is transferred, the aid of the law cannot, as a rule, be invoked for its recovery, though the other

vealed by the search which involves the question whether an action in form upon an executory contract, to recover money actually paid or advanced, can be defeated upon the ground that the real consideration was illicit relations. Assuming the truth of the defense in the **LANHAM CASE**, that the illicit relations constituted the consideration for the money advanced, the plaintiff was really attempting to recover back money paid under an executed contract, though his action was in form upon an executory contract. To have permitted the plaintiff to recover would have been to allow him, in practical effect, to accomplish what he clearly could not have accomplished in a direct action for that purpose, *viz.*, the recovery back of money paid under an executed contract based on illicit relations.

In **Summerlin v. Livingston**, 15 La. Ann. 519, it was held in a suit involving a settlement of the community between the defendant and his deceased wife, that defendant was entitled to set up the illegality of the marriage as a defense, by showing that deceased was legally married to another at the time of her marriage to defendant, notwithstanding defendant was aware of the fact and of her incapacity to marry again, and his course in marrying her was highly immoral and reprehensible. The court said that, while defendant could not avail himself of his own turpitude as a basis for a demand, he is not estopped when he resorts to it for purposes of defense.

Upon the principle that the court will not aid a party to an illegal or immoral contract, but will leave the parties in the position in which they have placed themselves, relief has been denied in the following cases, where the illicit relations were made a basis for a demand to recover property transferred in consideration of the continuance of such relations:

—**Brindley v. Lawton**, 53 N. J. Eq. 259, 31 Atl. 394, where a court of equity denied relief in a suit brought to compel the surrender of certain certificates of corporate stock, it being alleged that complainant's intestate gave them to the defendant as an 47 L.R.A. (N.S.)

party refuses to perform his part of the contract.

15 Am. & Eng. Enc. Law, 2d. 963, 1001; **Edwards v. Randle**, 63 Ark. 318, 36 L.R.A. 174, 58 Am. St. Rep. 108, 38 S. W. 343; **United States v. Grossmayer**, 9 Wall. 73, 19 L. ed. 627; 9 Cyc. 549, 562; **White v. Barber**, 123 U. S. 392, 31 L. ed. 243, 8 Sup. Ct. Rep. 221; **Ellicott v. Chamberlin**, 38 N. J. Eq. 604, 48 Am. Rep. 327; **Branham v. Stallings**, 21 Colo. 211, 52 Am. St. Rep. 213, 40 Pac. 396; **Liness v. Hesing**, 44 Ill. 113, 92 Am. Dec. 153; **Waite v. Merrill**, 4 Me. 102, 16 Am. Dec. 238; **Beard v. White**, 120 Ga. 1018, 48 S. E. 400; **Watkins v. Nugen**, 118 Ga. 372, 45 S. E. 262; **Ullman v. St. Louis Fair Asso.** 167 Mo. 273, 56 L.R.A. 606, 66 S. W. 949; **Calfee**

inducement to and consideration for her living thereafter in illicit relations with him;

—**Ayerst v. Jenkins**, L. R. 16 Eq. 275, 42 L. J. Ch. N. S. 690, 29 L. T. N. S. 126, 21 Week. Rep. 878, where the legal personal representative of a deceased grantor was denied relief in a suit to set aside a deed of trust or marriage settlement made in contemplation of marriage, whereby certain shares of corporate stock were transferred to a trustee for the benefit of the sister of grantor's deceased wife, by showing that the agreement of the parties to marry and cohabit was illegal and immoral on grounds of public policy, as being between persons within the prohibited degrees of consanguinity or affinity;

—**Otis v. Freeman**, 199 Mass. 160, 127 Am. St. Rep. 476, 85 N. E. 168, where a man who maintained illicit relations with a woman was denied the right to recover property purchased with the funds furnished her for the continuance of such relations;

—**Platt v. Elias**, 186 N. Y. 374, 11 L.R.A. (N.S.) 554, 116 Am. St. Rep. 558, 79 N. E. 1, 9 Ann. Cas. 780, where it was held that equity will not aid one in recovering money which he has given his mistress in consideration of their sexual intimacy.

—**Denton v. English**, 2 Nott & M'C. 581, 10 Am. Dec. 638, where it was held that defendants could not defeat an action of trover to recover the value of certain slaves, by showing that the real consideration was not that expressed in the bill of sale from deceased vendor to the vendee, through whom plaintiffs claimed, but that it was future illicit cohabitation between the vendor and the vendee, where it appeared that the contract had been fully executed by the signing, sealing, and delivery of the bill of sale and by delivery of possession of the negroes;

—**White v. Hunter**, 23 N. H. 128, where it was held that plaintiff, claiming as heir of the deceased grantor, could not avoid the effect of a deed to the defendant, in an action to recover the land, upon a showing that the same was given for the purpose of

v. Burgess, 3 W. Va. 274; Smith v. Applegate, 23 N. J. L. 352; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; Bagley v. Tabor, 5 Mass. 286, 4 Am. Dec. 767; Slifer v. Howell, 9 W. Va. 391; Hope v. Linden Park Blood Horse Asso. 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070; McMullen v. Hoffman, 174 U. S. 639, 656, 657, 43 L. ed. 1117, 1124, 19 Sup. Ct. Rep. 839; Embrey v. Jemison, 131 U. S. 336, 348, 349, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776.

Poffenbarger, delivered the opinion of the court:

In this case, the jury denied by its verdict right in the plaintiff to recover any portion of the demands stated in his declaration and bill of particulars, amounting to nearly \$5,000, consisting of three promissory notes and numerous sums of money alleged to have been paid out by him for her and at her request.

Under the general issue raised by her plea of non assumpsit, the defendant adduced evidence tending to prove a long period of illicit sexual intercourse between her and the plaintiff, induced on her part by the advancement and payment of the money demanded in the declaration, and, in connection with her testimony, introduced a

formal agreement for such intercourse and relation, acknowledging the receipt, prior to the date thereof on account of the same, of the sum of \$2,000. The plaintiff denied the execution of this contract and objected to its introduction. On this branch of the case, he supplemented his own testimony by that of five expert witnesses, who expressed the opinion that the signature was not in his handwriting. Other papers bearing his signature, and put in evidence, were before the jury for comparison. Two of the notes sued on, one for \$600 and another for \$340, bear date prior to that of the agreement. With very few exceptions, the defendant admits the advancements of money to her and payment of money in discharge of her debts and obligations. She also claims the plaintiff had surrendered to her the three notes specified in the bill of particulars, including the two just described. She does not claim, in her testimony, to have paid any of these notes or the money delivered to her or paid out by the plaintiff in discharge of her debts and obligations, but she nevertheless produced a receipt for the sum of \$1,000, bearing date June 12, 1906, and declaring said sum to be in full of account up to that date.

The formal assignments of error go to the

promoting the continuance of illicit intercourse between grantor and another;

—**Marksbury v. Taylor**, 10 Bush, 519, where plaintiffs, who claimed as heirs at law of grantor, were denied relief in an action to set aside certain deeds of conveyance, and to recover possession of the land held by the husband and heirs at law of the grantee, by showing that the real consideration for the conveyance was the illicit intercourse then and afterward existing between the grantor and grantee;

—**Watkins v. Nugen**, 118 Ga. 372, 45 S. E. 262, is to the same effect;

—**Hill v. Freeman**, 73 Ala. 200, 49 Am. Rep. 48, where it was held that ejectment could not be maintained by the heirs of the grantor, who conveyed land to defendant in consideration for the continuance of the illicit relations which the parties were maintaining at the date of the conveyance;

—**Monatt v. Parker**, 30 La. Ann. 585, 31 Am. Rep. 229, where it was held that one who gave real estate to his concubine was not entitled to recover it from the public administrator after her death, upon the ground that such gift was in violation of the statute and against good morals and public policy.

In **Bivins v. Jarnigan**, 3 Baxt. 282, it was held that the heirs of a deceased grantor were not entitled to relief in a suit to cancel a deed of conveyance, by showing that the real consideration was past illicit and adulterous intercourse between the parties thereto, where it appeared that the grantee

was in possession of the land under the deed.

And in **Burnett v. Sams**, 1 Tenn. Ch. App. 60, it was held that a deed given in consideration of past illicit relations would not be ordered given up at the instance of the grantor, where the grantee was in possession; nor a vendor's lien enforced for the money consideration recited in the deed.

In **Gisaf v. Neval**, 81 Pa. 356, it was held that one who promised a woman to buy her a house by way of compensation for her seduction and subsequent submission to an operation for abortion, which resulted in her serious sickness and suffering, was not entitled to claim a resulting trust by the fact that he furnished the purchase money for a house subsequently conveyed to her.

In **Marksbury v. Taylor**, supra, the court said: "It is insisted, however, that there is a class of cases where transactions or agreements in contravention of public policy will be relieved against in equity, for the reason that the public interest requires it to be done, and the court will serve the public through the individual, although he be a party to the wrong; but it is believed that in the cases where this has been done, the decisions were either based upon statutes or have been subsequently disregarded as unsound. The law, both in this country and in England, now undoubtedly is, in general, where parties are equally concerned in illegal agreements or transactions, whether such agreements or transactions be *mala*

admission of defendant's testimony to her immoral conduct and relations with the plaintiff, and the alleged contract or agreement for sexual intercourse between them, and the overruling of the motion to set aside the verdict.

Having shown an apparently valid debt by the introduction of the notes of the defendant and proof of payment of indebtedness for her and at her request, the plaintiff denies the right of the defendant to set up her own immoral and illegal relation with him as a consideration for the moneys paid to her and for her, on grounds of public policy. This position is untenable. The consideration for the payment of the money is part and parcel of the transaction, and if it could not be given in evidence to defeat the action, money paid upon an illegal consideration could always be recovered back in violation of that principle of public policy which forbids it. In order to evade this principle of law, it would only be necessary to prove one side of the contract. That illegality of the consideration may be set up as a defense to a debt *prima facie* valid is well settled by authority. *Calfee v. Burgess*, 3 W. Va. 279; *Slifer v. Howell*, 9 W. Va. 391; *Hope v. Linden Park Blood Horse Asso.* 58 N. J. L. 627, 55 Am. St.

Rep. 614, 34 Atl. 1070; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172; 9 Sup. Ct. Rep. 776; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839.

If the court were at liberty to deal with the case as jurors, a conclusion might be reached different from that of the verdict; but the law accords to the jury its province, which cannot be invaded by the court. As to the relation between the parties, the evidence consists almost wholly of their oral testimony, and it is directly and positively conflicting. There are circumstances tending to sustain the testimony of each of them. Correspondence introduced shows a relation of close intimacy, and it is not denied by the plaintiff. They differ only as to the issue of illicit intercourse. The defendant charges it and the plaintiff denies it. The latter delivered to the former money and paid notes, bills, and other demands for her, throughout a period of time extending from May 1, 1901, to June, 1908, and possibly later. The financial transactions between them began in Harrison county at a place called Marshville, where the defendant was then conducting a small grocery store and at or near which the plaintiff resided. Having obtained considerable money from him for the purpose, and,

prohibita or mala in se, courts of equity, like courts of law, will not interpose to grant relief to either. (Story, Eq. § 298; *Brookover v. Hurst*, 1 Met. 668; *Worcester v. Eaton*, 11 Mass. 377; *Browning v. Morris*, Cowp. pt. 2, p. 792; *Bibb v. Bibb*, 17 B. Mon. 307.) We are therefore constrained to hold that an executed contract based upon illicit sexual commerce cannot be set aside at the instance of the grantor or his heirs at law, who cannot occupy in court a better position than their ancestor through whom they claim."

But in *McDonald v. Fleming*, 12 B. Mon. 285, it was held that equity will decree the return of money with interest, advanced by a woman living in a state of concubinage, for the purchase of real estate which was conveyed to the man, and will impose a lien upon the land to secure its payment. It was also held, however, in this case that the woman, on account of the illicit relations, could not recover upon an implied contract to pay for services rendered as housekeeper. Generally, upon the right to recover for household services while parties were living in illicit relations, see note in 29 L.R.A. (N.S.) 787.

In *Coulson v. Allison*, 2 De. G. F. & J. 521, 3 L. T. N. S. 763, affirming 2 Giff. 279, 6 Jur. N. S. 1140, 3 L. T. N. S. 260, a conveyance of real and personal property by a woman to the husband of her deceased sister, in consideration of her marriage to him, was set aside upon the ground of

failure of consideration, where it appeared that she believed the marriage to be legal and proper. The court said that under the circumstances it was necessary for the defendant, in order to establish his claim to the property, to show that she was at the time of the transaction, fully and duly informed of all the circumstances of the case, and of the possible consequences of what she was about to do.

In *Phillips v. Probyn* [1899] 1 Ch. 817, 68 L. J. Ch. N. S. 401, 80 L. T. N. S. 513, 15 Times, L. R. 324, it was held upon an issue raised by the trustees of a marriage settlement, to determine who was entitled to the property which had been conveyed in trust for the benefit of a sister of the grantor's deceased wife in contemplation of her marriage to grantor, which was subsequently performed, that the trust for her was illegal and invalid, and that the trustees held the property in trust for personal representative of the grantor's deceased heir at law. The court distinguished *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 42 L. J. Ch. N. S. 690, 29 L. T. N. S. 126, 21 Week. Rep. 878, upon the ground that it was the trustees, and not the settlor or his personal representative, that were seeking to set aside the settlement, and said that they had not to consider what the position of matters would have been if the son or grandson of the settlor had been the plaintiff in the action.

A. L. R.

as she says, at his suggestion, she purchased with it a small tract of land somewhere in Braxton county, on which she built a house. Later, she and her husband and family removed to Braxton county, and the plaintiff occasionally visited her at that place. In the house so built, a room was provided especially for him. On one of his periodical visits to that place, in September, 1909, the defendant and her husband claim the latter entrapped and caught him in the act of having sexual intercourse with the wife. He admits his presence there and an altercation or controversy between him on the one side and the husband and wife on the other, but denies the improper conduct attributed to him. According to his testimony, this transaction was an effort on the part of the defendant and her husband to extort money from him on a false charge or accusation. He went home a day or two after this occurrence, and the husband of the defendant at a later date approached him near his home and attempted to have an interview with him. As to what then occurred between them, their testimony is conflicting, the plaintiff saying there was a renewed demand for money, and the husband denying it. On leaving the Meadows home, the plaintiff failed to take with him his trunk, which was later sent to him. In it, he says, were the three notes mentioned in the bill of particulars and put in evidence. The defendant insists he had delivered over to her all of the notes she had executed to him, but that they had been left where he could have found them, without intent that he should again repossess them, and he must have taken them clandestinely and without her consent. How they got back into his possession, she is unable to say. The plaintiff denies not only the conduct with which he is charged, but also his ability to engage in sexual intercourse. He was about seventy years old when his relations with the defendant began, and had had a severe stroke of paralysis in the year 1886. He suffered another attack of the disease in 1906. At the date of his last visit to the Meadows home and the alleged discovery of his immoral relations by the husband, he was about seventy-eight years old. The immoral written contract was put in evidence as an admission of his illicit relations with the defendant, and the evidence of five witnesses was adduced to prove that the signature thereto was not in his handwriting. One of these was familiar with his handwriting, and the others testified merely as experts. All were of the opinion that the signature was not in his handwriting. The jury had before them numerous checks, receipts, and letters for

purposes of comparison, and the expert witnesses were unable to show any very marked difference between the signature to the contract and the genuine signatures upon other papers. To set forth here, in addition to these salient facts and circumstances, the minute details of the testimony, would subserve no good purpose.

The vital question in issue depends, as has been stated, upon the credibility of two witnesses. The admitted facts and circumstances have no controlling probative force or effect. A long period of intimacy is admitted as well as proven. On the question of its character, its purpose, and incidents, the record discloses nothing but their oral testimony and the controverted written admission. As to the latter, there is nothing decisive in the evidence. In the opinion of five men, the signature to that paper was a forgery, but the jury, consisting of twelve men, compared it with numerous genuine signatures of the plaintiff and were of the opinion that it was genuine. On the evidence as disclosed by the record, its genuineness or spuriousness was largely a matter of opinion. A verdict thus dependent upon conflicting oral testimony cannot be disturbed by the court. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Fulton v. Crosby & B. Co.* 57 W. Va. 91, 49 S. E. 1012.

As two of the notes sued on bear dates prior to that on which the defendant says the immoral relation between them began and the date of the alleged contract for such relation, and the defendant admits the receipt of the money evidenced by them, it is said the illegal consideration could not have entered into them. This position is well sustained by law. A valid debt cannot be invalidated by proof of a subsequent, separate, and distinct illegal transaction between the parties. But this is not conclusive of the issue as to these notes. The defendant swears positively that the money was given to her without any expectation of its repayment, and that the notes were executed and delivered as a mere pretense of indebtedness, to the end that their relation might be shielded from discovery by members of plaintiff's family.

Another legal principle, that a written instrument cannot be contradicted by parol testimony, would sustain plaintiff's claim against this theory of defense, but the record discloses an additional fact in avoidance of the application of this legal rule, if the defendant's testimony is to be taken as true, a question for jury determination, namely, that these notes were bestowed upon the defendant as gifts. She swears positively that they were delivered up to her as gifts, and then subsequently ab-

strated from her possession by the plaintiff. A gift of a chose in action can be made in that way. A creditor can forgive a debt by way of gift, by delivery to the debtor of the evidence thereof. *Beach v. Endress*, 51 Barb. 570; *Hathaway v. Lynn*, 75 Wis. 186, 6 L.R.A. 551, 43 N. W. 956; *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176; *Albert v. Ziegler*, 29 Pa. 50. Taken in connection with all the circumstances attending the transactions between the parties and bearing upon the motive of the plaintiff, the testimony of the defendant to the gift of these notes is sufficient to sustain the jury's finding as to the intent with which they were delivered to her. His possession of them is a circumstance raising a presumption against donation, but this presumption is rebutted by her testimony, if the jury believed it, as they could and did.

Upon these principles and conclusions, the judgment will be affirmed.

ALABAMA SUPREME COURT.

BIRMINGHAM RAILWAY, LIGHT, & POWER COMPANY

v.

E. J. SMYER.

(— Ala. —, 61 So. 354.)

Injunction — against electric railway in street — double tracks.

1. An abutting owner cannot enjoin the doubling by municipal authority of a single track electric railway in a street, 34 feet wide, as a nuisance or an additional burden on the fee.

Eminent domain — double tracking street railway — compensation to abutting owner.

2. An abutting property owner is not within the operation of constitutional provisions requiring compensation for injuries or actual damages to his property by the construction or enlargement of the works of a public utility in a street, so as to be entitled to compensation for the doubling of a single track electric railway in the street, because the loading of wagons at the curb in front of his property is thereby made more inconvenient.

Nuisance — double track street railway — danger from collision.

3. An abutting property owner cannot re-

cover damages for the doubling of a single track electric railway in the street in front of his property, because of increased danger from collision with passing cars, since this danger is common to the public generally.

Public improvement — highway assessments — reimbursement by street railway company.

4. A property owner is not entitled to be reimbursed any portion of the expense which has been assessed against him for paving the street in front of his property, as a condition to the laying of street railway tracks therein, although, had the tracks been laid before the pavements were constructed, a portion of the cost would have been assessed against the railway company.

(February 6, 1913.)

CROSS APPEALS from a decree of the Chancery Court for Jefferson County in a suit to enjoin the doubling of a single track electric railway; defendant appealing from the part of the decree sustaining the injunction, and from the decrees overruling its demurrer to the entire bill of complaint, and requiring it to pay damages to plaintiff before the construction of the track; and plaintiff appealing from the part of the decrees sustaining defendant's demurrers to the part of the bill declaring the ordinance under which the construction of the track is authorized void, and seeking permanently to enjoin the said construction, and compensation for the amount paid out by plaintiff to the city for paving the street opposite his lot. Reversed on main appeal. Affirmed on cross appeal.

The facts are stated in the opinion.

Messrs. Lee C. Bradley and Frank M. Dominick, for defendant:

The word "injured" in § 235 of the Constitution has been almost uniformly held to include only the violation of a right, or, in other words, damage from violation of a legal right. *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; *State v. Moore*, 69 N. H. 99, 39 Atl. 584; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Brittle Silver Co. v. Rust*, 10 Colo. App. 463, 51 Pac. 526; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Ayers v. Lawrence*, 59 N. Y. 192; *Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 709, 63

Note.—The general question as to an abutter's right to compensation for railroads in streets is considered at length in the note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A.(N.S.) 673.

As to right of abutting owner to damages for special injuries where street railway is not considered an additional burden, see 47 L.R.A.(N.S.)

note to *Slaughter v. Meridan, L. & R. Co.* 25 L.R.A.(N.S.) 1265.

Generally, as to injury to abutting owner by laying street railway near side of the street, see notes to *Ashland & C. Street R. Co. v. Faulkner*, 43 L.R.A. 554, and *Wagner v. Bristol Belt Line R. Co.* 25 L.R.A.(N.S.), 1278.

N. Y. Supp. 309; *Manning v. Klein*, 1 Pa. Super. Ct. 217; *Jordan v. State*, 142 Ind. 422, 41 N. E. 817, 10 Am. Crim. Rep. 31; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Hitch v. Edgecombe County*, 132 N. C. 573, 44 S. E. 30; *Parker v. Griswold*, 17 Conn. 298, 42 Am. Dec. 739; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276; *Thornton v. Thornton*, 63 N. C. 212; *Smith v. St. Paul, M. & M. R. Co.* 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 891, 81 Pac. 840; *Tidewater R. Co. v. Shartzer*, 107 Va. 562, 17 L.R.A.(N.S.) 1054, 69 S. E. 407; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; *Lewis, Em. Dom.* 3d ed. § 366; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; *Rigney v. Chicago*, 102 Ill. 64; *Texas & S. R. Co. v. Meadows (Trinity & S. R. Co. v. Meadows)* 73 Tex. 32, 3 L.R.A. 565, 11 S. W. 145; *Jordan v. Benwood*, 42 W. Va. 312, 36 L.R.A. 519, 57 Am. St. Rep. 859, 26 S. E. 266; *Peel v. Atlanta*, 85 Ga. 138, 8 L.R.A. 787, 11 S. E. 582; *Rude v. St. Louis*, 93 Mo. 409, 6 S. W. 257; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 16 N. W. 475, 17 N. W. 120; 15 Cyc. 656; *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 96 Ala. 577, 18 L.R.A. 166, 11 So. 642; *Montgomery v. Maddox*, 89 Ala. 181, 7 So. 433; *Avondale v. McFarland*, 101 Ala. 381, 13 So. 504.

An electric street railway on grade with the street is one of the uses for which the street was originally dedicated, and the erection of such a railway in the street is not an additional servitude thereon.

Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 137, 43 L.R.A. 233, 24 So. 502; *Baker v. Selma Street & Suburban R. Co.* 130 Ala. 474, 30 So. 464; *Joyce, Electric Law*, § 335; *Morris v. Montgomery Traction Co.* 143 Ala. 246, 38 So. 834; *Com. v. Morrison*, 197 Mass. 199, 14 L.R.A.(N.S.) 196, 125 Am. St. Rep. 338, 83 N. E. 415; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L.R.A. 313, 51 Am. St. Rep. 543, 63 N. W. 111; *Hobbs v. Long Distance Teleph. & Teleg. Co.* 147 Ala. 393, 7 L.R.A.(N.S.) 87, 41 So. 1003, 11 Ann. Cas. 461.

Private interest must be made subservient to the general interest of the community, and the complainant is not to eke out the inconvenience of his own premises by an unreasonable use of the street.
47 L.R.A.(N.S.)

People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709.

But complainant would not have the right to have wagons and vehicles stand at right angles to the curb in loading and unloading.

Hobart v. Milwaukee City R. Co. 27 Wis. 194, 9 Am. Rep. 464; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, 44 Am. St. Rep. 203, 23 S. W. 592; *Sells v. Columbus Street R. Co.* 28 Ohio L. J. 172; *Oviatt v. Akron Street R. Co.* 3 Ohio S. & C. P. Dec. 253; *Kellinger v. Forty-second Street & G. Street Ferry R. Co.* 50 N. Y. 206; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 533; *Rafferty v. Central Traction Co.* 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *Carson v. Central R. Co.* 35 Cal. 329; *Wagner v. Bristol Belt Line R. Co.* 108 Va. 594, 25 L.R.A.(N.S.) 1278, 62 S. E. 391; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo. 308, 18 L.R.A. 339, 35 Am. St. Rep. 706, 20 S. W. 658; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 535.

Where the damage suffered by the complainant is the same in kind as that suffered by the general public, no recovery can be had by a private individual. The damage, to be recoverable, must be different not only in degree, but in kind.

Rigney v. Chicago, 102 Ill. 64; *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814; *Dentzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223.

Messrs. Edmund H. Dryer and E. J. Smyer, for plaintiff:

The complainant is the owner of the ultimate fee to the center of the street. Neither the state, the municipality, nor the public acquired any other interest than a mere easement.

Perry v. New Orleans, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 740; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; *Mobile & M. R. Co. v. Alabama Midland R. Co.* 116 Ala. 66, 23 So. 57.

The ultimate fee passed from the Elyton Land Company to the complainant through mesne conveyances, subject only to the easement.

Western R. Co. v. Alabama Grand Trunk R. Co. 96 Ala. 280, 17 L.R.A. 474, 11 So. 483.

The street was not in a municipality when it was dedicated, but the jurisdiction over

it passed into the municipality when it was brought within the city limits.

McCain v. State, 62 Ala. 138; Harn v. Dadeville, 100 Ala. 199, 14 So. 9.

Legislature could not change the primary character of the public easement, since whatever change might occur in the surroundings, the road or street must remain a public highway until abandoned, vacated, or discontinued in due course of law.

1 Elliott, Roads & Streets, 3d ed. § 507.

Streets and highways dedicated for public use are held by the state in trust for the public.

The state is not the owner, but is simply a trustee, charged with the administration of a trust which it has accepted.

Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 473, 58 Am. Rep. 615; Harn v. Dadeville, 100 Ala. 202, 14 So. 9; Perry v. New Orleans, M. & C. R. Co. 55 Ala. 421, 28 Am. Rep. 740; State ex rel. Atty. Gen. v. Louisville & N. R. Co. 158 Ala. 211, 48 So. 391; 2 Elliott, Roads & Streets, 3d ed. § 888; 1 Lewis, Em. Dom. 2d ed. § 91 k.

The ultimate fee remaining in the abutting owner, if the street is improperly obstructed or perverted to a use other than that for which it was dedicated, the owner of the fee has left in him sufficient title or right to prevent or redress the wrong.

Perry v. New Orleans, M. & C. R. Co. 55 Ala. 424, 28 Am. Rep. 740; Mobile & M. R. Co. v. Alabama Midland R. Co. 116 Ala. 58, 23 So. 57; 1 Lewis, Em. Dom. 2d ed. p. 195.

If the legislature vacates a street where the ultimate fee is in the abutter, the easement is destroyed, and the abutter holds title free of the easement.

Jackson v. Birmingham Foundry & Mach. Co. 154 Ala. 464, 45 So. 660; Albes v. Southern R. Co. 164 Ala. 356, 51 So. 327; Meighan v. Birmingham Terminal Co. 165 Ala. 591, 51 So. 775; Duy v. Alabama Western R. Co. 175 Ala. 162, 57 So. 724.

The legislature, in the exercise of the sovereign power of the state, may authorize a railroad to use a street for its roadbed, and totally destroy the street as a street; but the exercise of this power is not by the state as trustee, but is the exercise by the state of its sovereign power, which it was contemplated that the state should have the right to exercise when the trust was created.

State ex rel. Atty. Gen. v. Louisville & N. R. Co. 158 Ala. 217, 48 So. 391.

Where a street has been dedicated to the public as a highway, the ultimate fee remaining in the abutter, the legislature may grant the right to a railroad to use the street for its railroad, but can make the

grant only subject to the right of abutting proprietors under the constitution and laws of the state to have compensation for the property taken, injured, or destroyed.

Mobile & M. R. Co. v. Alabama Midland R. Co. 116 Ala. 51, 23 So. 57.

In the absence of legislative grant, a city has no power or authority by contract or ordinance to confer upon individuals or corporations the right to obstruct its streets, or to grant franchises and privileges over the same that tend to impair the public use for which they were dedicated and intended.

Mobile v. Louisville & N. R. Co. 124 Ala. 138, 26 So. 902.

Courts which hold as a general rule that street railways are a legitimate street use have, nevertheless, enjoined the construction of such a road where it would be especially injurious to the abutter, as where it was constructed with cuts and fills; or where there were already two tracks in the street.

2 Lewis, Em. Dom. p. 1369.

In the absence of express statutory authority, a city has no power to grant to a railroad company of any character such exclusive use of the street as will destroy its usefulness as a public thoroughfare.

27 Am. & Eng. Enc. Law, 2d ed. 174, § 4.

A city has no right to authorize the use of streets in such way by common carriers as to destroy them for general use as public ways, and to deprive abutting owners of access to their property.

Corby v. Chicago, R. I. & P. R. Co. 150 Mo. 465, 52 S. W. 282; Sherlock v. Kansas City Belt R. Co. 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; Knapp, S. & Co. v. St. Louis Transfer R. Co. 126 Mo. 26, 28 S. W. 627; Lockwood v. Wabash R. Co. 122 Mo. 86, 24 L.R.A. 516, 43 Am. St. Rep. 547, 26 S. W. 698; St. Louis, A. & T. H. R. Co. v. Belleville, 20 Ill. App. 580; Com. v. Frankfort, 92 Ky. 152, 17 S. W. 287; Dooly Block v. Salt Lake Rapid Transit Co. 9 Utah, 31, 24 L.R.A. 610, 33 Pac. 229; 1 Lewis, Em. Dom. 2d ed. § 117-A; Street R. Co. v. West Side Street R. Co. 48 Mich. 433, 12 N. W. 643; Dill. Mun. Corp. 5th ed. §§ 1248-1278; Joyce, Electric Law, 2d ed. §§ 336, 339, a; Nellis, Street Surface Railroads, pp. 135 et seq.; Highland Ave. & Belt R. Co. v. Birmingham R. & Electric Co. 113 Ala. 239, 21 So. 342; Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 143, 43 L.R.A. 233, 24 So. 502; Mobile, J. & K. C. R. Co. v. Middleton, 139 Ala. 610, 36 So. 782; Consolidated Electric Light Co. v. People's Electric Light & Gas Co. 94 Ala. 374, 10 So. 440; Birmingham & P.

M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; *Morris v. Montgomery Traction Co.* 143 Ala. 246, 38 So. 834.

Where legislative permission, directly or through authorized municipal consent, was given, the construction and operation was not *per se* a nuisance, but the physical invasion and injury without condemnation gave such owner the right to file a bill and enjoin before the taking or injury.

New & Old Decatur Beld & Terminal R. Co. v. Karcher, 112 Ala. 676, 21 So. 825; *Mobile & M. R. Co. v. Alabama Midland R. Co.* 116 Ala. 51, 23 So. 57; *Birmingham Belt R. Co. v. Lockwood*, 150 Ala. 610, 43 So. 819.

The construction and operation of a public service street electric railway did not constitute a new or additional servitude upon the highway, for which the owner of the fee was entitled to compensation.

Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 137, 43 L.R.A. 233, 24 So. 502; *Baker v. Selma Street & Suburban R. Co.* 130 Ala. 474, 30 So. 464, 135 Ala. 561, 93 Am. St. Rep. 42, 33 So. 685.

Whatever may be the rule as to an abutting property owner who owns only to the street line, in this case, the act resulting in actual damages is a "taking" or an "injury" under § 235 of the Constitution, for it takes and injures the fee itself.

Montgomery v. Maddox, 89 Ala. 181, 7 So. 433; *Avondale v. McFarland*, 101 Ala. 381, 13 So. 504; *New & Old Decatur Belt & Terminal R. Co. v. Karcher*, 112 Ala. 676, 21 So. 825; *Mobile & M. R. Co. v. Alabama Midland R. Co.* 116 Ala. 66, 23 So. 57; *Montgomery v. Lemle*, 121 Ala. 609, 25 So. 919; *Huntsville v. Ewing*, 116 Ala. 582, 22 So. 984; *Arndt v. Cullman*, 132 Ala. 550, 90 Am. St. Rep. 922, 31 So. 478; *Niehaus v. Cooke*, 134 Ala. 228, 32 So. 728; *New Decatur v. Scharfenberg*, 147 Ala. 367, 119 Am. St. Rep. 81, 41 So. 1025.

Mayfield, J., delivered the opinion of the court:

The following statement of the record, which is practically appellee's statement of the case made by his bill, presents the following questions for decision on this appeal: (1) Can a person whose property abuts on a public street in a city, which street is 34 feet wide, is much used for general travel, has been paved at the expense of abutting owners, and accommodates an electric street car line which is operated at grade, have injunctive relief against the street car company to prevent the construction by it of a double track on that street, notwithstanding the construc-

tion of such line is authorized by the city authorities? If not entitled to an absolute and permanent injunction, is he entitled to have the construction restrained until compensation is paid him for the injury to his property and for his aliquot part of the cost of paving the street in front of his property? These questions depend upon the answers to the following inquiries: First. Will the construction of the second car line or double track amount to a nuisance? Second. If it will not constitute a nuisance, will it be an additional servitude imposed upon the street, in excess of the use intended or designated in the act of dedication? Third. Are the plaintiff's damages, such as are shown in his bill, within the protection of § 235 of the state Constitution, which reads as follows: "Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall, on the demand of either party, be determined by a jury according to law?" Fourth. If his damages are not within the protection of § 235 of the Constitution, are they within the protection of § 227 of the Constitution, which reads as follows: "Any person, firm, association, or corporation who may construct or operate any public utility along or across the public streets of any city, town, or village, under any privilege or franchise permitting such construction or operation, shall be liable to abutting proprietors for the actual damage done to the abutting property on account of such construction or operation?"

The prime purpose of streets is use for travel by the public. The right of the public to the use of the street is paramount to that of an abutting owner, or to that of any individual or corporation, no matter what

may be the use to which he desires to devote a part of the street. Any unauthorized permanent obstruction of the streets, which prevents the exercise of this use by the public, is a nuisance, which a court of equity, in a proper suit, will abate. There are, however, some temporary obstructions and partial occupations of the streets, by individuals or corporations, which are allowed on the ground of necessity, such as materials for building or for repairing placed thereon by abutters in such manner as to cause the least inconvenience to the public. Moreover, individuals are permitted to use a part of the street, a reasonable length of time, for the receiving and delivering of goods at their residences or business houses abutting on the streets. These private uses, however, must not be inconsistent with the reasonably free passage of travel; but necessity justifies slight inconveniences and occasional interruptions in the free use of the whole of a street by the public.

The rule is well stated by Earl, J., in the case of *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, and approved by Mr. Freeman in a note to that case as reported in 1 Am. St. Rep. 831. It is there said: "An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways, without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto." Under this doctrine it was at first thought that the placing of a fixed track of rails in a street, on which street cars were to be operated, was an unwarranted obstruction of the street, though the cars were drawn by horses or mules; but all the courts held that it was not an unwarranted obstruction, but was a means of facilitating public travel along the street, and was therefore not a nuisance, but an improved mode of use of the street for the purpose intended. The New York court, however, held that, while it was not a permanent obstruction, yet it

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was an additional servitude imposed upon the highway, as to which the abutting owner was entitled to compensation; but all the other courts, save that of Nebraska, held that it was not even an additional servitude, and that the abutting owner was not entitled to compensation by reason of the construction of a street car track at grade in the street.

In the course of progress and the development of street transportation, the horse car was superseded by the dummy or steam line, and this by the electric car system; and it was in turn contended that each of these agencies of travel involved an unauthorized, unwarranted use of the streets, and therefore constituted an obstruction and a nuisance, or, if not a nuisance, an additional servitude imposed upon the highway, not included in or authorized by the original dedication or condemnation. This question was first considered by this court in the case of *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 413, 28 Am. Rep. 740, wherein the court, through Stone, J., spoke as follows: "The introduction of railroads as highways of travel and transportation has seemingly disturbed some of the old landmarks, and requires of the courts, in accommodation to the spirit of progress, that we apply principles long well understood to new conditions and exigencies. 'All property,' says an eminent authority, 'is held subject to those general regulations which are necessary to the common good and general welfare.' Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. *Com. v. Alger*, 7 Cush. 84, 85, per Shaw, Ch. J.: 'By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned.' *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 149, 62 Am. Dec. 625."

In *Perry's Case* it was held that an ordinary commercial railroad laid in a street was an additional servitude, and that a municipal corporation, without express authority from the legislature, could not authorize it.

The question was again before this court in the case of *Western R. Co. v. Alabama Grand Trunk R. Co.* 96 Ala. 272, 17 L.R.A.

474, 11 So. 483, in which case the authorities were reviewed; and it was held that, "where a railroad company, under express legislative and municipal authority, constructs its road on a street in a city, the fee to which street is in the proprietors of the property abutting thereon, such railway company is not a trespasser, nor its railway an unlawful obstruction or nuisance upon such street, and that an injunction will not lie in favor of such proprietor to restrain the construction of the road. *Perry v. New Orleans, M. & C. R. Co.* supra. But even in such cases, if the road is so constructed as to interfere with the easement of access residing in the proprietor of the property abutting on the street, or as to cause other special damage to his property, such proprietor is clothed with the right to prevent such injury by resort to a court of equity, or to redress the same in a court of law, as he may elect. *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24, 14 L.R.A. 462, 10 So. 267; *Evans v. Savannah & W. R. Co.* 90 Ala. 54, 7 So. 758."

In many respects a broad distinction is recognized in the authorities between urban and suburban and rural servitudes. A variety of uses to which the first may be applied without compensation to the owner of the ultimate fee, as having been within contemplation when the street was dedicated or condemned, would be an additional burden for which compensation must be made to owners of abutting property when the highway is a suburban or country road. The limited or restricted nature of the servitude of a suburban road undoubtedly leaves a very much greater right and interest in the owner of the servient estate than that which remains in the owner of a like estate in a city street; but it is not possible, under the authorities as they now stand, to mark with exactness and precise accuracy the extent of the interests and rights which remain in the owner of the servient estate in a country road. *Elliott, Roads & Streets*, p. 303.

The question was again considered in the case of *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 137, 43 L.R.A. 233, 24 So. 502. It was there said, as to the three modes of transportation of passengers: "The electric railways such as we are now considering are a comparatively recent development, yet, as is of common knowledge, they have practically superseded all systems of street railway enterprise (saving the cable systems in the larger cities), and their nature and modes of construction and operation, as affecting or not the legitimate use of streets within the implied contemplation of the dedication, have been subjects of frequent consideration and adjudication by courts of last resort in this 47 L.R.A. (N.S.)

country; and it may be said that there is almost unanimity in the adjudications that such uses are legitimate uses of streets, by the permission of municipalities, without any right of the owner of the fee to compensation therefor."

In *Baker v. Selma Street & Suburban R. Co.* 130 Ala. 474, 30 So. 464, after quoting the above, it was said that "the construction and operation of an electric street railway with municipal consent, along a public street, and conforming to its grade, with no special injury to the fee, is not the imposition of an additional servitude for which the owner of the fee can demand compensation."

The case of *Morris v. Montgomery Traction Co.* 143 Ala. 246, 38 So. 834, was a case very much like this at bar. There the street car company proposed to lay one track only in a very narrow street. The bill alleged: "That said street was very narrow, being only 24 feet in width, and was one of the principal thoroughfares in the city of Montgomery, and was passed by a great number of people daily, in wagons, buggies, and other vehicles. That the street railway proposed to occupy 10 feet of such street, and would thus prevent the passage of vehicles thereon, which would result in the necessary abandonment of such street, to the great inconvenience and injury of complainants. That property on said street would be exposed to greater dangers from fire, for the reason that fire engines and apparatus could not pass a car thereon." The court in that case held that complainants were not entitled to injunctive relief, citing the decision of 119 Ala. 144, and 130 Ala. 474 (above quoted from), and also *Joyce on Electric Law*, and *Booth and Nellis on Street Railroads*; the court quoting and saying: "'Streets and highways are dedicated to the use of the traveling public, and street railways, which are for the purpose of facilitating travel, impose no additional burden upon the abutting owner, and are a public use.' If they create noise, dust, and vibrations, and are attended with some inconvenience and even danger to life and property, so do other vehicles of travel and trade. They are legitimate uses within the original dedication of streets for the benefit of the public. *Joyce, Electric Law*. §§ 278, 341. 'A street surface passenger railway constructed at street grade in the usual manner, and operated by animal power (or by electricity), is not *per se* a public or private nuisance; nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation.' *Booth, Street Railways*, § 82. Such a use by the ordinary electric railway, with the usual means by which it is operat-

ed, is but an improved method of using the street for public travel; and there is no limit to the use of a public street for the purposes of travel thereon, so long as such use does not interfere unnecessarily with the ordinary modes of travel, and is no substantial impairment of private rights of property. *Nellis, Street Surface Railroads*, p. 135."

The ownership of lands which have been taken for, or dedicated as, public streets of cities, for most all practical purposes, is in the public. It is true that the naked fee often (as in this case) remains in the abutting proprietor; but this is not allowed to interfere with the use of the street as a highway by the public.

Lands once taken for, or dedicated as, public streets, are taken for all time for the purpose of providing a means of passage common to all the people, and may be rightfully used in any way that will best serve this purpose. The public thus acquire the right of passage over every part of it, from side to side, and from end to end. They acquire the right to so use it, not only by the means of vehicles then in use, but also by other means and vehicles which science and the improvement of the age may invent or discover to meet the needs of the ever-increasing population, or which may become necessary or expedient, provided such vehicles or modes do not exclude the proper use by other modes or kinds of vehicles. Any use of the street for public travel, which is within the limits of the public easement, whether it be by old or new methods, provided it does not tend to destroy the street as a means of passage and travel common to all, is lawful and permissible. These cases seem to settle the questions raised on this appeal against the contention of the complainant, appellee here, except as to the cost of paving, unless the laying of a double track in a street, instead of a single track, differentiates this case in principle, or unless § 227 of the Constitution of 1901 has changed the rules of law upon this subject.

We do not think that the laying of a double track in the street, which is 34 feet in width, and in the manner alleged in this bill, is an unwarranted use of the highway, and one not included in, or contemplated by, the original dedication of the street in question. If one line of the kind in question is for the purpose of "facilitating travel," and "imposes no additional burden upon the abutting owner," nor a "new servitude" upon the land, for which the owner is entitled to compensation, but is "only an improved method of using the street for public travel," then two lines or a double tracking of the same line, provided the public travel justifies

and demands the same, must fall within the same category.

It may be that one line or a single track will not afford proper or adequate means of transportation for the requirements and demands of a growing city; and, if not, then we can see no actionable wrong in the city's allowing or providing for two or more lines upon one street. We do not mean to say that a city cannot exceed its authority in placing so many car lines and cars on a given street as to constitute an additional burden or a new servitude not contemplated or intended in the dedication of the highway; but what we mean to decide is that a double track on the street in question, under the conditions shown in the bill, is not such an additional burden or servitude as would entitle the owner of an abutting fee to compensation. It is, we think, practically certain that the street in question will be as safe and as convenient for public travel in other vehicles, after the two tracks are laid, as now.

It is very true that complainant and others who desire to have wagons and other vehicles stand at or near the curbing for the purpose of loading and unloading goods and freight may suffer some inconvenience; but, as we showed at the outset of the opinion, this is a convenience allowed them by the law, which must yield to that of public travel along the street, whether it be in cars, in wagons, on horseback, or in automobiles, or in omnibuses. The old adage that "the street car is the poor man's carriage" is modernized so that the saying now is, "The street car is the poor man's automobile." The streets are primarily for public travel, for pedestrians and vehicles and conveyances in motion, and not for the purpose of their standing thereon. One of the laws of the road is, "Move on, don't stop." The policeman on duty in a crowded street proclaims it when he continually shouts, "Move on, don't block the street or sidewalk."

If the street in question is much used by many people in vehicles, as is alleged, then the complainant's right to stand his wagon in the street, at his curb, must yield to the right of the many people to pass along the street, if both cannot be done at the same time. His rights and those of the public, the many travelers of the highway, are the same, whether they all be in wagons, carriages, omnibuses, automobiles, or in the street cars, except that the street cars must move on a fixed track, and cannot turn to the right or the left, as can other vehicles. The right of the public to pass is paramount to the right of the individual to stand.

There is shown no good reason why the complainant cannot use his premises in the

same manner after the two tracks are laid, that he did before. It might be more inconvenient and more dangerous to load and unload wagons at the curb after than before; but this is true as to all increased travel on a given street, whether it be in cars or in other vehicles. An additional line of public carriages, omnibuses, taxicabs, or stage-coaches makes travel along the highway in other conveyances more inconvenient and more dangerous, to say nothing of increasing the congestion by standing on the streets. The only difference as to another line of street cars is in degree, and not in kind, except that the cars must move on a fixed track.

The bill in question claims two kinds of damages to the property of complainant, viz., damages resulting from destruction or impairment of his right of access to his property, and those resulting from increased danger to travel from collisions with passing cars. The latter is an injury or a damage which complainant would suffer in common with the general public, and one which would not authorize a private action.

The real and only serious question in the case is the alleged impairment of complainant's right of access to his residence and property which abuts on Twentieth street. The main fact alleged to show such impairment is that the car track will be laid so close to the curb as to make it impracticable and dangerous for wagons or other vehicles to stand in the street near the curb for the purpose of loading and unloading goods at his residence. There are many affidavits to support this averment of the bill which go into details more or less.

We are constrained to hold, however, on the undisputed facts, that there will be no substantial impairment of the easement of access to complainant's residence. The most that can be said is that the access may be made more inconvenient by reason of the fact that wagons or other vehicles cannot, with safety, stand at the curbing while a car is passing; but, as we have before said, this is one of the natural and "to be expected inconveniences" from traffic on a street of this kind, and one that must be held to have been contemplated or included in the original act of dedication or condemnation of the land to the use of a public street in a great city.

The case of *Wagner v. Bristol Belt Line R. Co.* 108 Va. 594, 25 L.R.A. (N.S.) 1278, 62 S. E. 391, is the authority nearest in point that we have been able to find. The bill in that case sought to enjoin the construction of a surface street car track at the side or edge of the street. The allegations were: (1) That an additional servitude was imposed upon the land occupied by the streets;

(2) that ingress and egress were unreasonably interfered with; (3) that complainant's property would be thereby made less valuable, desirable, and comfortable as a residence. That state has a constitutional provision like § 235 of ours, to the extent that it provided compensation for "injury" to property as well as for the "taking" thereof. The court in that case held: "Charter authority of a municipal corporation to permit car lines to be built in its streets, and determine and designate the route therefor, is not modified by a statute under which the street car company is acting, which provides that such tracks shall not in any wise obstruct or interfere with the use of the street, or damage property without compensation. . . . The mere fact that a street railway is located on the side, rather than in the center, of the street, is not sufficient to show that the abutting owner is entitled to compensation under a constitutional provision that private property shall not be damaged for public use without compensation. That a vehicle cannot stand between a street car track located on the side of the street and the curb, while a car is passing, does not show a violation of the rights of the abutting owner under a constitutional provision that private property shall not be damaged for public use without compensation. That the location of a street railway in a street will render abutting property less desirable and less comfortable as a residence does not entitle its owner to compensation under a constitutional provision that compensation must be made in case private property is damaged for public use."

It is further said in the opinion in that case, quoting in part from others: "In *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo. 308, 18 L.R.A. 339, 35 Am. St. Rep. 706, 20 S. W. 658, the tracks were laid so close to an abutting owner's property as not to permit wagons to stand between the tracks and the property; yet it was expressly held not to come under the damage clause of the Constitution. 'The convenience and advantage of all the inhabitants of the city, and of the public at large, must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interests of the community and the public, to the inferior and subordinate claims of the local lot owner. Such a construction of the law governing the dedication of public streets and the reserved rights of the original landowner and his assigns in the street, by unreasonably increasing the cost of rights of way or use, would obstruct all progress, and deprive the local community of the benefit to be de-

rived from the advancements of science, invention, and discovery.' . . . The suggestion that, because a vehicle could not stand between the track and the curb while a car is passing, the appellant's rights will be violated, is without merit. While appellant has unquestionably the right to occupy the street in front of his property to take away or deliver persons or goods, he may occupy the street for such purposes a reasonable length of time, and that right the street railway company must accord to him; and both must recognize that streets are established for the purpose of facilitating the passage of persons from one part of the city to another, and not for the standing of vehicles or storage of goods thereon. See authorities above cited, and Elliott on Roads & Streets, §§ 716, 717, 848. In a note to Ashland & C. Street R. Co. v. Faulkner, 43 L.R.A. 557, it is said: 'So, while the abutting owners have an easement in a street, in common with the whole people, to pass and repass, and also to have free access to their premises, the mere inconvenience of such access, occasioned by placing a street car track so near the sidewalk as not to leave sufficient space for a vehicle to stand, is not the subject of an action. So, a street railway, one of the tracks of which was in such close proximity to the sidewalk in front of the premises of an abutting owner as to interfere with, impede, and prevent his complete enjoyment of the use and occupation thereof, leaving insufficient space between the sidewalk and the track to admit of any kind of vehicle to be driven or to remain in front of his premises, is not, for that reason, a public nuisance, where the title to the street vested in the city; but the injuries are referable to that class of disadvantages to which one is subjected, resulting from the lawful exercise of the absolute power of control vested in the state in connection with the title to the fee of the land.' In Rafferty v. Central Traction Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884, it was held that the right of an abutting owner to the use of the street is the same after the tracks are laid thereon and the cars running as it was before. If, at any time, he has occasion for the presence of vehicles on the street in front of his property, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and if, in such exercise of the right, the passage of street cars is impeded, they must wait. See also Kellinger v. Forty-second Street & G. Street Ferry R. Co. 50 N. Y. 206."

It follows from what we have said, that complainant is entitled to no relief in equity.

ty under common-law principles, nor by virtue of § 235 of the Constitution of this state.

It is unnecessary for us to now construe § 227 of the Constitution, for two reasons: First, the only damages sought in this bill are those as for injury to or impairment of the easement of access; and we are certain that no such damages are shown as are recoverable under § 235 of the Constitution; second, whatever may be the purpose, object, or effect of § 227 of the Constitution, it is unlike § 235 of that instrument, in that it does not contemplate or require the payment of damages before the injury, and would therefore not support an action until the injury was suffered.

We are unable to see how or why the street car company, in a suit like this, should be required to refund to the complainant taxes which he has paid for paving the street in question. It is a mere incident that, if double tracks had been laid when the streets were paved, the street car company would have been required to pay a part of the tax which complainant paid. The city might have required the payment of this amount as a condition precedent to the right to construct the double track; but, not having done so, it is not within the power of the chancery court, nor of this court on appeal, to require the street car company to refund to complainant any part of the tax paid by him for this paving. This is a matter that rests primarily with the city; and its action in the premises cannot be controlled or changed in a collateral proceeding like this.

We have examined many reported cases like the one in question, and we feel sure that all the cases in which injunctive relief such as is prayed in this case was granted are readily distinguishable from this case on one or more of the following grounds: They were decisions from courts of states such as New York, in which an ordinary surface street car track, laid at grade, was held to be an additional or a new burden or servitude, and not to have been included or contemplated in the original dedication of the highway; or the construction of the track, poles, or line was held to have practically destroyed the highway or street for travel in vehicles of other kinds; or the complainant's easement of access was held to have been materially and permanently impaired, as by the changing of the grade of the street; or the construction was held not to have been authorized by the state or the municipality which was charged with the duty of controlling or regulating such affairs; or the construction was held to have been done or attempted contrary to or in violation of the

rights conferred by the state or other municipal authority. Cases of this kind are *Slaughter v. Meridian Light & R. Co.* 95 Miss. 251, 25 L.R.A.(N.S.) 1265, 48 So. 1040; *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L.R.A. 610, 33 Pac. 229; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L.R.A. 371, 49 N. W. 538, and others shown by note to § 636 of *Lewis on Eminent Domain*, vol. 2, pp. 1366, 1367. The distinctions are well pointed out by the author in the text, and by the many decisions cited in the notes. For example, in the *Mississippi* case (95 Miss. 251), the street was practically monopolized by the street car line, and travel in other vehicles almost prohibited. In the *Utah* case (9 Utah, 31), the tracks were not at grade, and there were already two other tracks in the street. In the *Michigan* case (87 Mich. 361), the grade was changed, and access materially impaired. In many other cases the construction was not authorized by the state or the municipality. The *New York* and *Nebraska* cases are put upon the ground that an electric car line is an additional servitude, not embraced within the act of dedication.

It should be noted that the *New York* court has admitted that the weight and number of authorities are against their holding; but the court adheres to its former decisions for the reason that the doctrine has now become a rule of property, and for the sake of *stare decisis*. The *Nebraska* decisions have been rather severely criticized, and, without approving or disapproving, we merely quote from the supreme court of Wisconsin, where it is said: "We are aware that there is at least one case decided in a court of last resort where a different conclusion was reached. We refer to *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67. The opinion there shows that the subject treated did not receive careful study. The conclusion reached is contrary to all the authorities cited by the court. A very few cases were cited,—but a small fraction of those where courts have considered the subject under discussion,—yet those referred to were all the *Nebraska* court could find, so said in the opinion. The decision was based on the theory that any exclusive occupancy of any part of a street by a street railway is a new burden on the fee title thereof. An effort was made to harmonize the contrary holdings in the few cases cited with the opinion, which seems to have been successful in the judgment of the writer of the opinion, yet success was reached by the exercise of judicial ingenuity that has few parallels." *La Crosse City R. Co. v. Hig-* 47 L.R.A.(N.S.)

bee, 107 Wis. 399, 400, 51 L.R.A. 923, 83 N. W. 704.

Complainant relies in part for his contention upon the doctrine announced by Mr. Lewis in his valuable work on *Eminent Domain*, and he quotes a text therefrom. We, like complainant, believe that Mr. Lewis has stated the true doctrine as to the right to relief of abutting owners in cases like this; and we not only quote the text relied upon by complainant, but we also quote the context as stating the true rule as to the right of the abutter to injunctive relief. In § 636 (pages 1368–1370, vol. 2) he says: "A distinction is made in some of the states between street railroads and commercial roads; the former being held to be a legitimate use of a street as a public highway. According to this view, the abutting owner has no more ground of complaint in case a street railroad is laid down and operated in front of his property than he would have if a line of omnibuses was operated on a street. But, where street railroads are put in the same category with commercial roads, the same rules and principles will apply in respect to the rights of abutting owners. They may enjoin the use of the street for such purposes in front of their property until the right has been obtained in the usual way. Where a statute gave compensation, it was held the abutter could enjoin until compensation was made. The construction of a railroad without lawful authority, or after the authority has expired, may be enjoined by the abutting owner. Courts which hold as a general rule that street railroads are a legitimate street use have nevertheless enjoined the construction of such a road where it would be especially injurious to the abutter, as where it was constructed with cuts and fills, or where there were already two tracks in the street. In one case a mandatory injunction was granted to compel the removal of a trolley pole so placed as to unnecessarily injure plaintiff. Where the company is required by ordinance to place its tracks in the center of the street, a different location may be enjoined by abutters." Our state, as we have shown, is one of those in which electric street cars are classed with omnibuses.

It follows from what we have said above that complainant can take nothing by his cross assignment of errors; that the appeal of respondent (appellant here) is well taken; and that its demurrers to the bill should have been sustained and the temporary injunction dissolved. A decree to this effect will be here entered.

Affirmed on the cross appeal, and re-

versed, rendered, and remanded on the main appeal.

All the Justices concur.

Petition for rehearing denied March 18, 1913.

ALABAMA SUPREME COURT.

CLOVERDALE HOMES, Appt.,

v.

TOWN OF CLOVERDALE et al.

(— Ala. —, 62 So. 712.)

Highway — dedication — retention of fee.

1. An easement only in the street vests in the public, leaving the ultimate fee in

Note. — Incorporation of territory into municipality as affecting prior rights as to use of highway.

As to power of legislature to annex territory to a municipality, see note in 27 L.R.A. 737.

For extension of city limits to include toll road, as taking of property for which compensation must be made, see note to *Belleville v. St. Clair County Turnp. Co.* 17 L.R.A.(N.S.) 1071.

The general rule as to the operation and effect of a lawful incorporation of territory into a municipality is that the territory duly annexed, "immediately on such annexation, becomes a part of the municipality, and, in the absence of statutory provision to the contrary, comes under the power, control, and jurisdiction of the municipality for all purposes." 28 Cyc. 215. This rule, however, does not ordinarily affect existing rights, and it is this point that the majority of the cases in the present note involve.

The succeeding municipal corporation may, of course, with the consent of the owner of the prior right, change a contract or make a new one regarding future exercise thereof. *People ex rel. Rockwell v. Chicago Teleph. Co.* 245 Ill. 121, 91 N. E. 1063; *People ex rel. Sherlock v. Chicago Teleph. Co.* 245 Ill. 154, 91 N. E. 1070.

Water pipes.

No case other than *CLOVERDALE HOMES v. CLOVERDALE* seems to have passed upon the right of a municipality to compel one who, pursuant to rights acquired in public streets prior to the incorporation of the municipality, has maintained pipes, etc., for the supply of water or other commodities of general public use therein, to secure a franchise.

The question of the municipality's right to compel the removal of pipes, wires, etc., placed in the streets by public service corporations and private owners, however, has been raised in a number of instances. In 47 L.R.A.(N.S.)

the abutting owner, under a statute providing that the acknowledgment and recording of a plat shall be held in law and in equity to be a conveyance in fee simple of the premises noted as donated to the public, and the premises intended for streets shall be held in trust for the uses and purposes intended or set forth in the plat.

Gas — right of home company to supply.

2. A corporation organized to develop a tract of residence property not within the limits of a municipal corporation, which, having no authority to engage in the business of supplying gas, has authority to contract for a supply of gas for its patrons, and enters into a contract with a gas company to supply such patrons through mains laid by it, cannot, where the fee of the street is in abutting owners and it secures permission to lay its mains from the county authorities, be compelled to secure a public service franchise by the municipality when

general, it may be said that the right of the succeeding municipality depends upon the character of the prior occupation. If it is by right under an existing contract with the authorities of the territory incorporated, the new incorporation takes subject to such rights and obligations; but if the occupancy is not under an unexpired contract or franchise, or is by license only, it seems that continued occupancy of the streets and highways would be subject to the control of the incorporating municipality. Of course, such occupancy is always subject to reasonable police regulations.

The question of the right of a water company to maintain pipes, etc., in streets and highways, acquired prior to the incorporation, was raised in *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749, wherein a water company had acquired the right to lay its pipes, etc., in the streets of a village which was subsequently incorporated into the city of Grand Rapids under a charter which made the city successor both to rights and obligations of the village. It was held that the water company's privileges did not fail when the village ceased to exist, the ground being that the incorporation in law continued the body politic as the same legal body. And see *Re Beauty Spring Water Co.* 134 App. Div. 17, 118 N. Y. Supp. 659, wherein it was said that the incorporation into a village of a part of the territory for which a water company, under authority from the town board, was furnishing water, did not impair the previous rights of the water company.

And in *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202, it was held that a town, upon incorporation, must exercise its powers subject to the rights of a water company to maintain pipes, etc., in its streets, acquired prior to the incorporation by grant of the county commissioners, and that therefore such a company could enjoin the municipality upon tearing up or interfering with its pipes.

it is incorporated, which will compel it to supply all applicants, as a condition to permitting its patrons to open the street to tap its mains.

Same — discrimination against consumer — power of municipality.

3. A municipal corporation which permits gas to be furnished to some of its inhabitants through mains laid by a real estate company cannot deny the right to tap the mains to anyone who has contracted therefor with the owner of the main.

(June 12, 1913.)

APPEAL by complainant from a decree of the Chancery Court for Montgomery County sustaining a demurrer to a bill filed to compel defendants to permit joiners to gas mains laid in streets, of the

So, in *Pennsylvania Water Co. v. Pittsburgh*, 226 Pa. 624, 75 Atl. 945, and in *Mellon v. Pittsburgh*, 227 Pa. 7, 75 Atl. 956, it was held that an unlimited grant by a borough to a water company to enter and lay pipes in its streets, accepted by the company, was a contract binding upon a city which afterward annexed the borough, agreeing to recognize all contracts for the supply of water made by the borough. It was further said in this case that the fact that the city expressly assumed the contract obligations of the borough added nothing to the strength of the water company's rights, and that the city would have been bound by the contract even though it had not expressly assumed the borough's contracts and obligations.

And in *Williamsport Water Co. v. Lycoming Gas & Water Co.* 95 Pa. 35, it was held that a water company which, by its charter, was granted an exclusive right to furnish certain territory which was then unincorporated with water, could enjoin a water company authorized by the municipality to which such unincorporated territory had been subsequently annexed, from laying pipes therein in violation of the original company's exclusive right, it being said that the incorporation did not affect the prior exclusive rights, so as to authorize the granting of rights which would infringe thereon.

In *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749, where the question was as to the rights of a water company to lay pipes, etc., in a street, under a charter obtained prior to the city's incorporation, it was held that the right must be exercised in harmony with the public convenience, and that it was the duty of the city to prevent injury to other interests, but that it could not interfere with the reasonable rights of the water company.

Poles and wires.

The question of the effect of incorporation upon prior rights of electric and telephone companies to maintain wires, etc., in streets 47 L.R.A. (N.S.)

defendant town, and dissolving an injunction which had been issued when the bill was filed.

Reversed.

The facts sufficiently appear in the opinion.

The ordinance and exhibit A referred to in the opinion are as follows:

"Section 1. It shall be unlawful for any person, firm, or corporation to make any excavation in, under, or across any street, alley, highway, or other public place in the town of Cloverdale, without a permit in writing from the town clerk.

"Sec. 2. Any person, firm, or corporation who shall violate the provisions of § 1 of this ordinance shall, on conviction, be fined not less than \$1 nor more than \$100."

and highways, has also been raised. Thus, in *Public Service Corp. v. Westfield*, 80 N. J. Eq. 295, 84 Atl. 718, it was held that the right of an electric company to maintain poles and wires in the streets and highways of a township was a property right which was not operated upon or affected by the subsequent incorporation of a part of such territory into a town.

And in *People ex rel. Rockwell v. Chicago* Teleph. Co. 245 Ill. 121, 91 N. E. 1065, followed in *People ex rel. Sherlock v. Chicago* Teleph. Co. 245 Ill. 154, 91 N. E. 1070, in holding that a municipal corporation which succeeded by annexation to the rights and powers of a town could not repudiate a franchise granted by the town to a telephone company to construct and maintain poles, wires, etc., in its streets, the court said that the town board of trustees, in granting such right, acted as an agent of the state, in its governmental and not in its proprietary capacity, and that therefore neither the town nor any other municipality succeeding to its governmental powers over its streets could have any right to repudiate the contract, or take back the grant without the consent of the telephone company.

Gas pipes.

And the question of the right of the municipality as to an existing franchise permitting gas pipes, etc., in streets, has also been presented. Thus, in *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 11 App. Div. 175, 42 N. Y. Supp. 1071, affirmed on this point in 153 N. Y. 528, 47 N. E. 787, it was held that a franchise granted by town authorities to a gas company to lay pipes, etc., in its streets and highways, was a property right which was not affected by the subsequent incorporation of the town into a village, and that the franchise could not be destroyed or taken from it by the arbitrary act of the village authorities in refusing to permit the company to lay conductors.

Railroads and street railways.

So, also, the relative rights of existing

The following ordinance also appears:

"Section 1. That any person, firm, or corporation who shall, at any time, desire to make any excavation in, under, or across any street, alley, highway, or public place in the town of Cloverdale, shall first apply to the town clerk in writing for permit to make such excavation, and shall, in the writing, state for what purpose the excavation is to be made, when it is to be made, and by whom, and a permit in the same writing to restore the condition of the excavation as may be required.

"(2) For all ordinary purposes, such as water connections, etc., the town clerk is hereby authorized to issue a written permit, but if any important excavation is applied for, the town clerk shall refer the

same to the town council, and shall not issue permission for such excavation until the town council shall pass upon the same.

"(3) Before any permit is issued by the town clerk, each applicant is required to place in his hands such sum as he may deem reasonable to have, not less, however, than \$10, to be held by him as a guaranty that said excavation shall be refilled in a proper and satisfactory manner, and the condition of the street, alley, highway, or other public place restored to its original condition, and if such applicant does not restore the condition of such public place within a reasonable time after excavation has been made, the town council, or the town clerk acting for it, shall have the right to use such money so deposited for the purpose

street railway and railroad corporations and the new municipalities have been decided. Thus, in *Belle v. Glenville*, 27 Ohio C. C. 181, in holding that the property rights of a street railway company operating in unincorporated territory, under county authority, are not affected by the annexation of such unincorporated territory to an adjoining municipality, the court answered the contention that the annexation had the effect to deprive the company of the right to operate in the annexed territory, as follows: "If the law is as claimed, every time the territorial limits of a municipality are extended so as to take in unincorporated territory, every street railroad operating under authority of the municipality to the extent that its lines are within the municipality, and under authority of the county commissioners so far as its lines are without the municipality, would have its property rights taken away by simply an annexation of such unincorporated territory to the municipality. This is against reason, and would perpetrate such a wrong upon street railroad companies as cannot be tolerated by the law." And in *Westport v. Mulholland*, 159 Mo. 86, 53 L.R.A. 442, 60 S. W. 77, affirming 84 Mo. App. 319, where a street railway company had obtained from the county the right to construct and maintain its tracks upon a highway which was afterward taken into the complainant city, it was held that the city could not, by ordinance, deprive the railroad company of its franchise, or impair its contracts with the county authorities. So, in *Jersey City, H. & P. Street R. Co. v. Garfield*, 68 N. J. L. 587, 53 Atl. 11, where a township committee had granted the right to construct and maintain an electric railway, it was held that a municipal corporation which was formed out of a part of the territory of the township could not revoke the franchise granted by the older municipality, it being said that the relation arising from the acceptance thereof could not be abrogated by the legislative fiat of the new incorporation.

And in *Johnson v. Owensboro & N. R. Co.* 18 Ky. L. Rep. 276, 36 S. W. 8, it was held 47 L.R.A. (N.S.)

that a municipal corporation did not, by reason of the fact that an extension of a city street was brought within the city limits, acquire a right to compel a railroad company which, by act of the legislature, operated its road over such street, to remove its track from the street extension upon the failure of the company to comply with the terms upon which it was permitted to use that part of the street originally within the city limits.

But the continued exercise of rights acquired prior to incorporation of the territory affected into a municipality is subject to reasonable police control and regulation. Thus, in *Westport v. Mulholland*, supra, it was held that the extension of the limits of a municipality over a road on which street railway tracks had been laid under county authority made such rights subject to an existing ordinance forbidding the tearing up of streets without consent of the municipal authorities, and that, while no contract between the city and the railway company was impaired so far as the ordinance merely required the tearing up of streets to be under reasonable police restriction, the city could not absolutely refuse permission to tear up the streets when the railroad company needed to do so.

And in *Pittsburg, Ft. W. & C. R. Co. v. Chicago*, 159 Ill. 369, 42 N. E. 781, it was held that a railroad company which, by its charter, was authorized to cross highways, was subject to an ordinance requiring a permit to lay additional tracks over a highway, although the railroad was built before the highway was laid out, and before the city limits were extended to include the place in question. But the court added that the city could neither act arbitrarily nor impose unreasonable burdens or restrictions upon the company. And that the new incorporation may enact reasonable police regulations, see also the following cases: *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *Mountain Water Co. v. Emaus*, 43 Pa. Super. Ct. 179, holding that the regulation must not amount to a deprivation of right; and

of restoring the condition of said street, alley, highway, or public place. If, however, the person making the excavation shall restore the original condition of the street satisfactorily to the town clerk, then the money so deposited shall be returned to the applicant."

Exhibit A, referred to, is as follows: "This agreement made and entered into on this the 16th day of September, 1908, by and between the Montgomery Light & Water Power Company, a corporation created and existing under the laws of the state of New Jersey, hereinafter designated as the party of the first part, and the Cloverdale Homes, a corporation created and existing under the laws of the state of Alabama, hereinafter designated as the party of the second part, witnesseth:

"(1) The party of the first part hereby agrees, in consideration of the covenants hereinafter made by the party of the second part, to allow the party of the second part to tap its street in the city of Mont-

gomery, Alabama, with a 4-inch gas main, for the purpose of extending the gas main of the party of the second part along any streets said party of the second part may see fit to lay such gas main in the Cloverdale plat.

"(2) The party of the first part hereby agrees that, if the property belonging to the Cloverdale Homes at the time of its incorporation, or other property contiguous to it subsequently acquired, should be taken into the city limits of Montgomery at any time, the party of the first part will purchase from the party of the second part such gas pipe as has been laid by the party of the second part, and to pay said party of the second part such amount as it would cost to duplicate such system of pipes at the time the sale is made. It is understood and agreed, however, between the parties to this instrument, that the party of the first part shall have the privilege of buying such pipe as may be owned by the party of the second part at any time it

Spring Water Co. v. Monroe, 55 Wash. 195, 104 Pac. 202.

Sewers.

And the right of a municipality to destroy or render useless a private sewer laid in the streets of the added territory was decided in *Wright v. Mt. Vernon*, 44 App. Div. 574, 60 N. Y. Supp. 1017. In this case an owner of land platted the same and constructed private sewers and drains in the streets thereof, and it was held that the municipality to which such track was subsequently added could not remove or render useless such sewers without making compensation to the owner. It was further said that the dedication of the streets to the public carried merely an easement, and did not carry title to the sewer in question.

Irrigation ditch.

And the question as to whether an irrigation ditch constructed upon a rural highway is a nuisance which may be abated at the suit of the municipality through which the ditch runs has been presented. Thus, in *Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 32 Pac. 943, where an irrigation ditch for public use was constructed at the instance and with the co-operation of the then owners of the land and projectors of a town site through which it passed, and without objection from the county authorities, through streets dedicated by the owners of the town site after the agreement to construct, but before its actual construction, it was held that the canal could not be declared a nuisance *per se*, or ordered filled up at the suit of the town, which became incorporated after its construction, where the town trustees, prior to the bringing of suit, had recognized its existence by regular acts and by assessing taxes upon

it, and especially where the canal could be so conducted and managed as to cause it to cease to be a nuisance.

Sanitary districts.

Another class of cases which may be of interest in connection with the foregoing includes those decisions where sanitary districts were annexed to existing municipalities. Thus, in California it has been held that sanitary districts incorporated and empowered to lay sewers, etc., in the streets and highways within their bounds, are extinguished and dissolved on annexation of their territory to a municipal corporation having power to lay sewers, etc., in its streets. In reaching this conclusion the California supreme court in *Re East Fruitvale Sanitary Dist.* 158 Cal. 453, 111 Pac. 368, reasoned as follows: "It is generally held that, where one municipal corporation is annexed to another, the annexing city takes over the functions of the annexed municipality, and the latter, by virtue of the annexation, is extinguished, and its property, powers, and duties are vested in the corporation of which it has become a part. . . . If this be true where one of two municipal corporations having coextensive powers is annexed to another, the same result must follow *a fortiori* where a public corporation having powers more limited than those of a municipal corporation is annexed to a city which possesses all of the powers of the corporation which has been annexed to it and others in addition." This decision was followed in *Re Upper Fruitvale Sanitary Dist.* 158 Cal. 461, 111 Pac. 372; *Re Fitchburg Sanitary Dist.* 158 Cal. 462, 111 Pac. 372; *Re Elmhurst Sanitary Dist.* 158 Cal. 463, 111 Pac. 372; *Re Seminary Park Sanitary Dist.* 158 Cal. 464, 111 Pac. 372; and *Re Redwood Sanitary Dist.* 158 Cal. 465, 111 Pac. 372. G. J. C.

shall so desire, whether before or after the property of the Cloverdale Homes shall be included in the city limits of Montgomery, by paying to the Cloverdale Homes such an amount as it would take to duplicate the system at the time of sale. Should the parties of the first and second part be unable to reach an agreement as to the price to be paid by the party of the first part to the party of the second part in the event a sale should be made under the provisions of the two preceding paragraphs of section numbered 'Second,' the price shall be fixed by three disinterested arbitrators, two of whom shall be selected by the parties to this agreement, each party selecting one arbitrator, and the third to be chosen by the two thus selected; and the price so fixed by said arbitrators shall be binding upon each of the parties to this agreement, the same as if said price had been named in this agreement.

"(3) It is agreed between the parties hereto that the party of the second part shall have the right to charge any property owner such amount as may be agreed upon between the party of the second part and such property owner for the privilege of making connection with the main of the party of the second part.

"(4) It is further agreed between the parties hereto that the party of the second part shall have the exclusive right of laying pipe lines throughout the property owned by the party of the second part at the time of its incorporation and property contiguous thereto subsequently acquired by the party of the second part, and the party of the second part shall also have the exclusive right of laying pipe lines throughout what is at present known as 'Cloverdale,' the agreed boundaries of which are shown on the plat hereto attached and made a part of this agreement. The party of the first part hereby agrees with the party of the second part that it will not lay or cause to be laid any gas pipe in the property of the Cloverdale Homes, or in Cloverdale, until the pipe of the party of the second part shall have been acquired by the party of the first part.

"(5) It is further agreed between the parties hereto that all connections to said mains shall be made by the party of the first part, and that no connection shall be made until persons desiring connections shall have filed with the party of the first part written permission from the party of the second part for such connection to be made.

"(6) The party of the first part hereby reserves the right to supervise the laying of said pipe, and the party of the second part agrees that such pipe shall be laid

under the supervision of the party of the first part, and the party of the second part agrees to pay such reasonable charges as shall be made by the inspector who shall inspect said work, and agrees that the party of the first part shall select such inspector.

"(7) It is further agreed that the party of the first part shall assess and collect all charges for the use of gas by parties using the gas by connection with the lines of the party of the second part. And the party of the first part agrees, in consideration of its being allowed to assess and collect such charges, that the party of the second part shall be allowed to make said connection at the intersection of the Norman Bridge road and Felder street without charge to the party of the second part.

"(8) It is further agreed that the party of the first part shall have such general powers and supervision over said pipes for the purpose of blowing them out, repairing them, and doing such other things as are necessary to be done in order that consumers may be given good service, and for the purpose of fixing and collecting charges for service, as it has under its charter over its own pipe lines in the city limits of Montgomery, Alabama.

"In witness whereof, the party of the first part has caused this instrument to be signed by R. J. Chambers, as its second vice president and general manager, and has caused the same to be attested by V. B. Day, as its secretary; and the party of the second part has caused the same to be executed by F. Stollenwerck, as its president, and the same to be attested by A. W. LeBron, as its secretary, on this the day and year above written. Executed in duplicate."

Mr. J. M. Foster, for appellant:

The owners of abutting lots have a right, as incident to such ownership, to make such temporary and reasonable use of the adjoining streets as is reasonably necessary to the improvement of their lots for residence or business purposes, and as does not materially interfere with the dominant use of the public, upon complying with reasonable regulations of the municipality.

Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82, Gil. 59, 88 Am. Dec. 59; Betcher v. Chicago, M. & St. P. R. Co. 110 Minn. 228, 124 N. W. 1096; Union Elevator Co. v. Kansas City Suburban Belt R. Co. 135 Mo. 353, 36 S. W. 1071.

The abutting lot owner owns a certain interest in the street, to do therein what is reasonably necessary for the improvement of his lot, provided he can so use it without detriment to the public rights; and

this right is property peculiar to his ownership of the abutting lot.

Elliott, Roads & Streets, § 690; *Holm v. Montgomery*, 62 Wash. 398, 34 L.R.A. (N.S.) 506, 113 Pac. 1115; *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 13 L.R.A. (N.S.) 904, 80 Pac. 1053; *Bronahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 166, 58 L.R.A. 782, 64 N. E. 141; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441; *Leadville v. Bohn Min. Co.* 37 Colo. 248, 8 L.R.A. (N.S.) 422, 86 Pac. 1038, 11 Ann. Cas. 443; *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67; *Snoddy v. Bolen*, 122 Mo. 479, 24 L.R.A. 507, 24 S. W. 142, 25 S. W. 932; 37 Cyc. p. 2, ¶¶ 207, 208; *Goodfellow Tire Co. v. Parks & B. Commissioner (Goodfellow Tire Co. v. Hurlbut)* 163 Mich. 249, 30 L.R.A. (N.S.) 1074, 128 N. W. 410; *Metcalf v. Boston*, 158 Mass. 284, 33 N. E. 586; *Sandpoint v. Doyle*, 14 Idaho, 749, 17 L.R.A. (N.S.) 497, 95 Pac. 945; *Georgetown v. Hambrick*, 127 Ky. 43, 13 L.R.A. (N.S.) 1113, 128 Am. St. Rep. 333, 104 S. W. 997; *Raymond v. Keseberg*, 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Costello v. State*, 108 Ala. 49, 35 L.R.A. 303, 18 So. 820.

Complainant is entitled to the injunction prayed for.

Austin v. Austin City Cemetery Asso. 87 Tex. 390, 47 Am. St. Rep. 114, 28 S. W. 528; *Bryan v. Birmingham*, 154 Ala. 447, 129 Am. St. Rep. 63, 45 So. 922; *Crawford v. Marion*, 154 N. C. 73, 35 L.R.A. (N.S.) 193, 69 S. E. 763; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; 22 Cyc. 765; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 144, 24 So. 731; *First Nat. Bank v. Tyson*, 133 Ala. 477, 59 L.R.A. 399, 91 Am. St. Rep. 46, 32 So. 144; *Dennis v. Mobile & M. R. Co.* 137 Ala. 657, 97 Am. St. Rep. 69, 35 So. 30; *Blondell v. Consolidated Gas Co.* 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; *Deegan v. Neville*, 127 Ala. 471, 85 Am. St. Rep. 137, 29 So. 173; *Christian Church v. Sommer*, 149 Ala. 145, 8 L.R.A. (N.S.) 1031, 123 Am. St. Rep. 27, 43 So. 8; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682, 3 Ann. Cas. 981.

Messrs. E. T. Graham and C. H. Roquemore for appellees.

De Graffenried, J., delivered the opinion of the court:

The questions involved in this case re- 47 L.R.A. (N.S.)

quire us to construe § 6030 of the Code of 1907, which is as follows:

"The acknowledgment and recording of such plat or map shall be held in law and in equity to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common, or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map."

It is necessary, in order that the provisions of the above § 6030 may be fully understood, that the provisions of that section be read in connection with the following other sections of the Code:

"6028 (3899). Town lots; survey and plat.—Any person desiring to subdivide his lands into lots shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plat or map thereof to be made, showing the subdivisions into which it is proposed to divide the same, giving the length and bearings of the boundaries of each lot and its number; and if it be the purpose of the owner to divide the lands into town lots, such plat or map shall show the streets, alleys, and public grounds, and give the bearings, length, width, and name of each street, as well as the number of each lot and block. Such plat or map must show the relation of the lands so platted or mapped to the government survey."

"6029 (3900). Plat to be certified, signed by owner, acknowledged, and recorded; evidence.—The plat or map, having been completed, shall be certified by the surveyor, which certificate must also be signed by the owner, his duly authorized agent or attorney, and acknowledged by such owner, agent, or attorney, in the same manner in which deeds are required to be acknowledged. The plat or map, together with the certificate of the surveyor and of acknowledgment, shall be recorded in the office of the judge of probate in the county in which the lands are situated, in a suitable book to be kept for that purpose; and such acknowledgment and record shall have like effect, and certified copies thereof, and of such plat or map, may be used in evidence to the same extent and with like effect as in the case of deeds."

The common law is the base upon which all of the laws of this state have been constructed, and when our courts are called upon to construe a statute,—when they are called upon to ascertain and declare the legal effect and meaning of a legislative enactment,—they must read the statute in the light of the common law.

At common law the ultimate fee to the middle of the street was in the abutting landowner. There was reasoning underlying the above rule of the common law, for the ultimate fee in lands should reside somewhere, and where it resides in the abutting landowner to the middle of a street, it furnishes to that landowner an efficient weapon for his protection against an unwarranted appropriation of a street, in the proper maintenance of which the situation of his property gives him a peculiar interest. Through this doctrine of the common law this court has been able to meet and determine, with justice to the owners of lands abutting upon streets, and to the public to whose use such streets are devoted, each question which the constant growth of municipalities and the rapid and continuing advancement of human activity have developed. In fact, through this principle, this court has, meeting the wants of the state as it has proceeded in its various stages of development, declared a system possessing sufficient elasticity, and at the same time sufficient certainty, to meet any demand which each improved system of communication and transportation, and each modern condition and need of human life, has made upon it. *Perry v. New Orleans*, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 740; *Western R. Co. v. Alabama Grand Trunk R. Co.* 96 Ala. 272, 17 L.R.A. 474, 11 So. 483; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24, 14 L.R.A. 462, 10 So. 267; *Birmingham R. Light & P. Co. v. Smyer*, — Ala. —, ante, 597, 61 So. 354. The common-law rights of a citizen occupy a high plane of sanctity. for they are inherited rights.

For this reason it is a general rule of construction of statutes that "there are certain objects which the legislature is presumed not to intend; and a construction which would lead to any of them is therefore to be avoided. It is found sometimes necessary to depart, not only from the primary and literal meaning of words, but also from the rules of grammatical construction, when it is improbable that they express the real intention of the legislature; it being more reasonable to hold that the legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to intend.

One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by unmistakable implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the

legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they were not really used. It is therefore an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act, and as not altering the general principles of the law [i. e., they are to be construed as near the use and reason of the prior law as may be without violation of their obvious meaning]." *Endlich, Interpretation of Statute*, p. 151, § 113.

In the case of *Thomas v. Hunt*, 134 Mo. 392, 32 L.R.A. 857, 35 S. W. 581, which is cited by counsel for appellant in his brief, the supreme court of Missouri, construing a statute somewhat similar to the above-quoted § 6030 of our present Code, said: "The statute in force when the plat was filed provided that such plats 'shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county in which such town, village, or addition is situate, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose.' *Rev. Stat. 1855, § 8, p. 1536*. Under this statute it has been held that the fee passes from the owner by the dedication. *Hannibal v. Draper*, 15 Mo. 634; *Reid v. Board of Education*, 73 Mo. 304. . . . Considering the policy of the law, as before stated, to be that the owners of property abutting on a street own the fee also to the center of the street, subject to the easement, it is clear to use that the statute was intended to effect the same purpose; that is, while the fee passed out of the dedicator and vested in the county, the public only secured an easement, and the abutting owners, respectively, the beneficial right in the land to the center of the street. This seems to be the view taken in the *Snoddy Case*, 122 Mo. 491, 24 L.R.A. 507, 25 S. W. 932, and 122 Mo. 493, 24 L.R.A. 512, 24 S. W. 142, though what is there said may be considered only *dicta*. We are therefore of the opinion that, by the statutory dedication of Tracy avenue, the fee to the land passed out of the dedicators, and the ownership, subject to the easement, vested in the abutting owners, respectively, to the center of the street." To the same effect is a later decision of the supreme court of Missouri, rendered by that court in *Union Elevator*

Co. v. Kansas City Suburban Belt R. Co. 135 Mo. 353, 36 S. W. 1071. In that case the court said: "Counsel for defendant insist that the cases cited are predicated of the fact that the owners of the lots in question in those cases owned to the center of the alley or street, while in this case the fee of the streets was dedicated to the county of Jackson in trust for the public. Coates & Hopkins' addition to the city was platted, and the plat filed in the recorder's office of said county, on the 7th day of January, 1876. By it Henning and Hopkins streets were dedicated to the public, and the fee therein vested in the city for public purposes. Gen. Stat. (Mo.) 1865, chap. 44, § 8. By that statute it is not meant that an absolute fee in the streets is vested in the city, with the right of disposal by deed, but simply the right of their control for the use of the public. Whatever may be the ruling in other jurisdictions under similar conditions, the law as announced in this state is that the owner of land adjoining a street or alley owns the fee to the center of such street or alley, as the case may be, subject to an easement in the public." To practically the same effect are the cases of *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, Gil. 59, 88 Am. Dec. 59, and *Betcher v. Chicago, M. & St. P. R. Co.* 110 Minn. 228, 124 N. W. 1096.

Taking into consideration the law as it had, through the entire history of this state, been declared by an unbroken line of decisions of this court, to exist, we are clearly of the opinion that, when an owner of land divides his land into town lots, and by his map, certified, signed, and acknowledged and recorded as required by § 6029 of the Code of 1907, dedicates certain parts of the said land to the public to be used for streets and alleys, an easement in the lands so dedicated for such purposes vests in the public, but the ultimate fee in the land, subject to such easement, remains in the abutting landowners to the center of such streets and alleys, and that § 6030 of the Code of 1907 was intended by the legislature to so declare. Sections 6031 and 6032 of the Code of 1907, which provide methods whereby the provisions of §§ 6028, 6029, and 6030 may be abrogated, clearly show that the construction which we have put upon said § 6030 was the construction which the legislature placed upon that section when it called it into existence.

1. While, under the laws of this state, the public have only an easement in a street of a city, that easement is paramount, and the right of the public to passage over a street extends over "every part of it, from side to side, and from end to end." The public acquires the right to use the street

not only by means of vehicles in use at the time of the dedication of the street, but also by such other reasonable methods of conveyance which in the future may be discovered, provided "such vehicles or modes do not exclude the proper use (of the street) by other modes or kinds of vehicles. Any use of the street for public travel, which is within the limits of the public easement, whether it be by old or new methods, provided it does not tend to destroy the street as a means of passage and travel common to all, is lawful and permissible." *Birmingham R. Light & P. Co. v. Smyer*, — Ala. —, 61 So. 354.

The mere fact that an abutting landowner owns the ultimate fee to the middle of the street does not confer upon him the right to put that part of the street in which he owns such ultimate fee to even a temporary use which is inconsistent with all of the rights of the public in such street, unless there is some necessity therefor. "The fee is entirely and completely subordinate to the dominant easement," and an invasion of the rights of the public in the street "can be justified only on the ground of necessity." *Com. v. Passmore*, 1 Serg. & R. 217; *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Raymond v. Kesenberg*, 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612.

As the abutter owns the fee to the middle of the street, he may, however, out of respect to the fact of his ownership, use that part of the street for any lawful purpose of his own, when such use in no way interferes with any of the dominant rights of the public. The word "street" means "the surface; it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers, for at the present day there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion includes the surface and so much of the depth as may be not unfairly used as streets are used." *Brett, L. J., in Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104; *Dill. Mun. Corp.* 5th ed. p. 1692, § 1072, note.

"They (that is, the abutting owners) may have every use and remedy that is consistent with the servitude or easement of a way over it and with police regulations." 3 Kent, Com. 433; 3 Dill. Mun. Corp. 5th ed. p. 1772, § 1123, and notes.

Of course, the uses to which an abutter may lawfully put a street varies with the size of the municipality in which the street

is situated. An abutter upon a street in a small village may lawfully use the street for purposes which would be unlawful in a city. The dominant right in a street is the right of the public, but the extent of that right depends upon the needs of the public. The surface of the street, in all places, great and small, must be kept open for the lawful use of the public, unless, indeed, there is some temporary paramount need of the abutting owner for a part of it. *Costello v. State*, 108 Ala. 45, 35 L.R.A. 303, 18 So. 820.

Of course, if a village grows into a town, and the town grows into a city, each step in the growth of such municipality increases the public demands, and thus, in fact, broadens the right of the public in both the surface and the subsurface use of the streets, and the authority of the abutter to use either the surface or the subsurface portions of such streets diminishes as the rights of the public increase. The private use of the abutter to the subsurface (as to the surface) of a street can only be justified out of respect to his private reasonable need therefor, subject, of course, to reasonable police regulations, and any private use to which he may put his street, as an abutter, must be held to be subservient to, and in recognition of, the dominant rights of the public in such street for all street purposes, and must give way to that dominant right whenever the public needs require that it shall do so. *Webb v. Demopolis*, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289.

2. The facts of this case are as follows: The N. E. $\frac{1}{4}$ of section 19, township 16, range 18, Montgomery county, Alabama, bounds the city of Montgomery on the south-east. The lands embraced in the above description are gently rolling and peculiarly adapted to residence purposes. On the 20th day of April, 1894, McClellan, Sherrer, and Brown, who then owned the lands and who desired to exploit and sell them for residence purposes, had the said lands surveyed and platted into lots and streets. The map of the lands, showing the various subdivisions and streets, was signed, certified, acknowledged, and recorded as provided in said § 6029 of the Code. Between April 20, 1894, and June 10, 1901, the said McClellan, Sherrer, and Brown sold to sundry people a large number of said lots. On June 10, 1901, McClellan, Sherrer, and Brown and all of their vendees, under the provisions of § 6031 of the Code of 1907, annulled the above-mentioned map. The property was then resurveyed, new streets and alleys were dedicated to the use of the public, instead of the old ones, a new map of the property was made,—all in accordance with the provisions of article 2 of

chapter 142 of the Code of 1907 (§§ 6028 to 6034, inclusive, of said Code); and the map was duly filed for record, and recorded in the probate office of Montgomery county. From the 10th day of June, 1901, to the 20th day of April, 1908, the Cloverdale Company, a private corporation which had become the owner of much of the above-described land, sold many of the lots to sundry individuals. On April 20, 1908, the appellant, the Cloverdale Homes, was incorporated. This corporation is a private corporation, and is authorized by its charter to purchase, own, sell, and otherwise deal in real estate. On or about the above-mentioned date, the Cloverdale Homes, appellant here, bought from the above-mentioned Cloverdale Company 128 of said lots. The Cloverdale Homes was really organized for the purpose of buying the above lots, to improve the property, and sell the lots to such persons as might desire suburban homes contiguous to the city of Montgomery. It paid \$50,000 for the lots; and, in order that the situation may be made fully to appear, we copy the following from the bill of complaint, which, as we understand this case, states the truth: "Said property was then mostly unimproved; the streets having only been laid out, but not opened and put in condition for use by the public. This property lay along the streets now known as Cloverdale road, Felder street, Galena avenue, Thorn place, Earl avenue, and Prairie avenue. In order to make said lots salable, it was necessary for the complainant to open up, grade, and gravel the streets running through said property, and to put water and gas mains upon said streets, so that water and gas should be accessible to the residents and owners of said lots. Complainant expended in the opening and improvement of said streets \$9,048.79; in the laying of water pipes, including fire plugs, \$6,495.29; and in the laying of gas mains, \$4,554.83. In order to reach the gas mains of the Montgomery Light & Water Power Company, which was the only concern furnishing gas to the inhabitants of the city of Montgomery and vicinity, it was necessary to lay mains from Norman Bridge road up to the limits of complainant's property, and this part of said main ran through no property belonging to complainant, and covered a great distance. Including the part of the main just referred to and the mains laid on the streets above mentioned, complainant laid 7,961 feet of gas main, at a cost, as aforesaid, of \$4,554.83. In order to get permission to connect with the gas mains of the Montgomery Light & Water Power Company, complainant had to enter into a contract with said company, a true copy

of which is hereto attached, marked Exhibit A, and prayed to be taken as a part of this bill of complaint."

The Cloverdale Homes has, under its charter, no authority to do a public service business, but it has the authority to provide facilities for obtaining gas, lights, and water for its tenants and vendees. This provision in its charter did not confer upon it the power of eminent domain, nor did it confer upon it the right to use the public highways of the county of Montgomery for the purpose of laying water and gas mains in them for the purpose of conducting water and gas to its properties or the properties of its vendees. It was by virtue of the above authority to provide facilities for obtaining gas, lights, and water for the above-stated purposes that it made the contract of which Exhibit A to the bill is a copy, and which the reporter will set out in his report of the facts of this case.

At the time the Cloverdale Homes laid the water and gas pipes referred to in the above-quoted portion of the bill of complaint, Cloverdale was an unincorporated village. Before the pipes were laid, the board of revenue of Montgomery county consented thereto, and, so far as this record discloses, the pipes were laid just as they now are without the objection of any person whatsoever. The Cloverdale Homes has nothing to do with furnishing gas to its tenants or vendees. That is a matter of contract between the tenant or vendee and the Montgomery Light & Water Power Company, which is a public service corporation, and which possesses the power of eminent domain. The pipes were laid by the Cloverdale Homes for the purpose of improving its own property and making it more valuable and salable, and, in selling its lots, the Cloverdale Homes has guaranteed to its vendees that they and those acquiring title through them shall have the right to tap the gas pipe free of charge. In order that other property owners not the vendees of the Cloverdale Homes nor tracing title through said Cloverdale Homes may enjoy the right of also tapping said gas pipe, the Cloverdale Homes offers all lot owners whose lots abut the streets in which the gas pipe is laid the privilege of paying a certain fixed price for that privilege. This fixed price, so the Cloverdale Homes contends, represents the actual cost per foot of laying the pipe along the street, but the respondent the town of Cloverdale contends that this fixed price is fixed arbitrarily, and is greatly in excess of such cost.

The Cloverdale Homes, since it acquired the above-mentioned properties, has sold off all of its lots except forty-six of them, and most of the purchasers of such lots 47 L.R.A.(N.S.)

have connected their lots with the above-mentioned gas pipe by laying service pipes from their residences under the ground to such gas pipe or main.

We direct attention to the fact that all of the above improvements were made, and all of the above things were done, without objection on the part of anyone, and with the consent of the board of revenue of Montgomery county, while Cloverdale was an unincorporated village or community. The gas pipe or main is laid beneath the surface of the streets or driveways in which it is situated; its presence in such streets or driveways in no way interferes with the full and free use by the public of such streets or driveways; and the fact that it is in the streets or driveways at all would be unknown by one who had not seen it while it was being laid, unless he was told of its presence. It is a convenient and cheap method used by those who are connected with it of conveying fuel to their homes, and is, of course, a thing of value to those who have the legal right to use it. The village of Cloverdale, as it now exists, is simply a place for residences. It was not designed or intended to be other than a place of homes, and there is no remote probability that in the future it will be other than a place where people will make their homes. Its inhabitants have taken up their habitations there in order that they may be, while in their homes, free from the dust, noise, and turmoil of city life. The adjoining city of Montgomery is the place where the people of Cloverdale now transact, and will in the future transact, their business affairs.

There is not now, and never has been, any objection on the part of the village of Cloverdale to the use by its inhabitants, or any of them, of the water pipe or main which was laid by the Cloverdale Homes along the streets. Water, through this water main, is supplied by the city of Montgomery to the inhabitants of Cloverdale who have possessed themselves of the right to use the water main, just as gas is furnished by the Montgomery Light & Water Power Company to those inhabitants of Cloverdale who have possessed themselves of the right to use the gas main. While water is in all climates necessary to all human life, savage and civilized, in our climate fuel is an essential to all civilized life. In our climate every civilized home must possess the fuel necessary to provide that home with heat sufficient to meet the requirements of the kitchen and the demands of its occupants for the comforts which only heat can supply. The method provided by the Cloverdale Homes for supplying its properties, and the properties of

its vendees and all others who may pay for that right, with heat, is not only economical, but is a method which probably puts the streets of Cloverdale as a matter of fact to less servitude, and the inhabitants of Cloverdale to less inconvenience, than any other known method. Heavy loads of coal and wood, when hauled about upon the highways, are more likely to produce injury to such highways than a flow of gas through a gas main firmly and properly imbedded in the street, and at a proper distance under the surface of such street.

3. On July 2, 1910, Cloverdale was incorporated as a municipal corporation, under the general laws of the state, under the name of the "town of Cloverdale." Since that time it has enjoyed all the privileges and rights of a municipal corporation, and it has a mayor and a board of aldermen. After the "town of Cloverdale" became a municipality, the said Cloverdale Homes sold one of its said lots to one Patterson, with its usual covenant or guaranty that he and his grantees should have and possess the right, by virtue of the possession and ownership of the lot, to tap the above-mentioned gas main for the purpose of obtaining gas to be used in the residence to be erected on said lot. Patterson built for a young married daughter, Mrs. Ben Noble, a residence on the lot, and she and her husband, Ben Noble, have taken up their residence upon the said lot. The gas main of the Cloverdale Homes is situated a few feet from this residence in the middle of a street or driveway which passes the residence on the western side of it. Ben Noble desires to tap said gas pipe. The town of Cloverdale refuses to allow him to do so, although Ben Noble is willing, and in every way has offered, to comply with the terms of an ordinance of said town which is set out in full in the answer of the town, and which ordinance appears on pages 30 and 31 of the transcript, and which ordinance the reporter will set out. The reasons why the town of Cloverdale has refused to allow Ben Noble, who stands in the shoes of, and acts for, Patterson, to tap the gas main, are stated by the town in its answer as follows: "That said complainant laid said gas mains in the streets of said town before it was incorporated, without having acquired a franchise for the purpose, and now, since said town was incorporated, did refuse to apply to, or accept from, said town a franchise to maintain and operate its gas mains in the streets of said town, all of which are well known to the complainant before the bill was filed. Said gas pipes, as alleged, were laid before the town was incorporated, and, after the incorporation of said town, and up to the

time of complainant's filing this bill, the town of Cloverdale has been endeavoring to make some satisfactory arrangement with complainant and with the Montgomery Light & Water Power Company by which both or one of them shall obtain a franchise from said town to engage in the gas business, so that some arrangements could be made by which all residents of Cloverdale, and any and all of the persons owning lots in said town, could tap said gas mains and have the benefit of gas service; but neither said complainant nor the Montgomery Light & Water Power Company will make any arrangements whatever with said town for the purpose of accomplishing the desire, and for that reason this defendant, acting through its mayor, has refused to grant any permit to any person to tap any gas main in the town of Cloverdale, until some person, firm, or corporation having the authority to do a gas business shall obtain a franchise from the town of Cloverdale to engage in such business therein."

Under its charter the complainant, as we have already stated, has no right to do a public service business. It has the right, under the express terms of its charter, "to supply water, gas, electric lights and power, and sewerage to the purchasers or tenants of its lands, and for such purposes to make any contract or engage in any business or enterprise which may seem desirable."

Complainant, under the letter of the above authority contained in its charter, laid the water and gas pipes at large expense, and made its contract with the Montgomery Light & Water Power Company, and up to the time of this controversy with Ben Noble, was peaceably carrying out its contracts with the purchasers of its lots. Many of the purchasers of its lots are now in the full enjoyment of the privileges which the town of Cloverdale wishes to deny to Ben Noble because the municipality is unable to force complainant to make a contract, the terms of which it shall itself declare, whereby all of the inhabitants of Cloverdale shall have the right to connect with said gas pipe. The right of complainant "to supply water and gas to the purchasers or tenants of its lands," through the water and gas pipes which, at much expense, it had laid in the streets and highways of Cloverdale with the consent of the board of revenue of Montgomery county, was a right which had vested in complainant before the municipality of the town of Cloverdale was formed, and we find nothing in any of the law books indicating that the town of Cloverdale, which appears to have made no arrangement of its own, either by contract with a public service corporation or otherwise, to supply its inhabitants with either

water or gas, has the right to arbitrarily deny to complainant and its vendees the orderly exercise of these rights under such reasonable police regulations as it may see proper to prescribe. When the Cloverdale Homes laid the water and gas pipes, it did so with the consent of the board of revenue of Montgomery county, and without objection on the part of any landowner whose lands abutted on any of the streets under which the pipes were laid. While the board of revenue may not have possessed the authority to grant the privilege which it thus attempted to confer, it is claimed by no one that the act of complainant in laying its pipes along the highways, pursuant to that authority, was an act in bad faith, and it cannot be claimed that the property in the water and gas pipes does not still remain in the Cloverdale Homes. Respectable courts of last resort differ on the question as to whether pipes laid as indicated in this record are an additional burden upon a rural highway. 1 Elliott, Roads & Streets, 3d ed. p. 544, § 492; Baltimore County Water & Electric Co. v. Dubreuil, 105 Md. 424, 9 L.R.A.(N.S.) 684, 66 Atl. 439; Cheney v. Barker, 198 Mass. 356, 16 L.R.A.(N.S.) 436, 84 N. E. 492. Whether they are an additional burden upon the streets or not, the complainant has, without intentional wrong, at large expense, placed in the streets its pipe. The pipe is there embedded in the street, doing damage to no one, and of no injury to the public use of the street in any way. It is of value to Ben Noble so long as it remains where it is, for through it he can obtain fuel for his house. Other people possessing no more right than Ben Noble, without objection on the part of the appellees, are using this pipe for the same purpose that Ben Noble desires to use it. The doctrine of *sic utere tuo ut alienum non laedas* is a doctrine of wide application, and we can see no reason why the town of Cloverdale, which now has complete jurisdiction over its streets, should be permitted to deny to Ben Noble the use of the pipe simply because all the other citizens of Cloverdale cannot use the pipe upon the same terms as Ben Noble. The law is reasonable, and it should not permit a municipality to deny to one of its citizens the enjoyment of a privilege of which he may be able to avail himself, because all of its citizens are not so situated as to avail themselves of the same privilege.

Ben Noble, or his father-in-law, Patterson, owns the fee of his lot to the center of the street, and, as the excavation which he desires to make in the street is safely guarded by the ordinance of the town of Cloverdale, and can amount to inconvenience 47 L.R.A.(N.S.)

to no one, we can see no reason why he should not be permitted to make it. Wright v. Mt. Vernon, 44 App. Div. 574, 60 N. Y. Supp. 1017.

4. Undoubtedly the town of Cloverdale has complete jurisdiction over its streets, and it has the power, if that be necessary to secure gas for all of its residents of the same class upon equal terms, to require the appellant to remove its gas pipes from its streets, or, upon the payment to appellant of a sum which will justly compensate it for the value of its pipes, to condemn the pipes to the use of the town. It cannot be said that the pipe can be maintained by appellant in the streets of Cloverdale as a matter of right, and we think that, taking into consideration the character of the pipe and its evident sufficiency to meet the demands of the owners of land who abut upon the streets in which it is laid, a court of equity, upon a bill filed for that purpose, can compel the Cloverdale Homes to accept what the court may determine to be just compensation to it for the use of its pipe for the stated purpose, or to remove the pipe from the streets.

The Montgomery Light & Water Power Company is a public service corporation and it cannot, of course, furnish to one of the residents of Cloverdale gas for his residence, and not furnish gas to all other residents of the town occupying the same class for their residences. All persons of the same class are entitled to gas upon the same terms. *Montgomery v. Greene*, — Ala. —, 60 So. 900. It is, of course, within the power of the town of Cloverdale, by such reasonable ordinances as it may see proper to adopt, to require a franchise tax of the Montgomery Light & Water Power Company for the privilege of supplying the inhabitants of the town of Cloverdale with gas, but, so long as said town permits the said company to supply any of the inhabitants of Cloverdale with gas through said gas main, it has not the authority to deny to Ben Noble the right to use said gas pipe for said purpose.

It is our opinion, therefore, that the appellant is entitled to the relief prayed for in its bill of complaint, and that the town of Cloverdale, upon the tender by Ben Noble of the sum of \$10 as required by the ordinance, which we have ordered the reporter to set out in his report of the facts of this case, be enjoined from preventing the said Ben Noble from making an excavation in the street necessary to enable him to attach a service pipe to the said gas pipe at a point opposite his residence in said street.

The decree of the Chancellor is therefore reversed, and a decree is here rendered

granting the complainant the relief prayed for in its bill of complaint.

Dowdell, Ch. J., and Anderson and Mayfield, JJ., concur.

Petition for rehearing denied June 30, 1913.

FLORIDA SUPREME COURT.

CALEDONIAN INSURANCE COMPANY,
Plff. in Err.,
v.

J. FRANK SMITH et al.

(— Fla. —, 62 So. 595.)

Insurance — vacancy of property — waiver.

A fire insurance policy was issued on three dwelling houses situated in a row and near together. It was proved in the policy that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." The policy contains two indorsements for vacancy permits, one from July 31, 1912, for thirty days from date, and the other is a vacancy permit for thirty days from August 31, 1912. The middle house was unoccupied and burned

Headnote by HOOKER, J.

Note. — Vacancy permit as a waiver of previous vacancy.

The violation of the vacancy clause in a standard fire insurance policy is held by the courts in some jurisdictions, to merely suspend the operation of the policy during the time of such violation, and it is held that if the insured property is reoccupied so that the violation in no way contributed to the cause of the loss, the insurer is liable thereunder, even though it had no knowledge of the violation. But in other jurisdictions it has been held that such violation renders the policy void, and that it cannot be revived in any way except by an agreement to that effect. See notes in 10 L.R.A.(N.S.) 740, and 28 L.R.A.(N.S.) 593.

The decision in *CALEDONIAN INS. CO. v. SMITH* is based upon the same principle which underlies the liberal and sensible construction adopted by the courts holding the first of these two views, i. e., that the policy is not absolutely void, but merely voidable.

In a court that has adopted this construction, the conclusion as to the effect of a vacancy permit would seem to be inevitable. If a reoccupancy terminates the suspension, it would be most illogical to

on the 6th day of October, 1912, destroying all of the three buildings. Held, that a vacancy of more than ten days previous to the first indorsement of a vacancy permit of thirty days cannot, either by itself or in connection with the six days' vacancy in October, 1912, avoid the policy, as the insurance company, by indorsing the vacancy permits on the policy, waived the previous vacancy and continued the policy with the same binding force it originally possessed.

(Cockrell, J., dissents.)

(May 13, 1913.)

ERROR to the Circuit Court for Escambia County to review a judgment in plaintiffs' favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. E. C. Maxwell for plaintiff in error.
Messrs. Reeves & Watson & Pasco, for defendants in error:

Constructive knowledge is a sufficient basis for waiver.

40 Cyc. 260, note 7; 29 Am. & Eng. Enc. Law, 1095; *Allesina v. London, L. & G. Ins. Co.* 2 Ann. Cas. 284, note; *Hall v. Niagara F. Ins. Co.* 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 727; *Note to People's F. Ins. Asso. v. Goynes*, 16 L.R.A.(N.S.) 1230; *Short v. Home Ins. Co.* 90 N. Y. 16, 43 Am. Rep. 138.

The violation of the vacancy clause did

hold that an express consent to the continuation of the vacancy would not have the same effect. The insurer's lack of knowledge of the breach, if it had no knowledge thereof, ought to be no more weighty in the one case than in the other.

In *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 119, 55 L.R.A. 825, 87 Am. St. Rep. 596, 61 N. E. 712, a clause in the policy provided that "this policy shall become void, unless consent in writing is indorsed by the company hereon, if any change takes place in the location of the property," and it was held that the removal of the personal property covered by the policy without the consent or knowledge of the company did not render the policy void, but only suspended its operation while the goods remained in that place of removal, and that their removal to a third location with the written consent of the company ended the suspension, so that the company was held liable for the loss of the goods destroyed after their second removal, although the insured had actually concealed the fact of the first removal. This note covers nothing but vacancy permits, but this case is completely on all fours with *CALEDONIAN INS. CO. v. SMITH*, in principle, since a vacancy permit could not differ in principle from a removal permit.

J. W. M.

not render the policy void, but only voidable.

Tillis v. Liverpool & L. & G. Ins. Co. 46 Fla. 268, 110 Am. St. Rep. 89, 35 So. 171; *Eagle Fire Co. v. Lewallen*, 56 Fla. 246, 47 So. 947.

Where a building has been vacant for more than ten days under the standard form of policy, but is reoccupied before the loss, the company cannot defeat recovery by reason of such vacancy, even though it did not learn of such vacancy until after the loss.

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; *Elliott, Ins.* ¶ 205; 2 *Cooley*, *Briefs on Ins.* 1680; *Insurance Co. of N. A. v. Pitts*, 88 Miss. 587, 7 L.R.A. (N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5, 9 Ann. Cas. 54; *Silver v. London Assur. Corp.* 61 Wash. 593, 112 Pac. 666; *Note to Born v. Home Ins. Co.* 80 Am. St. Rep. 305.

Hocker, J., delivered the opinion of the court:

The defendants in error sued the plaintiff in error to recover the amount of a fire insurance policy on three one-story shingle roof frame dwelling houses, each insured for \$300. It appears from the pleadings that these dwelling houses stood in a row a few feet apart, so close together that the burning of one would cause the burning of the others, and constituting but a single risk; that, by the terms of the policy of insurance, it was stipulated and agreed that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if a building therein described, whether intended for occupancy by the owner or tenant, should be or become vacant or unoccupied, and so remain for ten days; that one of the buildings described in the policy and insured, to wit, the middle building, became vacant during the pendency of said contract of insurance, and during the vacancy was burned, and the fire was communicated therefrom to the other buildings, whereby all of them were burned and destroyed. There was a judgment below in favor of the defendants in error, which is here for review. The issues are so framed as to present here: First, the question of the liability of the plaintiff in error under the policy; and, second, if liable, whether the policy is a divisible one. If the first proposition is decided in favor of the insurance company, the second is eliminated.

The policy contains the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if a building herein described, whether intended

for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." It has the following indorsements:

Pensacola, Florida, July 31st, 1912.

Permission is hereby granted for the buildings insured hereunder to remain vacant for a period of thirty (30) days from this date.

To attach to and form a part of policy No. 1,947,222 of the Caledonian Fire Insurance Company of Scotland.

[Signed by Agents.]

Pensacola, Florida, August 31st, 1912.

"Permission is hereby granted for the building insured hereunto to remain vacant for a period of thirty (30) days from this date.

To attach to and form a part of policy No. 1,947,222 of the Caledonian Insurance Company of Scotland.

[Signed by Agents.]

The middle building caught on fire on the 6th day of October, 1912, which destroyed all of the three buildings. It is alleged by the insurance company in its pleas, to which demurrers were sustained, that, prior to the month of July, 1912, the middle building became vacant during the pendency of the contract of insurance, and so remained continuously until the 6th of October, 1912, when the fire occurred, and it is insisted in argument here that because of this vacancy the policy became void, and the company is not liable. No authorities are cited by plaintiff in error. From such an examination of the law as we have been able to make, it seems to us that such a provision against a vacancy, when one occurs, does not render a policy void, but voidable. That principle is recognized in the Florida cases. See *Tillis v. Liverpool & L. & G. Ins. Co.* 46 Fla. 268, 110 Am. St. Rep. 89, 35 So. 171; *Eagle Fire Co. v. Lewallen*, 56 Fla. 246, 47 So. 947.

It is said in *German Ins. Co. v. Shader*, 68 Neb. 1, 60 L.R.A. 918, 93 N. W. 972: "Although the policy is conditioned to be void in certain cases, it is well settled that this means voidable at the option of the company. The contract is not wholly void, but the insurer may, if it chooses, insist upon forfeiture under certain conditions [citing] *Hunt v. State Ins. Co.* 66 Neb. 121, 92 N. W. 921, and cases cited. This construction of the policy has been assailed as in conflict with the language employed and at variance with the authorities. But it is well sustained by judicial decisions elsewhere [citing numerous authorities]."

In the case of *Viele v. Germania Ins. Co.*

26 Iowa, 9, 96 Am. Dec. 83, it is held that the forfeiture of a policy of insurance on account of the breach of the conditions thereof may be waived by the insurer, and if waived the policy continues of the same binding force which it originally possessed. A large number of authorities are cited to support this proposition. It is also held in the same case that "circumstances proving that the party treated the contract as subsisting, and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with or forfeiture waived, will be sufficient to preclude the setting up of the breaches of the condition as a defense to the contract of the party bound thereby [citing many authorities]." See 3 Joyce, Ins. §§ 2230, 2231.

Applying the foregoing principles of construction, it seems to us that the giving of the two vacancy permits of July 31 and August 31, 1912, was a complete waiver of any forfeiture of the policy by reason of previous vacancy of one of the buildings insured, and that gave the policy "the same binding force which it originally possessed." That was the condition of the policy on the 1st of October, 1912. It was as though there had been no previous vacancy. Subsequently, under the terms of the policy, there might be a vacancy of less than ten days which would not defeat the policy. We said in *L'Engle v. Scottish Union & Nat. F. Ins. Co.* 48 Fla. 82, text 92, 67 L.R.A. 581, 111 Am. St. Rep. 70, 37 So. 462, 466, 5 Ann. Cas. 748: "Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail."

In all cases the policy must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must in preference be adopted." This principle is applicable in determining, whether the ten days' vacancy period permitted by the policy is wiped out in whole or part by the vacancy permitted by the indorsements on the policy. We do not think it was.

The judgment below is affirmed.

Shackleford, Ch. J., and Taylor and Whitfield, JJ., concur.

Cockrell, J., dissents.

A petition for rehearing having been 47 L.R.A. (N.S.)

granted, the following *Per Curiam* response was handed down on June 26, 1913:

This cause came on again to be heard upon a rehearing heretofore granted, and being duly considered and the court being of the opinion that its former decision was in all respects correct, it is ordered, adjudged, and decreed that the judgment be and the same is hereby reaffirmed, and the opinion of the court heretofore filed shall stand as the opinion of the court.

GEORGIA SUPREME COURT.

CAROLINE COWART et al., Plffs. in Err.,
v.

A. J. SINGLETARY.

(— Ga. —, 79 S. E. 196.)

Reference — meager report — re-reference.

1. While the report of the auditor was not as full or explicit as it might have been, under the facts of the case, there was no reversible error in overruling a motion for a re-reference.

(a) The recovery of the amount of an open account was waived; and if there was a lack of specification as to its items, this will not require a reversal.

Evidence — sufficiency.

2. The action was equitable in character, the evidence was sufficient to authorize the finding of the auditor in favor of the plaintiff, and the ruling of the presiding judge in overruling exceptions thereto was not error.

Specific performance — contract to reconvey.

3. It is legally possible for one person to sell land to another at an agreed price, and at the same time, to secure the right to repurchase it; and if actually made in good faith, such a transaction is enforceable.

Vendor and purchaser — sale by holder of bond for title.

4. The obligee in a bond for title made a warranty deed to another. In the deed it was provided that the grantee bound himself to see that the obligations of his grantor under the bond should be complied with, and the grantee took possession and rented to the grantor. Held, that this provision bound the grantee to pay the purchase money, and it was not obnoxious to the statute of frauds.

Headnotes by LUMPKIN, J.

Note. — As to validity and effect of stipulation in contract for sale of land against assignment by a vendee without vendor's consent, see note to *Lockerby v. Amon*, 35 L.R.A. (N.S.) 1064.

(a) Whether the transaction in the present case was in fact a sale with an option to repurchase, or a method of securing an indebtedness, and whether there was fraud or usury, or what was the actual consideration, were questions dependent upon the evidence; and the auditor having reported in favor of the taker of the deed attacked on such grounds, and the presiding judge having overruled exceptions to his report, and such finding and ruling being authorized by the law and evidence, this court will not interfere.

Same — provision against transfer — waiver.

5. Where a bond for title stipulated that it was not transferable, and the obligee, before paying any of the notes given for the purchase money, executed a warranty deed to a third person, in which there was a provision binding the grantee to pay the purchase money debt of the grantor, and the grantor became the tenant of the grantee, and where the grantee paid to the obligor in the bond more than half of the purchase money notes as they became due, if thereafter the maker of the bond, with the consent of the obligee therein, accepted from another the unpaid balance of the purchase money before it fell due, and executed to such person a fee simple conveyance, he taking with notice of the rights of the grantee from the obligee in the bond, and thereafter conveying to such obligee a life estate in one half of the land, under such circumstances the grantee from the obligee in the bond could, in a proper equitable action, obtain a decree against the person so taking a deed from the obligor in the bond, requiring such person to make a deed to the plaintiff upon payment of the amount paid out by such defendant, less proper credits for mesne profits, and a decree against such person and the obligee in the bond, canceling the deed to the latter and recovering the property.

(a) No question of whether the tender was necessary arises under the pleadings and evidence.

(b) The obligor in the bond having died, no representative of the estate was made a party, and the action proceeded against the grantee from such obligor and the obligee in the bond. The defense was not by an administrator of such obligor, but by the obligee and the person taking a conveyance from the obligor with notice.

(Hill, J., dissents.)

(July 21, 1913.)

ERROR to the Superior Court for Early County to review a judgment in plaintiff's favor in an action to recover certain land which defendant Cowart had offered to convey to plaintiff upon payment by him of purchase money notes due for the land. Affirmed.

47 L.R.A. (N.S.)

Statement by Lumpkin, J.:

On January 27, 1907, A. J. Singletary filed his equitable petition against R. S. Grimsley, H. H. Grimsley, Caroline Cowart, and Mrs. E. E. Holmes. It does not appear that Mrs. Holmes was served, or that her administrator was made a party after her death. The petition alleged in substance as follows: On December 24, 1902, Mrs. Holmes bargained to Caroline Cowart a certain described lot of land. The purchase price was fixed at \$1,250, represented by twenty-three notes of \$50 each, and one note for \$100, falling due, respectively, on the 1st days of September, October, November, and December, in each successive year thereafter; the last note being due on December 1, 1903. Mrs. Holmes gave to Caroline a bond for title in accordance with these terms. On January 12, 1903, Caroline Cowart represented to the plaintiff that she was unable to comply with her agreement to pay the notes as they became due, and offered to convey to him the land if he would pay the notes as they matured. She accordingly executed to him a warranty deed for the land, in which was contained a recital that he bound himself to see that her obligations to Mrs. Holmes should be complied with. He accordingly paid to Mrs. Holmes the notes as they matured, and at the date of the filing of the petition he had paid to her fifteen of the notes, amounting to \$750, besides interest. Caroline Cowart, after the execution of her deed to the plaintiff, leased the land from him, and remained in possession thereof as his tenant; but the term of her tenancy has expired. On November 6, 1906, she and R. S. Grimsley, for the purpose of defrauding him and defeating his rights, and with full knowledge of them, had Mrs. Holmes to execute to Grimsley a warranty deed to the land. (H. H. Grimsley, though made a party, appeared in the progress of the case to have no interest in the matter.) R. S. Grimsley paid to Mrs. Holmes the balance due on the land, and all the purchase money notes were surrendered to him, except those which the plaintiff had previously taken up. Grimsley made a deed conveying a life estate in one half of the land to Caroline Cowart. It is the purpose and intention of Grimsley to take possession of the land, and of Caroline Cowart to surrender it to him. The plaintiff has always been ready, willing, and able to comply with his contract and pay the balance of the purchase money due as it matured, and he offers to do so. He prays that Grimsley be enjoined from taking possession of the land; that Caroline Cowart be enjoined from surrendering it to him; that she be ousted from possession; that his lien for rent be estab-

lished; that Grimsley be required to accept so much of the purchase price of the land as has fallen due by the terms of the notes, and be required to deliver to the plaintiff the notes for such amount held by Grimsley, and to accept the payment of the remaining notes as they mature; that, upon the payment by the plaintiff of the balance of the purchase money, Grimsley be required to execute to the plaintiff a deed to the land; that the deed from Grimsley to Caroline Cowart be surrendered and canceled; and for process and general relief. The plaintiff amended by alleging that Caroline Cowart was insolvent, and that the defendants had remained in possession, and had enjoyed the rents, issues, and profits, of the yearly value of \$200, for which the plaintiff prayed judgment as mesne profits.

Answers were filed by R. S. Grimsley and Caroline Cowart, in which they denied the alleged grounds for recovery, and averred that Grimsley was a purchaser for value from Mrs. Holmes. They attacked the deed from Caroline Cowart to Singletary on substantially the following grounds: (1) It was procured by fraud. (2) It was procured by duress. (3) It was upon an inadequate consideration, coupled with great disparity in mental capacity on the part of the contracting parties. (4) It was given to secure a usurious debt. (5) It was given as a security for or in payment of the debts of her husband. It was also contended that Singletary made no valid and binding promise in writing to pay the notes given by Caroline Cowart to Mrs. Holmes. Caroline Cowart offered, in her answer, to pay to the plaintiff any sum that might be found justly due to him.

A demurrer to the petition was overruled, but no exception was taken to that ruling. A verdict was rendered in favor of the plaintiff. The case was brought to this court, and the judgment was reversed on account of errors in the charge. Grimsley v. Singletary, 133 Ga. 56, 134 Am. St. Rep. 196, 65 S. E. 92. Later the case was referred to an auditor, whose report found in favor of Singletary. A motion for a reference was made and denied; and to this ruling exceptions *pendente lite* were filed, and error was subsequently assigned thereon. Exceptions of law and fact to the report of the auditor were filed. The presiding judge overruled the exceptions of law, declined to approve the exceptions of fact, and rendered a decree, in substance, that Grimsley should recover of Singletary \$435.70, with interest from the date of the auditor's report (that being the difference between the amount paid by Grimsley to Mrs. Holmes and the amount found against 47 L.R.A.(N.S.)

him on account of mesne profits for the half of the land to which he had held possession), less \$100 for the rent of the land for the then current year; that, upon tender of payment of this net amount, Grimsley should execute to Singletary a conveyance of the premises in dispute; that the plaintiff recover of Caroline Cowart and Grimsley the premises in dispute, subject to a lien in favor of Grimsley for the amount decreed in his favor, with interest; that Singletary recover of Caroline Cowart \$570 rent; and that the deed from Grimsley to her be canceled. Caroline Cowart and Grimsley excepted. The record does not show whether Mrs. Holmes was ever served. No answer by her is in the record. But it appears in the evidence that she was dead at the time of the trial, and no representative on her estate is shown to have been made a party. Other material facts appear in the opinion.

Messrs. W. G. Park and Pope & Bennett, for plaintiff in error:

The deed from Cowart to Singletary was void for usury.

Baggett v. Trulock, 77 Ga. 369, 3 S. E. 162; Burkhalter v. Oliver, 88 Ga. 478, 14 N. E. 704.

The only right which Singletary could set up would be for the difference between the amount he sent Mrs. Holmes and the amount of rents.

Winkinson v. Wooten, 59 Ga. 584.

Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify a court of equity in setting aside a sale.

Code 1910, § 4630; Pye v. Pye, 133 Ga. 246, 65 S. E. 424.

Mr. C. L. Glessner, for defendant in error:

Grimsley had sufficient notice to put him on inquiry, and he bought at his peril.

Talmadge Bros. v. Interstate Bldg. & L. Asso. 105 Ga. 550, 31 S. E. 618; Jordan v. Pollock, 14 Ga. 145; Clarke v. Ingram, 107 Ga. 565, 33 S. E. 802; Cummins v. Boston, 25 Ga. 277; Clarke v. Beck, 72 Ga. 127.

There was no fraud upon the part of A. J. Singletary in procuring the deed from Caroline Cowart conveying to him the land in controversy.

Street v. Lynch, 38 Ga. 631; Brown v. Crane, 47 Ga. 483.

To recommit a case to an auditor because his report "fails to unequivocally show what evidence was admitted, and what was rejected," or what rulings were made by him, necessarily rests largely in the discretion of the trial judge.

Trentham v. Bluthenthal, 118 Ga. 530, 45 S. E. 421.

Grimsley held the land in trust for Singletary, subject to his payment of the notes as they matured.

Street v. Lynch, 38 Ga. 631; *Brown v. Crane*, 47 Ga. 483; *Clarke v. Beck*, 72 Ga. 127; *Jordan v. Rhodes*, 24 Ga. 478; *Georgia State Bldg. & L. Asso. v. Faison*, 114 Ga. 655, 40 S. E. 760.

Singletary's acceptance of the deed, reciting his covenant to pay Mrs. Holmes the purchase price, was a "covenant running with the land."

Howard Mfg. Co. v. Water Lot Co. 53 Ga. 689.

It was such a covenant as would follow the land and become obligatory upon whomsoever might derive title through Singletary.

Georgia Southern R. Co. v. Reeves, 64 Ga. 492.

It was such a covenant, in writing, as would support an action for its breach.

Atlanta, K. & N. R. Co. v. McKinney, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701; *Kytle v. Kytle*, 128 Ga. 388, 57 S. E. 748.

The deed is in no sense a security deed, but an absolute deed of bargain and sale; the contemporaneous written agreement is strictly a contract of lease, with an option to repurchase, as it purports to be.

Felton v. Grier, 109 Ga. 320, 34 S. E. 601, 35 S. E. 175; *McElmurray v. Blodgett*, 120 Ga. 14, 47 S. E. 531; *Edwards v. Capps*, 122 Ga. 829, 50 S. E. 943; *Rogers v. Blouenstein*, 124 Ga. 503, 3 L.R.A.(N.S.) 213, 52 S. E. 617; *Brown v. Bonds*, 125 Ga. 838, 54 S. E. 933; *Fulwood v. Leitch*, 7 Ga. App. 359, 66 S. E. 987.

Grimsley could not occupy the position of an innocent purchaser.

Clarke v. Beck, 72 Ga. 127.

Lumpkin, J., delivered the opinion of the court:

1-3. The members of this court are agreed as to all matters involved in this case, except one. The issues of fact were found in favor of Singletary by a jury on a former trial, and by the auditor when the case was referred to him. The presiding judge has approved that finding, and the evidence was sufficient to authorize him so to do. There was no error in overruling the motion for a re-reference. The report of the auditor, while somewhat meager, was sufficiently full to withstand the attack made upon it in the motion for a re-reference, and a reversal is not required. This disposes of the contention that the deed made by Caroline Cowart to Singletary was procured by fraud; that the transaction was not in fact a sale with an option to repurchase, but was the securing of an indebted-

ness; that this debt was infected with usury and included a debt of her husband; that there was such mental disparity between the parties and such inadequacy of consideration as to amount to fraud; and all others depending on questions of fact. Under the evidence, the decision in *Baggett v. Trulock*, 77 Ga. 369, 3 S. E. 162, is not controlling. See, in this connection, *Felton v. Grier*, 109 Ga. 320, 34 S. E. 601, 35 S. E. 175; *McElmurray v. Blodgett*, 120 Ga. 9, 47 S. E. 531; *Brown v. Bonds*, 125 Ga. 833, 54 S. E. 933.

We were requested to review and overrule the decision in *Felton v. Grier*, 109 Ga. 320, 34 S. E. 601, 35 S. E. 175. Its special application to this case is the ruling that, it being legally possible for the owner of real estate to sell it to another at an agreed price, and at the same time secure the right to repurchase, the law will enforce such a transaction when actually made. Whether any criticism can be made upon anything that was said in the opinion is immaterial. The principal announced is correct, and we decline to reverse it.

4. It was urged that Singletary did not bind himself in writing to Caroline Cowart to pay the purchase money notes which were given by her to Mrs. Holmes; that, if there was any promise to that effect, it was in parol; and that such a promise was obnoxious to the statute of frauds. In the deed to Singletary it was recited that Caroline Cowart had given her notes for the purchase money of the land to Mrs. Holmes, and that "Singletary bonds [binds] himself to see that said bond is complied with." The acceptance of this conveyance by Singletary bound him to carry out such covenant. *Kytle v. Kytle*, 128 Ga. 387 (2), 57 S. E. 748. As between him and his grantor, such an agreement to pay purchase money was not within the statute of frauds. *Ford v. Finney*, 35 Ga. 258; *Gorman v. Wood*, 73 Ga. 370, 374; *W. E. Coldwell Co. v. Cowart*, 138 Ga. 233, 243, 75 S. E. 425.

5. We now come to the only point of difference between the members of this court. The bond for title which was given by Mrs. Holmes to Caroline Cowart, after describing the terms of the sale and the notes given for the purchase money, and binding Mrs. Holmes "to make or cause to be made" good and sufficient title in fee simple to the land upon payment of the notes, contained the following: "It is hereby understood and agreed that time is of the essence of this contract; and should the party of the second part fail to pay said notes as they become due, then this bond to become null and void, and whatever money shall be paid shall be treated as rent at the rate of \$150 per annum. And

it is further stipulated that this bond is not transferable to anyone." Under the facts of the case, the majority of the court are of the opinion that neither of the two clauses above quoted prevented Singletary from having equitable relief. The first clause declares time to be of the essence of the contract, and provides for a forfeiture in case of nonpayment of the purchase money. This clause does not undertake to put any restriction upon the transfer of the bond or the alienation of the property by the purchaser. There was no evidence to show that Mrs. Holmes ever claimed any forfeiture or breach of the bond arising from nonpayment. On the contrary, she received payment from Singletary of fifteen of the notes substantially, if not exactly, as they fell due, and received a large part of the purchase money from Grimsley in discharge of the remaining notes before they were due. She could not, of course, claim a forfeiture and at the same time receive the purchase money. So that any contention that there was a forfeiture and a resale, without regard to the original contract, finds no support whatever in the evidence. Indeed, such is not the contention; but this clause is used in support of the position that there was a limited restriction on alienation, as will appear below.

The clause of the bond for title upon which this branch of the case depends is the second clause above quoted, which reads as follows: "And it is further stipulated that this bond is not transferable to anyone." If the insertion of such a stipulation in the bond for title rendered the conveyance by the obligee to Singletary absolutely void, so that he acquired no right thereunder, and no equity arose in his favor by reason of the payment of a large part of the purchase money to Mrs. Holmes, and so that Mrs. Holmes could make a conveyance to Grimsley, receiving from him the balance of the purchase money, less what Singletary had paid, and so that Grimsley could convey a life interest in half of the land to Caroline Cowart, and Singletary could thus be entirely left out, and would have no equitable right whatever, then the finding of the auditor and the decree of the court were wrong; otherwise, they were right. There was evidence tending to show that Mrs. Holmes knew that Singletary was sending to her money to pay the notes of Caroline Cowart as they fell due, and that she accepted the money from him and delivered up the notes so paid. There was also abundant evidence to show that Grimsley knew that Caroline Cowart had made a deed to Singletary, and that Singletary had leased the place to her as his tenant, and that Grimsley was thus affected with notice

that Singletary had or claimed some character of interest in the land before Grimsley took a deed from Mrs. Holmes. It is also undisputed that, in acquiring title from Mrs. Holmes by paying the balance of the purchase money before it was due, Grimsley knew that a large part of the purchase money had been paid, and that he was receiving the benefit of such payments, and was getting the land for such balance, and not for the entire amount stipulated in the bond. He testified in general terms that he did not know that Singletary had made these payments, but thought that they had been made by Caroline Cowart; but he admitted having testified on a former trial that Caroline had told him that she had made a deed to Singletary, and, as stated above, there was evidence showing that he was put on notice or inquiry as to Singletary's interest, and the auditor found against him. Hence, in considering whether the report of the auditor and the decree can be declared to be erroneous as matter of law, we must accept it as a fact that Grimsley acted with notice of Singletary's interest. Under such facts, can it be held that Singletary had no equitable rights, and that he was cut off from all relief by reason of the provision in the bond for title that it was not transferable? The argument in favor of such a position must rest substantially upon one or all of these contentions: First, that the bond obligating the maker to convey a fee simple title upon payment of the purchase money is to be analogized to a conveyance in fee simple, and that in such a conveyance there may be a limited and reasonable restriction upon alienation; second, that the bond for title is to be analogized to a chose in action, which at common law was not assignable; third, that it is to be considered as a contract between the obligor and the obligee, and that the obligor had the right to provide with whom she desired to deal, and that the contract should not be assignable.

Before taking up each of these contentions separately, it may be well to note that, strictly speaking, there was no transfer of the bond, but that the obligee made a warranty deed to Singletary. Whatever title the maker of such a deed might acquire thereafter by payment of the purchase money would pass to her grantee. *Parker v. Jones*, 57 Ga. 204; *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854; *Powell, Actions for Land*, § 141. By the payment of the part of the purchase money, he or she undoubtedly acquired an equitable interest which could be conveyed. We deem it unnecessary to consider the question of whether the record of her deed carried con-

structive notice to Grimsley, as we have found that there was sufficient evidence to show actual notice on his part. If this conveyance by Caroline Cowart to Singletary be treated as substantially an assignment of the bond for title to him, nevertheless was it void, and did he acquire no rights thereunder, or by virtue of his payment of a considerable part of the purchase money?

The first contention stated above is dependent upon analogizing the restraint upon an assignment of a bond for a title to a restriction upon alienation by the grantee in a fee simple deed. Civil Code, § 3657, declares: "An absolute or fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." This definition excludes the right to limit the power of disposition during the life of the grantee, if the estate is one in fee simple. Moreover, by § 3718 of the Civil Code it is declared: "A condition repugnant to the estate granted is void." In *Freeman v. Phillips*, 113 Ga. 589, 38 S. E. 943, it was held: "A devise giving a fee in hand to remaindermen on the termination of a life estate, with the restrictions that the remaindermen should 'never mortgage, rent, or sell said parcel of land,' vests in such remaindermen, at the death of the life tenant, a fee in such land free from the restrictions sought to be imposed. The restraint upon alienation, being repugnant to the nature of the estate, is void." We are not dealing now with base fees or reversions or limitations over, or with the question whether, construing a particular conveyance as a whole, the estate conveyed is in fact a fee simple or a less estate, but with a conveyance in fee simple in which it is sought to restrict the right of alienation by the grantee.

If we look to authorities outside of our own Code and decisions, attempts to impose general restraints on alienation in granting a fee simple estate are held void, as repugnant to the estate granted. Restraints upon alienation of leasehold interests, estates for years, and the like, are held to be valid, in order to protect the versionary interest of the grantor. Some courts have held that, coupled with the grant of a fee simple interest, there may be a reasonable restraint on alienation for a limited time, or prohibiting a conveyance to a particular person, or the like. The leading case in this country in which this subject is elaborately discussed is *De Peyster v. Michael*, 6 N. Y. 476, 57 Am. Dec. 470. In *Mandelbaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61, 47 L.R.A. (N.S.)

the subject was again discussed at length by *Christiancy, J.* He attacked vigorously the statement of some text writers and judges that a grant of a fee simple estate could be made, and at the same time the grantee could be restricted from selling such estate for a limited time. He declared that this statement had arisen from a misconception of the actual ruling in *Large's Case*, Leon. pt. 2, p. 82, and had been perpetuated by erroneous *obiter dicta* which had grown into positive assertion. In conclusion he said: "And we think it would be unwise and injurious to admit into the law the principle contended for by the defendants' counsel, that such restrictions should be held valid if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? . . . The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." See also 2 *Jarman, Wills*, 2d ed. 1490. This seems to accord with the definition of a fee simple estate in our Codes. See also, in this connection, *Manierre v. Welling*, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311, and note.

In 24 Am. & Eng. Enc. Law, 2d ed. 867, it is said: "There are many *dicta*, as well as a few direct authorities, to the effect that restraints on alienation for a limited time are valid; but in a number of cases the validity of such restraints has been said to be doubtful, and on principle, and according to the weight of authority, a restriction, whether by way of condition or of limitation over or of bare prohibition against any and all alienation, although for a limited time, of a vested estate in fee, whether in possession or remainder, is void. In the case of a contingent remainder, however, or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid." As stated above, we need not consider the subject of conditions or limitations over, here mentioned, as they are not now involved. In jurisdictions where it is held that a restraint upon the right to sell a fee simple interest for a limited time is permissible, it is generally held that, to be enforceable, it must be coupled with a reversion or a limi-

tation over. 1 Warvelle, Vend. & P. 2d ed. § 451, p. 532; Fowlkes v. Wagoner, — Tenn. —, 46 S. W. 586; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 823, 837. In 1 Warvelle, Vend. & P. 2d ed. § 453, p. 533, it is said: "Restraints with respect to time have in several instances been held good, and the conditions sustained, provided the restriction is limited to a 'reasonable period;' but the weight of authority would seem to be against the validity of restraints upon alienation, however limited in time." See also Gray, Restraints on Alienation, 2d ed. §§ 54, 105, et seq.

Without entering at length into the various authorities on this subject, we think it is clear that, if the test applicable to conveyances of a fee simple estate with an attempted restriction on alienation were applied to the provision of the bond for title now under consideration, it would not be valid. Even should we follow those authorities which hold that there may be a restraint upon alienation for a reasonable time, the restraint sought to be imposed in this bond is not in terms limited as to time. The preceding provision of the bond, which declares time to be of the essence of the contract, and authorizes, or seeks to authorize, a forfeiture in case of nonpayment, cannot help the case. It did not declare a reasonable time within which there should be no alienation; nor does it appear that the obligor in the bond has in any manner sought to declare a forfeiture. If it could be held that this amounted to a restraint upon alienation for a reasonable time, namely, until the last payment should fall due, it could only be enforced for the benefit of the obligor. And when Mrs. Holmes received the purchase money due to her in full, she had no further right to insist on the restraint upon alienation.

The writer has dwelt at some length 'on the question of restraint upon alienation of a fee simple estate, because it is an important principle in the law of real estate, and there should be no misapprehension as to it, and also because in consultation some of our brethren were of the opinion that the analogy is important, if not controlling, in the case. In so far as the argument rests upon the rule that at common law choses in action were not assignable, so as to convey title, but only an equitable interest, it is sufficient to say that this rule has been changed by our statute. In Civil Code, § 3653, it is declared that "all choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice 47 L.R.A.(N.S.)

of the assignment is given to the person liable." In Bewick Lumber Co. v. Hall, 94 Ga. 539, 21 S. E. 154, a written instrument was as follows: "Credit check \$6.50. Number 687. February 20, 1891. Issued to Aaron Hatton. Not transferable. Payable on demand in merchandise by Bewick Lumber Company. Johnsonville, Georgia. G. B. Monroe." It was held that this was a chose in action arising upon a contract, and that it was assignable under the provisions of the Code section above quoted. This ruling was made in spite of the fact that the paper contained the words "not transferable." It may be remarked, however, that this was not an executory contract containing mutual obligations. That class of contracts will be next considered.

The third ground upon which the argument rests is that parties have a right to contract, and, among other terms of a contract, to provide, that it shall not be assignable, and that, as against the party who does not consent to the assignment, the assignee obtains no right. Certain classes of contracts are inherently nonassignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to such contract. The rule is sometimes stated by saying: "Contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, cannot be transferred to a third person by one of the parties to the contract, without the assent of the other."

Tifton, T. & G. R. Co. v. Bedgood, 116 Ga. 945, 43 S. E. 257. That case furnishes an illustration of the rule. The contract then before the court bound a railway company, for a sufficient consideration, to put in a side track to connect its main line with the sawmill of a certain firm, and to transport over its railway lumber shipped by that firm at a certain rate; and it bound the firm to ship all the lumber cut by them over the company's railway, with a named exception. The firm entered upon the contract an assignment of their interest in it, and the transferee entered upon it an assignment to another firm, who sought to enforce the contract against the railway company. It was held that such a contract was not assignable without the consent of the railway company.

In *Sims v. Cordele Ice Co.* 119 Ga. 597, 46 S. E. 841, it was held that an option or contract right to purchase designated property within a given time at a stipulated price, payable in instalments, and coupled with certain other agreements, upon the credit of the person owning such right, was not assignable without the consent of the other party.

In *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220, a contract under seal was made by the owner of land to convey it to another upon payment of a stipulated price within a given time. It recited a consideration of \$5. Before the end of the period mentioned, the obligee in the contract agreed with another person to sell his interest in the land arising under such contract. He caused the amount of purchase money to be tendered to the maker of the agreement, which she refused. He then filed an equitable petition, for the use of the person with whom he had contracted, to enforce specific performance. It was held by this court that, after the obligee in the contract had elected to pay the stipulated price, and had tendered it within the specified time, and demanded a conveyance, specific performance might be enforced at his instance, "suing in behalf of a third person to whom he has sold all his interest in the premises or in the contract sought to be enforced."

In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, Perry executed to Sims a paper in the following terms: "This is to certify that I have this day bargained to Jim Sims 50 acres of land off of the southeast corner of lot No. 240 in the 4th district of Terrell county, Georgia; the road running from the Hayes place to Dorse Henry's being the line. I agree to make him a good title on his paying me \$500. I agree to run said amount three years, provided he pays the rent promptly." Within less than a year after the making of this instrument, a certain person, on behalf of Sims, tendered to Perry the principal and interest in full, and demanded that a deed be made to Sims. Perry declined to do so. Two days later Sims transferred all his interest under the paper to one Paschal. Paschal tendered to Perry the principal and interest due, and demanded a deed, which was refused. Paschal filed an equitable petition to compel specific performance. It was held that "an assignee of such an agreement, who takes it from the vendee, being thereby subrogated to all his rights, assumes, upon filing a proceeding to enforce the agreement, all his liabilities thereunder, and upon a continuance of the tender is entitled to maintain an action for specific performance of the agreement."

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In *Sims v. Cordele Ice Co.* supra, the two cases last cited were distinguished from the one then under consideration, on the ground that the right to purchase the property in controversy for a designated sum was neither coupled with the assumption of any further liability by the purchaser to the seller, nor did it involve any relation of personal confidence between the parties. In other words, where it was a mere matter of paying the money and taking a title, and the money was paid or tendered, so that no further obligation remained open for performance, the contract was assignable.

In *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455, R. and P. entered into a contract by which P. leased from R. a lot of land for five years, covenanting to build on it a comfortable cabin, and clear and keep under good fence 20 acres of the lot, or more if he chose, and at the expiration of five years to pay R. \$100 for the land, and in the meantime to pay the taxes on the lot, and then the title to the land was to be made to him by R. P. assigned his interest in the land. It was held that the interest was assignable, and that the assignees might have specific performance of R. on showing compliance with the covenants to be performed by P. In these cases the question of limiting by agreement the power to assign a contract, so as to transfer both the rights and duties of the party attempting to make the assignment, was not involved. But they throw light on the question, by illustrating the difference between the assignability of an executory contract involving liabilities and mutual obligations, and one involving merely the payment of a sum of money and the taking of title, where the purchase money is paid or tendered. This distinction is important in connection with contracts which contain a provision against assignment, as well as in regard to contracts which are nonassignable without such a provision, as will be seen later on.

It has been quite frequently said that the parties to an executory contract may in terms prohibit its assignment, so that an assignee does not succeed to any rights in the contract by virtue of the assignment. This broad statement, however, is subject to certain modifications. It would hardly be held that a vendor and vendee of land could contract that the vendee should never assign or yield possession of the land sold, and thus preclude it from being seized and sold for the vendee's debts. As to a contract for the sale of land, such a provision is simply for the benefit or security of the vendor. If the vendor receives the full purchase price, he needs no further security, and can no longer insist on a provision

against alienation or assignment, the object of which was to secure such payment or to limit his dealings in regard to the sale to his vendee. If a case might arise where other rights of the vendor than the payment of the purchase money require protection, no such fact appears in this case. The vendor may also waive such a provision by his conduct.

In *Cheney v. Bilby*, 20 C. C. A. 291, 36 U. S. App. 720, 74 Fed. 52, a contract for the sale of land contained a stipulation "that no assignment of the premises or of this contract shall be valid unless with the written consent of the first party and by the indorsement of the assignment hereon." An assignment was made. Subsequently the assignee, filed an equitable petition against the vendor, alleging that all of the engagements of the vendee had been promptly fulfilled. One objection raised was that, if it should be conceded that the original vendee could enforce specific performance of the contract, his assignee could not do so. Caldwell, J., said: "This restraint upon the power of the purchaser to assign the contract unquestionably expired when the last purchase money note fell due, and complete performance of the contract was tendered by the complainant. The complainant's right to a deed then became absolute. From that time the seller was a mere naked trustee of the legal title, and the purchaser or his vendee the equitable owner of the land. It was no longer any concern of the seller what the beneficial owner of the land did with it, for he no longer had any interest in it. The purchaser had the right to convey his equitable title or assign his contract to whom he pleased, without asking Cheney's consent; and his vendee would succeed to all his rights." It was then said that the sale or assignment had in fact been ratified, and it was added: "Inasmuch, then, as the provision in question was only intended to secure the faithful performance of the agreement by the purchaser or his assignee, it would be both unreasonable and inequitable to hold that Cheney, the vendor, is privileged to take advantage of the provision, to avoid performance on his part, after the entire amount of the purchase money has been promptly paid or tendered. We must assume, whatever may be the fact in this regard, that the provision against assigning the contract without the vendor's consent was inserted therein for an honest and legitimate purpose; that is to say, for the purpose of securing the punctual payment of the purchase money, and a full compliance with other executory agreements, either by the original purchaser or by his assignee."

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In *Grigg v. Landis*, 21 N. J. Eq. 495, it was held that, where it appears on the face of a contract respecting the sale of land that the prohibition of assignment is not the main purpose of the covenant, but a mere incident to and security for such purpose, the contract is assignable in equity, and the assignee has all the equitable rights of the assignor. It was said that, the restriction being in the nature of a mere security for the performance of the principal covenants, such relief may be given by a court of equity as shall appear to be equitable under the circumstances of the case. See also *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14; *Thomassen v. De Goey*, 133 Iowa, 278, 119 Am. St. Rep. 605, 110 N. W. 581.

Turning now to some of the decisions in this state, in *Street v. Lynch*, 38 Ga. 631, Burnett purchased land from Hanna, took a bond for title, and paid him a part of the purchase money. Lynch bought the land from Burnett, paid the entire purchase money, and took a bond for title. Burnett deposited with him the grants from the state of Georgia, and promised to return home and pay the balance of the purchase money to Hanna, and then make a deed to Lynch. Instead of doing so, Burnett sold the land to Street before he paid the balance of the purchase money to Hanna; and Burnett and Street went to the widow and father of Hanna, who had died, and Burnett paid the balance due on the land with part of the money which Street was to pay him for the land, and at his request the Hannas made the deed, not to him for Lynch's benefit, but to Street, the subsequent purchaser. Chief Justice Brown said: "Now the whole case would seem to turn upon notice. If Street, at the time he made the purchase, had notice of the sale to Lynch, he took subject to the rights of Lynch, and held the land as a trustee for Lynch, and the most he could claim was that Lynch pay him the amount of balance of purchase money paid by him to Hanna, when he was bound to make Lynch a deed and deliver the possession to him."

In *Brown v. Crane*, 47 Ga. 483, it was held: "Where M. held a tract of land under bond for titles from W., and sold the same to C., executing a bond to make a fee simple title so soon as he obtained a title from W., C. paying the purchase money in full, and B., with a full knowledge of these facts, confederating with others, by threats, etc., induced M. to sell the land and to transfer to him W.'s bond, under which transfer B. procured a deed from W., held, that a demurrer to a bill filed by C., setting up the foregoing facts and praying that B.

may be decreed to execute him a title to said land, was properly overruled." Chief Justice Warner in the opinion said: "The view which a court of equity will take of it is to regard the defendant as holding the legal title to the land in trust for the benefit of the complainant, who had previously purchased and paid for it, and of which fact the defendant had full knowledge at the time he purchased the land from Maulden and procured the legal title thereto to himself."

In each of these cases there was no direct assignment of the bond for title held by the original vendee, but he gave an independent bond for title and received the purchase money; and it was held that one who took with notice of that fact took subject to the right of such purchaser. In the present case, the original obligee in the bond conveyed the land by warranty deed to Singletary, and the evidence sufficiently shows that Grimsley took his deed from the obligor with notice of Singletary's rights. See also *Bryant v. Booze*, 55 Ga. 438; *Pearson v. Courson*, 129 Ga. 656, 659, 59 S. E. 907.

It is true that, in the cases from which quotations are made above, the original bond for title did not contain a stipulation against a transfer. But if we are correct in the statement which we have made, that the ground on which such a stipulation can be sustained in an executory contract is for the protection of the vendor, that there was no hint of any right on the part of Mrs. Holmes requiring protection, except to secure payment of the purchase money, and that when she had been fully paid, she could not further insist on such a stipulation as against the grantee of her purchaser, then, under the facts of this case, the stipulation in the bond for title had served its purpose and was no longer of force. Mrs. Holmes did no more than protect herself by such a stipulation until she received her purchase money. She had received it in full. She conveyed her title, and took up her bond for title. While she was named as a party in the action, it appears in the evidence that she died, and her administrator appeared not to have been made a party; so that neither she in her lifetime nor her administrator after her death appeared and sought to enforce the stipulation against assignment. The only persons who are attempting to assert priority over the rights of Singletary, and who claim that Singletary has no interest because of such stipulation in the original bond, are Grimsley, who took with notice of Singletary's rights, and sought to get advantage of the payments which had been made by the latter, and Caroline Cowart, who could not set up such a claim against her warranty

deed. In this respect the case differs from such a case as that of *Lockerby v. Amon*, 64 Wash. 24, 35 L.R.A.(N.S.) 1064, 116 Pac. 463, Ann. Cas. 1913 A, 228, if we should follow the court in speculating as to whether the vendor might have had some other need for protection operating after payment or tender of the purchase money, which a majority of this court are not prepared to do.

Under the facts as disclosed by the evidence, Grimsley and Caroline Cowart could not defeat Singletary's rights because of the stipulation in the bond from Mrs. Holmes to Caroline Cowart that it should not be transferred.

Judgment affirmed.

All the Justices concur, except—

HILL, J., dissenting:

I cannot concur in the decision reached by my learned brethren in this case. The evidence tends to show that Mrs. Holmes owned a farm in Early county. She had leased it for a number of years to Singletary, who in turn subrented it, first to Shep Cowart, and later to his wife, Caroline. At the expiration of the lease to Singletary, Caroline Cowart, whose husband had become involved in debt, and who had formerly belonged as a slave to the parents of Mrs. Holmes, made a contract of purchase for the lot of land in controversy with Mrs. Holmes for the sum of \$1,250, the latter executing to Caroline a bond for title, with the stipulation that "this bond is not transferable to anyone." Singletary was a merchant and did a supply business. The Cowarts were indebted to him for supplies for the farm. Caroline, before the first purchase money note became due, and before she had paid any of the purchase money, executed a deed to the land to Singletary, "for and consideration of that A. J. Singletary will comply with the conditions of the bond she holds from Mrs. E. E. Holmes, receipt of which is hereby acknowledged." Contemporaneously with the execution of the deed, Singletary executed an instrument by the terms of which he declared that he had "leased to Caroline Cowart all of the cleared land" on the lot in controversy, for a term of six years, the consideration of the lease being 1,750 pounds of middling lint cotton payable October 1st each year. It is stipulated in this lease that Singletary agrees at the "termination or end of this lease, should the said Cowart pay all rents that may be due on this lease and all other indebtedness that she may owe said Singletary, and in addition \$750, then the said Singletary agrees to make said Cowart a deed to said lot of

land. It is distinctly understood that this is a lease contract, and not a sale; but, as stated, should said Cowart at the termination of this lease pay all rents, all other indebtedness, and \$750, the deed is to be made."

The evidence of Caroline and her husband tended to show that she did not know she was executing a deed to Singletary; that they were ignorant, and could neither read nor write, and were told by Singletary that the instrument was merely a "showing" or note for what they owed Singletary. The testimony of Singletary tended to deny all this, and to show that it was understood that the instrument signed was a deed. Caroline brought cotton to Singletary each fall after the lease, which her evidence tended to show was to be applied by him, as her agent, to the land notes of Mrs. Holmes. Singletary insists that he paid the money arising from the sale of the cotton to Mrs. Holmes on his own account as part of the purchase money, and not on the contract of Caroline with Mrs. Holmes.

He testified:

I would not say positively I wrote and told her I had bought the land or not. I would not say I wrote her that, but I wrote her to give her to understand that it was a good debt, and I would take it up; but I would not say that I wrote her, and told her (Caroline had deeded me the land. She knew I was paying them. She knew I wrote and told her to send them to the bank.

Q. She did not know who it was for?

A. I don't reckon she did. I wrote and told her I would pay the notes. . . . I just wrote Mrs. Holmes I would see the notes were paid.

The evidence tends to show that Singletary paid a portion of the notes, the first four directly to Mrs. Holmes, and the others through the bank. Caroline had possession of the first four notes paid. After a number of the notes had been paid by or through Singletary, the evidence tends to show that Caroline induced R. S. Grimsley to take up the remaining purchase money notes, amounting to \$727, which he paid to Mrs. Holmes upon Caroline's request, and Mrs. Holmes consented to, and did, execute a warranty deed to Grimsley, upon the promise of the latter to give Caroline a home for her lifetime. After the execution of the deed from Mrs. Holmes to Grimsley the latter executed a deed to Caroline to "a life interest" in one half of the lot of land in controversy. It is provided in this deed that, in the event the land shall be levied upon by any process whatever, or that Caroline or Shep Cowart shall lease or sell the land, it shall revert to the grantor.

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From a careful inspection of the record in this case, I think that the court erred in entering a decree requiring Grimsley to execute to Singletary a deed to the premises in dispute. I am aware of the rule that "if, after notice that another has made a contract for the purchase of land, a third person cuts in, buys it, and take a conveyance, such person stands in the place of his vendor, and a court of equity, if it would decree a specific performance of the contract against the latter, will render a like decree against the former." *Bryant v. Booze*, 55 Ga. 438. But the present case is different from the *Bryant Case*. There is no evidence in the instant case that Mrs. Holmes, the original vendor, ever knew that Caroline had sold to Singletary a title that she did not possess. The title was in Mrs. Holmes, and she was not bound, in selling it, to examine the records and see whether someone else claimed a title to her land. This duty may be upon a purchaser, but not upon one having the legal title and who desires to sell; and it is clear that Mrs. Holmes had the legal title. Nor is there in the record any evidence tending to show that Mrs. Holmes knew that Singletary was paying her the money for himself, but, on the contrary, Singletary testified, "I don't reckon she did" know whom the money was paid for. Under the circumstances, Mrs. Holmes could not be made to execute a deed to Singletary. She had not contracted with nor sold to him the land. She had no knowledge that he was paying her the notes as a purchaser from herself, or from Caroline. She had sold to another (Caroline), and the latter had requested that titles be made to Grimsley. How could Mrs. Holmes be made to perform specifically to Singletary, when she had never contracted to do so, or in any other way become bound to do so? If she cannot be made to perform specifically as to Singletary, I fail to see how her vendee can be so compelled. Mrs. Holmes's administrator was not a party to this suit.

It is argued that the assignee of the obligee in the bond stands in the shoes of the obligee, and that when part of the purchase money is paid by the assignee, and the remainder is tendered by him to the vendor, the latter will be compelled to execute a conveyance. But the reply is that there was a restriction in the bond for title that it was not to be transferable. The assignee had notice of the restriction; and there is authority that such restriction, if reasonable, is valid. Thus "a condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date, or to a certain person." 2 Devlin,

Real Estate, § 382. In the case of *Grigg v. Landis*, 19 N. J. Eq. 350-353, it is said: "Any person in selling his property, or making a contract for the sale, has the right to make such agreements and conditions as the purchaser will assent to, provided they are not contrary to law, or the policy of the law. It is not allowed to make property inalienable; it is contrary to the policy of the law; but it is permitted to restrain alienation for a limited time, or for certain specified purposes, or on certain conditions. . . . And there is nothing inequitable in the provision that until all arrears are paid up, and all stipulations complied with, the contract shall not be assigned, even in equity. It must be held, therefore, that the assignment, made in express violation of the positive provisions of the contract, is void, and the complainant, claiming through such assignment, is entitled to no relief in equity."

In 1 *Warvelle, Vendors*, 2d ed. § 452, it is said: "While the general principle that the conveyance of an estate in fee simple imports absolute ownership in the grantee, and that any restriction or condition imposed inconsistent with or repugnant to the estate so granted is void, seems to have been adopted as a universal rule of law, it has nevertheless been held in England from very early times that partial restraints may properly be annexed to a grant of the fee, and that the grantee may not disregard such partial restraint under penalty of forfeiture of his estate. This doctrine has also been recognized in some of the American states, and in a number of instances it has been held that a condition not to alien to a particular person or persons is valid,"—citing *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Gray v. Blanchard*, 8 Pick. 284; *Jackson ex dem. Lewis v. Schutz*, 18 Johns. 174, 9 Am. Dec. 195. Likewise: "Restraints with respect to time have in several instances been held good, and the conditions sustained, provided the restriction is limited to a 'reasonable period.'" Id. § 453, citing *Stewart v. Brady*, 3 Bush, 623; *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458; *Langdon v. Ingram*, 28 Ind. 360.

In the case of *Lockerby v. Amon*, 64 Wash. 24, 35 L.R.A.(N.S.) 1064, 116 Pac. 463, Ann. Cas. 1913 A, 228, the defendants entered into a written contract whereby they agreed to sell S. certain real estate. A cash payment was made, and the remainder was to be paid on or before two years after the date of the contract, with interest at 8 per cent per annum. It was provided in the contract that the "parties of the first part will sell to the said party of the second part, his heirs and assigns." 47 L.R.A.(N.S.)

It was also provided that, if the purchase money was paid according to the intent and tenor of the contract, then the parties of the first part were to make a warranty deed to the premises to the party of the second part. It was further provided that "no assignment of this agreement shall be valid without the consent and signature of W. R. Amon and Sarah M. Amon, his wife, the parties of the first part." The contract was afterwards assigned by the obligee to J., who tendered the full amount due under the contract, and demanded a deed. On being refused, he brought suit to compel specific performance. A judgment of dismissal was entered, on the ground that the contract was not assignable. The supreme court of that state affirmed the judgment, holding: "A provision in a conditional sale contract of real estate that it shall not be assigned without the consent of the vendor is valid, and an assignee without such consent secures no enforceable rights under the contract." In answer to the argument in that case that the restriction against alienation was designed only to insure payment of the purchase money, and that being tendered, there could be no reason for withholding the deed, *Chadwick, J.*, well said: "These arguments are not new, and find some support in the authorities; but they have been rejected by a majority of the courts. The privilege of selecting a grantee is an incident of ownership, and we cannot presume, as did the supreme court of Minnesota, that 'at most this stipulation against an assignment is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing payment of what was undertaken by the vendee, to wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against an assignment was intended to secure.' *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14. While this reasoning is entitled to consideration, we cannot accept it as the end of the law. A vendor may have confidence that his vendee will not use the property to his disadvantage. It is his privilege to decline to deal with strangers. Or he may, by limiting the right of assignment, save any question as to the interest of intervening third parties, a result not altogether unlikely under our community property system. Or he may be unwilling to assume to pass upon the legal sufficiency of an assignment." And in the case of *Omaha v. Standard Oil Co.* 55 Neb. 337, 75 N. W. 859, it was said: "It [the assignment of the bond] compelled the city to deal with strangers, and to determine at its peril which of the contesting claimants

was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract nonassignable." And see 88 Am. St. Rep. 201; 4 Cyc. 20. In *Langdon v. Ingram*, 28 Ind. 360, it was held: "A condition that a grantee or devisee shall not alienate for a particular time, or to a particular person, is good."

But it may be insisted that such a restriction as that contained in the bond in the present case, against alienation of the bond for title, is against public policy and void, unless by the terms of the restriction there is a limitation over of the property, or a forfeiture of the rights of the obligee in case of alienation; and there is some authority to that effect. But if a restriction against alienation without a clause of forfeiture is void as being against public policy, I fail to see why it is not equally so when there is a provision for forfeiture in case of alienation; for the foundation of this rule of public policy is that the public welfare demands that there be freedom to dispose of what one owns, and there is as much restraint on disposition where a forfeiture is imposed as when there is simply an agreement not to transfer.

Nor is the restriction void in this case because it amounts to a perpetuity. Under my construction of the bond for title, it cannot be transferred until the time when the last purchase money note is paid, and I think that this is a reasonable time within which to limit alienation. And, as held in many jurisdictions, a contract in restraint of alienation is not void if not unreasonable. An option in a lease to be exercised within fifteen years has been held not void as against perpetuities. 1 Page, Contr. § 382. Any other rule than this would deprive two or more persons of the right to contract; and this itself would be contrary to public policy. Two or more persons may contract without let or hindrance, provided the contract does not contravene some rule of law or of public policy. It is the right of every one to contract with whomsoever he pleases; and to hold that one cannot so contract, within the limitations above specified, would be to deprive him of a constitutional right. One has the right to select the person with whom he deals, and to restrict the time of payment named in a contract to a reasonable time, and prohibit alienation within such time; and that is only what this contract does. What was the effect of the restriction in the bond? If a reasonable condition imposed in a deed is valid, a similar one in a bond for title would likewise be valid. The effect of the condition in this bond was that there could be no transfer

of the bond, or a conveyance of the land in controversy by the obligee in the bond, until the last purchase money note was paid; and this, I think, was a reasonable condition. The evident purpose of the vendor was to secure a home to her old servant, Caroline, and she was not to alienate or transfer the bond until it matured, and the vendor could execute to her a deed to the land. The restriction as to alienation was limited, at all events, to a period of about six years, the maturity of the last note, as the bond stipulated that "time is of the essence of this contract; and should party of the second part fail to pay said notes, as they become due, then this bond becomes null and void, and whatever money is paid shall be treated as rent at the rate of \$150 per annum." It follows, from what has been said, that Caroline could not alienate or transfer the bond before the last note was due, and whosoever took a deed from Caroline before that date, with notice of the condition in the bond, was bound by that condition; and having no power to transfer the bond, she certainly could have no power to convey the land before the time stipulated in the bond. Therefore, when Singletary took the deed with notice of the condition in the bond, he acquired no right contrary to the condition.

This case is very different from the *Bryant Case*, 55 Ga. 438, where a third person had "cut in" to deprive a purchaser of his trade. In the view I take of the case, at the time Grimsley purchased the land from Mrs. Holmes, Singletary had not effected a legal contract of purchase of the land from Caroline, on account of the restriction in the bond providing that she could not alienate it, or with Mrs. Holmes; and hence Grimsley had the legal right to purchase from anyone having the legal right to sell. Mrs. Holmes never having parted with the legal title to Caroline, nor having sold to Singletary, so far as the evidence discloses, and Caroline having no right to sell to Singletary, Grimsley had the right to purchase from Mrs. Holmes, with the consent of Caroline that her contract with the obligor be canceled; and, having done so, Grimsley secured a good title relatively to Singletary and Caroline. While it is true Grimsley had notice of the deed from Cowart to Singletary, he also had notice of the restriction in the bond. It may be that Caroline is liable to Singletary on her warranty, if she executed the deed to him, as the auditor finds that she did, and that she is estopped from setting up that she had no title to the land; but I think there is no privity as between Grimsley and Singletary, and consequently the court could not, for the reasons given above, com-

pel Grimsley to execute a deed to Singletary, or enter a decree canceling the deed from Mrs. Holmes to Grimsley, or enter a judgment for any amount against Grimsley.

Petition for rehearing denied.

IDAHO SUPREME COURT.

ED. MALONEY, Resp't.,
v.

WINSTON BROTHERS COMPANY, Appt.

(18 Idaho, 740, 111 Pac. 1080.)

Instructions — sufficiency.

1. Instructions examined, considered, and held not to be erroneous.

Master — dangerous employment — assumption of risk.

2. Where a laborer seeks and obtains employment at a hazardous and dangerous task, and which must necessarily be prosecuted in a dangerous place, he thereby assumes the ordinary risks incident to the employment and attendant on the place where the work is prosecuted, but he does not thereby assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition, as a place of the kind should be maintained in which employees are to prosecute their work.

Same — railroad tunnel.

3. In the case of a hazardous work like driving a railroad tunnel through the mountain, an increased risk is assumed and an increased duty is imposed by law on both the master and servant, proportionate to the dangers of the place and the risks of the employment,—on the master to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant to either assume or avoid patent and obvious dangers and those necessarily incident to the work and the place in which the work is being prosecuted.

Headnotes by AILSHIE, J.

Note.—As to liability of master for dangerous conditions left after blasting, see note to *Fredericks v. Ft. Dodge Brick & Tile Co.* — L.R.A. (N.S.) —.

Upon the general question of the servant's assumption of risk of the master's breach of a statutory duty, see note to *Scheurer v. Banner Rubber Co.* 28 L.R.A. (N.S.) 1215.

As to the different forms of statement of the general rule with respect to the master's duty in furnishing places and appliances to the servant, see note to *Armour & Co. v. Russell*, 6 L.R.A. (N.S.) 602.

As to servant's right of action for in-

jury — character of work.

4. It is the established rule of law that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee or fellow servant to whom the negligent act is traceable.

Same — negligence of master.

5. In an action for personal injuries received by and on account of the negligence of the master, negligence must be shown, and this may be done by positive testimony of the commission of a wrongful act by the master, or the neglect by him to discharge a positive duty, or it may be shown by proof of the conditions of the place in which the master placed the servant, or the attendant circumstances surrounding the occurrence and the happening of the thing which caused the injury.

Same — direction of vice principal.

6. Where the servant is under the immediate direction of a superior employee or a vice principal, and performs each task or duty at the time and in the manner directed by his superior, and the servant has no discretion in the matter of inspecting or making safe the place in which he is to work, he has a right to assume that the superior or vice principal has examined and inspected the place in which he is set to work, and has found it in a reasonably safe condition, and in such case, the servant is only chargeable with the duty of taking notice of conditions as he sees them, and those dangers that are patent and obvious.

Same — tunnel — duty of master.

7. Where the master is engaged in driving a railroad tunnel and has a large number on men engaged in drilling, blasting, and shoveling away the rock and earth, it is the duty of the master to take reasonable precaution for the safety of the men, and to that end to have some person intrusted with the duty of examining and inspecting the place after shots have been fired, and of directing the manner and method of removing loose rock or earth from the walls and roof, and of making the place reasonably safe for the men who are to work therein.

Damages — injury to servant — computation.

8. Where an injury has been received by the servant on account of the negligence of

juries received in obeying a direct command, see note to *Lowe Mfg. Co. v. Payne*, 30 L.R.A. (N.S.) 436.

As to the applicability of the doctrine of *res ipsa loquitur* as between master and servant, see notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A. (N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A. (N.S.) 214.

Upon the question of vice principalship as determined with reference to the character of the act which caused the injury, see note to *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 33.

the master, damages should be computed and ascertained and awarded on the basis, as nearly as possible, of compensating the servant for the pain, suffering, and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was before the injury was inflicted.

On Petition for Rehearing.

Evidence — foreign law — judicial notice.

9. The courts of this state will not take judicial notice of the laws of a sister state. In the absence of pleadings and proof as to what the laws are in another state, the courts of this state will assume that the laws prevailing in a foreign state are the same as the laws of this state.

Conflict of law — presumption as to character of foreign law.

10. Where a question before the court is governed by the rule of common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that the common law is understood and construed to be the same in the foreign state as it is in the state of the forum.

(May 9, 1910.)

A PPEAL by defendant from a judgment of the District Court for Shoshone County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Bixby & Marlowe, Kerns & Ryan, Edgar Wilson, and F. M. Dudley for appellant.

Messrs. Gray & Knight and John H. Wourms for respondent.

Allshie, J., delivered the opinion of the court:

This action was prosecuted for the recovery of damages for personal injuries received by the plaintiff while working in what is known as the St. Paul pass tunnel which was being cut through the Bitter Root mountains for the use of the Chicago, Milwaukee, & St. Paul Ry. Co. The east end of this tunnel starts a short distance from the town of Taft, in Montana, while the west end of the tunnel is in Idaho. The plaintiff recovered judgment for \$15,000, and defendant moved for a new trial, and its motion was denied, and it has appealed from the judgment and order denying the motion.

This tunnel was about 24 feet wide by 30 feet high. The work was being prosecuted 47 L.R.A. (N.S.)

by four gangs of men, who were engaged in various classes of work, and each gang was under a separate shift boss. Two gangs of men worked at a time. The work was prosecuted in two sections. The upper half of the tunnel, known as "the heading," was driven by one gang of men, and a couple of hundred feet back of this work another gang was engaged in working on what is known as "the bench;" this work consisting in excavating the lower half of the tunnel. The respondent was employed as a machine man in operating an air drill and was working on the heading. Six drills were used at a time across the face of the tunnel. Each drill had two men, a machine man and a helper. After the holes were drilled they were loaded and fired. It was the custom that after the blasts were fired the shift boss would precede the gang of men to see that the smoke had sufficiently cleared away to begin work, and he was followed by the men. It appears to have been the duty of the shift boss to "sound" the overhanging rocks and inspect the place and see if it was necessary to "bar down" any loose rock or earth before the men began to work. It was then his custom to call the men and set them to work, telling each one where to work and what to do. Respondent had been in the employ of appellant about eighteen days prior to his injury. The timbering for the heading or upper tunnel work was of a temporary character, and was ordinarily extended as near up to the face of the tunnel as possible, in order to prevent rock and earth falling from above and injuring the men. The timbering overhead was up to within about 6 or 8 feet of the face of the heading at the time of this accident. The accident occurred in the heading on the morning of June 21, 1908. The plaintiff went on duty at 6:30 A. M. Blasts had been fired some time previous to this, and the loose rock and earth called "muck" had to be shoveled back before the men could set their machines. When respondent went on duty the shift boss told him to shovel back the rock, so that he could set his machine. The work appears to have been progressing in the greatest of haste and the men working fifteen minute relays. One gang would shovel fifteen minutes, and thereupon the other gang would take their place and shovel for a like period. Respondent was shoveling on a second relay when, from a half ton to a ton of rock fell and caught his left leg, crushing the ankle, breaking the fibula about 1½ inches above the ankle joint, thereby inflicting what is designated as a "Pott's fracture." The respondent was taken to the hospital, where he remained for three months and three

days, and thereafter returned to his work, and, after an attempt, lasting through three days, to continue his work, found that he was unable to do so, suffered great pain, and was obliged to quit. It appears that the injury is permanent. The fracture caused an eversion or turning out of the foot, resulting in shortening the left leg; and the evidence discloses that it will prevent him from doing a great deal of walking.

A great many errors are assigned and we will endeavor to deal with them in groups rather than singly. The first seven are directed at the admission and rejection of evidence. There was no error in these rulings of the court. The next group of assigned errors have reference to the giving and refusing instructions. There was no substantial error committed in these respects.

Instruction No. 5 given by the court is particularly objected to on account of the following language which it contained: "It is sufficient to say, however, that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond this he has the right to assume without inquiry or investigation that his employer has discharged his duty of furnishing him with a reasonably safe place in which to perform his duties." This part of the instruction is too broad, in that it tells the jury, "that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining such defects." This is not the law in all cases of damages. It is, however, the law under the facts of this case, and there was consequently no error in the court so instructing the jury. It should also be remembered that this instruction opened with the statement, "that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazard incident to the situation." From this it will be observed that the court told the jury that the employee assumed the usual and ordinary risks of a hazardous employment when he entered on this work. This instruction must be read in connection with the other instructions to which appellant objects.

Instruction No. 8 was eminently correct. It deals with the nature of the plaintiff's duties and of the scope of power and authority delegated by the master to the

shift boss. No. 12 advised the jury that the employee "has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe, and he is not bound to inspect it for the purpose of discovering a latent defect," etc. This was correct.

There was no error in instructions 6 and 13. Complaint is made of instructions No. 9, and appellant urges that this instruction, in effect, told the jury that the defendant would be liable to the plaintiff in any event if it failed to properly timber, brace, or support the grounds, regardless of the question of its exercise of due care. Instruction No. 9 is not capable of such a construction. This instruction, among other things, says: "If you find that there was negligence on the part of the master in failing to provide a safe place in which plaintiff had to work, . . . which by a reasonable inspection the defendant could have known was loose and liable to cave or fall," etc., that the defendant will be liable. This instruction specifically limited the liability to negligence on the part of the company in exercising reasonable care and due diligence. We find no error in the other instructions given.

Defendant's requested instruction No. 23 might properly have been given. It was intended to inform the jury that if they found for the plaintiff, in measuring the damages to which he was entitled they should take into consideration the fact that he was not wholly disabled, and the further question as to whether or not his disability was entirely permanent. The substance of this instruction, however, was covered by the instructions given, and there was no prejudice to the defendant in the refusal of the court to give this instruction. The instruction was substantially covered by instruction 15 given by the court.

The other assignments of error have reference either directly or indirectly to the sufficiency of the evidence to sustain the verdict and judgment, and will be fully covered by a consideration of the single question, as to the sufficiency of the evidence in this case to support the judgment.

It is contended by the appellant that plaintiff undertook an extra hazardous task, and that the ordinary risks of such a service were consequently assumed by him. This position is correct to the extent that he assumed the risk incident to the employment, but he did not assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition, as a place of the kind in which

the employee might work. *Bunker Hill & S. Min. & Concentrating Co. v. Jones*, 65 C. C. A. 363, 130 Fed. 813; *Ohio Copper Min. Co. v. Hutchings*, 96 C. C. A. 653, 172 Fed. 203; *Rowden v. Schoenherr-Walton Min. Co.* 136 Mo. App. 376, 117 S. W. 697. In the case of a hazardous work like driving a tunnel such as the one where respondent was working, an increased risk is assumed and a like increased duty is imposed by law on both the master and the servant proportionate to the dangers of the place,—on the master to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant to assume or avoid patent and obvious dangers and those necessarily incident to the work and place in which the work is being prosecuted. *Trihay v. Brooklyn Lead Min. Co.* 4 Utah, 468, 11 Pac. 612, 15 Mor. Min. Rep. 535; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 69. The law assumes that when these reciprocal duties have been faithfully discharged no injury of which the law takes cognizance will occur; but the moment an accident does occur the presumption arises that either the master or servant has been negligent, or that both have contributed to the injury.

It is contended by the appellant that if the injury in this case was caused by any negligent act, it was negligence of a fellow servant, for which the master was not liable. Now it is a well-established rule of law, which has been adopted in this state, that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee or fellow servant to whom the negligent act is traceable.

In *Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600, 18 Am. Neg. Rep. 363, this court adopted the following rule with reference to the liability of the master in such cases: "If the act or omission that caused the injury was one pertaining to the duty the master owed to his servant, he is responsible for the manner of its performance without regard to the rank of the servant or employee to whom it is intrusted. But if it is one pertaining to the duty of an operative, the employee performing it is a fellow servant with his collaborators, whatever his rank, for whose neglect the master is not liable."

It only remains to determine whether or not the duty of making the place at which respondent was working reasonably safe rested upon the master in this case, or was one of the duties of respondent and his fellow servants, the machine men and their

helpers. The evidence disclosed by the record in this case tends strongly toward the conclusion that respondent and the other machine men and their helpers were under the absolute and direct control and supervision of the shift boss, and that they had no discretion either as to what they should do or the manner in which they should do the tasks assigned them. They were told by the shift boss when to go into the heading and begin work after shots had been fired. They were directed to the specific place to set up their machines. They were told when to bar down loose rock and when to shovel muck. They were shown by the shift boss the particular direction in which to point the holes and the character of load to use in each hole. The evidence also tends to show that an employee there, who offered any suggestion as to the method of doing a piece of work, or protested against entering upon a special task, or made any protest as to the safety of the place, incurred the risk of being immediately discharged from the works.

It seems to have been the custom of the shift boss to enter and inspect the roof and walls for the purpose of ascertaining the safety of the place before calling the men to put them to work. If he found any place where loose rock or earth needed barring down or the roof needed trimming, he directed the men in doing that work before they commenced shoveling muck or setting up their machines or drilling.

The evidence does not show either that an inspection was or was not made prior to the accident. Respondent testified that it looked safe so far as he could see when he went to work, but appellant does not show that any inspection had been made. The rock and earth which fell on respondent appears to have come from the roof of the tunnel, and the witnesses say that if the roof had been sounded, that it is reasonably certain that the accident would have been averted. They testify as to the nature of the formation and probability of a sounding having located this danger and enabled the men to bar it down before commencing to muck.

It is contended by appellant that there is no proof of any negligent act or conduct on the part of the master which caused or contributed to the injury sustained. It is true as contended, that in all such cases negligence must be shown in some manner. 1 *Thomp. Neg.* §§ 28, 50, and 59; *Rysdorp v. George Pankratz Lumber Co.* 95 Wis. 622, 70 N. W. 677, 2 Am. Neg. Rep. 269; *Reino v. Montana Mineral Land Development Co.* 38 Mont. 291, 99 Pac. 853; *Holt v. Spokane & P. R. Co.* 4 Idaho, 443, 40 Pac. 56. This may be done by positive

testimony of the performance of a negligent act by the master, or the neglect by him to discharge a positive duty. It may also be shown by the conditions of the place in which he placed the servant, or the attendant circumstances surrounding the happening of the event which caused the injury.

Under the facts of this case and the circumstances under which the injury occurred, the nature of the place, and the attendant circumstances, as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master who was represented by the shift boss was negligent in the discharge of his duty in inspecting and examining or failing to inspect the place where respondent was set to work, and in not giving such directions as were necessary in order to have rendered the place safe, and thereby avoided the injury which resulted. *Vanesse v. Catsburg Coal Co.* 159 Pa. 403, 28 Atl. 200; *Peirce v. Kile* 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865; *Cinkovitch v. Thistle Coal Co.* 143 Iowa, 595, 121 N. W. 1036.

Under such circumstances, the servant would not be expected or required to make an inspection of the roof and walls or the condition of the place, but had a right to assume that the shift boss, who was in that case the vice principal, had examined and inspected the place and found it to be reasonably safe. *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; *Ross v. Shanley*, 185 Ill. 390, 56 N. E. 1105; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; *Crist v. Wichita Gas, Electric Light & P. Co.* 72 Kan. 135, 83 Pac. 199, 19 Am. Neg. Rep. 238; *Crawford v. Bonners Ferry Lumber Co.* 12 Idaho, 686, 87 Pac. 998, 10 Ann. Cas. 1. Under those circumstances, the servant was only bound to take notice of the conditions he saw and those dangers that were patent and obvious. In a recent case (*Rowden v. Schoenherr-Walton* Min. Co. 136 Mo. App. 376, 117 S. W. 695) the Missouri court of appeals quoted with approval from *Gibson v. Midland Bridge Co.* 112 Mo. App. 594, 87 S. W. 3, as follows: "It is not supposed, when given a task to perform, that he (the servant) will, on his own motion, consume his master's time in making comprehensive inspections to detect dangers. All that is required of him is that he use his senses in the position assigned him, and, as to dangers not to him apparent, and not inherent to the employment, he has the right to rely upon his master's judgment and humanity 47 L.R.A. (N.S.)

for the safety of his position." But aside from the evidence found in this record as to the actual duty of the master as discharged through the shift boss, and the custom which prevailed in this tunnel, it is not too much, we think, to say that as a matter of law it was the duty of the master to have an employee there, in the person of the shift boss, or someone else, whose specific duty it should be to examine and inspect the roof and walls of this tunnel, following the firing of shots, and previous to setting men to work with machines and drilling holes or to shoveling muck, or other work than the specific acts of making the place safe. In other words, it was the duty of the master, under such circumstances and in the prosecution of such a dangerous and hazardous work, to have some specific agent charged with the particular duty of looking after and making reasonably safe a place in which so large a number of men were crowded together in hurriedly prosecuting the master's work. This does not mean that the master must or can make the place absolutely safe. The word "safe," as used in such a case, is a relative term, and is used in connection with the character of the work and the nature of the place. It must be remembered, too, that the injury was not received by the servant while engaged in the work of making the place safe. The evidence was sufficient to justify the jury in returning a verdict for the plaintiff.

This brings us to a consideration of the question as to the excessive character of the verdict rendered in this case. The plaintiff asked for a judgment for \$15,000. The jury returned a verdict for the full amount. Maloney was twenty-nine years old at the time of this accident. He had been engaged for about nine years at similar work on railroad tunnels and mining tunnels in the states of Virginia, West Virginia, Arkansas, and California. He testified that his wages during this period of nine years at tunnel work had ranged from \$3 to \$5 per day. He was getting \$4.10 per day for the work in this tunnel where the accident occurred, and had some kind of an agreement for a bonus whereby he says he was making a total of \$5 per day. This appears to have been an arrangement the company had with its men to expedite the work and carry it on more rapidly than would ordinarily be the case. The evidence of the experts shows that his earning capacity is reduced about 50 per cent.

The respondent has also called our attention to certain authorities on practical surgery and the treatment of fractures, in which the authors deal with the particular kind of injury the respondent received in

this case, namely, a "comminuted Pott's fracture," which tends to eversion of the foot. It is said by one of these authorities that about 70 per cent of the cases recover, so that no serious or permanent inconvenience is suffered thereafter, while the remaining 30 per cent become permanently disabled, suffering more or less in some cases, and that there is an average loss of about 50 per cent in earning capacity. So in this case the evidence of the experts as to the loss of the earning capacity of respondent resulting from the injury is in substantial harmony with the authorities submitted on the same subject. We are therefore required to deal with the question of damages awarded in this case on the theory that the respondent's earning capacity has been permanently impaired about 50 per cent. Giving the respondent the most favorable consideration his evidence will justify, as to his previous earning capacity, his greatest average earning capacity would be \$1,200 per year. To compensate him for the loss of one half this income would entitle him to an annual income of \$600. The legal rate of interest in this state is 7 per cent, and we take it that anyone can obtain that rate; or better, on money in this country. Seven per cent on \$15,000 would bring the respondent an annual income of \$1,050. This is manifestly excessive and disproportionate to the injury received or the resultant loss of earning capacity.

It is conceded that the respondent's general health is not impaired. Damages in these cases must be awarded on the theory of a money consideration for the suffering, loss, and injury which the complainant has received. A man would either be crazy or an arrant villain who would voluntarily submit to the loss of a limb for any money consideration. Indeed, damages are not awarded on the theory that the injured party has voluntarily submitted himself to the injury. On the contrary, he is awarded damages because he has sustained an injury from which he himself could not, with the use of reasonable diligence, have escaped. After the injury has been sustained the only way of computing the loss is in dollars and cents, and that must be upon some theory or basis. The proper basis, and that recognized by all the authorities, is to compensate him for the loss he has sustained and will in the future sustain by and on account of the injury inflicted. Neither the law nor the one whose negligence caused the injury can restore to the victim a whole or sound body. The nearest thing, then, that can be done toward placing the party *in statu quo*, is to so compensate him as to equal the pecuniary loss and diminished

earning capacity entailed by reason of the injury. *Watson, Damages for Personal Injuries*, chap. 25.

The pecuniary and financial loss sustained can be estimated with a reasonable degree of certainty. On the other hand, the amount to be allowed for humiliation, pain, and suffering entailed by the injury must be left to the arbitrary judgment of the jury (*Lindsay v. Oregon Short Line R. Co.* 13 Idaho, 477, 12 L.R.A. (N.S.) 184, 90 Pac. 984; *Tarr v. Oregon Short Line R. Co.* 14 Idaho, 204, 125 Am. St. Rep. 151, 93 Pac. 957); subject only to correction by the courts for abusive and passionate exercise. (*Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, 8 Am. Neg. Cas. 76; *Watson, Personal Injuries*, §§ 311, 314).

We have made considerable research in order to ascertain the views of the several courts of this country with reference to the proper amount of damages to be awarded for an injury similar to the one received by respondent. We will briefly call attention to some of the cases.

In *Wimber v. Iowa C. R. Co.* 114 Iowa, 551, 87 N. W. 505, a brakeman, thirty-nine years old and in good health, was injured so that it was necessary to amputate one leg about 6 inches below the knee. A verdict was rendered in his favor for \$14,500. The supreme court held the verdict excessive and reduced it to \$8,000.

In *Budge v. Morgan's L. & T. R. & S. Co.* 108 La. 349, 58 L.R.A. 333, 32 So. 535, a brakeman sustained the loss of a leg and a verdict and judgment for \$12,500 was held excessive and reduced to \$6,000. In *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661, a brakeman sustained an injury whereby he lost both legs. A verdict of \$18,000 was held excessive and the judgment was reversed on the ground that it would produce an income three times as large as his earning capacity.

In *Nicholds v. Crystal Plate Glass Co.* 126 Mo. 55, 27 S. W. 516, 28 S. W. 991, the bones of the ankle were broken and the injury was of a permanent nature. A verdict of \$8,666 was held excessive and reduced to \$5,000. In *San Antonio & A. P. R. Co. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246, a locomotive engineer earning from \$135 to \$150 a month lost a leg. The jury awarded a verdict of \$18,000, and the court reduced it to \$16,000. In *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46, 31 Pac. 411, 10 Am. Neg. Cas. 384, a carpenter received an injury to his knee which prevented him following his regular vocation. The jury returned a verdict for \$7,000, and the court reduced it to \$5,000.

In *Chitty v. St. Louis, I. M. & S. R. Co.* 166 Mo. 435, 65 S. W. 959, plaintiff, who had been at different times engaged in scaling logs and keeping books, received an injury to one of his legs and ankle which kept him in the hospital for nine months and fifteen days, and who was apparently permanently injured, and at the expiration of seven years after the injury, when a second trial took place he was still suffering pain and the wound was not entirely healed, was awarded a verdict of \$15,000. The supreme court held the verdict excessive and ordered that it be reduced to \$10,000.

In the opinion in the case last cited there is a table of cases showing the nature of the injury and the amount of the verdict in a number of similar cases. In all these cases the courts held the verdicts excessive. As the same may be useful we set them forth in this opinion. They are as follows: *Southwestern R. Co. v. Singleton*, 66 Ga. 252, for fracture of leg, \$14,833; *Lombard v. Chicago, R. I. & P. R. Co.* 47 Iowa, 494, for broken leg, \$4,000; *Kroener v. Chicago, M. & St. P. R. Co.* 88 Iowa, 16, 55 N. W. 28, for loss of foot, \$12,000; *Slette v. Great Northern R. Co.* 53 Minn. 341, 55 N. W. 137, for broken leg, \$4,100; *Johnson v. St. Paul City R. Co.* 67 Minn. 260, 36 L.R.A. 586, 69 N. W. 900, 1 Am. Neg. Rep. 93, for broken ankle, \$4,000; *Bailey v. Rome, W. & O. R. Co.* 80 Hun, 4, 20 N. Y. Supp. 816, for loss of leg, \$16,000; *Peri v. New York C. & H. R. Co.* 87 Hun, 499, 34 N. Y. Supp. 1009, for loss of foot, \$10,000; *Bronson v. Forty-Second Street, M. & St. N. Ave. R. Co.* 67 Hun, 649, 21 N. Y. Supp. 695, for broken leg, \$11,000.

It will be seen from an examination of the foregoing authorities, as well as many others, that the courts have almost invariably held verdicts of anything like the amount of this excessive, and have accordingly exercised their power and authority in ordering a modification of the judgment, or in granting a new trial on account of prejudice and bias of the jury in rendering such excessive verdicts. In our examination of these various cases dealing with injuries of a similar character to the one under consideration, we find that the average judgments as finally ordered by the appellate courts have been less than \$10,000. It is clear that a recovery should not be allowed to the extent of a vindictive or punitive judgment. If the master has been guilty of wanton and criminal negligence, it is the clear and unmistakable duty of the state to deal with him through the criminal laws, and to allow the servant to recover to such an extent only as will leave him as nearly as possible in as good a position

as he was before the infliction of the injuries. This verdict is clearly excessive, and we have concluded that it should be reduced to \$10,000. This would insure him an annual income of at least \$700 from the principal sum. This will fully compensate him for his annual loss of earning capacity and still will give him a fair compensation for the pain and suffering inflicted by the injury.

The judgment will be affirmed to the extent of \$10,000, on condition that the respondent file within thirty days after going down of the remittitur a waiver of the excess of \$5,000 and an acceptance of the judgment as thus modified. On failure to do so, the judgment will be reversed *in toto* and a new trial granted. Modified and affirmed accordingly, with costs in favor of respondent.

Sullivan, Ch. J., and Stewart, J., concur.

A petition for rehearing having been filed, Allshie, J., handed down the following additional opinion December 7, 1910:

A rehearing was granted in this case, and the matter was argued exhaustively orally and four separate briefs by different counsel have been filed on behalf of appellants, in which the questions of fact involved are discussed, and the authorities bearing on the case have been exhaustively analyzed and considered. The chief argument on behalf of appellant has been directed to two propositions: First, that in a case like this the master is under no obligation to furnish the servant with a safe place in which to work; that at the most "the master is only liable to the exercise of reasonable care to furnish the servant with a reasonably safe place in which to discharge the work for which he is employed;" second, it is insisted that the mere happening of an accident does not imply that the master has been negligent, but that the master's negligence must be alleged and proven.

We will first briefly notice these question before dealing with the other questions to which less importance has been attached. It is both impracticable and impossible for the court to review and consider the multitude of authorities cited in this case. We may say, however, in the outset, that we have no serious fault to find with either of the propositions above stated for which appellant contends. To say that the master is under the duty of exercising "reasonable care" in order to make a place "reasonably safe" in which his servant is to work is substantially the same as to say "the master must furnish the servant a reasonably

safe place in which to work." To say that there is any material or substantial difference between the two propositions is only a legal refinement and a theoretical distinction, which is not distinguishable by a jury of practical men in drawing the line between duty and negligence. The master must use reasonable care in each instance, and that is true whether he is to furnish a "reasonably safe place" in which the servant shall work, or the servant himself is employed to make the place in which he shall work. In no event is the master relieved from the exercise of "reasonable care" for the safety and protection of his employee. In the one case, however, the employee may not be able to recover because of his assumption of risk or his contributory negligence, and in another case he may be free from fault himself, and the master be liable on account of his failure to exercise reasonable care. In other words, the failure of the master to discharge his legal duty by the exercise of reasonable care does not always subject him to liability in damages, for the reason that other intervening circumstances sometimes relieve him of liability. *Longpre v. Big Blackfoot Mill*. Co. 38 Mont. 99, 99 Pac. 131.

Under the second proposition advanced by counsel for appellant, particular stress is laid upon the following sentence found in the original opinion, which succeeds a statement of the reciprocal duties and liabilities of the master and servant: "The law assumes that when these reciprocal duties have been faithfully discharged no injury of which the law takes cognizance will occur; but the moment an accident does occur, the presumption arises that either the master or servant has been negligent, or that both have contributed to the injury." We apprehend that the objection to the foregoing quotation arises either out of a failure to observe it closely or read it in connection with the balance of the opinion. As an abstract proposition, we think there can be no doubt as to its correctness. The presumption which it is stated arises on the happening of an accident does not, in the absence of proof, identify the party guilty of the negligence. It is stated, and we think correctly, too, that, as an abstract proposition, the happening of an accident "of which the law takes cognizance," at once implies an act of negligence on the part of someone. It is not the law anywhere, so far as we are aware, that the mere happening of an accident is of itself proof that the master has been negligent and is liable for the injury and damage sustained. The happening of the accident, however, must be proven before there is any occasion for proving negligence on the part of the master. The

fact of the accident and injury established, circumstances and physical conditions may be resorted to for the purpose of determining on whom the responsibility for the accident rests and to whom the negligence is imputable. In the original opinion we said: "The evidence does not show either that an inspection was or was not made prior to the accident. Respondent testified that it looked safe so far as he could see when he went to work, but appellant does not show that any inspection had been made. The rock and earth which fell on respondent appears to have come from the roof of the tunnel, and the witnesses say that if the roof had been sounded that it is reasonably certain that the accident would have been averted. They testify as to the nature of the formation and probability of a sounding having located this danger and enabled the men to bar it down before commencing to muck. . . . Under the facts of this case and the circumstances under which the injury occurred, the nature of the place, and the attendant circumstances, as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master, who was represented by the shift boss, was negligent in the discharge of his duty in inspecting and examining or failing to inspect the place where respondent was set to work, and in not giving such directions as were necessary in order to have rendered the place safe and thereby avoided the injury which resulted." See also *Norman v. Wabash R. Co.* 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 727; *Central Coal & Coke Co. v. Williams*, 97 C. C. A. 597, 173 Fed. 337; *Haynie v. Tennessee Coal, Iron & R. Co.* 99 C. C. A. 71, 175 Fed. 55.

In this case the servant was not primarily engaged in making the place safe in which he worked. In this respect the case differs materially from *Thurman v. Pittsburg & M. Copper Co.* 41 Mont. 141, 108 Pac. 588, on which appellant relies. There the servant was charged with the special duty of making the place safe. Here the servant was under the direction and control of the shift boss. It was his duty, when directed by the shift boss, to assist in making the place safe. The determination, however, as to what should be done and when it was necessary to perform an act looking toward the making of the place safe rested with the shift boss, and it was the duty of the shift boss to make the inspection before setting the men to work. In this case it does not appear whether an inspection was made or not. The defendant produced no evidence to that effect, and the plaintiff did not know. He did know, however, that subsequent events demonstrated that the

place was not safe. He furnished proof of the physical conditions and the attendant circumstances from which it might well be concluded that the inspection had either not been made, or, if made, had been negligently made.

Three days prior to the filing of the original opinion in this case, the court of appeals of the state of Kentucky had under consideration a case involving a very similar state of facts in *Williams Coal Co. v. Cooper*, 138 Ky. 287, 127 S. W. 1000. The court said in that case: "It is argued that, if it was the duty of the coal company to keep the room reasonably safe, this duty was performed, as the 'loader' whose business it was to examine the roof and put it in a reasonably safe condition performed this service; at any rate, exercised his best judgment in attempting to do so. And it is said that, as the 'loader' believed after inspection that the room was reasonably safe, his judgment is conclusive of the question that the master furnished a reasonably safe place. But with this argument we cannot agree. In the opinion of the 'loader' the room may have been reasonably safe, but the fact that the roof fell soon after his inspection demonstrates that it was not reasonably safe. . . . It was a question for the jury to say from the evidence whether or not the place was reasonably safe. And in considering this question they had the right to give such weight as they deemed proper to the statement of the inspector. They may or may not believe from it that the master discharged his duty in furnishing a reasonably safe place."

The same court, as late as June 1st of this year, again had the same question under consideration in *Huddleston v. Straight Creek Coal & Coke Co.* 138 Ky. 506, 128 S. W. 589, and after considering an argument very much like that made in this case, said: "We cannot give our approval to a doctrine like this. The jury have the right to hear and consider, not only the evidence from the mouths of witnesses as to what they did and what was done, but they have also the right to hear and consider other evidence from witnesses who are qualified to testify as to the physical condition of the place and appliance before, at the time, and immediately after the accident, and the jury may, from the facts and circumstances thus proven, be warranted in concluding that they are entitled to more weight than the personal evidence of the witnesses whose testimony was in contradiction of these facts and circumstances. Let us take this case as an apt illustration. Notwithstanding the uncontradicted evidence of Elswick, the jury

might be of the opinion, based upon the evidence of the physical conditions, that, as the roof fell soon after his inspection, he did not make a careful inspection; or, in other words, that the master did not exercise ordinary care to put and keep the entry in reasonably safe condition. This was a question for the jury, not the court, and so the court erred in taking the case from the jury."

The accident in this case occurred in the tunnel on the Montana side of the line between Idaho and Montana. It has been argued on the rehearing that under the statutes and decisions of Montana, a recovery could not be had in this case in Montana, and that it is accordingly the duty of this court to deny the respondent any relief. On the proposition that respondent could not recover in Montana, counsel cite two cases from the supreme court of that state, *Cummings v. Reins Copper Co.* 40 Mont. 599, 107 Pac. 904, and *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499; and on the general proposition that the respondent is bound by the law of the place where the injury occurred, counsel cite: *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, 5 Am. Neg. Rep. 549; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; *Kansas City, Ft. S. & M. R. Co. v. Becker*, 67 Ark. 1, 46 L.R.A. 814, 77 Am. St. Rep. 78, 53 S. W. 406; *Turner v. St. Clair Tunnel Co.* 111 Mich. 578, 36 L.R.A. 134, 66 Am. St. Rep. 397, 70 N. W. 146; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L.R.A. 276, 59 Am. St. Rep. 28, 33 S. W. 857. The trouble with the application of the rules announced by these authorities is that in the present case the appellant failed to plead and prove in the lower court the laws of Montana as a defense to the action. We cannot take judicial notice of the laws of a sister state. In the absence of pleading and proof as to what the laws are in a sister state, we must assume that the same law prevails in the foreign state that prevails here. The authorities are uniform to this effect. This court has recognized the rule in *Moore v. Pooley*, 17 Idaho, 61, 104 Pac. 898. See 5 Enc. Ev. 813; 2 Wharton, Conf. L. 3d ed. 781, a, b; *Hall v. Pillow*, 31 Ark. 32; *Norris v. Harris*, 15 Cal. 226; *Hickman v. Alpaugh*, 21 Cal. 225; *Daggett v. Southwest Packing Co.* 155 Cal. 762, 103 Pac. 204; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *Schwartz v. Panama R. Co.* 155 Cal. 742, 103 Pac. 196; *Justis v. Atchison, T. & S. F. R. Co.* 12 Cal. App. 639,

108 Pac. 328; Bemis v. McKenzie, 13 Fla. 553; Hill v. Wilker, 41 Ga. 449, 5 Am. Rep. 540; Baltimore & O. R. Co. v. Freeze, 169 Ind. 370, 82 N. E. 761; News Pub. Co. v. Associated Press, 114 Ill. App. 241; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; Bershears v. Nelson Distilling Co. 80 Kan. 194, 101 Pac. 1011; Sandidge v. Hunt, 40 La. Ann. 766, 5 So. 55; McKenzie v. Wardwell, 61 Me. 136; Bearse v. McLean, 199 Mass. 242, 85 N. E. 462; Brimhall v. Van Campen, 8 Minn. 13, Gil. 1, 82 Am. Dec. 118; Standard Leather Co. v. Mercantile Town Mut. Ins. Co. 131 Mo. App. 701, 111 S. W. 631; Bannard v. Duncan, 79 Neb. 189, 126 Am. St. Rep. 661, 112 N. W. 353; Rogers v. Hatch, 8 Nev. 35; Hall v. Southern R. Co. 146 N. C. 345, 59 S. E. 879; Brumagim v. Chew, 19 N. J. Eq. 130; Harn v. Cole, 20 Okla. 553, 95 Pac. 415; Betz v. Wilson. 17 Okla. 383, 87 Pac. 844; Schlottbeck v. Schwinn, 23 Okla. 681, 103 Pac. 854; Bollinger v. Gallagher, 144 Pa. 205, 22 Atl. 815; Jonesville Mfg. Co. v. Southern R. Co. 77 S. C. 480, 58 S. E. 422; Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544; Star Clothing Mfg. Co. v. Nordeman, 118 Tenn. 384, 100 S. W. 93; Atchison, T. & S. F. R. Co. v. Mills, 49 Tex. Civ. App. 349, 108 S. W. 480; Missouri, K. & T. R. Co. v. Wise, — Tex. Civ. App. —, 106 S. W. 465; Kin Kaid v. Lee, 54 Tex. Civ. App. 622, 119 S. W. 342; Atchison, T. & S. F. R. Co. v. Smythe, 55 Tex. Civ. App. 557, 119 S. W. 892; Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556; s. c. 29 Wash. 215, 69 Pac. 736; Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56; McKnight v. Oregon Short Line R. Co. 33 Mont. 40, 82 Pac. 661; Crosby v. Cuba R. Co. (C. C.) 158 Fed. 144; s. c. 95 C. C. A. 539, 170 Fed. 369. Where the question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that it is the same in that state as in the state of the forum. 5 Enc. Ev. 817-820; Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751; Taber v. Seaboard Air Line R. Co. 81 S. C. 317, 62 S. E. 311, and cases above cited.

Counsel for appellant finally insist that if the judgment must be affirmed in this case, that the damages, even as reduced by the previous decision, are still excessive. In support of this contention, counsel have cited a number of additional authorities in which the question of the amount of dam-

ages to be awarded, and the age and condition of the party injured, and his capacity for earning wages, are all considered. As they may be useful to counsel in other similar cases, we cite them herein: 13 Cyc. pp. 134, 135; Bosworth v. Standard Oil Co. 92 Hun, 485, 37 N. Y. Supp. 43; Nicholds v. Crystal Plate Glass Co. 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46, 31 Pac. 411, 10 Am. Neg. Cas. 384; Florida R. & Nav. Co. v. Webster, 25 Fla. 394, 5 So. 714; Kroener v. Chicago, M. & St. P. R. Co. 88 Iowa, 16, 55 N. W. 28; Missouri P. R. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Kennon v. Gilmer, 9 Mont. 108, 22 Pac. 448; Brown v. Southern P. R. Co. 7 Utah, 288, 26 Pac. 579; Thompson v. Chicago, St. P. & K. C. R. Co. 71 Minn. 89, 73 N. W. 707; Moore v. W. R. Pickering Lumber Co. 105 La. 504, 29 So. 990; Wimber v. Iowa C. R. Co. 114 Iowa, 551, 87 N. W. 505; Bell v. Globe Lumber Co. 107 La. 725, 31 So. 994; Budge v. Morgan's L. & T. R. & S. S. Co. 108 La. 349, 58 L.R.A. 333, 32 So. 535.

On the other hand, counsel for respondent insist that the court erred in the original opinion herein in reducing the judgment and that it should have been allowed to stand as assessed by the jury and entered of judgment by the trial court. In support of respondent's contention, his counsel have cited us to the following additional authorities considering the amount of damages allowable in similar cases: Eckels v. Edison, 139 Ill. App. 75; Canfield v. Chicago, R. I. & P. R. Co. 142 Iowa, 658, 121 N. W. 186; Williams v. Spokane Falls & N. R. Co. 42 Wash. 597, 84 Pac. 1129, also 44 Wash. 363, 87 Pac. 491; Indiana, I. & I. R. Co. v. Otstatot, 212 Ill. 429, 72 N. E. 387; Wimber v. Iowa C. R. Co. 114 Iowa, 551, 87 N. W. 505; Budge v. Morgan's L. & T. R. & S. S. Co. 108 La. 349, 58 L.R.A. 333, 32 So. 535; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661; Nicholds v. Crystal Plate Glass Co. 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; San Antonio & A. P. R. Co. v. Connell, 27 Tex. Civ. App. 533, 66 S. W. 246; Texarkana & Ft. S. R. Co. v. Toliver, 37 Tex. Civ. App. 437, 84 S. W. 375; The Fullerton, 92 C. C. A. 463, 167 Fed. 1; International & G. N. R. Co. v. Brice, — Tex. Civ. App. —, 126 S. W. 613; Galveston, H. & S. A. R. Co. v. Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; Engler v. Western U. Teleg. Co. (C. C.) 69 Fed. 185; Jones v. New York C. & H. R. R. Co. 99 App. Div. 1, 90 N. Y. Supp. 422; Mitchell v. Broadway & S. A. R. Co. 70 Hun, 387, 24 N. Y. Supp. 32; Chicago, B. & Q. R. Co. v. Dunn, 106 Ill. App. 194; Chicago & G.

T. R. Co. v. Spurney, 197 Ill. 471, 64 N. E. 302; Tully v. New York & T. S. S. Co. 10 App. Div. 463, 42 N. Y. Supp. 29; Illinois C. R. Co. v. O'Connor, 90 Ill. App. 142; Yazoo & M. Valley R. Co. v. Scott, 95 Miss. 43, 48 So. 239; Gale v. New York C. & H. R. R. Co. 13 Hun, 4; Galveston, H. & N. R. Co. v. Murphy, 52 Tex. Civ. App. 420, 114 S. W. 443; Rodney v. St. Louis S. W. R. Co. 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Texas & N. O. R. Co. v. Parsons, — Tex. Civ. App. —, 109 S. W. 240; Id., 102 Tex. 157, 132 Am. St. Rep. 857, 113 S. W. 914; Texas & N. O. R. Co. v. Carr, — Tex. Civ. App. —, 42 S. W. 126; Merchants' & Miners Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 S. E. 130; Houston & G. N. R. Co. v. Randall, 50 Tex. 254; Dougherty v. Missouri R. Co. 97 Mo. 647, 8 S. W. 900, 11 S. W. 251, 4 Am. Neg. Cas. 597; Missouri P. R. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291; Trinity & S. R. Co. v. Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18; O'Donnell v. American Ref. Co. 41 App. Div. 307, 58 N. Y. Supp. 640, 6 Am. Neg. Rep. 322; Baltzer v. Chicago, M. & N. R. Co. 89 Wis. 257, 60 N. W. 716; Chicago Anderson Pressed Brick Co. v. Rembarz, 51 Ill. App. 543; Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706, 15 Am. Neg. Cas. 163; Atchison, T. & S. F. R. Co. v. Moore, 31 Kan. 197, 1 Pac. 644; Illinois C. R. Co. v. Harris, 63 Ill. App. 172; Lee v. Southern P. R. Co. 101 Cal. 121, 35 Pac. 572; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Montgomery Traction Co. v. Knabe, 158 Ala. 458, 48 So. 501; Macon & W. R. Co. v. Winn, 26 Ga. 250; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374; Morgan v. Southern P. Co. 95 Cal. 501, 30 Pac. 601, 2 Am. Neg. Cas. 196; Foley v. Everett, 142 Ill. App. 250; Reeks v. Seattle Electric Co. 54 Wash. 609, 104 Pac. 126; Burch v. Southern P. Co. 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912 B, 1166; Solen v. Virginia & T. R. Co. 13 Nev. 106; McLean v. Lewiston, 8 Idaho, 472, 69 Pac. 478, 12 Am. Neg. Rep. 243; Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983; Wall v. Livezey, 6 Colo. 465; Ryan v. Gilmer, 2 Mont. 523, 25 Am. Rep. 744; Aldrich v. Palmer, 24 Cal. 513; Wheaton v. North Beach & M. R. Co. 36 Cal. 591, 2 Am. Neg. Cas. 164; Boyce v. California Stage Co. 25 Cal. 460, 9 Am. Neg. Cas. 66; Wilson v. Fitch, 41 Cal. 363, 9 Mor. Min. Rep. 155.

Our further examination and consideration of the question as to the amount of damages that should be allowed have failed to convince us that any change should be made from that allowed by the original opinion. We recognize the fact that there

is no absolute standard by which damages can be measured in these cases. We are of the opinion, however, that the amount awarded by the jury in this case was excessive, and in view of all the facts and circumstances and in the light of the decisions from the various states which have considered this subject, we feel that the sum of \$10,000 to which the judgment was reduced by the original opinion is fair and as near an approximation to justice in the case as we can reach.

We feel that we should not close the consideration of this case without reverting to one argument that has been made in the briefs on behalf of appellant which does not have to do with the law of the case so much as with the public policy of the state. It has been argued with a great deal of zeal that the rule of law as announced in the original opinion is entirely too harsh on the master, and if permanently adopted in this state will have the tendency to discourage investments, the building of railroads, and street and electric car lines, power plants, mining development, and will generally retard the growth and development of the state's resources and industries. We feel that this apprehension is wholly unfounded and arises more out of a fear of an erroneous application of the rule we have announced than of any error of severity in the rule itself. The resources and industries of this state ought to be developed, and it is the hope of every citizen, including the members of this court, that railroads may be built, mines developed, and diversified industries built up, and it is not the temper or purpose of the court to promulgate any rule of decision that will hamper or deter any legitimate enterprise or industry; but we do want to be understood as insisting that this march of progress and development shall not come at a sacrifice of human life and safety, or in disregard of the common rights of the laboring man who shall furnish the brawn and sinew for that work.

After a somewhat laborious and tedious examination of this case a second time, we feel that the original opinion correctly states the principles of law applicable to the case, and that the conclusion reached on the former hearing should stand as the judgment of the court in this case. The judgment of the trial court will therefore be affirmed to the extent of \$10,000, on condition that the respondent file within thirty days after the going down of the remittitur a waiver of the excess of \$5,000 and an acceptance of the judgment as thus modified. On failure to do so, the judgment will be reversed *in toto*, and a new trial

granted. Modified and affirmed accordingly, with costs in favor of the respondent.

Sullivan, Ch. J., concurs.

KANSAS SUPREME COURT.

ESTELLA VAN GUNDY et al.

v.

CLUM C. SHEWEY, Appt.

(— Kan. —, 133 Pac. 720.)

Vendor and purchaser — deed from heir — absence of probate.

1. A vendor's title is not necessarily unmarketable because derived through deeds from the heirs of a deceased owner whose estate was not probated.

Same — abstract of title — how constructed.

2. In such a case an abstract of title may be made to exhibit a good title by attaching to it the affidavits of credible persons who know the facts, showing intestacy, heirship, capacity to convey, and the satisfaction of all claims against the estate of the deceased.

Same — vendee's burden.

3. When such a showing has been made, it devolves upon the vendee objecting to the title to show wherein it is bad or doubtful, or that the evidence necessary to establish the facts is so uncertain or inaccessible as to render the title doubtful.

Same — trust deed — release by beneficiary.

4. In 1888 the owner of a tract of land gave a trust deed or mortgage to a person designated as trustee for a third person designated as beneficiary. The beneficiary assigned the mortgage and the assignee released it. The trustee has acquiesced in the release for a period of time exceeding that prescribed by the statute of limitations. Held, the trustee has no interest in the land which is now or may hereafter become substantial, and that the title is not doubtful because he did not join in the release.

Writ — publication — affidavit — sufficiency.

5. Under § 79 of the Civil Code (Gen. Stat. 1909, § 5672), which takes the place

Headnotes by BURCH, J.

Note. — As to what is a marketable title, see note to Justice v. Button, 38 L.R.A. (N.S.) 1. See also later case, Roosback v. Micks, 42 L.R.A. (N.S.) 444.

For duty of vendor as to abstract of title, see note to Eiche v. Kionka, 43 L.R.A. (N.S.) 44.

For character of inquiry as to whereabouts of party necessary to sustain constructive service of process, see note to Grigsby v. Wopschall, 37 L.R.A. (N.S.) 206. 47 L.R.A. (N.S.)

of § 73 of the old Code, an affidavit for service by publication which wholly fails to show, either by direct statement or by way of inference from other statements, that the plaintiff diligently inquired as to the residence of the defendants to be served by publication, and was unable to learn the place of such residence, is void.

Vendor and purchaser — tax title — sufficiency.

6. Various objections by a vendee to a title based upon a tax deed which is good on its face, which has been of record for more than fifteen years, and under which the vendor has been in possession for more than five years considered, and held that the tax deed and the vendor's possession constitute a title sufficient to extinguish all rights, titles, and interests of prior origin.

(July 5, 1913.)

APPEAL by defendant from a judgment of the District Court for Norton County in plaintiffs' favor in an action brought to compel specific performance of a contract for the sale of certain land. Affirmed.

The facts are stated in the opinion.

Mr. Willard Simmons, for appellant:

The statute of limitations, while a shield for defense, is not a weapon of attack, and cannot be made the basis of affirmative relief.

Capell v. Dill, 82 Kan. 652, 109 Pac. 286; Burditt v. Burditt, 62 Kan. 576, 64 Pac. 77; Holden v. Spier, 65 Kan. 412, 70 Pac. 348; Corlett v. Mutual Ben. L. Ins. Co. 60 Kan. 134, 55 Pac. 844; Hays Land & Invest. Co. v. Bassett, 85 Kan. 48, 116 Pac. 475; Salter v. Corbett, 80 Kan. 327, 102 Pac. 452; Walker v. Boh, 32 Kan. 354, 4 Pac. 272; Stump v. Burnett, 67 Kan. 589, 73 Pac. 894.

Specific performance cannot be decreed where reasonable doubt concerning the title exists, though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that, too, where at law the title might in fact be declared good.

Van Riper v. Wickersham, 77 N. J. Eq. 232, 30 L.R.A. (N.S.) 25, 76 Atl. 1020, Ann. Cas. 1912 A, 319; Pom. Spec. Perf. § 198; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Dobbs v. Norcross, 24 N. J. Eq. 327; Tillotson v. Gesner, 33 N. J. Eq. 313; Cornell v. Andrews, 35 N. J. Eq. 7; Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99; Justice v. Button, 89 Neb. 367, 38 L.R.A. (N.S.) 1, 131 N. W. 736; Durham v. Hadley, 47 Kan. 73, 27 Pac. 105.

Such a title as appellant was to receive cannot rest in parol. Appellees cannot refuse to furnish record title such as they

contract to give, and compel appellant to resort to parol evidence to establish his title, or to establish or protect any link in the chain of title by parol testimony.

Watson v. Boyle, 55 Wash. 141, 104 Pac. 147; *Irving v. Campbell*, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Knox v. DeSpain*, 156 Ill. App. 134.

It is not sufficient that the title is good in fact,—that it is capable of being made good by affidavits or other oral testimony,—it must be good of record.

Howe v. Coates, 97 Minn. 385, 4 L.R.A. (N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787.

A doubtful title cannot be made marketable by a decision of the court in an action between the vendor and vendee merely.

Williams v. Bricker, 83 Kan. 53, 30 L.R.A. (N.S.) 343, 109 Pac. 998.

Had the publication notice been legal, and upon sufficient affidavit, the attempted quiet title would have been wholly insufficient.

Smith v. Hunter, 241 Ill. 514, 132 Am. St. Rep. 231, 89 N. E. 686; *Grouch v. Martin*, 47 Kan. 313, 27 Pac. 985; *Claypool v. Houston*, 12 Kan. 324.

Equity will not, by a decree for specific performance, compel a party to accept a title which is so doubtful that it may be exposed to litigation. The court will not cast upon him the risk of litigation and the embarrassment of questionable title.

Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; *Daniell v. Shaw*, 166 Mass. 582, 44 N. E. 991; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; 26 Am. & Eng. Enc. Law, 111; *Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; *Morrison v. Waggy*, 43 W. Va. 405, 27 S. E. 314; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Simon v. Vanderveer*, 155 N. Y. 377, 63 Am. St. Rep. 683, 49 N. E. 1043; *McNutt v. Nellans*, 82 Kan. 427, 108 Pac. 834; *Williams v. Bricker*, 83 Kan. 53, 30 L.R.A. (N.S.) 343, 109 Pac. 998.

Mr. H. O. Caster, for appellees:

Appellant cannot attack the validity of the tax deed.

Cowdery v. Greenlee, 126 Ga. 786, 8 L.R.A. (N.S.) 137, 55 S. E. 918; *Ballou v. Sherwood*, 32 Neb. 668, 49 N. W. 790, 50 N. W. 1131.

The tax title having been of record for more than five years, and appellees and their grantors having been in the peaceable possession of the land all that time, this vests in them an absolute title which extinguishes and destroys all titles, liens, and interests 47 L.R.A. (N.S.)

existing when the tax proceedings were had upon which the tax deed is founded.

Girard Trust Co. v. Jones, 81 Kan. 753, 106 Pac. 1052; *Douglass v. Lowell*, 64 Kan. 533, 67 Pac. 1106.

Title by adverse possession is as high as any known to the law.

McWhorter v. Heltzell, 124 Ind. 129, 24 N. E. 743; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *Sims v. Frankfort*, 79 Ind. 446; *Wilson v. Campbell*, 119 Ind. 290, 21 N. E. 893; 1 Am. & Eng. Enc. Law, 30.

It is sufficient to show a good title at any time before final decree.

Hobson v. Buchanan, 96 N. C. 444, 2 S. E. 180; *Hepburn v. Auld*, 5 Cranch, 262, 3 L. ed. 96; *Seymour v. Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Pierce v. Nichols*, 1 Paige, 244; *Baldwin v. Salter*, 8 Paige, 473; *Fraker v. Brazelton*, 12 Lea, 278; *Luckett v. Williamson*, 37 Mo. 388; *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 346; *Lyles v. Kirkpatrick*, 9 S. C. 265; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *McKinney v. Jones*, 57 Wis. 301, 15 N. W. 160; *Montgomery v. Gibbs*, 40 Iowa, 652; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460.

A title by adverse possession may be so clearly proved, and be so free from doubt, as to be a proper foundation for a decree for specific performance against the purchaser.

Scott v. Nixon, 3 Drury & War. 388, 2 Connor & L. 185, 6 Ir. Eq. Rep. 8; *Games v. Bonnor*, 54 L. J. Ch. N. S. 517, 33 Week. Rep. 64; *Ottinger v. Strasburger*, 33 Hun, 466, 102 N. Y. 692; *Pratt v. Eby*, 67 Pa. 396; *Gump v. Silbey*, 79 Md. 165, 28 Atl. 977; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *Logan v. Bull*, 78 Ky. 607.

In order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show beyond a reasonable doubt that the title is good.

Sturtevant v. Jaques, 14 Allen, 523; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Jeffries v. Jeffries*, 117 Mass. 187; *First African M. E. Soc. v. Brown*, 147 Mass. 296, 17 N. E. 549.

Burch, J., delivered the opinion of the court:

The action in the district court was brought by the plaintiff, Estella Van Gundy, as vendor, to compel the defendant, Clum C. Shewey, as vendee, to specifically perform a contract for the sale of a quarter section of land. Judgment was rendered for the plaintiff, and the defendant appeals.

The defendant declined to perform on his part because he was not satisfied with the title offered. The contract did not guaran-

tee a perfect record title, and consequently the defendant must be satisfied with a marketable title. The subject of what is a marketable and what a doubtful title is sufficiently discussed in the case of *McNutt v. Nellans*, 82 Kan. 424, 108 Pac. 834.

The plaintiff derived title through deeds from the heirs of George Fossler, deceased, whose estate was not probated. Attached to the abstract furnished to the defendant is a showing by the affidavit of a person having knowledge of the facts that Fossler died intestate, possessed of the real estate in question, that the grantors in the deeds referred to were his heirs and only heirs, that they were of legal age when they conveyed, and that all of Fossler's debts at the time of his death and his funeral expenses were paid in full.

A title is not unmarketable because there is a break in the record occasioned by the death of the owner and consequent devolution of title by operation of law. From the very nature of the case, however, the only way in which an abstract can be made to exhibit a good title in such instances is by a showing of the kind just described. When a vendor has by this means exhibited a title free from doubt, it devolves upon a vendee objecting to it to show wherein the title is bad or doubtful. *Maupin, Marketable Title to Real Estate* 2d ed. p. 749, § 295. The defendant does not dispute any of the facts set forth in the affidavit referred to, or show that he would labor under any difficulty in proving them should occasion arise. Therefore the title appears to be free from doubt so far as the matter under consideration is concerned.

In 1888 the then owner of 40 acres of the land gave a mortgage upon it to Edward E. Holmes, as trustee for Willis G. Myers, as beneficiary. The beneficiary assigned the mortgage and the assignee released it many years ago. Technically, perhaps, the release may be said to be defective because the trustee did not join. Since, however, satisfaction of the debt has been acknowledged by the party entitled to the benefit of the security, and since the release has been acquiesced in by the trustee and the beneficiary for a period of time exceeding that prescribed by the statute of limitations, there is no fair ground for doubting that the mortgage is no longer a lien upon the land. The plaintiff invokes the aid of chapter 301, Laws of 1905, which provided that recorded assignments and releases of mortgages in certain instances shall be deemed to be valid, and required them to be challenged if at all within one year from the time when the act took effect (June 8, 1905). It is possible that by a liberal interpretation of the statute the release in

question may be brought within its terms, but it is not necessary to decide the question, since it is plain that the trustee has no interest in the land which is now or which may hereafter become substantial.

A number of claimed defects in the title to the south half of the quarter section were pointed out, and time was extended to the plaintiff in which to cure them by an action to quiet title. Service was made upon the defendants in such action by publication. Section 79 of the new Code radically changed the requirements of § 73 of the old Code respecting the contents of the affidavit for service by publication. It reads as follows: "Before service by publication can be made, an affidavit must be filed, stating the residence, if known, of the defendant or defendants sought to be served, and if not known, stating that the plaintiff has diligently inquired as to the residence of such defendant or defendants, and has been unable to learn the place of such residence, and that the plaintiff is unable to procure actual service of summons on such defendant or defendants within this state, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Civil Code, § 79 (Gen. Stat. 1909, § 5672).

In the suit to quiet title the affidavit stated that the defendants were nonresidents of the state of Kansas, that their residence was unknown to the plaintiff, and that actual service could not be made upon them in the state of Kansas, but it wholly failed to show even by way of inference from other statements that the plaintiff had diligently inquired as to the residence of the defendants, and had been unable to learn the place of such residence. Under the well-known rule the total omission of a material averment renders the affidavit and the service based upon it void, and consequently the decree rendered did not aid the title.

The plaintiff has title to the south half of the quarter section by virtue of a tax deed issued in 1896, good on its face, and of record for more than fifteen years at the time of the trial, during all of which time the land has been in the possession of the plaintiff and her grantors. The plaintiff herself had been in possession for more than three and one half years when the decree quieting her title was rendered, and there is no pretense that possession for more than five years is not readily provable. The defendant claims the tax deed is void on its face because the consideration stated cannot be arrived at from the data furnished by the antecedent recitals, but it is easy enough to do so under the liberal rules

which have been adopted for the interpretation of tax deeds which have been of record for five years or more. This deed effectually extinguishes the basis of all claims which might, according to the abstract, be asserted by the defendants in the action to quiet title. Indeed, the defendant made no serious objection to the tax title until after judgment had been rendered in the suit to quiet title. He now argues that the suit to quiet title exposed the tax deed to attack for irregularities in the proceedings upon which it was based, and consequently destroyed its impregnability as a muniment of title should any of the defendants choose to treat the void service as valid and ask to be let in to defend.

The decree quieting title purports to be based upon adverse possession and there is nothing whatever in the proceedings to indicate that the right of action was predicated upon the tax deed. The only defendants who have shown a disposition to assert an interest in the land (the most insistent one being the holder of a mortgage now twenty-five years in default) were promptly notified of the commencement of the suit. They made default and consequently cannot now open the judgment. The possible claims of the other defendants, all of whom defaulted, are quite negligible and the time for opening the judgment has almost expired. If, however, anyone should come in, the defendant, as successor to the plaintiff's title, will have the right to be substituted and to dismiss, and the tax deed and the present plaintiff's possession alone constitute a title sufficient to extinguish all rights, titles, and interests of prior origin. Laws 1911, chap. 232, § 3.

Several questions of practice have been presented, but the court has passed them by and has given its attention to the real character and strength of the title which the defendant has been ordered to accept. Believing that such title is good beyond all reasonable doubt, the judgment of the District Court is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

UNITED STATES FIDELITY & GUARANTY COMPANY, APT.,
v.

COMMONWEALTH OF KENTUCKY.

(139 Ky. 27, 129 S. W. 314.)

Tax — commercial agency — interstate.
The business of maintaining attorneys in various sections of a state, to make col-
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lections for and furnish information to merchant customers as to the financial standing of persons in the vicinity of such attorneys, is not, although it may require the sending of letters from state to state, interstate commerce so as to exempt the proprietor from paying a license tax imposed by the state.

(Barker, Ch. J., dissents.)

(June 9, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Mason County imposing a fine upon it upon trial under an indictment and conviction, for failure to pay the license tax required of those engaged in reporting credits. Affirmed.

The facts are stated in the opinion.

Mr. Allan D. Cole for appellant.

Messrs. James Breathitt, Attorney General, and T. B. McGregor, Assistant Attorney General, for the Commonwealth.

Carroll, J., delivered the opinion of the court:

The question in this case is: Was the appellant company at the time of its indictment and conviction engaged in the

Note. — Business of collection or commercial agency as interstate commerce.

UNITED STATES FIDELITY & G. Co. v. COM. was affirmed in 231 U. S. 394, 58 L. ed. —, 34 Sup. Ct. Rep. 122, where the court, after distinguishing *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881 (as relating to an agent whose business was the direct solicitation of passengers for interstate journeys by rail), and *International Text-book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103 (as relating to trade in text-books, etc., for courses of study pursued by means of correspondence), said: "In the present case it appears that there is not even systematic or continuous correspondence, much less interstate commerce resulting therefrom. There is no direct or necessary connection between the service performed by the plaintiff in error through its representatives and the making or fulfillment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky, with respect to the credit and standing of persons engaged in business in that state, may be received from merchants without the state in anticipation of commercial transactions between them in future. But, on the other hand, similar inquiries may be received from merchants in Kentucky, and may have reference alone to intrastate, and not to interstate, transactions. Or, the information may be desired as an aid in extending or refusing to extend credit for past transactions, as well as to lay the basis

business of interstate commerce and consequently exempt from the operations of § 4224 of the Kentucky Statutes (Russell's Stat. § 6157), providing in part that "each and every person, partnership, or corporation having representatives in this state, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, shall pay a license tax of \$100." The appellant company was indicted for failing to pay the license tax demanded by the statute, and upon a trial under the indictment was fined \$150. Heretofore, the commonwealth proceeded by penal action against the appellant company to recover the penalty denounced for failure to comply with the provisions of the statute in reference to paying a license tax, and from a judgment finding it guilty it prosecuted an appeal to this court. In the opinion, which may be found in 133 Ky. 740, 118 S. W. 1000, we held that the company was engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, and hence liable for the tax. In that case the only defense made was that the business it was engaged in did not fall within the scope or meaning of the statute. Upon that feature of the case we are satisfied with the correctness of the conclusion reached in the former case. So that the only question now open is: Was the business the company engaged in "interstate commerce" within the

meaning of § 8, art. 1, of the Federal Constitution, providing that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?"

For the purpose of clearly presenting the question, we will state so much of the indictment, special plea, and evidence as may be necessary to an understanding of it. The indictment charges that the company "did unlawfully, wilfully, and knowingly employ and keep representatives and agents, to wit, A. D. Cole and F. P. O'Donnell, in said county and state of Kentucky, engaged and employed in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in said Mason county, Kentucky; and that said representatives and agents, as representatives and agents of said United States Fidelity & Guaranty Company, during all times mentioned herein, inquired into and reported upon the credit and standing of divers persons whose names are unknown to the grand jury, engaged in business in said county and state during said time, and all of which was so done by said corporation and said A. D. Cole and F. P. O'Donnell, who were at all times aforesaid the authorized, engaged, and employed representatives, agents, and correspondents of the said corporation, and engaged and employed as such by said corporation, in carrying on said business of inquiring into and reporting upon the credit and standing of persons engaged in busi-

for future dealings. The circumstances that, in a substantial number of cases,—even if in the greater number,—there is correspondence, by letter or otherwise, from state to state, which may, perhaps, have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling. The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business (*Ficklen v. Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810); or the business of the live stock exchange that was under consideration in *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; or the business of a cotton broker dealing in futures or options (*Ware v. Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031). To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

The subject seems to have been considered 47 L.R.A. (N.S.)

in but one earlier case (*State v. Morgan*, *infra*), in which the opinion of the court seems more simple and direct than those rendered in the principal case by the Kentucky court, or the United States Supreme Court in affirmance. But it may be that, in the Kentucky case, both courts felt the constraint of the decision in *International Textbook Co. v. Pigg*, *supra*, a decision which seems likely to cause the courts a good deal of embarrassment.

In *State v. Morgan*, 2 S. D. 32, 48 N. W. 314, writ of error dismissed on motion of plaintiff in error, 159 U. S. 261, 40 L. ed. 145, 15 Sup. Ct. Rep. 1041, it was held that a state statute was not an unlawful interference with interstate commerce, which provided that "no company, association, individual, or association of individuals, formed under the laws of this or any other state or foreign government, shall transact the business of a commercial agency, without first receiving a certificate from the state auditor;" that \$50,000 deposit must be made; that 2 per cent must be paid on the amount received from sources growing out of business transacted in the state; that there should be a resident attorney on whom process might be served, and that no person should act as agent without a certificate from the state auditor under a penalty. The court said: "Mercantile commercial

ness in said county and state, and all of which said inquiring and reporting aforesaid was done by said representatives and agents of said corporation, with its knowledge, direction, and consent; and all of which was so done as aforesaid by the said United States Fidelity & Guaranty Company and the said A. D. Cole and F. P. O'Donnell without license so to do, contrary to law and against the peace and dignity of the commonwealth of Kentucky."

To this indictment the company, in addition to its general plea of not guilty, interposed the following special plea: "It states that it is a corporation created, organized, and existing under and by virtue of the laws of the state of Maryland; that at all times herein mentioned it has been engaged, pursuant to its charter, in the publication and distribution of a list of selected attorneys in the United States, which it has, for a consideration, furnished to business men and merchants throughout the United States to enable them to transact and carry on business between the states of this Union; that, under its method of business, its designated attorneys at Maysville, Kentucky, have, through the United States mail, received inquiries from and made report to merchants residing outside this commonwealth with reference to the financial standing of merchants residing in the city of Maysville and Mason county, as well as at Aberdeen, Brown county, Ohio; that the inquiries so received and so furnished

to said merchants and business men outside the state of Kentucky have been used by them as an incident to the carrying on of their said business and commerce between the states of this Union; that the purpose of the organization of defendant company, and the granting of the rights and privileges to it as aforesaid, was to enable it to be, and said defendant is now, and was at all times herein mentioned, in fact, an instrument to promote, facilitate, and carry on commerce between the states of the Union; and that the offense for which it has been indicted herein are and were matters and things done by it and its said agents under and pursuant to its said charter, in promoting and facilitating commerce between the states of the Union. Defendant therefore states that the act of the legislature of Kentucky pursuant to which the indictment herein was drawn is and was in conflict with § 8, subsection 3, of the Constitution of the United States, which it now pleads and relies upon in bar of this indictment, and that the provisions of said act are therefore null and void as to this defendant."

Frank P. O'Donnell, the agent of the company at Maysville, testified, in part:

Q. State the substance of the contract you had with them in regard to the reporting upon the credit and standing of persons engaged in business in Maysville, Mason county, Kentucky.

agencies, as we understand them, are establishments which make a business of collecting information relating to the credit, character, responsibility, general reputation, and other matters affecting persons, firms, and corporations engaged in business, for the purpose of furnishing this information to its customers for a cash consideration. . . . The business is merely a bureau of information, acting as the agent of its employers, and its object is to collect and impart information to those who pay for it. It is true that this information may be confined within the limits of the state, or it may cross state lines, both in its collection and its dissemination, but for this reason it cannot be called interstate commerce. It is strongly urged by the plaintiff in error that these agencies are instruments of commerce, and are just as necessary to modern commerce as railroads and telegraphs, and without them the free interchange of commerce would be hindered and delayed. We are unable to agree with this contention. Information or intelligence is not an article of commerce in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities, to be shipped or forwarded from one state to another and there
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put up for sale. The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties. It is individual in its character, and has no relation to the general public. The mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collector, storer, and holder of it, to be given directly to those who wish to purchase or pay for it. . . . The business, as conducted by mercantile agencies, may be an adjunct of commerce and of commercial transactions, but it is a separate and distinct appliance, and does not come within the principles of law which govern or regulate either of them." And the conviction of a special agent of a mercantile agency of other states, for a violation of the statute, was affirmed.

The reader will remember that it is not every business connected with commerce which is commerce. The business of marine insurance, for example, is not commerce; the making of the contract is a mere incident of commercial intercourse. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

For instruction by correspondence as interstate commerce, see the note to *International Textbook Co. v. Pigg*, 27 L.R.A. (N.S.) 493.

B. B. B.

A. My recollection is that I assumed the obligation to diligently and faithfully and truthfully report on persons, their credit and character for reliability, etc., which might be sought by merchants elsewhere or in the state.

He further said that it was his duty under the agreement with the company "to make prompt reports free of charge to said subscriber, but only when request for same is accompanied by the department's usual form of inquiry blank, upon persons engaged in any branch of trade in the city or town and vicinity where the undersigned is located. Such reports to be as full and comprehensive as can be made upon a reasonable investigation of the person or persons inquired about. Under no circumstances will the undersigned reveal the name or address of the inquirer to the person or persons upon whom the inquiry is made.

Q. During those twelve months prior to March 30th, did you, or not, in pursuance of that agreement and as agent and representative and correspondent of the United States Fidelity & Guaranty Company, make report on the credit and standing of divers persons engaged in business in the county of Mason, this state?

A. I did.

Q. You are located in Mason county, and were the agent for Mason county, Kentucky?

A. Mr. Cole and myself were the agents for Mason county in that department; yes, sir.

Q. What was there in regard to an agreement for you to pay the company anything?

A. There was a consideration paid for representation.

Q. And for that consideration paid you had your name inserted?

A. That was not the inducement with me, at least; the inducement was to get the business.

Q. Of being their attorney?

A. Yes, sir.

Q. And for that consideration paid to them, you had your name inserted in the Quarterly?

A. I don't know whether it was in consideration of that fact, but the fact is it was inserted.

Q. Did you, or not, make those credit reports directly to the guaranty company, and by subscribers sending you in blanks saying they were subscribers of the company and entitled to such reports?

A. All of our business was done directly with the subscribers, who were generally merchants who sought to know the standing of local merchants.

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Q. From whom did you receive communications with reference to the financial standing of merchants in Mason county and adjacent territory?

A. From divers persons. I could not now, I believe, recall a single person, and under my contract I would not be permitted to reveal the person by whom information was sought.

In brief, the agreement or arrangement between the appellant company and its attorney was that the appellant company, in consideration of the fee paid to it by attorneys throughout the country, inserted their names in books issued by it, and guaranteed merchants and other persons sending to these attorneys claims that they would promptly and faithfully pay over all money collected. It also furnished merchants and other persons for a consideration its list of guaranteed attorneys, and provided the attorneys and subscribers with blank forms upon which information respecting the financial standing of persons whom the subscribing merchant desired to deal with might be furnished by the attorney. The attorneys, when requested, answered such inquiries concerning the business and commercial standing of persons as subscribing members to the list of guaranteed attorneys desired. These attorneys did not make any reports to the guaranty company, but sent their reports direct to the firm or person making the inquiry.

We will now proceed to inquire whether or not the appellant company, through the agency of these Maysville attorneys, was engaged in this state in "interstate commerce." If it was, the judgment must be reversed, with directions to dismiss the prosecution, as there is, of course, no room to doubt that the state cannot levy a tax upon persons or things engaged in carrying on interstate commerce. In the consideration of this question, which involves an attempt to make what seems to us a new application of the commerce clause of the Constitution, we will confine ourselves in the citation of authority to the opinions of the Supreme Court of the United States, as the final construction and application of this clause of the Constitution is entirely the result of the opinions of that court. In the multitude of cases on this subject decided by the Supreme Court, beginning in 1824 with *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and ending with the *International Textbook Co. v. Pigg* (handed down April 4, 1910) 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, we have not found any case that extends as far the law applicable to interstate commerce as we are asked to go in this case.

As we understand "interstate commerce," excluding its application to persons as not pertinent to the matter under consideration, the essential and indispensable element in it is the transportation of property or intelligence from one state into another. It embraces not only the property or intelligence thus sent, but the physical agencies, such as railroad, express, and telegraph companies engaged in the commerce, and their employees, as well as all persons who are directly connected as principals or agents in carrying on the business, except that, as applied to intelligence, it does not include every person who writes a letter or sends a message; being confined to those persons, such as the postal authorities and employees of telegraph companies, through whose agency or instrumentality the intelligence desired to be sent is conveyed, and those persons who send or exchange intelligence as an essential part of a business they are engaged in, and that directly results in the transportation of property. And it is not competent for the state to place any burden or restraint in the way of taxation or otherwise upon any of the articles or things that are the subject of interstate commerce, or upon any agency or instrumentality that assists directly or immediately in carrying it on. In other words, interstate commerce, until it has acquired a status or place of abode within the jurisdiction of a state, has the unrestricted privilege of coming and going where it pleases. The Constitution of the United States has extended to it the freedom of each state, and no state has the right to abridge in any way its freedom, or to impose upon it any burden or restraint, although the property used in carrying it on may be taxed in the state where it is located. With this general statement, we will confine the scope of this opinion to the precise matter in hand, which is limited to the single inquiry whether or not the appellant company, in the promotion of its business through these attorneys, is an agency or instrumentality of interstate commerce. If it is, then it is necessarily due to the fact that its attorneys, in gathering and forwarding information, are directly or immediately connected with the transportation of property from one state into another.

The opinions of the Supreme Court have never extended the application of the commerce clause to persons who had no direct relation to the business carried on; but, when they have sustained such relation, it has been uniformly held that it was not competent for the state to impose on them any tax. Thus, it was held in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, that it was not within 47 L.R.A. (N.S.)

the power of the state to require the agent of an express company doing interstate business to obtain a license from the auditor of the state; the court saying: "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. . . . No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

And in *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, an ordinance was held invalid that imposed a license tax upon the agent of a railroad whose duty it was to solicit passenger traffic over a road engaged in interstate commerce. In that case the court said: "The fact of intercourse and traffic again embraces all the means, instruments, and places by and in which intercourse and traffic are carried on; and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated."

And so in *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, a statute of the state of Tennessee imposing upon "all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein, by sample," a license tax, was held invalid in so far as it applied to drummers representing non-resident firms. In that case the court said: "A state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce. . . . When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. . . . But to tax the sale of such goods, or the offer to sell them before they are brought into the state, is a very different

thing, and seems to us clearly a tax on interstate commerce itself."

Again, in *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, an ordinance requiring the agent of a nonresident company to obtain a license before he delivered the goods previously sold by the company was held to be in violation of the commerce clause of the Constitution.

In *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576, a statute of Tennessee imposing a tax upon merchandise brokers whose business was confined to soliciting orders within the state as agents for nonresident factories was declared to be in violation of the commerce clause of the Federal Constitution.

In *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, the facts were these: The text-book company was a Pennsylvania corporation carrying on what was known as a "correspondence school." In the conduct of its business, it prepared and published "instruction papers, text-books, and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding from time to time of such publications and apparatus to students. . . . The company employs local or traveling agents, called 'solicitors-collectors,' whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its correspondence schools. . . . In conformity with the contract between the company and its scholars, the scholarship and instruction papers, text-books, and illustrative apparatus called for under each accepted application, are sent by the company from Scranton directly to the applicant, and instruction is imparted by means of correspondence through the mails between the company at its office in that city and the applicant at his residence in another state." The company had a solicitor in Kansas, who had procured a number of students to take correspondence courses in the schools of the text-book company. The question was whether or not the business in which the company was engaged was interstate commerce. In holding that it was, the court, among other things, said: "It involved, as already suggested, regular and practically continuous intercourse between the text-book company located in Pennsylvania and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. . . . More than that, this mode—looking at the contracts between the

text-book company and its scholars—involved the transportation from the state where the school was located, to the state in which the scholar resides, of books, apparatus, and papers useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled from time to time by virtue of his contract to information and direction. Intercourse of that kind between parties in different states—particularly when it is in execution of a valid contract between them—is as much intercourse in the constitutional sense as intercourse by means of the telegraph. . . . If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states by means of correspondence through the mails is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

These cases we think sustain the general statement heretofore made, indicating the persons and things embraced within the meaning of the commerce clause. Now, let us see if the appellant company, through its Maysville attorneys, was so connected with the carrying on of commerce as to bring its acts within the protection of the Federal Constitution. That indirectly, remotely, or incidentally the attorneys may have had some minor part in the importation of goods may be conceded; but this is not sufficient. They must have had some immediate or direct connection with the transportation of goods from one state to another. The attorneys making the reports were not the agents for either the buyer or seller in the sense that goods or articles were bought or sold through their agency or instrumentality. The reports they furnished did not constitute any contract of bargain or sale, or, indeed, offer to make any such contract. They merely reported the financial standing of merchants concerning whom inquiries were made, and this ended their connection with the matter. The merchant to whom the report was made might or might not, in the exercise of his pleasure, sell goods to the person whose standing he ascertained. If a commercial transaction took place between the merchant whose standing was reported, and the merchant to whom the report was sent, it was due entirely to subsequent negotiations between

them, with which the reporting attorneys had nothing to do. It will thus be seen that these attorneys had no direct relation to or with anything that was the subject of commerce. They did not sell or offer to sell any goods, they did not deliver or offer to deliver any, they did not handle or in any way have the possession of any goods, they did not bring the buyer and the seller together, or have anything whatever to do with the transportation of articles or goods, and we are unable to perceive how it can be said, under the broadest construction of the commerce clause, that the reports furnished by these attorneys were instrumentalities in facilitating or carrying on interstate commerce. As said in *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764: "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated." To the same effect is *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

Illustrating the business of the appellant by that carried on through its Kentucky attorneys, we find that the correspondence in which the Maysville attorneys furnished nonresident dealers with information was only desultory and occasional. It is doubtful if more than one letter was exchanged between these attorneys and their nonresident correspondent. The correspondence was not regular or continuous with any particular person, as in the *International Textbook Co. Case*; nor was it followed, as was the correspondence in that case, by the making of any contract or the transportation of any goods between the parties to the correspondence. If the interstate commerce clause is extended to embrace the facts of this case, and is held to be applicable to persons who are engaged in transmitting the character of information or intelligence imparted by the Maysville attorneys, there is virtually no limitation upon its reach, and there are few professional or business men of the state who cannot invoke its protection to save them from license taxes either imposed by the state or municipal governments. To illustrate: There are many physicians, lawyers, brokers, stock dealers, and real estate agents who occasionally carry on in a professional way correspondence with nonresident patients, clients, or patrons, and as a result of this correspondence it might happen that an engagement would be entered into that would result in the transportation of property or the making of contracts. But we can hard-

ly believe that, merely because a person in one state occasionally writes a letter to a person in another state that may result in bringing about a contract between the parties or the exchange of commodities, he can be said to be engaged in interstate commerce in the sense that he would be exempt from license taxes imposed upon every person engaged in a similar trade or occupation. Our Constitution authorizes the state and each of the towns and cities to impose a license tax on all trades and occupations, and under this power the state in many instances, and nearly all of the towns and cities, have imposed a license tax on lawyers, physicians, real estate agents, and many other trades and occupations. Now, is it to be said that a physician who can show that he is treating by correspondence a patient in Indiana, although he does not send him any medicine, is to be exempt from the license tax exacted from all other physicians in the state whose business is confined to the limits of the state? Is a lawyer practising in this state, but who occasionally has litigation or business in another state that requires correspondence between himself and his clients and other parties, to be free from the burden that is imposed on other lawyers who practise exclusively in the courts of this state? Illustrations like these might be multiplied beyond number; but the ones we have mentioned are sufficient to make it manifest that, if the commerce clause is extended to reach this class of persons, it will be a serious obstacle in the way of the state and its municipal subdivisions in the collection of revenue, and result in the imposition of many unequal burdens in the way of taxation.

For the reasons indicated, the appellant, not being protected by the commerce clause of the Federal Constitution, must pay the tax imposed, and the judgment is affirmed.

Barker, Ch. J., dissents.

Affirmed by the Supreme Court of the United States December 1, 1913, 231 U. S. 394, 58 L. ed. —, 34 Sup. Ct. Rep. 122.

MAINE SUPREME JUDICIAL COURT.

HARRY B. LAWRENCE

v.

HENRY RICHARDS et al., Trustees of Gardiner Water District.

(— Me. —, 88 Atl. 92.)

Appeal — mandamus proceeding — exceptions by petitioner.

1. Exceptions by petitioner in a man-

damus proceeding are not forbidden although no writ is granted, by a statute providing that the petition may be heard by a justice, who may reserve questions upon exceptions or otherwise for the full court, but that the case shall proceed until a decision is reached and the writ ordered, so that the overruling of the exceptions shall dispose of the case, and that after the writ is granted the justice shall certify all exceptions, followed by provisions as to the time within which the excepting party and adverse party may file their arguments.

Water — duty to supply everyone within district.

2. A district organized to supply its inhabitants with water is not bound to furnish a supply to everyone that demands it, regardless of the expense involved and the returns which will result in so doing; espe-

cially where the statute provides that water rates shall be established sufficient to provide for such extensions and renewals as become necessary.

Mandamus — discretion as to extension of water system — control.

3. Mandamus will not lie to review the discretion of the trustees of a water district in determining to what extent the system shall be extended and who shall be supplied.

(September 12, 1913.)

EXCEPTIONS by petitioner to a ruling of the Supreme Judicial Court for Kennebec County, denying a peremptory writ of mandamus to compel defendants, as trustees of the Gardiner Water District, to ex-

Note. — Duty of water company or municipality supplying water to extend the service to all applicants willing to comply with its regulations.

The present note is intended to cover the cases where the refusal to extend the service was upon some ground other than the fault of the applicant, as, for example, where the refusal, as in *LAWRENCE v. RICHARDS*, was because of the expense involved. Irrigation cases have been excluded.

As to establishment and regulation of municipal water supply in general, see note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33.

As to right or duty of municipal corporation to supply nonresident with water, see note to *Childs v. Columbia*, 34 L.R.A. (N.S.) 542.

As to discontinuing service to compel payment to water bills, see the notes in 40 L.R.A. (N.S.) 263; 31 L.R.A. (N.S.) 301; and 61 L.R.A. 33. And as to right to shut off water from whole building because of one tenant's delinquency, see notes in 39 L.R.A. (N.S.) 814 and 61 L.R.A. 33.

It is the general rule that each inhabitant of a municipality has the right, upon complying with all reasonable regulations, to have the service of a public-service corporation supplying such municipality extended to him, and this without unjust discrimination. The following cases, which involve either a water supply company or a municipality itself supplying water for public use, support this rule: *San Diego Land & Town Co. v. National City*, 74 Fed. 79; *Wiemer v. Louisville Water Co.* 130 Fed. 251; *Birmingham Waterworks Co. v. Keiley*, 2 Ala. App. 629, 56 So. 838; *Weatherly v. Capital City Water Co.* 115 Ala. 156, 22 So. 140; *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445; *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 586, 27 L.R.A. (N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951; *Mahoney v. American Land & Water Co.* 2 Cal. App. 185, 83 Pac. 267; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264; *Niehaus Bros. Co. v. Contra Costa Water Co.* 159 47 L.R.A. (N.S.)

Cal. 305, 36 L.R.A. (N.S.) 1045, 113 Pac. 375; *Bothwell v. Consumers' Co.* 13 Idaho, 568, 24 L.R.A. (N.S.) 485, 92 Pac. 553; *Hatch v. Consumers' Co.* 17 Idaho, 204, 40 L.R.A. (N.S.) 263, 104 Pac. 670; *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 577; *Kerz v. Galena Water Co.* 139 Ill. App. 598; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Chicago v. Northwestern Mut. L. Ins. Co.* 218 Ill. 40, 1 L.R.A. (N.S.) 770, 75 N. E. 803; *Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A. (N.S.) 963, 62 Atl. 136, set out in *LAWRENCE v. RICHARDS*; *Lumbard v. Stearns*, 4 Cush. 60; *Ginnings v. Meridian Waterworks Co.* 100 Miss. 507, 56 So. 450; *State ex rel. Lanyon v. Joplin Waterworks*, 52 Mo. App. 312; *State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 199, 32 L.R.A. 697, 56 Am. St. Rep. 574, 44 Pac. 966; *American Waterworks Co. v. State*, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311, affirming 46 N. J. L. 495; *Plainfield-Union Water Co. v. Plainfield*, 83 N. J. L. 332, 85 Atl. 321; *People ex rel. McGrath v. Green Island Water Co.* 56 Hun, 76, 9 N. Y. Supp. 168; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; *Hyndman Water Co. v. Hyndman*, 7 Pa. Super. Ct. 191; *Poole v. Paris Mountain Water Co.* 81 S. C. 436, 128 Am. St. Rep. 923, 62 S. E. 874; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058; *Farmer v. Nashville*, 127 Tenn. 509, 45 L.R.A. (N.S.) 240, 156 S. W. 189; *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816; *Ball v. Texarkana Water Corp.* — Tex. Civ. App. —, 127 S. W. 1068; *Houston v. Lockwood Invest Co.* — Tex. Civ. App. —, 144 S. W. 685; *Jeter v. Vinton-Roanoke Water Co.* 114 Va. 769, 76 S. E. 921.

And it has been held that the fact that a pipe laid by a water company along a street in the exercise of its franchise was laid under an agreement with certain per-

tend the water mains of the District to petitioner's residence and to supply him with water. Overruled.

The facts are stated in the opinion.

Mr. Henry H. Sawyer, for petitioner: Mandamus is the proper remedy for the petitioner herein.

Robbins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136; *Webster v. Ballou*, 108 Me. 522, 81 Atl. 1009, Ann Cas. 1913 B, 567.

Under the act creating Gardiner Water District, the petitioner has a clear legal right to have his residence supplied with water as requested.

Augusta v. Augusta Water Dist. 101 Me. 148, 63 Atl. 663; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 62 Atl. 774; *Rob-*

sons who paid the expenses, that they should have the exclusive use of the water, and that the company should not tap the pipe without their consent unless it first repaid them for the pipe, does not relieve the company from its obligation to supply water to all persons living on such street who may apply for it, on reasonable terms. *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244.

But in England it has been held that a water company created by act of Parliament for supplying water to the inhabitants of a town upon terms mutually agreed upon cannot be compelled to supply any inhabitant beyond the term of his contract. *Weale v. West Middlesex Waterworks Co.* 1 Jac. & W. 358.

The question, however, as to what particular circumstances require the service to be extended, or, on the other hand, relieve the company or municipality from extending its service, is one not so easy of solution, as the above-stated general rule is clearly not applicable in some cases. In the majority of cases the decisions are influenced or directly controlled by the charter or franchise under which the duty, if any, arises.

Thus, in some instances it has been held that there is no duty to extend water mains where the cost thereof and the return therefrom would be greatly disproportionate. Of this nature is *LAWRENCE v. RICHARDS*. The question of cost of installation has also been entered into in other decisions. Thus, in *Water Comrs. v. Bloomfield*, 84 Conn. 522, 80 Atl. 794, which involved the rights of the municipality under facts identical with those set out in connection with *West Hartford v. Water Comrs.* infra, it was held that the board ought not to be compelled to build water mains or laterals unless the same were to be used so as to yield such a return on the outlay as to reimburse the board for the cost. And see *Cleveland v. Malden Waterworks*, as set out infra.

On the other hand, it has been expressly said that "all" must be served, irrespective of distance. Thus, in *Bothwell v. Con-* 47 L.R.A.(N.S.)

bins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136; *Lumbard v. Stearns*, 4 Cush. 60; *Turner v. Revere Water Co.* 171 Mass. 329, 40 L.R.A. 657, 68 Am. St. Rep. 432, 50 N. E. 634; *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840; *Wood v. Auburn*, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; *Kimball v. North East Harbor Water Co.* 107 Me. 467, 32 L.R.A.(N.S.) 805, 78 Atl. 865.

Mr. William P. Whitehouse, with Messrs. Will C. Atkins and George W. Heselton, for respondents:

The writ of mandamus cannot be invoked to compel the trustees to extend the main water pipes of the district, as prayed for, contrary to their own judgment, and with-

sumers' Co. 13 Idaho, 568, 24 L.R.A.(N.S.) 485, 92 Pac. 353, in discussing the rights of a water company and its duty to extend its service, it was said that "the company, in the enjoyment of its franchise privileges, is placed by the Constitution under a public duty to supply water to all living within the franchise limits on payment of the rental rates. It owes this duty to everyone so long as it has water to sell, whether he be on the line of its main or at a great distance therefrom." But this statement was purely *obiter*.

In some cases the duty has been held to be a discretionary one. Thus, in *Moore v. Harrodsburg*, 32 Ky. L. Rep. 384, 105 S. W. 926, where a citizen who brought an action to compel the city authorities to extend its water mains so as to give him relatively the same benefits as were afforded to other citizens and property holders was denied the relief requested, the court said: "The city officials are charged with the administration of the affairs of the city. They must determine when and where water mains must be put in, and when and how an electric light line must be extended. The courts cannot undertake to manage the affairs of a city by injunction. Where a public duty is enjoined the court may require the city authorities to act, but it cannot control their discretion as to how they shall act. The city authorities are on the ground; they live among the people who pay the taxes. They can judge much better than we can as to what the best interest of the city requires. In the absence of fraud, corruption, or arbitrary action, the judgment of the city officials as to the management of the affairs of the city is beyond judicial control." And in *Linck v. Litchfield*, 31 Ill. App. 118, in holding that a municipality owning a waterworks could not be compelled to maintain the main which had supplied plaintiff's premises, it was said: "The power of the city to extend water mains, or to maintain them in particular places, is in its nature legislative and governmental, and must of necessity be discretionary."

"If municipal authorities were compelled

out regard to the wisdom or expediency of the act under existing conditions.

Bangor v. County Comrs. 87 Me. 294, 32 Atl. 903; State ex rel. Gerke v. Hamilton County, 26 Ohio St. 364; American Casualty Ins. & Secur. Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; High, Extr. Legal Rem. § 42; Flourney v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; Chase v. Blackstone Canal Co. 10 Pick. 244; Henkel v. Millard, 97 Md. 24, 54 Atl. 657; Kinlein v. Baltimore, 118 Md. 576, 85 Atl. 679; Com. ex rel. Vandyle v. Henry, 49 Pa. 530; People ex rel. Harris

v. Land Office Comrs. 149 N. Y. 26, 43 N. E. 418; People ex rel. Francis v. Troy, 78 N. Y. 33, 34 Am. Rep. 500; Browne v. Bentonville, 94 Ark. 80, 126 S. W. 93; 2 Spelling, Inj. § 687; 19 Am. & Eng. Enc. Law, 735-737; 26 Cyc. 160, 161.

Mandamus cannot be invoked for the purpose of reviewing the decision of the trustees, or compelling them to change their judgment.

Bangor R. & Electric Co. v. County Comrs. 87 Me. 294, 32 Atl. 903.

Savage, Ch. J., delivered the opinion of the court:

This is a mandamus proceeding, brought against the defendants as trustees of the Gardiner Water District, wherein it is

to construct or maintain water pipes whenever courts or juries might think proper, there would be an entire subversion of municipal government and control." (But in connection with this case, see Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A.(N.S.) 770, 75 N. E. 803, wherein it was said that when a municipal corporation not required by its charter to furnish a water supply sees fit to do so, it acts not by virtue of the power of sovereignty, but rather engages in a business which is public in its nature, and which imposes upon it the duty to serve all who may apply, upon equal terms. This statement seems directly opposed to the decision in the Linck Case. And in Boswell v. Philadelphia, 15 W. N. C. 169, it was held that the granting of a permit to the owner of houses located on a private street, which had not been accepted by the city, to connect by private pipes with a water main on an adjoining street, was discretionary with the city water department, and could be prohibited by them unless a frontage tax was paid, to be held by the city should it subsequently lay pipes in the private street.)

As before stated, many of the cases are directly controlled by the terms of the franchise or charter granting the power to distribute water for public use. The following cases illustrate various forms of such provisions:

For a franchise ordinance which provides that the water company need not extend its water mains along any ungraded street or alley, see Hatch v. Consumers' Co. 17 Idaho, 204, 40 L.R.A.(N.S.) 263, 104 Pac. 670, holding, however, that where the company had voluntarily extended its main along such a street, it could not refuse to supply a customer thereon, on the theory that it was not compelled to build along such street in the first place.

But where a franchise of a water company provides that the city must require the company to extend its mains along any graded street and also on streets not on grade, but that in the latter case the city must pay for any change necessitated by

bringing the street to grade, the water company may be compelled to extend its mains into portions of the city not originally supplied. Topeka v. Topeka Water Co. 58 Kan. 349, 49 Pac. 79.

And in People ex rel. Hilliker v. Pierce, 64 Misc. 627, 119 N. Y. Supp. 121, where a municipal waterworks system was constructed pursuant to a state which provided that the water board "may" extend the mains within the village if the expense thereof in any one year shall not exceed a certain sum, or may, in lieu of extending the mains, use such amount in improvements, it was held that the word "may" should be construed "must," so as to entitle one to whom the service had not been extended to compel the board, in the exercise of its governmental functions, to extend its mains to his premises, where the cost thereof would not exceed the statutory limit, and would not greatly exceed the *per capita* cost of the original plant.

And for a charter which expressly provides that every person within a municipality shall be entitled to water upon paying a reasonable compensation, see Bourke v. Olcott Water Co. 84 Vt. 121, 33 L.R.A.(N.S.) 1015, 78 Atl. 715, Ann. Cas. 1912 D, 108.

And in West Hartford v. Water Comrs. 68 Conn. 323, 36 Atl. 786, it was held that a city which, by its charter, was permitted to take water from a certain stream at a point in an adjoining town, upon condition that it furnish water to the inhabitants of such town who lived "within a reasonable distance from the line of main pipes," was bound to furnish water to all inhabitants who lived within a reasonable distance from the main pipes; that such duty could not be limited by the board of water commissioners; and that the question whether an applicant lived within a "reasonable distance" of the main line of pipes was one for the determination of the courts.

For an ordinance franchise illustrative of those wherein the duty to extend pipes, etc., is made subject to the control of the city authorities provided an adequate re-

sought to compel the defendants to extend the water mains of the district to the petitioner's residence in South Gardiner, and supply him with water. The cause was heard before a single justice, who denied the peremptory writ, and it comes before us on exceptions to that ruling.

The defendants, in the first place, interpose the objection that exceptions do not lie when a peremptory writ of mandamus is denied. And they rely upon the language found in Rev. Stat. chap. 104, §§ 17, 18. Section 17 reads as follows: "A petition for a writ of mandamus may be presented to a justice of the supreme judicial court in any county in term time or vacation, who may, upon notice to all parties, hear and determine the same, or may reserve questions of law arising thereon, upon exceptions or otherwise, for the determination of the full court, which may hear and determine the same as hereinafter provided; but in all cases where exceptions are alleged to any rulings, findings, or decrees made upon such petition, the case shall be proceeded with as if no exceptions had been

taken, until a decision shall be had and the peremptory writ shall have been ordered, so that the overruling of such exceptions would finally dispose of the case. . . ." In § 18 it is provided that "after judgment and decree that the peremptory writ be granted, the justice of said court before whom the proceedings are pending shall forthwith certify to the chief justice for decision, all exceptions which may be filed and allowed to any rulings, findings, or decrees made at any stage of the proceedings." Then follow provisions for the time within which the "excepting party" and the "adverse party" shall file their arguments with the court.

It is true that the language is that the case shall proceed as if no exceptions had been taken until the peremptory writ is ordered, and that there is no literal provision for certifying exceptions to the chief justice until after the peremptory writ is granted. But in no other part of either section is there any restriction upon the right of exceptions, or any discrimination between the parties. And the question is, Was it the

turn for the outlay is guaranteed, see *Cleveland v. Malden Waterworks Co.* 69 Wash. 541, 125 Pac. 769, wherein the ordinance under consideration provided that the water company should lay pipes, etc., as the proper city authorities directed, "provided that a sufficient number of persons on the streets to be benefited by said extensions shall first petition and sign contracts with the company guaranteeing" a certain per cent net on the estimated cost of the extension, etc.

And for a franchise ordinance which provided that the water company should extend the mains when requested to do so by a majority of all votes cast at any election at which the proposition of such an extension shall have been submitted, see *Illinois Trust & Sav. Bank v. Burlington*, 79 Kan. 797, 101 Pac. 649, holding that such provision means a majority of all those voting on any proposition at such an election, and not merely those voting on the extension proposition unless that were the only thing voted upon.

The question whether a municipal corporation operating a waterworks is in duty bound to extend its water mains to particular territory within its limits for the purpose of affording fire protection has also been raised. Thus, in *Browne v. Bentonville*, 94 Ark. 80, 126 S. W. 93, it was held that the city authorities had discretionary powers in the matter, and that their decision as to the necessity for an extension of the mains to a particular territory, and what sized main, if any, should be laid, and whether the financial condition of the city would warrant the expenditure, was an act done in a legislative or governmental capacity of the city, and that such discretion, exercised in good faith, could not be controlled at the suit of one owning

property in the territory for which the protection was sought. (The general question of the duty of a municipality or water company under its contract with consumers to supply water for extinguishment of fires is treated in the notes to *Niehaus Bros. Co. v. Contra Costa Water Co.* 36 L.R.A. (N.S.) 1045; *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33, and *Howsmon v. Trenton Water Co.* 23 L.R.A. 146. As to right of property owner to maintain action against water company for failure to supply sufficient water for fire purposes, as required by its contract with him, see notes to *Mugge v. Tampa Waterworks Co.* 6 L.R.A. (N.S.) 1171, and *Hone v. Presque Isle Water Co.* 21 L.R.A. (N.S.) 1021. And as to liability of water company for destruction of property of municipality by fire in consequence of failure to maintain sufficient pressure, see note to *Milford v. Bangor R. & Electric Co.* 30 L.R.A. (N.S.) 526.)

The question whether a water company may be compelled to furnish water to territory added to the municipality after the granting of the water company's franchise has also been presented. A case of this character is *Turners Falls Fire Dist. v. Millers Falls Water Supply Dist.* 189 Mass. 263, 75 N. E. 630, wherein a corporation contracted to supply a municipal corporation with water throughout its district, and in which it was held that a subsequent addition of territory to the latter corporation did not enlarge the contract so as to require the former corporation to supply water to the territory added to the other corporation, especially where there was no intimation in the act enlarging the corporation that it was intended to affect the right of either party to the water supply contract.

G. J. C.

legislative intent that a petitioner is bound by the decision of the single justice, in case it is against him, but that the respondents may take exceptions to the decision, in case it is against them? Such a discrimination does not seem consonant with the principles of justice and fair play. And we think the statute should not be so construed as to permit such discrimination, unless the statute, read as a whole, clearly requires it.

It will be noticed that if the interpretation sought to be put upon the statute is the correct one, a petitioner will never have occasion to reserve exceptions in any case, for if he prevails he will not need them, and if he is defeated he cannot use them. But the language of the statute, aside from the two phrases already quoted, is general. It places no restrictions upon the power of the single justice to "reserve questions of law upon exceptions," whether he rules for or against the petitioner. Again, if the proposed construction be correct, only a respondent could be an "excepting party," and only a petitioner could be an "adverse party." Yet the statute uses these expressions as general terms, and gives no hint, in this connection, that either party may not be an "excepting party." The very manner in which these terms are used seems to indicate that the legislative thought was that either party might except, in which case the other party would be the "adverse party." We think the legislative intent becomes quite clear when we consider the legislative reason for requiring that when exceptions are reserved the case shall nevertheless proceed as if exceptions had not been taken, to a final decision. The reason expressed is, "so that the overruling of such exceptions would finally dispose of the case." *Mandamus* is a direct and forceful process, and in many instances public or private necessity may require a speedy determination of the issues involved. This is recognized in the other provisions of the statute requiring the exceptions to be "forthwith" certified to the chief justice, and limiting the times for argument to short periods. And we think the evident purpose of the clause under discussion was not to deprive a petitioner of the right of exceptions which the preceding general clause seems to have given him, but to prevent a respondent from delaying the proceeding by interposing interlocutory objections, and carrying exceptions to adverse rulings thereon to the law court in advance of a hearing and decision on the merits. Accordingly we are of opinion that the petitioner's exceptions are properly before us for consideration.

The Gardiner Water District is a quasi municipal corporation, created by chapter 47 L.R.A. (N.S.)

82 of the Private and Special Laws of 1903. It is about 6 miles long northerly and southerly, and about 1½ wide on the average. Territorially it includes only a part of the city of Gardiner, but it does include the village of South Gardiner, in which the petitioner's house is situated. The primary object of the charter was to enable the district to acquire the ownership of the existing water system of the Maine Water Company in Gardiner, Pittston, Randolph, and Farmingdale, by condemnation or otherwise. For, although power was granted to it to take and hold water of the Cobboscontee river, and to take land for dams, reservoirs, and so forth, yet § 13 of the act provided that this grant of power should be inoperative unless the district should first acquire the plant and franchises of the Maine Water Company. At the time the charter was granted, and at the time the district acquired the plant of the Main Water Company, its system was extended only through the more congested and thickly settled portions of the city of Gardiner, and not into the outlying parts of the district. The area of service lay mostly within a circle 1 mile in diameter. It did not then extend to South Gardiner, which is about 5 miles from the city proper. Nor has it since been extended in the direction of South Gardiner more than a few hundred feet.

The charter of the district provides, in § 5, that "all the affairs of said water district shall be managed by a board of trustees composed of three members, to be chosen by the municipal officers of the city of Gardiner." In the original act, § 9, the district, by its trustees, was authorized to issue bonds to an amount sufficient to procure funds to pay the expenses incurred in the acquisition of the property of the Maine Water Company, and the purchase thereof, and for further extensions, additions, and improvements of said plant. And it was provided, by reference to Rev. Stat. 1883, chap. 46, § 55, that such bonds should be a legal obligation of the district for the payment of which the property of the inhabitants of the district might be taken on execution. The trustees were empowered to establish rates (§ 10) which should at least be sufficient to provide revenue for: (1) The payment of current expenses, and for such extensions and renewals as might become necessary; (2) the payment of interest on the indebtedness of the district; and (3) to provide annually an amount equal to 4 per cent of the indebtedness, to be added to the sinking fund. Any surplus remaining at the end of a year might be paid to the municipalities supplied, in propor-

tion to their respective contributions to the gross earnings.

By chapter 89 of the Private and Special Laws of 1905, the power of the district to issue bonds was limited, so that "when the cost of renewals, extensions, additions, or improvements proposed during any one fiscal year of said water district shall be estimated by the trustees at more than \$10,000," the issue of bonds to provide funds for the payment of the same must first be approved by a majority of the legal voters in the district voting at a special election. But when the expense will not exceed \$10,000 during the year, the trustees by this act were authorized to issue bonds to procure funds for making such extensions as may seem necessary to them. In this case the expense of extending the water mains from Gardiner city to South Gardiner is variously estimated at from \$45,000 to \$70,000. In any event it would be more than \$10,000. No issue of bonds for such an extension has been approved by the voters, nor in fact has the question of such an issue been submitted to them.

Before passing to an inquiry into the issues of law involved, we make one further comment upon the powers and duties of the trustees. Neither of the statutes referred to makes any provision for corporate action by the voters themselves, except in the matter of approving or disapproving issues of bonds. There is no provision for meetings of the voters to shape the policy of the district, or to give directions to the trustees, nor are the trustees subject to official control by the municipal officers of Gardiner. The district is a separate, independent entity, and "all" its affairs are to be managed by the trustees. The trustees are therefore, for the time being, potentially the district itself. They have power to do all that the district may lawfully do. They are charged with the performance of all duties which the law imposes upon the district. If the district has the right to use its discretion in any situation, the trustees may exercise that same discretion.

The petitioner alleges that the trustees have neglected and refused to extend the water mains to South Gardiner, and to supply the residents of that village with water for domestic purposes, and the city of Gardiner within the village with water for municipal purposes. And particularly he alleges that they have neglected and refused to supply his residence in South Gardiner with water for domestic purposes, though such service has been demanded. The refusal is admitted. The demand is not questioned.

The respondents, in their return to the alternative writ, set up in brief: (1) That 47 L.R.A.(N.S.)

under the charter of 1903, and the amendment of 1905, the district was not bound to supply all of the inhabitants thereof with water; (2) that the trustees are vested with the right to use their discretion in the matter of extension; (3) that under the act of 1905 the right to make extensions according to their discretion was limited to such as should cost not exceeding \$10,000 in any one fiscal year, and that an extension to South Gardiner would cost more than that sum; and (4) that they have exercised their discretion wisely.

The petitioner, under his answer to the return, contends: (1) That it is the legal duty of the district to supply him with water; (2) that the trustees are not vested with any discretion in the matter; and (3) that chapter 89 of the Private and Special Laws of 1905, which purports to limit the powers of the trustees to issue bonds for extensions, and thus practically prevent extensions which will cost more than \$10,000, unless the bond issue to provide funds for the same is approved by the voters, is unconstitutional and void, in that it impairs the obligation of a contract. And thus arise the issues to be determined.

It is well settled that mandamus does not lie to compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer, board, or commission at whose hands performance is desired. The court may, under proper circumstances, require an inferior tribunal to exercise its discretion, but not prescribe how it shall exercise it. The domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the court. The court cannot substitute its own judgment for that of the tribunal to which it was committed by law. *Bangor v. County Comrs.* 87 Me. 294, 32 Atl. 903; *Spelling, Extr. Rem.* §§ 687, 1384. This principle is admitted in argument by the petitioner.

But the petitioner contends that the trustees have no discretion in the matter, and that by force of the original act of 1903 he has a clear, legal, and vested right, even a contract right, to have water supplied at his house,—a right which the legislature could not impair by the amendment of 1905. He bases his contention on the ground that the district is bound to supply every inhabitant of the district with water. If this contention has real merit, the consequence is that the trustees, acting for the district, are legally bound to supply water to all inhabitants, no matter how large the cost of the undertaking, nor how small the revenue, and no matter how ruinous and destructive the result might be to the financial ability of the district to carry on its operations.

That this contention is not sound is, we think, easily demonstrable. The area of the district outside of the city proper and South Gardiner is scatteringly settled. The elevation in some places is considerably higher than the system's reservoir. It does not need the testimony of expert engineers to satisfy a reasoning mind that under such conditions the expense necessarily to be incurred in performing the duty, as it is claimed to be, of supplying every inhabitant of the district with water, would practically be destructive of the purposes of the charter. It would create a burden too heavy to be borne. Did the legislature contemplate and intend such a possible result? Did the legislature intend, when it empowered the cities of Lewiston and Bangor to own their water systems, with powers and duties with respect to the water supply similar to those of the Gardiner Water District, that those cities were bound to furnish water over the entire extent of their territorial areas? We do not think so. It is a matter of common knowledge that water systems in towns or cities containing both an urban and a rural population, whether the systems be owned privately or municipally, never have been in fact, and are not now, anywhere extended beyond the more compact parts of the town into and through the rural parts. It is practicable in the rural parts for inhabitants to supply themselves. In the thickly settled parts it gradually becomes inconvenient, impracticable, and sometimes impossible for the inhabitants to do so. Sources of supply become exhausted or defiled, and the need for more water, which the inhabitant cannot well furnish for himself, becomes imperative. Organized action, either public or private, becomes necessary, and the individual then pays for a service which he can no longer perform for himself.

We think, then, there was nothing in the situation existing in Gardiner which gives color to the contention that the legislature intended the district to be bound to supply all the inhabitants within its limits with water, or to operate and extend the system beyond the ordinary limits to which similar systems are operated and extended. The system which the district was authorized to acquire was limited in Gardiner in fact to the urban portion of the city. This system the trustees were empowered to extend and improve, but we do not think that the statute thereby required them to extend to all parts of the district, to the parts which did not need the water as well as to those which did; even, if the petitioner's theory is correct, to extend to the individual who might reside in the remotest rural portion of the town, if he demanded it. To place
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such a construction upon the statute, which alone imposed duties upon the trustees, seems unreasonable, and there is nothing in the language of the statute which requires such a construction. In fact there is an implication otherwise in the statute. By § 10 it was provided that the water rates established by the trustees should be such as to provide revenue ". . . for such extensions and renewals as may become necessary." This clearly does not mean extensions all over the district.

We think, then, that the contention that, as a matter of law, every individual in the district has the right to have the water brought to him, cannot be sustained. But if the district is not in law bound to supply all, who is to determine to what extent the system shall be extended, and who shall thereby be supplied? The power to do this must necessarily be vested in the trustees. It is not given to any other person or body. In making the determination they must use their judgment and exercise their discretion, and the exercise of that discretion is not reviewable on mandamus.

It is true that the situation of the petitioner in the village of South Gardiner may not be the same as that of the farmer in the rural part of the town with his spring, or well, or brook. But once grant, as we must, that the trustees are vested with a discretion not to extend to every part of the district, it follows that some power must decide the limits of extension. There is no dividing line in the exercise of the discretion. There is no ground for saying that the trustees have discretion as to part of the district, and have none as to another part. They must have discretion as to all extensions or none. If they abuse their discretion, the remedy does not lie in the power of the court, but in the wisdom of the legislature.

It follows from what we have said that the petitioner has no vested legal right, whether it be in the nature of contract or otherwise, to have the district's water main extended to his house. His only legal right is that the trustees shall exercise their discretion. That they have done, adversely to the petitioner.

It is proper to say that the case of *Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136, on which the petitioner strongly relies, is easily distinguishable from this case. There the main was already extended by the petitioner's house, and mandamus was granted to compel the defendant to permit water to be conducted from the main to the house. There was no question of extending a main, nor was the defendant in that case vested with any such discretion as we think these

defendants are. The court in that case held that a public-service corporation was bound to serve all impartially, fairly, and without discrimination, but it did not hold that such a corporation authorized to supply water to the public was bound at all hazards, without regard to expense or revenue, or the exercise of good business judgment, to extend its mains to every individual of the public who might demand it. But what the duties of a public-service corporation may be in a particular case are not involved in this case, and we do not need to consider them now.

It is unnecessary to consider the other questions raised. Our conclusion is that the Gardiner Water District is a municipal corporation created for a special purpose, that its trustees are vested with discretionary powers in the matter of extensions of the system, and that the court cannot interfere with the exercise of their discretion. Exceptions overruled.

MARYLAND COURT OF APPEALS.

POWERS SYMINGTON, Appt.,

v.

FREDERICK G. SIPES.

(— Md. —, 88 Atl. 134.)

Master and servant — injury by automobile — act of chauffeur — liability of owner.

The owner of an automobile is not liable for an injury caused by collision of the

car with a vehicle on the highway while the car is in charge of a chauffeur who, having been directed to take it to the garage, uses it for a pleasure drive for himself and his friends.

(June 25, 1913.)

APPEAL by defendant from a judgment of the Superior Court of Baltimore City in plaintiff's favor in an action brought to recover damages for injuries caused by a collision between defendant's automobile and plaintiff's buggy. Reversed.

The facts are stated in the opinion.

Mr. W. Stuart Symington, Jr., for appellant:

The chauffeur, Whitty, is alone liable, because at the time of the accident he was not acting within the scope of his employment.

Beiswanger v. American Bonding & T. Co. 98 Md. 296, 57 Atl. 202; Steinman v. Baltimore Antiseptic Steam Laundry Co. 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517; Carter v. Howe Mach. Co. 51 Md. 290, 34 Am. Rep. 311; Kessler v. Deutsch, 44 Misc. 209, 88 N. Y. Supp. 846; Central R. Co. v. Peacock, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; Brown v. Purviance, 2 Harr. & G. 316; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400; Storey v. Ashton, 38 L. J. Q. B. N. S. 223, 10 Best & S. 337, L. R. 4 Q. B. 476, 17 Week. Rep. 727; Patterson v. Kates, 152 Fed. 481; Ritchie v. Walker, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; Fiske v. Enders, 73 Conn. 338, 47 Atl. 681; McIntire v. Hartfelder-Garbutt Co. 9 Ga. App. 327, 71 S. E. 492;

Note. — Liability of owner for injuries by automobile while being used by a servant or a third person for his own business or pleasure.

Cases passing upon liability where automobile is being used by a member of the owner's family are not included in the present note. This specific question is covered in the note accompanying McNeal v. McKain, 41 L.R.A.(N.S.) 775; and see Parker v. Wilson, 43 L.R.A.(N.S.) 87.

The cases upon the question of who is responsible for the negligence of a chauffeur operating a leased or demonstrating car will be found gathered in the notes accompanying Gerretson v. Rambler Garage Co. 40 L.R.A.(N.S.) 457, and Meyers v. Tri-State Automobile Co. 44 L.R.A.(N.S.) 113.

The question of the liability of owner for injuries caused by automobile while being used by a servant or a third person for his own business or pleasure is covered in the notes to Christy v. Elliott, 1 L.R.A.(N.S.) 215; Hayes v. Wilkins, 9 L.R.A.(N.S.) 1035; Jones v. Hoge, 14 L.R.A.(N.S.) 216; Danforth v. Fisher, 21 L.R.A.(N.S.) 93; Steffen v. McNaughton, 26 L.R.A.(N.S.) 382; Fleischner v. Durgin, 33 L.R.A.(N.S.) 47 L.R.A.(N.S.)

79; Hartley v. Miller, 33 L.R.A.(N.S.) 81; and Riley v. Roach, 37 L.R.A.(N.S.) 834; and the present note contains only the decisions which have passed upon the point since the writing of the last note.

The owner of an automobile is not liable for an injury done by it unless it is proved that the person driving it was acting within the scope of his employment and in the prosecution of the owner's business. White Oak Coal Co. v. Rivoux, — Ohio St. —, 46 L.R.A.(N.S.) 1091, 102 N. E. 302.

As to whether showing of ownership and operation by employee raises presumption of owner's liability, see note to this case in 46 L.R.A.(N.S.) 1091.

And the fact that the defendant owns an automobile jointly with his wife will not render him liable for an injury which happened while it was being used by his wife without his knowledge, and being driven by her son, who was the defendant's stepson, the doctrine of *respondet superior* being the only theory upon which a recovery could be had, and the facts being insufficient to show a relationship of master and servant. Towers v. Errington, 78 Misc. 297, 138 N. Y. Supp. 119.

If a chauffeur or other servant takes the

Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; *Fleischner v. Durgin*, 207 Mass. 435, 33 L.R.A. (N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291; *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897; *Sheridan v. Charlick*, 4 Daly, 338; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Clark v. Buckmobile Co.* 107 App. Div. 120, 94 N. Y. Supp. 771; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Douglass v. Hewson*, 142 App. Div. 166, 127 N. Y. Supp. 220; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Northup v. Robinson*, 33 R. I. 496, 82 Atl. 392, 2 N. C. C. A. 439; *Colwell v. Aetna Bottle & Stopper Co.* 33 R. I. 531, 82 Atl. 388, 2 N. C. C. A. 430; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A. (N. S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A. (N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227.

Even if Whitty was acting in the scope of his employment, P. Symington, the owner, is not liable.

Sacker v. Waddell, 98 Md. 43, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324; *Shepard v. Jacobs*, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897; *Parsons v. Wisner*, 113

automobile of his master without the knowledge or consent of the latter, and contrary to his directions, and while riding in it for his own purposes, and not in connection with the business of the master, negligently injures a person, the master will not be liable. *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618.

Nor will the master be liable for an injury which occurs where he has loaned the machine to his servant for the latter's personal use at a time when he was not engaged in the owner's business. *Ibid.*

So, an automobile company is not liable for an injury occasioned by an automobile while being driven by an employee to whom it had been loaned for personal use, since he was not at the time acting as the company's servant. *Siegel v. White Co.* 81 Misc. 171, 142 N. Y. Supp. 318.

And where the defense in an action for an injury caused by an automobile shows conclusively that the car was not being used at the time of the injury in the defendant's employment or upon his business, but was being used by another person on business of his own, a verdict should be directed for the defendant under § 340, Rem. & Bal. 47 L.R.A. (N.S.)

N. Y. Supp. 922; *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Supp. 121; *Hartley v. Miller*, 33 L.R.A. (N.S.) 81, note; *Babbitt, Motor Vehicles*, § 582; *Dauids, Motor Vehicles*, § 207; *Berry, Automobiles*, § 148; *Huddy, Automobiles*, p. 296.

No appearance for appellee.

Urner, J., delivered the opinion of the court:

The appellant placed his automobile and chauffeur at the disposal of his brother for a trip from Baltimore to Virginia. After being used for that purpose, the car was brought back to Baltimore by the chauffeur alone, under instructions to take it direct to Griffin's garage. Upon reaching the suburbs of the city in the early afternoon, instead of obeying his orders by proceeding to the destination mentioned, he diverted himself during the remainder of the day by driving around to various road houses and saloons, accompanied part of the time by five of his acquaintances, who joined him at one of the places thus visited. While returning with his companions about 9 o'clock in the evening to the point from which he started on this excursion, he negligently ran the car into the rear of the appellee's buggy, and caused the injuries for which recovery is sought in this action. His itinerary is thus described by the testimony: From Arlington in the suburbs he drove to the Seven Mile House and back; then over to Park Heights avenue, to the Suburban and Gray's Road House; then to the Five Mile House on the Reisterstown road, where he found the

Code. *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165.

And where a servant employed in a garage took an automobile of his employer without authority, and while using it without his employer's consent, contracted to carry passengers and negligently injured them, the employer is not liable, although the employee had occasionally been sent out by the owner to drive cars for the transportation of passengers. *Christensen v. Christensen*, — Tex. Civ. App. —, 155 S. W. 995.

The owner of an automobile is not, in the absence of statute, liable for an injury which occurred while the car was being used by a boarder who was accorded the privilege of using it when it was not otherwise in demand, and who, upon the occasion in question, took it without the owner's knowledge and invited the owner's wife and some children to accompany him, although it appeared that the owner's wife was in the habit of using the car for her pleasure whenever she desired. *Armstrong v. Sellers*, — Ala. —, 62 So. 28.

And although the car was unregistered, the owner cannot be held liable upon the facts recited under a statute merely making it unlawful for any person to operate an

friends referred to, and also a blacksmith, whom he drove to the Maryland General Hospital to be treated for an injured leg; then back to the Five Mile House; then to Brodie's on the Liberty road; then to Forney's saloon beyond Mt. Hope Gate; then back towards Arlington along the Reisters-town road, at which time and place the accident occurred; and then to the garage of the Green Spring Valley Club, where the automobile was left for the night. A judgment was recovered by the appellee against the owner and chauffeur jointly. The appeal is by the owner alone; a writ of summons and severance having been granted upon his application.

Upon the facts we have recited, as to

automobile without first registering it, and making a violation of the act a misdemeanor, since operation only by those whose duty it was to register it was prohibited, and neither the owner nor his servant was operating the car at the time of the injury. *Ibid.*

And where there was no evidence to show that the machine had been acquired more than ten days before the accident, the owner was not liable under a statute requiring automobiles to be registered within ten days after they are acquired, and making it unlawful for any person to operate an unregistered car. *Ibid.*

There is a conflict in the evidence in an action against an automobile owner to recover for an injury which occurred while it was being operated by his chauffeur, warranting submission to the jury, where there is evidence for the defendant that on the evening of the injury the chauffeur was not notified that his services were needed, as was usual in case the owner wished to use the car, and that he took the machine without authority and used it for his own purposes, while the plaintiff's evidence tended to show that the defendant, in his conversation with the plaintiff concerning the injury, said nothing about the chauffeur's having taken the car without authority, and stated that he would satisfy the plaintiff for the injury, and encouraged his going away in accordance with the doctor's advice, telling him to keep an account of the expense. *Fielder v. Davison, supra.*

And in *Colley v. Lewis*, — Ala. App. —, 61 So. 37, the question whether an employee of the owner of an automobile was acting outside the scope of his employment, and using the car for his own purposes at the time an injury occurred, was held to be for the jury, there being evidence that the machine became disabled and was left by the owner with his servant with instructions to get it going and leave it in front of his place of business, and that the servant, after repairing it, drove it to the place directed and then, with several companions, ran it for several miles, in the course of which the accident occurred, and there being some evidence that the employee

which there is no dispute, we have no hesitation in deciding, as a matter of law, that the appellant is not liable in this action, and that the instruction he proposed to that effect should have been granted. The proof makes it perfectly clear that, even if the chauffeur be regarded as the servant of the appellant rather than of his brother, during the period in question, he was not at the time of the collision acting within the scope of his employment, but was using the automobile contrary to the express orders to which he was then subject, and exclusively for his own individual purposes. The decisions are unanimous in holding that under such circumstances the servant is solely re-

was testing the machine, and other testimony to the effect that he was using it for his own purposes.

And in *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006, it was held proper to submit the question whether the defendant's chauffeur was acting within the scope of his employment to the jury, where there was evidence that he was employed to drive defendant's automobile whenever he wanted to use it; that he slept in the defendant's house, but took his meals at another place about half a mile distant, and had his laundry done at another place about the same distance away; that both his meals and laundry were paid for by the defendant as a part of his wages; that he often went to his meals in the car; that he went for his laundry at different times in the day as was convenient; and that on the evening of the accident he had been to supper in the machine and was on his way for his laundry at the time the accident occurred, intending after he had accomplished this to return home and await orders.

But where the evidence in an action to recover for an injury received by being run into by an automobile showed that the machine had been loaned to the father of the owner's employee by the owner's wife to get a doctor, and that after the employee had performed this errand, he took a friend a short distance and was returning home when the accident occurred, there is no substantial evidence that the employee was acting for the owner, although two witnesses who were near by when the accident occurred testified that the owner subsequently stated that he had sent the employee up the street with a friend of his, but the owner testified that he said that the employee had "fetched a friend home and was on his way back." *Ludberg v. Barghoorn, supra.*

See also *Northup v. Robinson and Colwell v. Aetna Bottle & Stopper Co.*, set out by the court in *SYMINGTON v. SIPS*.

As to the validity of statute making owner liable for injuries by automobile being used by another, see note to *Daugherty v. Thomas*, 45 L.R.A.(N.S.) 699.

J. T. W.

sponsible for the consequences of his negligence.

In *Colwell v. Ætna Bottle & Stopper Co.* 33 R. I. 531, 82 Atl. 388, 2 N. C. C. A. 430, a chauffeur was directed by the owner of an automobile to drive it to a garage, but used the car to take a coemployee home and to go for his supper, and while doing so collided with another automobile. Upon this state of facts it was held that the chauffeur was not acting in the course of his employment at the time of the accident, and that the owner was not liable. In discussing the conduct of the chauffeur, the court said: "When he first arrived at the garage on Bradford street it was his duty, then, to take the automobile into the garage and wash it and put it up for the night. That was all that he was instructed or expected to do. He had no authority, either express or implied, to use the machine for the benefit of another employee, or for his own convenience in going to get his supper. His use of the automobile from the time he left the Bradford street garage and during the whole circuit that he made from that point to Potter's avenue, and from there to the restaurant on Westminster street, and from there back to the Bradford street garage, was unauthorized and beyond the scope of his employment."

In *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227, the accident for which the suit was brought happened while the defendant's chauffeur was alone in the automobile and was going to his home for dinner. Under his contract of employment the chauffeur was to provide himself with meals. He had previously used the car a number of times in going to his home for that purpose, but without the knowledge of his employer. The relation of master and servant was held to have been suspended at the time of the accident, and the defendant owner was exempted from liability.

The case of *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535, is thus stated by the court: "At 5 o'clock on the day of the accident, McCauley, who was employed by the defendant as a chauffeur, took the automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be at the New City Hotel with the automobile at a quarter before 7 o'clock. After he had eaten supper, instead of taking the car to the hotel according to the defendant's order, he drove to West Manchester, a mile or two distant from his boarding place, and in an opposite direction from the hotel, for the purpose of calling upon a friend. At the time of the accident he had finished his call

and was on his way to the hotel. Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission and went with it on an errand of his own,—that he was acting for himself, and not for the defendant, at that time. As it cannot be found from the evidence that McCauley was doing what he was employed to do at the time the plaintiff was injured, there was no error in the order of nonsuit."

In *Northup v. Robinson*, 33 R. I. 496, 82 Atl. 392, 2 N. C. C. A. 439, the facts as narrated in the opinion were as follows: "The plaintiff was thrown from his bicycle by a collision with an automobile owned by the defendant, and operated by his chauffeur. The chauffeur started out that morning from the defendant's house to go to the postoffice and express office at Wakefield for his employer. After leaving the postoffice, instead of going to the express office or returning to the defendant's home, he started to deliver a note from the gardener who was employed on the defendant's premises, to the gardener's wife, who lived on another road beyond the postoffice, some distance from the route between the postoffice, the express office, and defendant's home. At the time of the collision he was undertaking this errand with the automobile, without the knowledge or consent of the defendant, and solely to accommodate the gardener." The court said: "This act was not in furtherance of the defendant's business, and was not done under authority or permission, either express or implied. It was an independent journey, exclusively his own." It was held that the verdict had been properly directed for the defendant.

The supreme judicial court of Massachusetts, in a case where the accident occurred while the chauffeur, who was ordered to take the automobile from the garage to a shop less than a mile distant, was driving a friend to a point 6 miles away to get a chain for his own use, declared the rule to be that "the master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work." *Fleischner v. Durgin*, 207 Mass. 435, 33 L.R.A.(N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291.

The cases already cited sufficiently illustrate the principle which must be applied to the facts now under review, but there are numerous other decisions to the same general effect. *McCarty v. Timmins*, 178 Mass. 378,

86 Am. St. Rep. 490, 59 N. E. 1038; Fiske v. Enders, 73 Conn. 338, 47 Atl. 681; Howe v. Leighton, 75 N. H. 601, 75 Atl. 102; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Lewis v. Amorous, 3 Ga. App. 51, 59 S. E. 338; McIntire v. Hartfelder-Garbutt Co. 9 Ga. App. 327, 71 S. E. 492; Fielder v. Davison, 139 Ga. 509, 77 S. E. 618; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 779, 126 Pac. 742; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Patterson v. Kates (C. C.) 152 Fed. 481; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 625, 10 Ann. Cas. 731; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Douglass v. Hewson, 142 App. Div. 166, 127 N. Y. Supp. 220; Storey v. Ashton, L. R. 4 Q. B. 476, 38 L. J. Q. B. N. S. 223, 10 Best & S. 337, 17 Week. Rep. 727; Mitchell v. Crassweller, 13 C. B. 235, 22 L. J. C. P. N. S. 100, 17 Jur. 716, 1 Week. Rep. 153, 17 Eng. Rul. Cas. 252.

In 28 Cyc. 39, the rule is stated to be that the owner is not liable "where the servant or chauffeur, although originally taking the vehicle out for the owner's use, deviates from his owner's business and goes upon some independent journey for his own or another's pleasure or benefit." The same conclusion is expressed in *Davidson*, *Motor Vehicles*, § 216, *Berry*, *Automobiles*, §§ 138, 145; *Babbitt*, *Motor Vehicles*, §§ 570, 570a, and *Huddy*, *Automobiles*, 3 ed. §§ 32, 269.

In a number of the cases above cited the contention was made that an automobile is a dangerous instrumentality, and that a master who trusts such a machine to his servant for use on a public highway is chargeable for injuries resulting from the servant's negligence; but this theory has been uniformly rejected.

While this court has not heretofore had submitted for its decision an issue arising upon facts analogous to those shown by this record, it has repeatedly applied the general and elementary rule that the master is liable for the negligent act of the servant only when it is committed within the scope of the service for which he is employed. *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Steinman v. Baltimore Antiseptic Steam Laundry Co.* 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517; *Beiswanger v. American* 47 L.R.A.(N.S.)

Bonding & T. Co. 98 Md. 296, 57 Atl. 202; *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311; *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709. There is nothing in the statutory law of the state relating to the use of motor vehicles that is inconsistent with this well-settled principle of the common law. Code, art. 56, §§ 133-161.

The exceptions contained in the record relate in part to the admissibility of evidence, and also dispute the liability of the appellant upon the ground that the chauffeur was in the service and pay of the appellant's brother during the trip to and from Virginia. We do not find it necessary to pass upon these questions, as the point we have considered is conclusive of the case. The judgment will accordingly be reversed as to the appellant, and we find no occasion to award a new trial.

Judgment reversed as to the appellant, without awarding a new trial; the appellee to pay the costs of the appeal.

NEBRASKA SUPREME COURT.

FANNIE SVANDA

v.

FRANK SVANDA, Jr., Appt.

(93 Neb. 404, 140 N. W. 777.)

Divorce — refusal of support.

1. Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant her a decree of divorce.

Marriage — annulment — weakness of mind.

2. Mere weakness of mind is not a sufficient ground for the annulment of a marriage, unless it amounts to idiocy or insanity. Nor will circumstances tending to show fraud, combination, or circumvention on the part of the father and friends of the wife to induce one to marry his daughter give the court authority to decree the annulment of the marriage, unless the petitioner was an idiot or insane, within the meaning of those terms, at the time the marriage ceremony was performed.

(March 28, 1913.)

APPEAL by defendant from a judgment of the District Court for Richardson

Headnotes by BARNES, J.

Note. — For mental capacity essential to a valid marriage, see notes to *Sims v. Sims*, 40 L.R.A. 737, and *Dunphy v. Dunphy*, 38 L.R.A.(N.S.) 818.

County in plaintiff's favor in an action for a divorce. Affirmed.

The facts are stated in the opinion.

Messrs. S. P. Davidson, E. Falloon, and Roscoe Anderson for appellant.

Messrs. Reavis & Reavis for appellee.

Barnes, J., delivered the opinion of the court:

Plaintiff brought this action in the district court of Richardson county to obtain a divorce from her husband, Frank Svanda, Jr., on the ground of nonsupport. The petition was in the usual form. Service of summons was had upon the defendant, and thereupon Frank Svanda, Sr., the father of the defendant, procured his own appointment as his son's guardian, and in that capacity filed an answer to plaintiff's petition admitting the marriage, denying the nonsupport, and alleging, in substance, that at the time the marriage ceremony was performed the defendant was mentally incompetent to enter into the marriage contract, that the marriage was void, and prayed the plaintiff be denied a divorce, and that defendant have a decree annulling the marriage, and for costs. The reply was, in substance, a general denial. Upon a trial of the issues thus joined, plaintiff had the findings and judgment, and the defendant has appealed.

As we view the record, plaintiff clearly established her allegation of nonsupport. In fact, it is not claimed by the defendant that at any time since about one month after the marriage he has contributed anything to the support of his wife, although he is possessed of some property, and was able by his labor on the farm to furnish her with proper food and clothing.

Defendant, to maintain the issue of mental incapacity, produced the evidence of three physicians who claim to have examined him upon the eve of the trial. They testified, in substance, that at the time they examined him he was mentally incompetent to contract marriage. It must be observed, however, that the physicians had never examined the defendant at any other time, and knew nothing about his mental condition either before, or at the time when, the marriage ceremony was performed.

A witness was also produced who stated that, when the defendant was about seventeen years of age, he attended his school. He testified that defendant was dull and made little or no progress in his school work. Other witnesses testified that defendant, when a boy, was backward and retiring in his disposition, and preferred the company of neighbor boys rather than the society of girls; that at times, when company or strangers came to the home, he kept out of sight, to some extent at least. Two other

witnesses testified that they were of opinion that defendant was not competent to make contracts. But it should be observed that each of those witnesses had contracted with him in the way of purchase and sale of property. In fact, it may be said that defendant was not possessed of any great degree of mental power; but the testimony of his own witnesses shows that he was able to carry on the ordinary business of farming; that he rented 80 acres of land from his father for several years, which he successfully farmed on his own account; that he had a team of his own, as well as other personal property. It is claimed, however, that defendant did not ask the plaintiff to marry him, and this fact is urged as evidence of his mental incapacity. It appears, however, that the plaintiff was employed as a domestic at the home of defendant's father and mother; that after she had been there something over a month the father and mother told her that if she and Frank (meaning the defendant) would get married, they would give them 160 acres of land; that, after talking the matter over, plaintiff and defendant agreed to the proposition; that defendant's father purchased him a suit of clothes, and furnished him with money with which to pay the expenses of the marriage, and thereupon defendant and plaintiff went over to the home of plaintiff's parents; that the following day, March 12, 1907, they went with her father to Pawnee City, where they were married by a justice of the peace; that they returned to the home of plaintiff's father, where they remained that night, and the next day they went to the Svanda home, where they lived as husband and wife for about a month, when, by reason of the conduct of defendant's father towards the plaintiff, the defendant took her to her father's home, promising to visit her every other day, and told her that as soon as he had his corn planted he would come for her and they would make a home for themselves; that some days after defendant left her father's house, he returned and informed her that he would have nothing more to do with her, and from that time to the day of the trial defendant failed and refused to live with plaintiff or furnish her any means of support whatsoever.

The burden of proof in this case was on the defendant to show such mental incapacity on his part as would render his marriage with the plaintiff void. On that question it was said in *Elzey v. Elzey*, 1 Houst. (Del.) 308, that "imbecility of mind is not a sufficient ground of divorce, unless it amounts to idiocy or insanity. Nor will intoxication at the time of the marriage, accompanied with circumstances of fraud, combination, or circumvention on the part

of the father and friends of the wife to induce the petitioner to marry his daughter, give the court jurisdiction to decree a divorce, unless the petitioner was insane within the meaning of the act." In that case it was further said: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness, and capacity essential to the validity of such an engagement; which, after all, in many cases, depends more on sentiments of mutual esteem, attachment, and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts." It must be observed that it was neither alleged nor proven that defendant was insane or an idiot when the marriage ceremony was performed, and there is much competent evidence in the record which tends to show that defendant had sufficient mental capacity to enter into the marriage contract at the time the ceremony was performed; and although the testimony is conflicting, in view of the rule above stated, we are of opinion that the findings of the district court are amply sustained by the evidence. It appears that the decree of the district court gave the plaintiff \$400 as permanent alimony, and \$100 as attorneys' fees. We assume that the trial court took into consideration the fact that in another action, tried in that court, plaintiff had on appeal recovered jointly with defendant an interest in 120 acres of valuable land, and therefore the court allowed her only \$500 as the amount of her permanent alimony and attorneys' fees.

As we view the record, the judgment of the District Court was right, and it is therefore affirmed.

Reese, Ch. J., and Fawcett and Rose, JJ., concur. Sedgwick, Letton, and Hamer, JJ., not sitting.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT. (Division No. 2.)

FIRST STATE BANK OF ARDMORE, Plff.
in Err.,

v.

KING & McCANTS, Interveners, et al.

(— Okla. —, 133 Pac. 30.)

Mortgage — failure to renew — effect on junior encumbrancer.

1. A. took a mortgage on certain chattels

Headnotes by BREWER, C.

47 L.R.A.(N.S.)

in 1908, upon which there was at the time a prior, valid, properly registered mortgage in favor of K. & M. At the time the controversy arose between these parties over the property, the lien of K. & M. had expired as to "subsequent purchasers or encumbrancers of the property in good faith, for value," because of a failure to file a renewal affidavit. Held, that A., having taken his mortgage with notice of the lien of K. & M., never became, as to K. & M., a "subsequent encumbrancer of the property in good faith, for value."

Replevin — mortgaged property — right of mortgagee.

2. Where the holder of a second mortgage takes chattels from the mortgagor by a writ of replevin, the holder of a prior and superior mortgage has the right to be made a party to the replevin suit by the court, under § 5574, Comp. Laws 1909; and the fact that such party styles his pleading an intervention, and is called an intervener, is immaterial.

(May 20, 1913.)

Note. — Failure to renew chattel mortgage as affecting purchaser or encumbrancer of property before lien of mortgage had expired.

"Renew" in this connection includes refilling or other steps necessary to keep lien of mortgage alive.

This note does not include cases dealing with the effect of taking possession by mortgagee as substitute for renewal or refilling; nor does it include cases referring to the sufficiency of the statement or of other steps necessary to constitute a refilling.

As to effect of actual notice of an unrecorded mortgage and for a few earlier cases on renewal of mortgages, see note in 13 L.R.A. 388.

As to effect of chattel mortgagee taking possession before any specific right or lien of creditors has attached, to cure original defect in mortgage as against creditors, see note in 25 L.R.A.(N.S.) 110.

As to necessity of recording mortgage in state to which property is subsequently removed, see notes in 64 L.R.A. 356; 6 L.R.A.(N.S.) 940; and 35 L.R.A.(N.S.) 386.

The cases, with the exception of those of Arkansas, are agreed that the failure to refile a chattel mortgage,—as required by statute, to protect it as against subsequent purchasers and encumbrancers in good faith, does not affect it as against a purchaser or encumbrancer with actual notice of the prior mortgage before the expiration of the period for refilling.

Kan.—Corbin v. Kincaid, 33 Kan. 649, 7 Pac. 145 (assignee of second mortgage); Howard v. First Nat. Bank, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 983 (mortgagee); Casner v. Crawford, 4 Kan. App. 687, 46 Pac. 41; Farmers' & M. Bank v. Bank of Glen Elder, 46 Kan. 376, 26 Pac. 680; Miltonvale State Bank v. Kuhnle, 50 Kan.

ERROR to the District Court for Carter County to review a judgment in favor of interveners in an action brought to recover possession of certain mortgaged property. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. W. D. Potter for plaintiff in error.
Messrs. Cruce, Cruce, & Bleakmore for defendants in error.

Brewer, C., filed the following opinion:

The particular questions in this case are as to which of two mortgagees has the superior right to certain mortgaged chattels, and whether or not, in a replevin suit by one of the mortgagees for the mortgaged chattels, the other mortgagee can, with leave of court, intervene and have his rights determined.

On December 6, 1906, one T. J. Jordan gave to defendants in error King & McCants, who will hereafter be called interveners, a mortgage on certain live stock situated in the southern district of Indian territory, in what is now Carter county, Oklahoma. This mortgage was indorsed on the back, "This instrument is to be filed,

but not recorded," and was on said December 6, 1906, filed in the office of the clerk of the United States court, in compliance with the law of Arkansas on the subject, then in force in Indian territory. On November 29, 1907, King & McCants filed the statutory renewal affidavit required by the law of Arkansas, which had the effect of continuing the lien of the mortgage and notice thereof, as against all persons, for one year. On January 4, 1908, the First State Bank of Ardmore, plaintiff in error herein, who will hereafter be called plaintiff, obtained a mortgage from Jordan on the same property, which was duly filed under the laws of the state of Oklahoma in Carter county. On December 31, 1908, the said First State Bank brought a suit, as plaintiff, in the district court of Carter county, in replevin, and obtained possession of the live stock covered by both mortgages, in addition to considerable property not covered by the mortgage of the interveners. After receiving possession of the property, the plaintiff bank proceeded to sell the same under the terms and power of sale contained in its mortgage. While this suit was pending, King & McCants filed, with

420, 34 Am. St. Rep. 129, 31 Pac. 1057 (approving *Howard v. First Nat. Bank*, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 983, defendant appearing to have had only constructive notice).

Mich.—*Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899 (purchaser at an execution sale upon judgment against the mortgagor, the purchaser being the judgment creditor); *Flory v. Comstock*, 62 Mich. 522, 28 N. W. 701 (purchaser from second mortgagee, who was a member of a partnership at the time the first mortgage was given by the partnership); *Wetherell v. Spencer*, 3 Mich. 123 (mortgagor); *Wade v. Strachan*, 71 Mich. 459, 39 N. W. 582 (mortgagor), overruling *Briggs v. Mette*, 42 Mich. 12, 3 N. W. 231.

Neb.—*Ransom v. Schmela*, 13 Neb. 73, 12 N. W. 926.

N. J.—*National Bank v. Sprague*, 21 N. J. Eq. 530 (mortgagee).

N. Y.—*Meech v. Patchin*, 14 N. Y. 71 (mortgagor); *Wiles v. Clapp*, 41 Barb. 645, *dictum* (purchaser); *Lewis v. Palmer*, 28 N. Y. 271 (purchaser from assignees for benefit of creditors of mortgagors); *Lattimer v. Wheeler*, 30 Barb. 485 (mortgagee); *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136, affirmed without opinion in 165 N. Y. 633, 59 N. E. 1125 (mortgagee taking mortgage which by its terms was expressly subject to the other, both mortgages being taken on the same day); *Thompson v. VanVechten*, 27 N. Y. 568, *dictum*; *Gregory v. Thomas*, 20 Wend. 17 (mortgagee); *Hill v. Beebe*, 13 N. Y. 556 (second mortgage by its terms expressly subject to the first mortgage).

Ohio.—*Day v. Munson*, 14 Ohio St. 483, 47 L.R.A. (N.S.)

(mortgagee); *Whitaker v. Westfall*, 2 Ohio C. C. 321, 1 Ohio C. D. 509, *dictum*; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169, 48 N. E. 879 (mortgagee); *Paine v. Mason*, 7 Ohio St. 199 (mortgagee).

Fed.—*Riederer v. Pfaff*, 61 Fed. 872 (mortgagee).

Wis.—*Ullman v. Duncan*, 78 Wis. 213, 9 L.R.A. 683, 47 N. W. 266 (administrator of estate of second mortgagee, second mortgagee being a member of the partnership at the time the firm gave the second mortgage); *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394 (mortgagee).

In *McKennon v. May*, 39 Ark. 442, however, the court apparently goes to the extent of denying the priority of the earlier mortgage, even though the subsequent purchaser or encumbrancer has actual knowledge thereof, and held that where the holder of a valid existing mortgage upon chattels failed to file the extension affidavit required by statute, he lost his lien as against another mortgagee, who acquired a mortgage upon the same property before his own lien expired. The court said in part: "Under our laws providing for the recording of mortgages actual notice does not supply the want of registration under the general statute, or the filing of a chattel mortgage, and the extension affidavit is required by the act in question." (See comment on this case in *FIRST STATE BANK v. KING & McCANTS*.)

In *Crawford v. Trigg*, — Ark. —, 15 S. W. 185, where it does not appear whether or not the purchaser had actual notice of the mortgage, the court held, in an action brought after the time for filing had expired, that a purchaser from the

leave of court first obtained, their petition in intervention, setting up their prior mortgage, together with the renewal affidavit, and alleging a superior lien as to certain of the property involved in the suit. At a trial in the district court, without a jury, by agreement of the parties, the court found the issues in favor of the interveners, and that as to a certain horse and some cattle, that the lien of their mortgage was prior and superior to that of plaintiff; that defendant Jordan owed interveners \$190 balance on their mortgage, and that plaintiff had sold the property covered by interveners' mortgage and had the proceeds thereof in a like sum in its possession; and that therefore interveners were entitled to judgment against the plaintiff for the said amount of money. Judgment being entered accordingly, the plaintiff brings this writ of error and relies here upon the two propositions mentioned at the beginning of this statement.

(1) The principal question is: Did plaintiff's mortgage, taken at a time when interveners' mortgage was a valid subsisting lien on the same property, and con-

fessedly prior and superior to plaintiff's, later become superior to the first mortgage, because when suit was brought the year of extension under the renewal affidavit had expired without the filing of a second renewal affidavit by interveners?

Had this entire transaction occurred—that is, had both mortgages been executed and suit brought—under the Arkansas law, thus fixing entirely the rights of both parties under that law, the question would be answered in the affirmative on the authority of *McKennon v. May*, 39 Ark. 442, and *Crawford v. Trigg*, — Ark. —, 15 S. W. 185, and *National Live Stock Commission Co. v. Taliaferro*, 20 Okla. 177, 93 Pac. 983, following those cases. The supreme court of Arkansas had consistently held, contrary to principle and the weight of authority, as admitted by that court in *Crawford v. Trigg*, supra, that a second mortgage, taken while the first was a valid lien and notice to all the world by virtue of being filed, became superior to the first, if, at the time of suit, the first mortgage had then been on file more than one year without a renewal affidavit. This holding

mortgagor of chattels during the period while a valid, recorded mortgage on the chattels was in existence, could claim title to the property as against the holder of the mortgage. The court follows *McKennon v. May*, supra, but disapproves of it, and concedes that the decision is questionable upon principle, and against the weight of authority.

National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 983 (construing the Arkansas statute while it was in effect in Indian territory, by act of Congress), followed *McKennon v. May*, supra. This decision is not now the law in Oklahoma, but the law is represented by the principal case, which is in accord with *Meech v. Patchin*, 14 N. Y. 71, and with the weight of authority.

The weight of authority holds that the failure to refile the chattel mortgage, properly filed and recorded in the first instance, does not defeat it as against a purchaser or encumbrancer who became such before the expiration of the period for refileing, although he may not have had actual notice. In other words, to be a subsequent purchaser or encumbrancer in good faith, entitled to protection in the event of the failure to refile within the time required by statute, one must have made the purchase or taken the encumbrance after the expiration of the period allowed by the statute for refileing.

Kan.—*Howard v. First Nat. Bank*, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 983 (mortgagee); *Miltonvale State Bank v. Kuhnle*, 50 Kan. 420, 34 Am. St. Rep. 129, 31 Pac. 1057 (mortgagor); following the *Howard Case*, supra, and there being apparently only constructive notice.
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Mich.—*Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899 (purchaser at an execution sale upon judgment against the mortgagor, the purchaser being the judgment creditor); *Wade v. Strachan*, 71 Mich. 459, 39 N. W. 582 (mortgagee), overruling *Briggs v. Mette*, 42 Mich. 12, 3 N. W. 231. In both of these cases the mortgagees had actual notice, but the court seems to consider constructive notice as sufficient. *Wetherell v. Spencer*, 3 Mich. 123 (mortgagee), apparently only constructive notice.
Minn.—*Edson v. Newell*, 14 Minn. 228, Gil. 167 (purchaser at an execution sale).

Mo.—*Frank v. Playter*, 73 Mo. 672 (construing Kan. Stat.) (purchaser at a judicial sale after attachment; apparently only constructive notice).

N. Y.—*Meech v. Patchin*, 14 N. Y. 71 (mortgagee); *Dillingham v. Bolt*, 37 N. Y. 198, 4 Abb. Pr. N. S. 221, overruling *Dillingham v. Ladue*, 35 Barb. 38 (subvendee); *Shutter v. Ward*, 17 N. Y. Week. Dig. 69 (purchaser); *Jaqueth v. Merritt*, 29 Hun, 584 (mortgagee); *Thompson v. Van Vechten*, 27 N. Y. 568 (*dictum*); *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729 (assignee of second mortgagee); *Manning v. Monaghan*, 23 N. Y. 539 (purchaser at a public auction held by a receiver appointed by the court at the instance of a creditor of the mortgagor); *Wolff v. Rausch*, 22 Misc. 108, 48 N. Y. Supp. 716 (purchaser); *American Box Mach. Co. v. Zentgraf*, 45 App. Div. 522, 61 N. Y. Supp. 417, 7 N. Y. Anno. Cas. 182 (mortgagee); *Beakin v. Feigen-span*, 32 App. Div. 29, 52 N. Y. Supp. 750 (purchaser).

Okla.—*FIRST STATE BANK v. KING & McCANTS*,

was a logical sequence of the rule announced by that court that, as to subsequent purchasers or encumbrancers in good faith, actual notice of a prior mortgage was no notice at all; that the only notice that would bind or affect a subsequent purchaser or mortgagee was the notice arising out of a compliance with the statute. *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Watkins v. Wassell*, 15 Ark. 73; *Hannah v. Carrington*, 18 Ark. 85; *Wright v. Graham*, 42 Ark. 140; *Hobbs v. Young*, 30 Okla. 271, 120 Pac. 946. In other words, that a man might see his neighbor take a mortgage and pay the consideration, and then take a second mortgage, and if he could get it filed before his neighbor's, he would be a subsequent encumbrancer in good faith. This ruling, as has been suggested, led to the one in point here, and is contrary to the great weight of authority.

In this case, however, whatever rights the second mortgagee has flow from the law prevailing at the time he took his mortgage; it is an Oklahoma contract, into which the law in force at the time entered. That law, as construed by the courts, said

to him when he took his mortgage that a subsequent purchaser or encumbrancer was not such in good faith under the statute (§ 4422, Comp. Laws 1909), if he took with notice of the prior encumbrance. *Campbell v. Richardson*, 6 Okla. 375, 51 Pac. 659; *Strahorn-Hutton-Evans Commission Co. v. Florer*, 7 Okla. 499, 54 Pac. 710. Our statute on this subject comes from Dakota, *Campbell v. Richardson*, *supra*, and the Oklahoma territorial supreme court followed the construction placed on it by the Dakota supreme court in *Walter A. Wood Mowing & Reaping Mach. Co. v. Lee*, 4 S. D. 495, 57 N. W. 238.

When plaintiff took his mortgage, interveners' mortgage was a valid subsisting lien, and being of record, in compliance with the registration laws, was notice to all persons, including plaintiff. This is conceded by plaintiff, but the contention is made that, with the failure of interpleaders to file the second renewal affidavit when required, that thereafter their mortgage was void as to plaintiff; we do not think so. Plaintiff took with notice and in hostility to the first mortgage, and under the law of

Wis.—*Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892 (mortgagor); *Newman v. Tymeson*, 192 Wis. 448 (attaching creditor); *Nix v. Wiswell*, 84 Wis. 334, 54 N. W. 620 (purchaser).

In the leading case of *Meech v. Patchin*, 14 N. Y. 71, the court said: "A person about to deal with the possessor and apparent owner of chattels could, by resorting to the proper clerk's office, ascertain whether he had mortgaged them to another party. Should he find a mortgage on file, he could not determine without the help of the third section whether the lien still continued, whatever length of time had elapsed since the filing; but by means of the provision in that section, he could be certain that the mortgage had ceased to be a lien, if he found it had not been renewed within one year. If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien. When the plaintiffs in this case took their mortgage, the defendant's mortgage was on file, and they accordingly had the notice of it which the statute contemplated. The year from the time it was filed had not elapsed, and no fault or want of diligence had therefore happened on the part of the defendant. The defendant's mortgage was in full vigor, and the plaintiffs' was taken subject to it. The care which the plaintiffs exercised to file their mortgage, and to preserve its validity by annually re-filing a copy, was a suitable precaution against parties coming after them; but it had not, as I conceive, any effect against the defendant's prior mortgage. The priority of the respective mortgages was fixed as soon as the last one, that of the plain- 47 L.R.A. (N.S.)

tiffs, had been executed. If the controversy had arisen within the year from the filing of the defendant's mortgage there could not have been any pretense but that the defendant would have had the prior title. Their respective rights having become thus fixed, the diligence or want of diligence of either, as to preserving their liens against subsequent purchasers and mortgagees, by re-filing their respective mortgages, was of no importance as against each other. This seems to me [to be] the necessary construction of the statute, as well from its language as upon its general policy. Its language is, every mortgage filed, etc., shall cease to be valid, etc., against subsequent purchasers or mortgagees, unless it shall, within thirty days before the expiration of the year, be again filed. Subsequent, I think, means after the time when it ought to be again filed to preserve its validity."

A contrary view, however, is taken in Ohio as to the sufficiency of constructive notice.

The Ohio case of *Paine v. Mason*, 7 Ohio St. 199, which is the foundation of the Ohio law, cites *Gregory v. Thomas*, 20 Wend. 17, as authority for the statement that constructive notice is not sufficient to show lack of good faith, and that actual notice is necessary. But *Gregory v. Thomas* was overruled in so far as it denies the sufficiency of constructive notice by *Meech v. Patchin*, 14 N. Y. 71, nearly a year before *Paine v. Mason*, was decided. The only real foundation for the Ohio rule is that *Gregory v. Thomas* represented the New York law at the time the Ohio statute, which is similar to the New York statute, was passed by the Ohio legislature.

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his contract he never became a subsequent encumbrancer "in good faith, for value," as against the first mortgage.

Almost this identical question is presented and so decided in *Howard v. First Nat. Bank*, 44 Kan. 549, 10 L.R.A. 537, 24 Pac. 983, under practically the same statute. In that case the second mortgage was taken while the first was clearly alive under the Kansas statute, but when the matter got into suit the contention was made that an attempted renewal affidavit was void, and that therefore the first mortgage had expired and let the second one in to the exclusion of the first. After stating this contention the court says: "We don't care to discuss the sufficiency of the affidavit, as we believe with the trial judge that under the circumstances of this case, the renewal affidavit is not a material matter. The affidavit could only be material in case there were subsequent purchasers, or mortgagees in good faith." And further: "Because the language of the statute (§ 3905, Gen. Stat. 1889), 'every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit,' etc., does not include intermediate purchasers or mortgagees; that is, purchasers or mortgagees who purchased, or whose mortgages were taken intermediate the time of filing of such mortgage and the end of the year during which it remains in force without the renewal affidavit, but it means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year, and after it became necessary to file a renewal affidavit to continue the mortgage in force. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record. But he who purchases before the year expires takes with notice of the mortgage and the rights of the mortgagee under the same. If, therefore, the mortgagee fails at the end of the year and within the time prescribed by the statute to file his renewal affidavit, the purchaser is not affected adversely by the failure to file the affidavit, though the lien of the mortgage as to him remains intact. His rights are unaffected. They remain the same as before. He has invested nothing

upon the strength of the failure of the mortgagee to file his renewal affidavit. At the time he purchased he knew of the encumbrance. This knowledge continues, and he may not be said to be a purchaser in good faith. The same reasoning applies to intermediate mortgagees. But we are not left to a decision of this question solely upon reason or principle. The great weight of authority sustains this view." The following cases seem to be in point: *Meech v. Patchin*, 14 N. Y. 71; *Dillingham v. Bolt*, 37 N. Y. 198; *Newman v. Tymeson*, 12 Wis. 448; *Lowe v. Wing*, 56 Wis. 33, 13 N. W. 892; *Edson v. Newell*, 14 Minn. 228, Gil. 167; *Frank v. Playter*, 73 Mo. 672; 6 Cyc. 1093, 1094, notes, and cases cited.

(2) Counsel contend in the second point that the intervention in this case was not authorized by law. This, too, must be decided against them. The second mortgagee sued the mortgagor in replevin and took possession of the mortgaged property. It may be true that a judgment in this suit would not have determined the question against the holders of the first mortgage; but they, knowing of the matter, were justified in feeling considerable concern over the situation. Their rights were being interfered with and their security appropriated. Why should they not ask to come into the case? They could have been made defendants under the terms of the statute. Section 5574, Comp. Laws 1909, says: "When in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it to be done."

Coming in by a petition in intervention merely made them parties. *Noble v. Worthy*, 1 Ind. Terr. 458, 45 S. W. 137. Had they not come in, plaintiff would have been forced to stand the expense of another suit over matters that could be determined fully, justly, and without inconvenience in the suit they had begun. In *Clevenger v. Lewis*, 20 Okla. 837, 16 L.R.A.(N.S.) 410, 95 Pac. 230, 16 Ann. Cas. 56, this court, speaking through Chief Justice Williams, has said: "Where the intervenor voluntarily appears and asks to intervene and have his rights determined in said cause, it is certainly within the power of the court to permit it. This jurisdiction ought always to be exercised to the ends of the furtherance of justice." The right of a third party, who is a claimant of the property and its possession, to intervene in a replevin suit therefor, is admitted in the following authorities: *Winchester v. Bryant*, 65 Ark. 116, 44 S. W. 1124; *Hamilton v. Duty*, 36 Ark. 474; *Newton v. Round*, 109 Iowa. 286. 80 N. W. 391; *Schmitt &*

Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. 99; Cobbe, Replevin, 444-446; Wells, Replevin, 2d ed. page 536.

The suit of plaintiff was the assertion of a right to the possession of the mortgaged property. The intervention took issue with this assertion and set up a superior right to the animals and their possession. It would be difficult to demonstrate how plaintiff was injuriously affected by the allowance of the intervention. Had it been refused or not resorted to, interveners could have waited until plaintiff established his right to possession, as against the defendant, then brought their suit against plaintiff for possession of the same property, and taken it; or, in case it had been sold, obtained its value to the extent of their interest. The same result was reached.

The cause should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied June 30, 1913.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA,
Appt.,
v.

CHARLES R. KENNEDY et al.

(240 Pa. 214, 87 Atl. 605.)

Nuisance — public — pollution of private stream.

1. Pollution of a stream the title to the bed of which is in the riparian owners is

Note. — Injunction at suit of state against public nuisance which is also a crime.

This note brings down to date the note to Carrell v. State, 33 L.R.A. (N.S.) 325, and the earlier notes therein referred to.

In DeQueen v. Fenton, 98 Ark. 521, 136 S. W. 945, it was held, in accord with the Carrell Case, supra, that a chancery court has no jurisdiction to enjoin, at the suit of a city, the creation of a public nuisance consisting of the permitting of stock and cattle to run at large within the limits of the city, where this is an infraction of the criminal law, and a complete and adequate remedy is afforded by the courts of law through a criminal prosecution.

And in Missouri, a court of equity will not, at the suit of a city, enjoin the further maintenance of a public nuisance consisting of improper billboards, where the maintenance of such structures is a violation of a quasi criminal ordinance which contains, within itself, the efficient means of enforcement, and thus affords to the city a full, 47 L.R.A. (N.S.)

a public nuisance, where the legislature has made it a misdemeanor to pollute any of the waters of the state.

Injunction — against nuisance — statutory misdemeanor.

2. Injunction lies against the pollution of a stream in such a manner as to constitute a public nuisance, although such pollution is by statute made a misdemeanor punishable by fine or imprisonment.

(March 31, 1913.)

APPEAL by plaintiff from a decree of the Court of Common Pleas for Chester County dismissing a bill filed to enjoin the pollution of a stream. Reversed.

The facts are stated in the opinion.

Messrs. William I. Schaffer, Louis J. Palmer, Parker S. Williams, Charles Sinkler, and John C. Bell, Attorney General for the Commonwealth.

Mr. A. M. Holding, for appellees:

The commonwealth cannot maintain this bill, because no wrong has been committed against the public, except as the same has been declared a wrong by, and is to be redressed under, the act of 1905.

Sparhawk v. Union Pass. R. Co. 54 Pa. 402; Philadelphia v. Lyster, 3 Pa. Super. Ct. 475; Williamsport v. McFadden, 15 W. N. C. 269; Com. v. Yost, 197 Pa. 174, 46 Atl. 845; Com. v. Ashley, 37 Pa. Super. Ct. 254; Rhymer v. Fretz, 206 Pa. 230, 98 Am. St. Rep. 777, 55 Atl. 959; Roaring Creek Water Co. v. Anthracite Coal Co. 212 Pa. 115, 61 Atl. 811; State ex rel. Board of Health v. Bergen County, 46 N. J. Eq. 173, 18 Atl. 465; Com. v. Emmers, 221 Pa. 304, 70 Atl. 762; Dixon v. Sheffer, 46 Pa. Super. Ct. 452.

Even if otherwise plaintiff were entitled

complete, and unembarrassed remedy by legal procedure. Kansas City Gunning Advertising Co. v. Kansas City, 240 Mo. 659, 144 S. W. 1099. The court, in this case, however, said: "The jurisdiction of equity to prevent irreparable injury to property is not devested by the fact that the act to be enjoined may also be a violation of the criminal law; neither does a court of equity lack power to enjoin the continuance of a public nuisance. Its action in these instances is incidental and grows out of its inherent jurisdiction to protect property rights from destruction, and to conserve the morals of the people. . . . But a court of chancery is not a medium for the enforcement of the criminal law, hence it scans closely transactions having that aspect before entertaining jurisdiction. It may be that an exigency could arise which would warrant a suit in equity to enjoin the plaintiff and other persons from violating the terms of the ordinance under review, but we do not think that it now exists."

So, in State ex rel. Jackson v. Lindsay, 85 Kan. 79, 35 L.R.A. (N.S.) 810, 116 Pac.

to an injunction, it lost the right thereto by its own laches.

1 Spelling, Inj. & Extr. Rem. 2d ed. § 26; 1 High, Inj. 3d ed. § 786; Seal v. Northern C. R. Co. 1 Pearson (Pa.) 547; Pottsgrove Twp. v. Pennsylvania S. V. R. Co. 2 Montg. Co. L. Rep. 133.

The remedy of the commonwealth is exclusively under the act of 1905.

Curran v. Delano, 235 Pa. 478, 84 Atl. 452; Dixon v. Sheffer, 46 Pa. Super. Ct. 452.

Stewart, J., delivered the opinion of the court:

The facts found by the learned chancellor abundantly establish the jurisdiction of the court to grant the injunction prayed for. Not only so, but they disclose as well a case which imperatively calls for the application of this extraordinary remedy. The finding is clear and explicit that the defendants' sewage plant, as at present maintained, allows the escape of sewage into the Darby creek to an extent that renders the waters of the stream unfit for drinking or other domestic uses. And yet we have the legal conclusion derived by the chancellor that this condition does not constitute a public nuisance; that inasmuch as Darby creek is a private stream in the sense that the riparian owners along it own *ad filum aquæ* the public can have no rights therein, and consequently the pollution of such stream constitutes nothing more than private injury of which only a riparian owner may complain. True, this court said quite as much with respect to a like stream in *Com. v. Yost*, 197 Pa. 171, 46 Atl. 845, but under very different conditions from those we have here. In that case a defendant was indicted and convicted of the offense of maintaining and continuing a common nuisance, a cesspool emptying into and connecting with a stream or water course along which many citizens lived "and from which they obtain . . . wa-

ter, and from which divers other . . . citizens obtain and are supplied with water for drinking and domestic purposes." The indictment charged that because of the maintenance of this nuisance, "the water of said stream was and is impregnated, corrupted, and made unwholesome, to the great damage and common nuisance of the said citizens, and of all of the people of the commonwealth." We put our refusal to sustain the conviction of the defendant distinctly on the ground that the only circumstance shown indicating that the offense was a matter of public concern was that a riparian owner, a water company some 12 miles below the point where the sewage entered the stream, without ownership in the running water, and therefore without right to divert it, was for commercial purposes supplying it for general use. We held that the wrong done by the defendant, if any, was to such riparian owner in depriving it of pure water for its own legitimate purposes, and that any wrong so done was a private one for which the remedy was purely civil. We did there say that, "If . . . the waters of a stream in which riparian owners alone have an interest be polluted, the wrong or injury is a private one." As an abstract proposition this was entirely correct at the time we said it, and it is equally correct now, except as the state, by recent legislation in the exercise of its police power in the interest of the public, has resumed in one important particular, and for a definite purpose, its control of all the flowing waters of the commonwealth, and, in consequence, the riparian owners, because of this exercise of power by the state, can no longer be said to be alone interested. It cannot be a matter of public concern that a stream from which the public are excluded by the riparian owners has been rendered unfit for domestic use. When this happens, the riparian owners alone are injured, and they alone can complain. Water pumped from coal mines

207, the court said: "Courts of equity are reluctant to use the process of injunction where the remedy by indictment or information is efficacious, but will not hesitate where the remedy is not adequate, and it is necessary to protect the rights of the public or an individual. A court is not powerless to prevent the doing of an act merely because it is denounced as a public offense. . . . It is a well-recognized principle that, when a place is a public nuisance, its maintenance may be enjoined at the suit of the public prosecutor, although its maintenance is subject to criminal prosecution."

And under a statute providing that "an injunction may be granted in the name of the state to enjoin and suppress the keeping 47 L.R.A. (N.S.)

and maintenance of a common nuisance," this remedy is available against the keeper of a turf exchange which is a public nuisance, notwithstanding the criminal laws of the state, to which the keeper of the exchange is also answerable, have not first been resorted to. *Jones v. State*, — Okla. —, 44 L.R.A. (N.S.) 161, 132 Pac. 319. The court in this case distinguished the earlier case of *State ex rel. West v. State Capital Co.* 24 Okla. 252, 103 Pac. 1021, cited in the note in 33 L.R.A. (N.S.) 325, on the ground that the offense there sought to be enjoined (the advertising for sale and purchase of intoxicating liquors kept for sale without the state) did not constitute a public nuisance.

A. C. W.

and tanneries, if allowed to drain into a running stream, will pollute, and may work serious damage to riparian owners by rendering the water too unclean for domestic use; but, so long as the injury is so confined, the public is not prejudiced, and are without ground of complaint. In all such cases, and many others might be enumerated, it is perfectly correct to say that the riparian owners alone have an interest in the waters of the stream to be protected.

But, in view of the recent legislation to which we have referred, the matter takes on an entirely different aspect when it is sewage that is discharged into a running stream. Because sewage is the most efficient medium for the dissemination of infecting germs, which do their deadly work in such an infinite variety of insidious ways, not at all dependent upon free access of the public to the stream which the germs pollute, it cannot be said that the "riparian owners alone have an interest in the stream." When this deleterious substance pollutes any running stream the public health is endangered thereby. The infection from which the riparian owner himself may peradventure escape may nevertheless in a hundred ways, through his innocent acts, spread through a community; for he no more than any other lives to himself alone. It was this consideration, as indicated by the title, that led to the passage of the act of April 22, 1905 (P. L. 260), which declares it to be a misdemeanor, punishable by fine or imprisonment, for any individual, private corporation, or company to discharge sewage, or permit the same to flow, into "the waters of the state." The act defines "waters of the state" to mean "all streams and springs, and all bodies of surface and ground water, whether natural or artificial, within the boundaries of the state." This does not make all such streams public streams, but it does subject them to police control, because, while not public streams, they are susceptible of being turned into public nuisances. The offense here denounced is against the state, and it is committed whenever sewage is permitted to drain into any surface stream within the commonwealth. We have attempted to distinguish between *Com. v. Yost*, decided five years before the enactment of the statute of April 22, 1905, and the present case, only to show that there is nothing in the former that in any way interferes with the exercise of restraining power by the court when the facts are as we have them here.

The learned chancellor was of opinion that the offense committed by respondents was not the maintenance of a public nuisance, for the reason that the stream into

which the sewage drained was not a public stream, and being but a violation of a penal statute, the only remedy was to be found in the enforcement of the penalty provided. It is unnecessary to add anything to what we have already said on the first branch of this proposition. We simply repeat that it is not necessary to constitute a public nuisance in running water, that the stream should be a public stream. Because the public health is endangered by drainage of sewage into any flowing stream, the legislature has denounced it as an offense on the part of any one permitting it. In no more positive way could it be declared a public nuisance.

As to the second, we need only refer to what was said by this court in *Bunnell's Appeal*, 69 Pa. 59: "It is not to be denied that the supreme court and the several courts of common pleas have jurisdiction to restrain public nuisances under certain circumstances. This power is conferred by the fifth clause of the 13th section of the act of June 16, 1836 [P. L. 789], extended over the state by subsequent legislation. But the power will be exercised only when the right is clear, and not doubtful, and when the threatened injury is of a permanent or an irreparable character. The mere fact that there is a remedy at law by indictment or action will not alone prevent the exercise of the power, but it is a reason why the jurisdiction of chancery should be confined to cases of a very plain character, where the injury is irreparable and cannot await the slow progress of the legal redress." No case could be plainer on its facts than the present one. The learned chancellor was similarly impressed, for in his opinion he distinctly states that he would enjoin the pollution complained of if he had authority to do so. That he was clothed with ample authority, notwithstanding a remedy at law by indictment existed, sufficiently appears in the case we have cited, which is only one of many equally explicit. That the injury threatened would be irreparable, in the only proper sense of the term,—that is to say, in occasioning damages which could be estimated only by conjecture, and not by any accurate standard (*Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372), and ought not to be required to await upon the slow progress of the legal redress,—is too evident to call for discussion.

For the reasons stated the assignments of error are sustained; the decree dismissing plaintiffs' bill is reversed; the bill is ordered to be reinstated; and the court below is directed to enter a decree in favor of the plaintiff, enjoining the defendant from maintaining and operating their sew-

age plant in the place where it is now maintained and operated, in such manner as permits sewage to escape from the said plant and drain and flow into Darby creek or its tributaries. The costs to be paid by the defendants.

PENNSYLVANIA SUPREME COURT.

FRANK P. LAUER, Appt.,

v.

SUSAN ELIZABETH HOFFMAN et al.

(241 Pa. 315, 88 Atl. 496.)

Shelley's Case — provision against vesting of fee — effect.

1. A devise to testator's wife for life, then to his daughter for life, then to the daughter's children, or in default of children to such persons as the daughter shall direct, vests the fee in the daughter, notwithstanding the will provides that in no event shall the fee vest in the wife or daughter during the lifetime of either of them.

Same — when rule applies.

2. The rule in Shelley's Case applies whenever there is a clearly expressed intention of the grantor that the remainderman is to take not from him, but from the grantee of a life estate to which he has attached an inheritable succession in his grantee or devisee.

(Mestrezat and Moschzisker, JJ., dissent.)

(May 28, 1913.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Berks County in defendants' favor in an action brought to recover money paid down for property which defendants had contracted to sell to plaintiff, and which he claims they could not legally convey. Affirmed.

The facts are stated in the opinion.

Mr. Henry P. Keiser, for appellant:

The purpose in construing a will is to ascertain the intention of the testator, so that it may be carried out in the disposition which he has made of his property.

Wood v. Schoen, 216 Pa. 425, 66 Atl. 79.

The word "children" is primarily one of purchase.

Mannerback's Estate, 133 Pa. 342, 19 Atl. 552; Harbster's Estate, 133 Pa. 351, 19 Atl. 558; Fetherman's Estate, 181 Pa. 349, 37 Atl. 516; Lancaster v. Flowers, 198 Pa. 614, 48 Atl. 896.

Note. — Generally, as to the rule in Shelley's Case, see note in 29 L.R.A.(N.S.) 963; and see especially pages 1039 et seq. of that note for the effect of the rule on intention.

47 L.R.A.(N.S.)

The devise to testator's daughter constitutes a life estate only.

Cote v. Von Bonnhorst, 41 Pa. 243; West v. Vernon, 215 Pa. 545, 64 Atl. 686; Gross v. Strominger, 178 Pa. 64, 35 Atl. 852; Gittleman's Appeal, 3 Walk. (Pa.) 270.

Messrs. Joseph R. Dickinson and Jeremiah K. Grant, for appellee:

The devise comes within the operation of the rule in Shelley's Case, 1 Coke, 104.

Yarnall's Appeal, 70 Pa. 335; Price v. Taylor, 28 Pa. 95; Potts's Appeal, 30 Pa. 168; Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586; Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374; Simpson v. Reed, 205 Pa. 53, 54 Atl. 499.

A testator cannot create an estate in fee and then deprive the tenant of the incidents and rights of a tenant in fee, such as the uncontrolled power of disposition whether by will or deed; and restraints upon such powers are void.

Doebler's Estate, 64 Pa. 9; Kepple's Appeal, 53 Pa. 211; Walker v. Vincent, 19 Pa. 369; Woodside's Estate, 188 Pa. 45, 41 Atl. 475.

An heir is not to be disinherited unless the intention is clear; and in the construction of wills of doubtful meaning, every intendment is to be made in favor of the heir.

Clayton v. Clayton, 3 Binn. 486; Brendlinger v. Brendlinger, 26 Pa. 132; Hancock's Appeal, 112 Pa. 532, 5 Atl. 56; Gray's Estate, 147 Pa. 67, 23 Atl. 205; Nebinger's Estate, 185 Pa. 399, 39 Atl. 1049.

Brown, J., delivered the opinion of the court:

It is clear that the testator intended to give his daughter but a life estate in the property which she and her husband have contracted to sell to the appellant; but it is equally clear that, in giving her that estate, he intended to make her a source of inheritable succession, and she therefore took a fee under the unbending rule in Shelley's Case as applied in this state. This is so plainly demonstrated in the opinion of the learned president judge of the court below, that little, if anything, can be well added to it, and it will be very briefly supplemented.

The following is the substance of the clause in the will of Franklin S. Bickley by which he devised the real estate in controversy to his daughter, the appellee: "I give and devise to my said wife . . . my real estate situate on the north side of Penn street . . . in the city of Reading. . . . She to have and to hold the same for and during the term of her natural life, and to have the rents, issues, and profits thereof during the same period. And

immediately after the death of my said wife, I give and devise the said real estate to my only child and daughter, Susan Elizabeth, for and during the term of her natural life, she to have the rents, issues, and profits thereof during said period, and after the death of my said daughter, the said real estate shall descend to and become vested in the children of my said daughter, should she have any, in fee simple, and in default of such children, then such person or persons as she may by her last will and testament direct; but in no event whatever shall the fee simple to the said real estate vest in my wife . . . or my daughter, Susan Elizabeth, during their lifetime or the lifetime of either of them."

No one familiar with the rule in Shelley's Case would pretend that the appellee did not take an estate in fee simple, if the testator had not added to the devise to his daughter the following words: "But in no event whatever shall the fee simple to the said real estate vest in my wife . . . or my daughter, Susan Elizabeth, during their lifetime or the lifetime of either of them." If, by the preceding words of the testator, the daughter took a fee under the application of the rule in Shelley's Case to the clearly expressed intention of the father that, upon her death, the property should descend to her children, his subsequent words were utterly inoperative to prevent the legal consequence of the former, no matter how plain the latter may be of a contrary intent. Authorities might be multiplied as to this. In Doeblers Appeal, 64 Pa. 9, the testator, Elisha Biggs, made the following devise to his son, Elisha H. Biggs: "I give and devise to my son, Elisha H. Biggs, the block known as the Exchange Building and the Old Arcade; beginning, etc., . . . I also give and devise to him my mansion house after my wife's decease, should she remain unmarried, as also the lot of ground immediately below it, containing about one-half acre, more or less. . . . But he shall in no wise sell or alienate any of the above-described property, as it is intended that he shall have a life interest only in the same, with remainder over to his heirs in fee, subject to the payment of my debts, and subject also to the bequest to my wife, or any other bequests hereafter mentioned, and he shall in no wise come into possession of any of the above-described property until his twenty-second year." Surely these words were as clearly indicative of the intention of the testator that a fee simple should not vest in his son as are those of Franklin S. Bickley that his daughter should have but a life estate, but we held, 47 L.R.A. (N.S.)

through Mr. Justice Sharswood, in the former case, that the son took a fee; and what was there said is not only peculiarly applicable to the case now before us, but conclusive of the right of the appellee to assert a title in fee simple: "The rule in Shelley's Case is never a means of discovering intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and though the original reason of it, the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage, has passed away, it is still maintained as a part of the system of real property which is based on feudalism and as a rule of policy. It declares inexorably that, where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs *qua* heirs as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if mediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so, it is not competent for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. That is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply,—that the ancestor shall be tenant for life only and impeachable for waste,—if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that 'he shall in no wise sell or alienate, as it is intended that he shall have a life interest only,' it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law." Two other cases announcing the same rule are Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374, and Simpson v. Reed, 205 Pa. 53, 54 Atl. 499. It is needless to refer to more of our many cases in support of an unquestioned rule of property.

It may be conceded that the testator intended to say in effect, by the concluding words of the devise to his daughter, that the rule in Shelley's Case should not apply to it; but, though this was his intention, he was as powerless to prevent the operation of that rule as he was to create a new canon of descent, if, by the preceding words in the devise to his daughter for life, he intended to make her the source of her

children's inheritance of the property upon her death. *Hileman v. Bouslaugh*, 13 Pa. 344, 53 Am. Dec. 474; *Simpson v. Reed*, supra. What are the words of the devise? "I give and devise the said real estate to my only child and daughter, Susan Elizabeth, for and during the term of her natural life, she to have the rents, issues, and profits thereof during said period, and after the death of my said daughter, the said real estate shall descend to and become vested in the children of my said daughter." Upon the death of the daughter her children are to take by descent, not by devise, and that descent must be from her, for the father had devised the property to her; and when he said that, upon her death, it shall "become vested in the children of my said daughter," his undoubted intention was that they should then come into the enjoyment and possession of the property by descent from her. In *Moyer v. Rentschler*, 231 Pa. 620, 81 Atl. 52, the words of the devise were, "After the death of my grandsons, as aforesaid, said property is then to descend or go into the possession of their children;" and it was held that this gave the grandsons a fee.

The touchstone, as unvarying as the needle to the pole, for the application of the rule in *Shelley's Case*, is a clearly expressed intention by a grantor or deviser that the remaindermen are not to take from him, but from his grantee or devisee of a life estate to which he has attached an inheritable succession in his grantee or devisee. With this easily comprehended and constantly kept in mind, the rule in *Shelley's Case* is simple and "ill deserves the epithets" chronically bestowed upon it.

We need go no further in vindication of the judgment below, which is now affirmed.

Mestrezat, J., dissenting:

We have uniformly held, as stated in the recent case of *Wood v. Schoen*, 216 Pa. 425, 428, 66 Atl. 79, that the purpose in construing a will is to ascertain the intention of the testator, so that it may be carried out in the disposition which he has made of his property. Technical rules of construction should only be resorted to and applied in the interpretation of a will when found necessary in determining the meaning of the instrument. In the present case there can be no doubt of the intention of the testator. In fact, the majority opinion states that it is clear that the testator intended to give to his daughter but a life estate in the property. It is, however, held that she takes an estate in fee under the rule in *Shelley's Case*. This rule frequently tends to defeat the intention of the testator, and is enforced only where the language used by him in disposing of his estate must

be construed under the rule. If his intention clearly appears by the language of the whole testament, *Shelley's rule* cannot be applied to a part of the will so as to defeat the manifest intention as disclosed by the whole instrument. The intent of a testator is to be gathered from his entire will rather than from the terms of a particular devise which, regarded alone, might be inconsistent with his testamentary scheme as a whole. *Dean v. Winton*, 150 Pa. 227, 232, 24 Atl. 664.

The dispositive part of the will is as follows: "I give and devise to my said wife, Amelia, my real estate. . . . She to have and to hold the same for and during the term of her natural life. . . . And immediately after the death of my said wife, I give and devise the said real estate to my only child and daughter, Susan Elizabeth, for and during the term of her natural life, . . . and after the death of my said daughter, the said real estate shall descend to and become vested in the children of my said daughter, should she have any, in fee simple, . . . but in no event whatever shall the fee simple to the said real estate vest in my wife, Amelia, or my daughter, Susan Elizabeth, during their lifetime or the lifetime of either of them." As conceded by the majority of the court, it is clear the testator intended to give his daughter but a life estate in the property. Why, then, is it held that he did not give her a life estate, but a fee simple? Because, as stated in the opinion, it is "clear that in giving her that (life) estate, he intended to make her a source of inheritable succession, and she therefore took a fee under the unbending rule in *Shelley's Case* as applied in this state."

But the rule is silent until the intention of the testator is ascertained. *Guthrie's Appeal*, 37 Pa. 9. In the case at bar the testator did not intend to make the daughter the source of inheritable succession. He intended what he said, that in no event should she take a fee simple estate, and hence could not be the source of succession. He intended that the children of the daughter should take the real estate from him, and not from her. It may be conceded that, under our cases, the daughter would have been the source of succession if the testator, in disposing of the property, had used only the words: "After the death of my said daughter, the said real estate shall descend to and become vested in the children of my said daughter." But those were not the only operative words of the devise. Other and emphatic language in the will interpreting and limiting the operation of those words was subsequently added by the testator. The scrivener understood the

judicial construction of the clause just quoted, and that it created a fee in the daughter; and it was to meet that interpretation, and to prevent its consequence, that he added immediately after the clause: "But in no event whatever shall the fee simple to the said real estate vest in my . . . daughter." The two clauses must be read together, and when thus read the language of the devise, under the settled rules of construction, vests in the daughter a life estate in the property and the remainder in fee in her children. "It may be," says Strong, J., in *Sheets' Estate*, 52 Pa. 257, 263, "that, if the first clause of the sentence stood alone, it would give a fee simple to those children in the real estate, and an absolute interest in the personal property. But in the same sentence, as well as in those that follow it, the testator has declared in effect that such was not his intention." Our construction gives effect to every part of the will, and carries out the unquestioned intention of the testator. In this view, the rule in *Shelley's Case* has no application, as the words of the devise do not bring it within the operation of the rule.

There is another well-settled rule which the doctrine of the majority opinion contravenes, and that is that an estate of inheritance in real estate given in a will may be reduced to a lesser estate if the subsequent language of the instrument unequivocally shows that such was the intention of the testator. Mr. Justice Strong, delivering the opinion in *Sheets' Estate*, supra, and quoting from 1 Jarman on Wills, 436, says: "No principle is better settled than that, if a testator in one part of his will give to a person an estate of inheritance of lands or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only, the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might be a fee was intended to be a lesser right." This language is quoted and the principle approved in *Snyder's Appeal*, 95 Pa. 174; *Good v. Fichthorn*, 144 Pa. 287, 27 Am. St. Rep. 630, 22 Atl. 1032; *Krebs's Estate*, 184 Pa. 222, 39 Atl. 66; *Shower's Estate*, 211 Pa. 297, 60 Atl. 789.

The majority opinion construes the words "descend to" and "become vested in" as standing alone, and not controlled or affected by the subsequent positive declaration that they shall not be interpreted so

as to create in the daughter a fee simple estate. This construction ignores the cardinal rule time and again announced in all jurisdictions, that a will shall be construed from its four corners, and that all parts of it shall be made to harmonize if possible. "It is one of the general rules in construing a will," says *Mercur*, Chief Justice, in *Miller's Appeal*, 113 Pa. 459, 467, 6 Atl. 717, "that all the parts thereof are to be construed in relation to each other, so, if possible, as to form one consistent whole. The intent of the testator is to be deduced from the language of the will taken as a whole. The inquiry is not necessarily limited to a consideration of the particular devises, but includes the whole instrument." Here a particular devise is considered alone without regard to its relation to a correlated clause, thereby defeating the manifest intention of the testator and vesting in the daughter a fee simple estate, contrary to the language of the devise and to the testator's expressed declaration.

I would reverse the judgment and enter judgment for the plaintiff on the case stated.

Moschzisker, J., dissenting:

In view of the fact that the testator provides that "in no event whatever shall the fee simple to the said real estate vest in . . . my daughter," it seems to me that this is the same as though he had provided that the words "shall descend to and become vested in" should be construed to mean "shall descend from me and go to." *Donovan v. Woodworth*, 234 Pa. 507, 83 Atl. 425. If the will is thus read, no violence is done to the words used, no departure is made from the rule in *Shelley's Case*, and the clear intent of the testator is given effect. I believe that the will can and should be so read, and for this reason I must dissent from the majority opinion.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

W. J. MASSIE, Plff. in Err.

(— W. Va. —, 78 S. E. 382.)

Indictment — obstructing public road — sufficiency.

1. An indictment, under § 1515a80, Code Supp. 1909, for obstructing a public road,

Headnotes by MILLER, J.

Note. — *Indictment: rejection as surplusage of matter which tends to negative offense otherwise stated.*

In general, as to sufficiency of indictment for statutory offense, see notes to Com. use

which charges that defendant "did knowingly, wilfully, and unlawfully obstruct a certain road and pass way, to wit, the road and pass way leading from the land of S. A. Parker, in Jumping Branch District, adjoining the said W. J. Massie, over the lands of said Massie, where he now resides, in said district, to the public county road leading from Jumping Branch to Flat Top, by then and there unlawfully locking a gate over and across said road and pass way, and continuing the same from said time hitherto, in consequence of said unlawfully locking of said gate by the defendant, W. J. Massie, said road and pass way was rendered impassable for all the time aforesaid, said road and pass way being lawfully owned by and used by said A. S. Parker at the time aforesaid, against the peace and dignity of the state," omitting the words, "and to which road the public has the right of or is not denied the use," employed in § 1515a1, defining a public

road, is bad of demurrer, the road so described being a private road not covered by the statute.

Same — language of statute — superfluous matter — effect.

2. Though, as a general rule, an indictment for a statutory offense is good if the offense be charged in the language of the statute, and the indictment in this case would have been good if it had been confined to the language of said § 1515a80, nevertheless, as the prosecutor undertook to include therein descriptive matter showing the road alleged to have been obstructed to be a private, and not a public, road, thereby effectively negating the offense meant to be covered by the statute, and showing the prosecution not maintainable, the descriptive language cannot be rejected as surplusage on demurrer, and the indictment should be quashed.

(May 6, 1913.)

of Allegheny County v. Weiss, 11 L.R.A. 530, and State v. Bush, 13 L.R.A. 607.

The cases are in accord with *STATE v. MASSIE*, that matter negating an offense otherwise stated cannot be rejected as surplusage. The general rule in regard to rejection of unnecessary matter as surplusage is thus stated in 22 Cyc. 367: "The fact that an indictment contains immaterial and unnecessary matter will not render it bad where such matter may be rejected as surplusage, the rule being that if, after the rejection of surplusage, enough remains to constitute a valid charge of the offense, the indictment will be sustained." But this rule does not apply in cases where the superfluous matter negatives the commission of a crime.

In *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798, 71 S. W. 1017, the court said that among the cases to which its attention had been called, there was no case which went to the extent of saying that even an unnecessary allegation that was so repugnant and inconsistent with the main charge, as to show that no offense had been committed, would be treated as surplusage; that if a state of facts was admitted which showed that the defendant could not be convicted of the offense charged, he ought not to be put upon trial therefor. And the court suggested as an analogy an announcement by the counsel for the state in open court, when the case was called for trial, that some material fact necessary to the conviction of the defendant did not in fact exist, and he would be unable to prove it.

It was accordingly held in *State v. Leonard*, supra, that an indictment was insufficient which charged defendant with having in his possession a forged railroad ticket providing that it should be good when officially dated, and that any alteration rendered it void; and which also charged that the date stamp was "obliterated and erased," and did not state the substitution of a forged official date. The theory was that the recital of the obliteration of the stamp, without the substitution of a forged stamp, 47 L.R.A. (N.S.)

was an admission that the ticket in the possession of the defendant did not have sufficient closeness of resemblance to the genuine ticket to mislead or deceive, one of the elements that gave validity to the genuine ticket being thus obliterated.

In *State v. Weyland*, 126 Mo. App. 723, 105 S. W. 660, it was said that a statute providing that trials will not be disturbed nor judgments arrested on account of "a repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged," would not permit such a contradiction as negatives a crime.

In *State v. McConnell*, 240 Mo. 269, 144 S. W. 830, the court, in holding the information in that case sufficient, said: "We are not unmindful of the rule that an allegation in an information which discloses that no crime has been committed cannot be rejected as surplusage."

Upon the principle that matter in an information descriptive of the particular way in which an offense was committed cannot be rejected as surplusage, and that if such matter shows that no offense was in fact committed, the information should be quashed, it was held in *Raymond v. People*, 9 Ill. App. 344, that an information should be quashed which charged defendant with patronizing a house of ill fame "by being an inmate thereof," where the statute simply punished those who kept or patronized such houses. It was said that at common law the inmates were not indictable, and that the patrons, within the meaning of the statute, were the frequenters, and not the inmates. Therefore the additional allegation in the information disclosed that the offense was not within the statute.

To the same effect is *State v. Mahan*, 2 Ala. 340, holding that where an indictment based upon a statute contains unnecessary matter which shows that it does not fall within the statute, a demurrer should be sustained. In that case the indictment charged the defendant with betting on the result of an election, and also contained al-

ERROR to the Circuit Court for Summers County to review a judgment convicting defendant of unlawfully obstructing a road. Reversed.

The facts are stated in the opinion.

Mr. R. F. Dunlap, for plaintiff in error:

The criminal statute of West Virginia does not apply to the obstruction of a private or individual pass way.

Words in a statute are presumed to be used in their ordinary and popular meaning.

Funkhouser v. Spahr, 102 Va. 306, 46 S. E. 378; Altmeyer v. Caufield, 37 W. Va. 847, 17 S. E. 409.

The word "road" is synonymous with "highway."

Heiple v. East Portland, 13 Or. 97, 8 Pac. 907; Respublica v. Arnold, 3 Yeates,

417; State v. Chesapeake & O. R. Co. 24 W. Va. 811; State v. Dry Fork R. Co. 50 W. Va. 235, 40 S. E. 447.

Indictments must "explicitly charge all the facts and circumstances which constitute the crime, so that the courts can certainly see on the face of the indictment, as a question of law, afterwards, when these facts and circumstances are confessed or proven to be true, that the crime has been committed, and behold upon the record an undoubted warrant for awarding the judgment of the law."

Fitch v. Com. 92 Va. 824, 24 S. E. 272; State v. Whitter, 18 W. Va. 306.

Mr. A. A. Lilly, Attorney General, for the State:

The indictment follows the language of the statute, and is good.

Johnson v. Com. 24 Gratt. 555; Helf-

legations showing that the election had taken place several months previous to the time of making the bet; and the statute applied only to bets on an election not yet consummated. The court said that in general it was sufficient for the indictment to charge the offense in the terms of the statute, but that if the superfluous allegations showed a case not within the statute, the several allegations became repugnant to each other, and the indictment was bad on demurrer:

An indictment is insufficient which shows that the finding of the grand jury was based upon a law which had been repealed. *United States v. Goodwin*, 20 Fed. 237. In this instance the indictment recited that an attorney had received a fee of more than \$10 for his services in aiding an applicant for a pension, and that the same was unlawful "under the laws of the United States, and the provisions contained in the Revised Statutes of the United States in the title pertaining to pensions." It appeared that, while there was a statute making such action illegal, the same was not in the Revised Statutes nor in the title pertaining to pensions; but that the new statute on the matter had repealed the former law under which the indictment was found. The court said that the words, "in the Revised Statutes of the United States in the title pertaining to pensions," could not be rejected as surplusage, because they limited the expression, "laws of the United States," and pointed out particularly the law on which the indictment was found; that if there had been no allegation in the indictment as to the law, it might have been sustained, but as the allegation made it evident that the finding was upon a law which had been repealed, the judgment must be arrested.

The general rule laid down in *STATE v. MASSIE*, and supported by the other cases in this note seems, at first observation, to be out of harmony with that in *State v. Ferrato*, 72 Wash. 112, 129 Pac. 898, where the court said that, "in the absence of a

motion to strike, or make more definite and certain, the parts of the information which are relied on to show that no crime is charged may be rejected as surplusage, and enough will be left under our practice allowing a crime to be charged in the language of the statute to pass the grounds of demurrer." An examination of that case, however, shows that the unnecessary allegations did not, according to the court's construction, negative the commission of the crime, although it was so contended. But the information, after setting forth the commission of larceny according to the statute, also alleged the manner of the larceny, in that it was by a certain game of chance or skill, through which the court held that larceny as defined by the statute might be committed, when accompanied by the fraudulent methods also alleged in the information.

In a number of cases where the surplus allegations did not tend to negative an offense otherwise stated, the court has inferentially given support to the general rule laid down in *STATE v. MASSIE* and the other authorities above cited, by stating, in effect, that unless the unnecessary matter constituted a legal justification or negated the offense charged, it might be rejected as surplusage (excepting also, of course, other conditions not within the scope of this note, for instance, that it is not descriptive of the identity of the offense). Among possible other cases of this class are the following: *State v. Barrett*, 121 Ia. 1058, 46 So. 1016; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Watson v. State*, 111 Ind. 599, 12 N. E. 1008; *State v. Mayberry*, 48 Me. 218; *State v. Kendall*, 38 Neb. 817, 57 N. W. 525 (the court saying that if the unnecessary matter had been of such a nature as to negative the other averments, it was probable the state ought not to have been permitted to strike it out, but that such matter might be stricken out where it did not tend to negative any of the essential averments); *Hase v. State*, 74 Neb. 493, 105 N. W. 253. R. E. H.

rick v. Com. 29 Gratt. 844; State v. Jones, 53 W. Va. 613, 45 S. E. 916; Smith v. Com. 85 Va. 924, 9 S. E. 148; State v. Snow, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777.

It is within the province of the legislature to determine what shall constitute a road for the obstruction of which an indictment will lie.

Elliott, *Roads & Streets*, 2d ed. § 6.

Miller, J., delivered the opinion of the court:

The indictment charges that defendant on the 15th day of February, 1911, in the county of Summers, "did knowingly, wilfully, and unlawfully obstruct a certain road and pass way, to wit, the road and pass way leading from the land of S. A. Parker, in Jumping Branch District, adjoining the said W. J. Massie, over the lands of said Massie, where he now resides, in said district, to the public county road leading from Jumping Branch to Flat Top, by then and there unlawfully locking a gate over and across said road and pass way, and continuing the same from said time hitherto, in consequence of said unlawfully locking of said gate by the defendant, W. J. Massie, said road and pass way was rendered impassable for all the time aforesaid, said road and pass way being lawfully owned by and used by said A. S. Parker at the time aforesaid, against the peace and dignity of the state." The sole question presented is, Does the indictment charge an offense under the statute, or should the demurrer or motion to quash have been sustained?

Prior to chapter 52, Acts 1909, §§ 1515a1 and 1515a80, Code Supp. 1909, we had held in State v. Dry Fork R. Co. 50 W. Va. 235, 40 S. E. 447, and State v. Chesapeake & O. R. Co. 24 W. Va. 809, that "to sustain an indictment for obstructing a public road, it must be shown that the road is a public one, not merely a private road." Section 1515a80 on which the indictment in this case was found, provides: "Any person who shall . . . obstruct or injure any road . . . shall be guilty of a misdemeanor, and upon conviction be fined not less than ten nor more than fifty dollars." Section 1515a1 defines public road as follows: "A public road within the meaning of this chapter, includes any road leading from any other public road over one or more person's land to another person's land, and which has been established for the convenience of one or more residents or landowners or persons or corporation owning or occupying or desiring to use or occupy lands which cannot be reached by any other public road. and to 47 L.R.A.(N.S.)

which road the public has the right of or is not denied the use."

It is to be observed, of course, that § 1515a80 does not use the word "public road;" neither did § 45, chapter 43, Code 1899, involve in State v. Dry Fork R. Co. supra. Nevertheless, that case and prior cases said the road intended was a public road. Moreover, § 1515a1, uses the words, "which cannot be reached by any other public road," implying that the road intended to be protected must itself be a public road.

But the question here is, Does the indictment describe a public road within the meaning of said § 1515a1? We think not. The road there described is charged to be lawfully owned and used by A. S. Parker, the prosecuting witness, and it is not charged, in the language of the statute or in equivalent words, to be a road "to which . . . the public has the right of or is not denied the use." The road described is plainly a private road. If, as the indictment alleges, it is lawfully owned and used by Parker, presumably it is not a road which the public had the "right of or is not denied the use."

It is argued, however, and as the cases cited hold, that when an indictment for a statutory offense follows the language of the statute, it is generally good. Johnson v. Com. 24 Gratt. 555; Helfrich v. Com. 29 Gratt. 844; State v. Jones, 53 W. Va. 613, 45 S. E. 916; Smith v. Com. 85 Va. 924, 9 S. E. 148. And so in this case, if the public prosecutor had confined himself to the language of § 1515a80, charging defendant simply with obstructing a road, sufficiently locating it for the purposes of identification, that, under the authorities, would have been sufficient, and proof that the road was of the kind and description covered by § 1515a1 would have been admissible. State v. Dry Fork R. Co. and State v. Chesapeake & O. R. Co. supra. The word "road" as used in § 45, chapter 43, of the Code, in force at the time of those decisions, was held to mean public road, and not to apply to a private road, but to public roads only, and that the proof upon the trial must be that the road obstructed was in fact a public road.

But it is said the court may properly treat the additional words of description as surplusage, and as the evidence is not brought up, we must assume the proof sustained the indictment. This is a correct proposition if the words may properly be treated as surplusage. State v. Hall, 26 W. Va. 236; State v. Pendergast, 20 W. Va. 672; Boyle v. Com. 14 Gratt. 674, Anno. Mon. Note, 630.

But what words or matter of an indict-

ment may be properly treated as surplusage? In *State v. Hall*, the indictment, otherwise good, was held not to be vitiated because its conclusion contained surplus matter not necessary to be proved. *State v. Pendergast* is not much in point, though cited for the proposition in *State v. Hall*. The point presented here is rather a nice one, but nevertheless vital, and should have proper consideration. Joyce on Indictment, § 263, says: "It is a general rule that an indictment will not be vitiated by matter which is mere surplusage, and that such matter need not be proved." But in § 267 he says: "The principle of law which permits unnecessary and harmless allegations in an indictment to be disregarded as surplusage does not authorize the court to garble the indictment, regardless of its general tenor and scope, so as to entirely change the meaning. And while immaterial averments may be rejected, there cannot be a rejection as surplusage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge, and this includes those allegations which operate by way of description or limitation on that which is material." See also same book, § 421. Mr. Bishop (2 Bishop, New Crim. Proc. § 482) says: "Unnecessary matter of a sort, or so averred as, to negative the offense meant, or otherwise to show the prosecution not maintainable, cannot be rejected as surplusage." In 6 Comyns's Dig. 1825 ed. chapter 29, page 61, it is said: "Surplusage does not hurt." "Yet, if a man, by the allegation of a thing not necessary, shows that he had no cause of action, this, though surplusage, shall hurt; as, in assize, if the plaintiff makes a title which he need not, and the title is not good, the whole shall abate." See also other illustrations there given. In *Com. v. Atwood*, 11 Mass. 93, we find this: "We cannot reject as surplusage what may have been the ground of the conviction." In *State v. Copp*, 15 N. H. 212, it is held that a descriptive averment must be laid as proved, and, as applying to the case then before the court, it is said: "In an indictment for resisting a deputy sheriff in the discharge of his duty, an averment that the sheriff was 'legally appointed and duly qualified' is descriptive, and must be proved." Again, in *State v. Canney*, 19 N. H. 135, the indictment alleged that the prisoner "broke and entered the store of one Merrill," and certain goods "in the shop aforesaid then and there being, then and there in the shop aforesaid, feloniously did steal, take, and carry away." It was held that the words "store" and "shop," as in § 9 of chapter 215, Revised Statutes, were not synonymous; that

the word "shop," being descriptive of the place where the larceny was committed, could not be rejected as surplusage, and that the demurrer was well taken. In *Lewis v. State*, 113 Ind. 59, 14 N. E. 892, the indictment was under § 1750, Rev. Stat. 1881, for the larceny of money. The court held that in such an indictment it was only necessary to describe the money stolen simply as money, but that if a particular description was given, it must be proved substantially as charged, or a verdict of conviction could not be sustained. In *Fulford v. State*, 50 Ga. 593, the court considered the question, "When do averments which might have been omitted become material, or, at least, so enter into the indictment as framed that they cannot be stricken or rejected as surplusage?" The court answered the question in part, as follows: "Starkie on Evidence, volume 3, page 1539, says it is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can ever be rejected; and on page 1542, same volume, makes it more specific by restating the rule thus: 'The position that descriptive averments cannot be rejected extends to all allegations which operate by way of description or limitation of that which is material.' Bishop says: 'If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance. And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other.' 1 Bishop, Crim. Proc. §§ 234, 235. If the prosecutor state the offense with unnecessary particularity, he will be bound by that statement, and must prove it as laid. *United States v. Brown*, 3 McLean, 233, Fed. Cas. No. 14,666; *Rex v. Dowlin*, 5 T. R. 311." The principles of these authorities are covered in the text in 22 Cyc. 370, with citation of other decisions in note.

The principles laid down in the textbooks and court decisions referred to we think render the indictment in this case bad on demurrer, and in our opinion the demurrer and motion to quash should have been sustained. It may be said that the evidence showed the road to be a public road within the definition given in the statute; but assume that it did, was it admissible under the indictment, which clearly described a private road; was there not a fatal variance? We think so. Defendant was entitled on his trial to stand on the indictment and the offense charged

as laid. Having charged the obstruction of a private way or road, clearly the state was not entitled to prove the obstruction of a public road. The record in this case strongly evinces, what is probably the fact, that the controversy involved was one between neighbors over a purely private way or road, in which the public had no interest. Such cases have no place in the criminal courts.

We are of opinion, for the reasons given, to reverse the judgment and to enter such judgment here as we think the Circuit Court should have entered, quashing the indictment and discharging the prisoner from further prosecution.

GEORGIA SUPREME COURT.

AMBURSEN HYDRAULIC CONSTRUCTION COMPANY et al., Pliffs. in Err.,
v.

NORTHERN CONTRACTING COMPANY
et al.

(— Ga. —, 78 S. E. 340.)

Abatement — pending action in other state.

1. The pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in a court of another state.

Same — reversal of parties.

2. This rule applies as well where the second suit is instituted by the defendant in the first suit, as where the plaintiff in both actions is the same person.

Injunction against suit in other state.

3. The rule in equity is analogous to that at law, and the pendency in equity of the same cause of action between the same parties will not authorize an injunction against a subsequent action at law in another state by the defendant against the plaintiff, unless it appears that the prosecution of the second suit would be inequitable and unjust.

Evidence — sufficiency — enjoining suit.

4. The facts of this case examined, and it is held that the court should not have enjoined the prosecution of the common-law action for damages for a breach of contract brought by the defendant against the plaintiff in the first suit in the state of New

York, where the plaintiff had its corporate existence.

(May 13, 1913.)

ERROR to the Superior Court for Rabun County to review a judgment in plaintiffs' favor in an action brought to recover damages for breach of contract. Reversed.

Statement by Evans, P. J.:

The Northern Contracting Company, a corporation of the state of New York, contracted with the Ambursen Hydraulic Construction Company, a corporation of the state of New Jersey, for the construction of a dam across the Tallulah river, in Rabun county, Georgia. The contract was entered into on June 27, 1912, and contained a provision that "the work herein embraced shall be wholly completed at a date not later than March 1, 1913, time being of the essence hereof." It was further covenanted that, if at any time during the work it should appear by report of the chief engineer of the Northern Contracting Company that the forces employed, the quantity or quality of tools, appliances, or workmen provided, or the progress of the work, is not such as to insure the completion of the work within the stipulated time or according to specifications, the Northern Contracting Company may serve a written notice on the Ambursen Company to supply at once such increase of forces, appliances, or tools, and to cause such improvement in the character of the work, so as to conform to specifications, and if, on the expiration of ten days after the service of such notice, the Ambursen Company shall have failed to furnish the Northern Contracting Company's engineer satisfactory evidence of the Ambursen Company's intention, efforts, and ability to immediately furnish the requisite material and workmen and remedy the specified deficiencies, or if it shall appear that the Ambursen Company is insolvent or bankrupt, the Northern Contracting Company was empowered to "enter and take possession of the said work, or any part thereof, with the tools, materials, plant, appliances, houses, machinery, and other appurtenances and supplies thereon or used in connection with the work, and hold the same for security for any and all damage or liability that may arise by reason of the nonfulfilment of this contract within the time herein specified, and furthermore may employ the said tools, materials, plants, machinery, and other appurtenances and such other means as the company or its engineer may deem proper to complete the work, at the expense of the contractor, and

Headnotes by EVANS, P. J.

Note. — For injunction against action or proceeding in foreign jurisdiction, see notes to Thorndike v. Thorndike, 21 L.R.A. 71, and O'Haire v. Burns, 25 L.R.A. (N.S.) 267. And see also later cases, Mason v. Harlow, 33 L.R.A. (N.S.) 234; Jones v. Hughes, 42 L.R.A. (N.S.) 502; and Freich v. Hinkley, 46 L.R.A. (N.S.) 695.
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may deduct the cost of the same from any payments then due or thereafter becoming due to the constructor, and the constructor shall pay the cost thereof to the company; or may declare such contract forfeited as it may elect."

On December 26, 1912, the Northern Contracting Company filed in the superior court of Rabun county its petition against the Ambursen Hydraulic Construction Company, its superintendent and agent in charge of the work of building the dam, who were temporarily residing in Rabun county, alleging that the Ambursen Company, in pursuance of its contract, proceeded to erect a dam across the Tallulah river, when, without excuse or justification, it abandoned its contract and ceased work on December 19, 1912. It was further alleged that, in view of the provisions of the contract that the work was to be completed within a specified time, and, on the happening of the contingencies authorizing them so to do, that the Northern Contracting Company entered upon and took possession of the work, together with the tools, materials, plant, appliances, houses, machinery, and other supplies thereon, and that it purposes holding the same as security as provided in the contract, and to employ the same, together with such other appurtenances and other means as it and its engineer may deem proper, to complete the work according to the contract. That the Ambursen Company not only had its superintendent and agent, but also more than 100 employees, upon the work, and that the Ambursen Company had notified petitioner that they will not permit it or its employees to use their tools, materials, etc., and that petitioner has a force of laborers of its own engaged upon a part of the work, and that, unless the Ambursen Company was restrained from interfering with petitioner in the use of the tools, materials etc., there would be not only danger of violence, but that the tools, materials, etc., would be injured or destroyed. The damage claimed to accrue to petitioner from the defendant's violation and abandonment of its contract was alleged. The prayers of the petition were for judgment for breach of contract; for a decree ascertaining what are the tools, materials, etc., described in the contract, and which petitioner holds as security for damages arising from the defendant's breach of contract; that petitioner be decreed to have a lien in the nature of a mortgage thereon, to secure such sums as they may have for its damages; and that the tools, materials, etc., be sold in satisfaction of any judgment which it may recover; for injunction against interference with the premises or with the tools, materials, etc.;

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for general relief and process. The defendants were served on December 26, 1912, with a copy of the suit, process, and order of court temporarily restraining the defendants as prayed.

On December 31, 1912, the Ambursen Hydraulic Construction Company and Burton Thompson filed in the supreme court of New York, in the county of Nassau, a suit against the Northern Contracting Company and the Georgia Railway & Power Company. In this suit the contract between it and the defendant company was set out, and it was alleged that the defendant had failed to comply with the contract in many particulars, by reason whereof the plaintiff was unable to carry out and perform the terms of the contract on its part. It was further alleged that the dam was being constructed on the property of the Georgia Railway & Power Company, and that this company guaranteed to the plaintiff the punctual performance of all things to be done by, and the payment of all moneys to be paid by, the Northern Contracting Company to it, but that the power company had failed to comply with its guaranty. The seizure of the personal property on the work belonging to the Ambursen Company was alleged, and also that this company had sold to Burton Thompson an undivided one-half interest in it. Wherefore plaintiffs demanded judgment that the defendants be required forthwith to deliver the personal property seized by the Northern Contracting Company to the plaintiffs; that it be decreed that the defendants had violated their contract and had no right to hold this property; that the defendants be restrained from proceeding with the construction of the dam according to the plans prepared by the Ambursen Company and by the use of the plaintiffs' personal property; that an account be taken for damages caused by the detention of the personal property by the defendants; and that plaintiffs have judgment therefor.

On January 11, 1913, the Northern Contracting Company amended its petition against the Ambursen Hydraulic Construction Company. In the amendment it was alleged that, subsequent to the service of their original suit, the foregoing suit in the state of New York was filed in violation of the restraining order previously granted, and that its purpose was to defeat the jurisdiction of the superior court of Rabun county, and to take the custody of the property to the state of New York. A copy of the indemnity contract and bond executed by the Georgia Railway & Power Company was alleged. The prayer was for an injunction against the Ambursen Company from prosecuting its suit in New York.

The Ambursen Hydraulic Construction Company and Burton Thompson also, on December 31, 1912, brought a suit in the supreme court of New York, in the county of Nassau, against the Northern Contracting Company to recover damages for breach of the contract between it and the Ambursen Company, alleging that before the commencement of the action the Ambursen Company had transferred to Burton Thompson an undivided one-half interest in the right of action. Thereafter, on January 16, 1913, the Northern Contracting Company again amended its petition pending in Rabun superior court, alleging the pendency of the action for breach of contract in the supreme court of New York, and that the matters therein involved relate to the same contract and transactions in its original suit; that the maintenance of the suit in the state of New York is a great hardship to the Northern Contracting Company, and subjects it to double litigation relating to the same cause of action, and has the effect of interfering with the jurisdiction of the superior court of Rabun county to fully adjudicate all matters contained in its original petition; that the Northern Contracting Company has no property in the state of New York, so that there is no reason for a judgment against it in that state. The prayer of the amendment was to enjoin the Ambursen Company from prosecuting in the state of New York its action to recover damages for breach of contract. The Ambursen Company filed its answer, and an interlocutory hearing was had on the prayer for a *pendente lite* injunction.

After hearing the evidence, the court rendered a judgment, decreeing: "(1) That the Georgia Railway & Power Company be made party plaintiff in this suit with the Northern Contracting Company. (2) That the plaintiff make a good and solvent bond in the sum of \$100,000 conditioned to pay the defendant, the Ambursen Hydraulic Construction Company, any and all damages it may recover of plaintiff in this suit. (3) It is ordered that, on said bond being made, the restraining order heretofore granted on defendant's motion preserving the status of the property, and restraining the plaintiff from using the same, be and is vacated. (4) It is also ordered and adjudged that the defendant, its employees, agents, and servants are restrained and enjoined from doing any of the acts or things complained of in the original petition, until the further order of this court. (5) It is further ordered and adjudged that on said party plaintiff being made, and bond made as herein required, and until the further order of this court, the defendant Ambursen Construc-

tion Company, its officers, agents, attorneys, and servants are restrained and enjoined from further proceeding with or prosecuting either of the two suits brought in New York, and complained of in the amended pleading of the plaintiff." Exception is taken to so much of this judgment as restrains the Ambursen Hydraulic Construction Company from prosecuting its common-law action pending in the supreme court of New York.

Messrs. Robert C. Alston and Philip H. Alston, for plaintiffs in error:

The fact that a bill in equity is pending in another state concerning the same subject-matter affords no ground for enjoining a suit at law, even though the parties to the action at law are also parties to the suit in equity in the foreign state.

Hadfield v. Bartlett, 66 Wis. 634, 29 N. W. 639; High, Inj. § 49; Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris), 96 U. S. 538, 24 L. ed. 737.

A creditor may pursue his remedies in different jurisdictions.

Caine v. Seattle & N. R. Co. 12 Wash. 596, 41 Pac. 904; Burrows v. Miller, 5 How. Pr. 51; Cook v. Litchfield, 5 Sandf. 330; DeArmond v. Bohn, 12 Ind. 607; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; Bowne v. Joy, 9 Johns. 221; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433.

The court will not grant an injunction against an action at law where that action does not involve the *res* in possession of the court first having jurisdiction.

Green v. Underwood, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 427; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470; Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Freedman v. Howe, 24 How. 450, 16 L. ed. 749; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Borer v. Chapman, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342; Briggs v. Stroud, 58 Fed. 719; First Nat. Bank v. Duel County, 74 Fed. 374.

Proceedings in *rem* and in *personam* do not conflict with each other until satisfaction is obtained, and therefore cannot be pleaded in abatement of each other.

Delahay v. Clement, 4 Ill. 201; Parmelee v. Tennessee & S. Valley R. Co. 13 Lea, 600; The Kalorama, 10 Wall. 204, 19 L. ed. 941; Joslin v. Millsbaugh, 27 Mich. 517;

Bolton v. Landers, 27 Cal. 105; West v. McConnell, 5 La. 424, 25 Am. Dec. 195; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Greer v. Cook, 88 Ark. 93, 113 S. W. 1009, 16 Ann. Cas. 672; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178; Joyce, Inj. § 544B.

If defendant has a good defense at law, injunction will not issue; and the fact that it has not such defense must be shown in the pleadings.

Joyce, Inj. § 600; Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599, 18 Sup. Ct. Rep. 217; Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Whitney v. Wilder, 4 C. C. A. 510, 13 U. S. App. 180, 54 Fed. 554; Waters v. Waters, 124 Ga. 349, 52 So. 425.

Mr. W. A. Charters also for plaintiffs in error.

Messrs. H. H. Dean, King & Spalding, and E. Marvin Underwood, for defendants in error:

Either party may in a proper case be enjoined from prosecuting another suit, although it may be pending in a foreign state or county.

Commercial Acetylene Co. v. Avery Portable Lighting Co. 152 Fed. 642; Cole v. Cunningham, 133 U. S. 107, 118, 33 L. ed. 538, 543, 10 Sup. Ct. Rep. 269; Gage v. Riverside Trust Co. 86 Fed. 984; Nelson v. Lamm, — Tex. Civ. App. —, 147 S. W. 664; Home Ins. Co. v. Howell, 24 N. J. Eq. 238; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153; Cole v. Young, 24 Kan. 435; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Field v. Holbrook, 3 Abb. Pr. 377; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Story, Eq. Jur. § 899; 22 Cyc. 813; Miller v. Gittings, 85 Md. 601, 37 L.R.A. 654, 60 Am. St. Rep. 352, 37 Atl. 372; Erie R. Co. v. Ramsey, 45 N. Y. 637; Guaranty Trust Co. v. Edison United Phonograph Co. 128 App. Div. 591, 112 N. Y. Supp. 929; Edgell v. Clarke, 19 App. Div. 199, 45 N. Y. Supp. 979; Locomobile Co. v. American Bridge Co. 80 App. Div. 44, 80 N. Y. Supp. 288; Webster v. Columbia Nat. L. Ins. Co. 62 Misc. 345, 115 N. Y. Supp. 892, 196 N. Y. 523, 89 N. E. 1114.

The court in Georgia can enjoin the Ambursen Company.

Cunningham v. Butler, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 782.

Evans, P. J., delivered the opinion of the court:

The general rule is well settled that the pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in a court of another 47 L.R.A.(N.S.)

state. Tarver v. Rankin, 3 Ga. 210; Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109. The more common instance of the application of this rule is where the plaintiff in the first suit is also the plaintiff in the second action. The rule, however, is not limited to cases where the plaintiff in both suits is the same person. If each of the parties to a contract claims that the other has breached it, each would be entitled to sue for the breach. The defendant in the first suit could recoup his damages of the plaintiff in that suit; but this right would not forbid his going into another state, where his adversary resides, and there bringing a suit to recover damages for a breach of the contract. If the defendant in such a case can place his claim for damages in a more favorable condition to obtain redress; if his remedy in the state of his adversary party is more comprehensive,—no sound reason appears to us why he may not go into the state of the other party to the contract alleged to have been breached and sue him there. It would be, indeed, anomalous for a resident of one state, claiming an action for breach of contract, to leave his own jurisdiction to sue for its breach, and set up such prior suit in abatement of an action brought by the defendant against him in his own state to recover damages for a breach of the same contract. To grant such a privilege would be to allow a citizen of a state to evade its laws of remedial procedure, by instituting a suit in a foreign jurisdiction. Hence, we conclude that the rule that the pendency of a prior suit in one state cannot be pleaded in abatement of a suit between the same parties for the same cause of action in a court of another state applies as well where the second suit is instituted by the defendant in the first suit, as where the plaintiff in both actions is the same person.

The circumstances that one of the suits may be pending in a court of equity and the other in a court of law does not alter the principle. Upon authority, both English and American, the Supreme Court of the United States has held that the plea of a former suit pending in equity for the same cause in a foreign jurisdiction will not abate in action at law in a domestic tribunal, or authorize an injunction against prosecuting such action. Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 24 L. ed. 737.

We do not contend that, after a bill in equity has been filed, in a proper case the court may not enjoin the parties from litigating the whole or a part of the cause of action in a foreign court; but we do contend that the bare fact that a bill in equity is pending in this state, in the absence of

equitable considerations, furnishes no ground to enjoin a defendant from suing his claim in a foreign court, although the cause of action may arise out of the contract involved in the litigation in the equity court. Before the prosecution of the defendant's suit will be enjoined, the propriety and necessity of confining the litigation to the tribunal in which it is first instituted must appear. The power of a court of equity to restrain persons within its jurisdiction from prosecuting suits in a foreign court rests upon the basis that the person sought to be enjoined is within the jurisdiction of the court, and he can be prevented from doing an inequitable thing. 22 Cyc. 813. The case of *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573, is illustrative of the principle. In that case a Georgia creditor sued out an attachment against his nonresident debtor in this state. He also sued his debtor on the identical demand in the state of New York. His attachment suit was prosecuted to judgment and satisfied by payment. After paying the attachment judgment, the creditor assured the debtor that he would not further press the New York suit; but in violation of such assurance he prosecuted the New York suit to judgment. Thereupon the debtor filed a bill against the Georgia creditor in the county of his residence to enjoin the enforcement of the New York judgment, and this court held that the creditor, a citizen of this state, having voluntarily sued his claim to judgment in the courts of this state, and accepted payment of the judgment, will be enjoined from collecting the claim for the second time in a foreign court.

In the case at bar the Northern Contracting Company contracted with the Ambursen Hydraulic Construction Company to construct a dam across the Tallulah river in Georgia. The former is a corporation of the state of New York, and the latter a corporation of the state of New Jersey. In the progress of the work differences arose between the contracting parties; each charging the other with a breach of the contract. Work was suspended. In order to complete the dam within the stipulated time, the Northern Contracting Company entered upon the work and took possession of the tools, materials, etc., of the Ambursen Company. The contract gave them a right to do this under certain contingencies, and when this right was exercised they were to hold this property as security for any damages sustained by a breach of the contract on the part of the Ambursen Company. In this situation the Northern Contracting Com-

pany brought a suit in Rabun county to recover damages for breach of contract, praying that the covenant granting to it the right to retain the personal property as security be treated as a mortgage and foreclosed as such, and for injunction against interference with their work of construction and the use of defendant's tools, materials, etc. The temporary restraining order was no broader than the prayer for injunction. Afterwards the Ambursen Company, with another, alleged to be an assignee of a half interest in the subject-matter of the litigation, brought two actions in the supreme court of New York in the county of Nassau. The first concerned the personal property which was alleged to have been taken by the Northern Contracting Company, and the latter was a plain action at law for a breach of the contract. No point is made upon the injunction against prosecuting a suit in New York for the recovery of the personal property, but exception is taken to the injunction against prosecuting the action for breach of contract.

Now let us see whether the case presented shows a necessity for confining the litigation for a breach of the contract to the superior court of Rabun county. The fact that the maintenance of the two suits will cause double litigation, inasmuch as they involve the same subject-matter, is insufficient cause for an injunction against prosecuting the common-law action in New York, for the reasons advanced in the first part of this opinion. The suit in New York is for a breach of contract, and in no way interferes with the possession by the Northern Contracting Company of the personal property of the Ambursen Company, alleged to have been taken into possession by the Northern Contracting Company pursuant to the contract. In other words, the prosecution of the breach of contract action in New York does not affect the *res* in possession of the Georgia court. The restraining order did not forbid the institution of the action. It only remains to determine whether it is unfair and against conscience for the Ambursen Company to sue the Northern Contracting Company, at the latter's home, for an alleged breach of contract, instead of submitting to the tribunal of a state selected by the other party.

It is urged as reasons for confining the litigation to the action filed in Rabun county that that suit was first filed; that the court in which it pends is vested with full jurisdiction over the subject-matter; that the contract was to be performed in Georgia; and that the witnesses by whom the breach of contract and other relevant

issues may be established are more accessible to the Georgia court. It is also urged that the Ambursen Company procured the Georgia Railway & Power Company to be made a party and asked for and obtained from the court a protective bond. For all of which reasons it is claimed that it would be unfair and inequitable not to confine all of the litigation to the action first instituted by it. On the other hand, the Ambursen Company replies that it has the legal right to sue the plaintiff in the venue of the latter's domicile; that the matters set up by the Northern Contracting Company against prosecuting an action against it in the state where it was incorporated relate solely to its own convenience; and that equity will not take away from the Ambursen Company its plain legal rights, and require it to litigate in this state for the convenience of the other party, who prefers to submit the controversy to a foreign court rather than try the issues in a court of its legal residence. The Ambursen Company joined the Georgia Railway & Power Company with the Northern Contracting Company in its suit in New York concerning the personal property, but it does not appear from the record that the Georgia Railway & Power Company was made a party to this litigation at the instance of the Ambursen Company, or that it asked that the Northern Contracting Company be required to give bond to indemnify against a recovery of damages. But even if it did, we do not see how its effort to protect its property involved in the litigation should deprive it of its legal right to sue for damages for breach of contract in another state.

The joinder of Burton Thompson as a coplaintiff with the Ambursen Company in the New York suit is no ground for an injunction against the further prosecution of the action, even if the assignment be invalid. If both assignor and assignee are before the court as parties, the defendant is secure of all its rights, and further than they are involved is not concerned with the question of title. *Gilmore v. Bangs*, 55 Ga. 405.

On the whole case, we think that the interlocutory judgment should be so modified as to relieve the Ambursen Hydraulic Construction Company from the injunction against prosecuting its common-law action for breach of contract in the state of New York.

Judgment reversed.

All the Justices concur.
47 L.R.A.(N.S.)

INDIANA SUPREME COURT.

JOHN M. MARKLEY, Appt.,
v.
BRADY MURPHY.

(— Ind. —, 102 N. E. 376.)

Exemptions — evasion — civil liability.

1. One who violates a penal statute forbidding the assigning of a claim against a wage earner out of the state for collection where employer and employee are both found in the state, and the wages are exempt from execution, is liable in a civil action for the damages thereby inflicted upon the wage earner.

Constitutional law — forbidding evasion of execution exemptions — privileges and immunities.

2. No unconstitutional interference with liberty, grant of special privileges or immunities, or deprivation of property without due process of law, is effected by prohibiting the assignment of a claim against a wage earner out of the state, to evade his constitutional exemptions from execution.

(June 24, 1913.)

Note. — *A debtor's right of action against his creditor for collecting debt in another jurisdiction in evasion of exemption laws of their domicile.*

This note is supplementary to note to *Stewart v. Thomson*, 36 L.R.A. 582.

As to injunction against suit in another state to evade local exemption laws, see note to *Wierse v. Thomas*, 15 L.R.A.(N.S.) 1008. See also, in connection with this subject, notes to *Illinois C. R. Co. v. Smith*, 19 L.R.A. 577; *Thorndike v. Thorndike*, 21 L.R.A. 71; and *Goodwin v. Claytor*, 67 L.R.A. 209.

As to enforcing exemption laws of another state, see note to *National Tube Co. v. Smith*, 1 L.R.A.(N.S.) 195.

As to recovery of judgment for exempt claim pending garnishment proceedings in another state, see note to *Becker v. Illinois C. R. Co.* 35 L.R.A.(N.S.) 1154.

Right of action.

The Ohio statute affirmatively giving the debtor a right of action against a creditor for the transfer or assignment of a claim to evade the state exemption law was held valid in *Hinds v. Sells*, 63 Ohio St. 328, 58 N. E. 800, as against the contention that it was unconstitutional. This case is discussed in *MARKLEY v. MURPHY*.

So the Pennsylvania act prohibiting the assignment of a claim to a person without the state for the purpose of collection by attachment to evade the exemption laws, and giving the debtor a right of action for debt against the person so assigning the claim, has been held not unconstitutional. *Sweeny v. Hunter*, 145 Pa. 363, 14 L.R.A. 594, 22 Atl. 653.

APPEAL by defendant from a judgment of the Superior Court for Madison County in plaintiff's favor in an action brought to recover damages resulting from alleged oppressive garnishment, due to the assignment of a claim against an employee to a nonresident for collection. Affirmed.

The facts are stated in the opinion.

Mr. Herman F. Wilkie and Henrietta Wilkie for appellant.

Messrs. Campbell & Kidwell for appellee.

Morris, J., delivered the opinion of the court:

Action by appellee, against appellant, for damages resulting from alleged oppressive garnishment.

And in *MARKLEY v. MURPHY*, the debtor, because peculiarly injured thereby, was held entitled to a right of action against a creditor who had assigned a claim to evade the exemption laws, in violation of the statute, although the statute did not expressly confer such a right.

This case, in connection with *Kestler v. Kern*, 2 Ind. App. 488, 28 N. W. 726, in effect overrules *Uppinghouse v. Mundel*, 103 Ind. 238, 2 N. E. 719, discussed in note in 36 L.R.A. 582. In the *Kestler* Case the court suggests a distinction between the penal law enacted for the protection of a pre-existing right and a penal law where the right did not otherwise exist, and that the case in question belonged to the forum; observing that this phase of the question was not presented in the *Uppinghouse* Case.

When statute violated.

A creditor who takes a claim out of the state of Indiana, with intent to deprive a debtor of the benefit of exemption laws, "sends" the claim out of the state within the meaning of the statute making such act an offense. *State v. Dittmar*, 120 Ind. 54, 22 N. E. 88; same holding on later appeal, 120 Ind. 388, 22 N. E. 299 (criminal prosecution against creditor).

—absolute sale of claim.

It is held in *Goldborough v. Bolenbaugh*, 3 Ohio C. C. 583, 2 Ohio C. D. 337, that a statute prescribing a penalty (for assigning or transferring a debt against a resident of Ohio for the purpose of collection by attachment, or sending out of the state a claim for debt against such person for the aforesaid purpose with intent to deprive a resident of the state of the right to have his personal earnings exempt from application to the payments of his debts, and giving the person whose personal earnings are attached a right of action against the person sending the claim, or against the one to whom it is sent, or both) does not prohibit a resident of the state from selling to a nonresident, a claim for debt against another resident of the state, even 47 L.R.A. (N.S.)

The complaint avers that plaintiff was indebted to defendant on account, for goods sold, in a certain amount; that plaintiff, defendant, and the American Sheet & Tin Plate Company, a corporation, were within the jurisdiction and subject to the process of the courts of Madison county; that the corporation was operating a manufacturing plant in West Virginia, but at the same time was operating one in Madison county, and had office and officers and agents there; that plaintiff was a bona fide resident householder of Indiana, residing in the city of Elwood, and defendant was a bona fide resident of the same city; that plaintiff owned less than \$300 worth of property, including wages due him from the corporation, and was unable to pay the debt

though the sale is for purposes of collection, and with knowledge that it would be collected by attachment. In construing the above statute, the court said: "Three limitations or prohibitions appear in this statute, viz.: assigning, transferring, sending; and any act of a creditor coming within these prohibitions is forbidden. It appears from the evidence in this case that the defendant sold his claim against the plaintiff to a resident of West Virginia, and that soon afterwards the vendee collected the same by attachment. It is fairly to be inferred from the evidence that the defendant knew that the claim would be collected by attachment, but he says he had no interest in it. It may have been the intention of the legislature to forbid the sale of claims against a resident of Ohio to a nonresident where the vendor knew that the claim was to be collected by process of garnishment, but it seems to us that if they did, they have failed to incorporate any such provision into the statute. Construing this statute strictly, as we must, a transfer, assignment, or sending for the purpose of collection is quite different from a sale with knowledge that it will be so collected by the vendee. For myself, I think that this case illustrates how as great a wrong may be perpetrated upon the debtor as any forbidden by the statute, by simply avoiding the letter of the statute. The remedy, however, for a case of this kind, lies in an appeal to the legislature, and not to the courts."

—right of nonresident.

Where a creditor residing in Nebraska brought suit in that state against a resident of Kansas, to recover a debt, and garnisheed a railroad company for wages due debtor, it was held in *McCormack v. Tinch*, 77 Neb. 857, 110 N. W. 547, an action by the debtor against such creditor, based on the Nebraska act providing for the protection of the earnings of employees of corporations, firms, or individuals engaged in interstate business, and which made it unlawful to sell or dispose of a

owing to defendant, and had the right to claim such property as exempt from execution against defendant's claim; that plaintiff was a laborer in the employ of the corporation at Elwood, and the latter was indebted to him in a certain sum for wages; that defendant, in violation of § 2669, Burns's Anno. Stat. 1908, for the purpose of depriving plaintiff of his right to claim his wages exempt from execution, assigned and transferred his claim against plaintiff to one Smith, of West Virginia, for the purpose of having the claim sued on and collected in West Virginia, by proceedings in attachment and garnishment; that such proceedings were had in a West Virginia court; that the corporation was compelled to and did pay defendant's claim from the

wages due plaintiff from the corporation. Appellant contends that the court erred in overruling his demurrer to the complaint because, as asserted, the law recognizes no cause of action, on the facts averred, and because the statute (§ 2669, Burns's Anno. Stat. 1908) is void, by reason of violating the provisions of §§ 1 and 23, art. 1, of the Constitution of Indiana, and the 14th Amendment of the Federal Constitution.

The statute in question reads as follows: "Whoever, either directly or indirectly, assigns or transfers any claim for debt against a citizen of Indiana, for the purpose of having the same collected by proceedings in attachment, garnishment, or other process, out of the wages or personal earnings of the debtors, in courts outside of the state of

claim against a debtor of the state for the purpose of evading the exemption laws, that a nonresident of Nebraska was not entitled to the benefit of and could not maintain an action based on such act. The court observed that it was apparent from the title of the act that it was not intended to refer to the residence of the employees. "This title contemplates that the residence of the employer may be in this state or in a sister state, the qualification as to him being that he shall be engaged in interstate commerce and be subject to garnishment in some sister state. Again, it could not have been the intention of the legislature to prohibit a resident of this state from sending the claim held by him against a resident of an adjoining state, the employee of a railway operated through both states, to be sued there, and the rights of the parties determined by the laws of the state where the debtor resides."

Intent.

It seems that such a statute is not violated if a claim is transferred or assigned to a person outside of the state by a creditor with no intention of evading the law of exemption; and the question of the existence or nonexistence of such intention or purpose is one of fact, to be determined by the jury under appropriate instructions. *Karnes v. Dovey*, 53 Neb. 725, 74 N. W. 311. (Action by debtor against creditor to recover damages for assignment of claim and garnishment of exempt wages. Judgment for defendant affirmed.)

And a judgment for damages because of an assignment of a cause of action to a resident of another state for the purpose of evading the exemption laws of Nebraska cannot be sustained when, on the trial, there was no proof of the controverted fact that the right of exemption existed. *Stull v. Miller*, 55 Neb. 30, 75 N. E. 239.

So, in *Drury v. High*, 8 Ohio Dec. Report, 523, it is held that the assignment of a judgment by a judgment creditor to a resident of another state, who thereupon garnished wages due debtor, was not a 47 L.R.A.(N.S.)

violation of the Ohio statute prohibiting the assignment of the debt to evade the exemption laws, where it was not shown that the claim was sent from the state for the purpose of collection and the avoidance of the exemption laws.

So, where a Nebraska bank delivered a note to a Chicago collection agency for collection, and the agency, without authority and without the bank's knowledge, commenced suit against debtor in Illinois to collect the claim, and made a pretense, at least, of garnishing a railroad company by which debtor was employed in Nebraska, it was held in *Satterlee v. First Nat. Bank*, 78 Neb. 691, 111 N. E. 591, an action by debtor against the bank, founded upon the statute making it unlawful to sell or assign a claim in evasion of the exemption laws, that the institution of a suit in another state against the employee of a railroad company is also prima facie evidence of evasion of the exemption laws of Nebraska; and that the owner of a note already in judgment, who places it in the hands of a collection agency with a distinct agreement that no suit is to be brought thereon, is not bound by the unauthorized action of the agent in bringing suit.

In *Frieden v. Conkling*, 4 Neb. (Unof.) 814, 96 N. W. 615, it was held that a finding of an intent to evade the exemption law was justified by evidence showing that an assignment of a judgment was not bona fide, but was colorable, and made for the purpose of evading the Nebraska exemption laws, notwithstanding the creditor disclaimed any intention to evade the exemption laws, and insisted on the good faith of the transaction, so far as he was concerned.

Exemption of judgment recovered under the statute.

In *Steel v. McKerrihan*, 172 Pa. 280, 33 Atl. 570, a creditor residing in Pennsylvania sent a claim to West Virginia and collected by garnishment wages due the debtor from a railroad company which employed him in Pennsylvania. The debtor then,

Indiana, when the creditor, debtor, and person or corporation owing the money intended to be reached by the proceedings in attachment are each and all within the jurisdiction of the courts of the state of Indiana, shall, on conviction [thereof], be fined in any sum not less than \$20 nor more than \$50." It is a substantial copy of § 2163, Rev. Stat. 1881.

It is claimed that there is no cause of action here, because the violation of a criminal act is a public wrong only, and cannot result in the creation of a private, actionable, wrong.

In *Kestler v. Kern*, 2 Ind. App. 488, 28 N. E. 726, the facts alleged were similar to those here averred, and the same questions (aside from the constitutional one), relating to the sufficiency of the complaint, were there determined as are here presented. In a learned opinion by Crumpacker, J., the complaint was held sufficient. The following paragraph from Cooley on Torts was quoted with approval: "When the act or neglect which constitutes a public wrong is specially and peculiarly injurious to an individual, and obstructs him in the enjoyment of some right which the law has undertaken to assure, the offender may be

subject to a double liability; he may be punished by the state, and he may also be compelled to remunerate the individual."

In *Kestler v. Kern*, supra, it was contended, as here, that the doctrine declared in *Uppinghouse v. Mundel*, 103 Ind. 238, 2 N. E. 719, barred any right of action on a state of facts as there averred, but it was held (Reinhard, J.,) dissenting that the latter case, properly distinguished, did not prevent a recovery on the facts alleged.

In *Baltimore & O. S. W. R. Co. v. Adams* (1903) 159 Ind. 688, 60 L.R.A. 396, 66 N. E. 43, it was held that the garnishee defendant was not liable to the original debtor. This court said: "The original creditor violated our statutes in sending the claim without the state for the purpose of garnishment. . . . A wrong has been done the appellee, but its consequences ought not to be visited upon the appellant in the absence of any showing that it was a party to, or responsible for, such wrong." While in the above opinion, neither the case of *Uppinghouse v. Mundel*, supra, nor *Kestler v. Kern*, supra, is discussed, it is evident that this court did recognize the existence of a wrong done the plaintiff, and for which an action might have been main-

under "an act to secure to laborers within this commonwealth, and to prevent assignment of claims for the purpose of securing their collection against laborers outside of this commonwealth," recovered a judgment against the creditor for the amount of the wages. The creditor held a note against the debtor which he transferred to his wife, who entered judgment upon it in Pennsylvania, and issued an attachment execution for the purpose of appropriating the claim for which judgment was recovered against her husband. It was held that the protection afforded to the laborer by the act could not be taken from him in this manner, and that the attachment should be quashed. The court said: "It seems to us, upon due consideration of the case, that the judgment recovered in the action given by the statute represents the wages collected in violation of it, and that the creditor holds the wages so collected subject to the exemption applicable to them in the hands of his debtor's employer." In this connection see note to *Caldwell v. Ryan*, 16 L.R.A.(N.S.) 494, as to the right to set off one judgment against another which is exempt, or is based on a wrongful taking of exempt property.

Recognition of statute in another state.

In *Stephens v. Brown*, 20 W. Va. 450, the court held that a citizen of Ohio might garnish a domestic corporation of West Virginia in respect of wages due to another citizen of Ohio, notwithstanding that, in sending the claim into West Virginia, he

violated the Ohio statute. The court said: "The exemption laws of no two states are precisely the same. Those in the state of Ohio differ greatly from those in this state. Our statutes are a part of the administration machinery of the state for carrying out the purposes and policy of its government in the various departments, and are essentially local and adapted to our peculiar condition and the best interests of our people. If, therefore, we were to undertake to enforce the exemption laws of the state of Ohio, the same reason would require the enforcement of such laws of every other state and country; this would not only be injurious to the interest of our own citizens, but it would create such confusion and diversity that it would be impossible for the courts to administer them, or the people to have any just idea of their rights under them. I am therefore of opinion that the plaintiff was entitled, as a matter of right, to institute and prosecute this action in the municipal court of Wheeling, and that the defendant can neither as a right nor by comity obtain the protection of the said statutes of the state of Ohio in the courts of this state."

Generally as to the enforcement of exemption laws of other states, see note in 1 L.R.A.(N.S.) 195. And generally as to garnishment in one state of an indebtedness due to a principal defendant, resident in another state, see notes in 67 L.R.A. 209, 3 L.R.A.(N.S.) 608, and 20 L.R.A.(N.S.) 264.

J. D. C.

tained against the railway company had the latter participated with the creditors in the violation of the statute, resulting in his loss of a right to exemption, guaranteed him by the Constitution and statutes. In our opinion the case of *Kestler v. Kern*, supra, declares a correct and a just rule. *O'Connor v. Walter*, 37 Neb. 267, 23 L.R.A. 650, 40 Am. St. Rep. 486, 55 N. W. 867; *Stark v. Bare*, 39 Kan. 100, 7 Am. St. Rep. 537, 17 Pac. 826; 18 Cyc. 1485; *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616.

Is our statute constitutional?

In Ohio, with constitutional provisions substantially like our own, a statute similar to ours, with an added provision affirmatively giving the debtor a right of action against the original creditor, was assailed as in conflict with the Constitution of that state. The court said: "The purpose of this section is to protect our citizens in their rights relating to homesteads and exemptions, and as the statutes on that subject are constitutional, any statute which is reasonably in aid of the right must also be constitutional, unless it should conflict with some other part of the Constitution. We find no such conflict. The section in question only prevents our own citizens from resorting to a sharp trick or practice in another state to defeat the provisions of our exemption laws; and the general assembly has full power to so protect our citizens." *Hinds v. Sells*, 63 Ohio St. 328, 59 N. E. 800.

Section 22, art. 1, of our Constitution, when adopted, enjoined the duty of the legislature to provide, by wholesome laws, for exempting from seizure or sale for the payment of debts a reasonable amount of the debtor's property. The legislature has executed the constitutional mandate by appropriate enactment. Section 745, *Burns's Anno. Stat.* 1908. Section 2669, *Burns's Anno. Stat.* 1908, aims at the preservation of the debtor's constitutional right, by further legislation intended to circumvent those who by "sharp trick" would subvert the humane provisions of our exemption laws. The statute is not violative of the constitutional provisions above named, and, as against the objections urged by appellant, the complaint states a cause of action.

It is claimed that the court erred in overruling the motion for a new trial, because, as asserted, the evidence does not support the decision of the trial court. The evidence is sufficient.

There is no error. Judgment affirmed.
47 L.R.A.(N.S.)

NEW YORK COURT OF APPEALS.

FANNIE E. WILLSON, Appt.,
v.

FAXON, WILLIAMS, & FAXON, Respnt.

(208 N. Y. 108, 101 N. E. 799.)

Druggists — sale of patent medicines — liability for purity.

1. A druggist who holds himself out as the actual manufacturer of a patent medicine put up by a wholesaler with the retailer's name on the package is not entitled to the benefit of an exception in a statute making druggists responsible for the quality of medicine sold by them, except those sold in original packages of the manufacturer, and those articles known as patent or proprietary medicines.

Same — negligence — sufficiency of evidence.

2. A druggist may be found negligent in selling a patent medicine bought in the market, as a harmless preparation put up by himself, when it consists of a dangerous poison, if his only knowledge as to its contents was a statement by the manufacturer that it was similar to a well-known article, the contents of which he was ignorant.

(Collin, J., dissents.)

(April 4, 1913.)

Note. — Duty of druggist or apothecary in the sale or compounding of medicines.

This note is supplementary to that on the same subject appended to *Tremblay v. Kimball*, 29 L.R.A.(N.S.) 900.

As to whether the fact that a drug clerk is a licensed pharmacist relieves the employer from liability for negligence or lack of skill, see note to *Tombari v. Connors*, 39 L.R.A.(N.S.) 274.

As to liability of druggist for injury to stranger from drug or poison sold by him, see notes to *Watson v. Augusta Brewing Co.* 1 L.R.A.(N.S.) 1178, and *McKibbin v. Bax*, 13 L.R.A.(N.S.) 646.

In *Coughlin v. Bradbury*, 109 Me. 571, 85 Atl. 294, the court said that the fact that the defendant, who filled the prescription, was not a registered druggist, was immaterial; that if he was negligent, whether registered or not, he would be liable for damages, and *vice versa*.

In *Coughlin v. Bradbury*, supra, defendant who so filled a prescription calling for 5 grains pnenacetin to be mixed with other ingredients and put up in the form of five powders containing 1 grain each of phenacetin, that the drug was not evenly distributed, and a child taking the same was injured, was held liable for damages to the mother of the child, although, in filling the prescription, the defendant had pursued the usual course in regard to prescriptions of this kind, namely, weighing the required

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Erie County in defendant's favor in an action brought to recover damages for injuries caused by a proprietary medicine sold by defendant to plaintiff. Reversed.

The facts are stated in the opinion.

Mr. Charles Newton, for appellant:

Defendant was negligent in selling tablets containing calomel for cascara, and representing them to be purely vegetable.

State Bd. of Pharmacy v. Matthews, 197 N. Y. 353, 26 L.R.A.(N.S.) 1013, 90 N. E. 966; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Bruckel v. Milhau's Son, 116 App. Div. 832, 102 N. Y. Supp. 395; Torgeson v. Schultz, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 11 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407.

For this negligence defendant is liable to plaintiff.

number of grains of each ingredient, placing them in a mortar, and stirring them for "from a minute and a half to two minutes," and dividing the mixture into equal parts. The court said that it was incumbent on the defendant either to mix the ingredients so thoroughly that each powder would contain substantially the intended quantity, or to compound each powder separately by weight, which it was practicable to do.

A druggist cannot escape liability for the sale of wood alcohol without a poison label, on the ground that the applicant, intending to use it as a beverage, fraudulently applied for alcohol to be used as a medicine. Campbell v. Brown, 85 Kan. 527, 117 Pac. 1010.

Wood alcohol is included in the phrase "substance or liquid usually denominated poisonous," in a crimes act making it a misdemeanor to sell arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous, without being labeled as a poison. Ibid.

It was also held in Campbell v. Brown, supra, that the sale of wood alcohol without a label as a poison, which was a misdemeanor under the crimes act, was not legalized by the pharmacy act, making it unlawful for druggists to retail certain classes of articles without being labeled as poison.

Kelly v. Ross, 165 Mo. App. 475, 148 S. W. 1000, was an action against a druggist for damages for injuries caused by an alleged "deadly poisonous liquid" sold by the defendant in place of a certain "hand lotion" for which the plaintiff had applied, but the discussion in the case is confined chiefly to the question of damages and of the sufficiency of the evidence to sustain the verdict.

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Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407; Torgeson v. Schultz, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; O'Neill v. James, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 Ann. Cas. 177, 17 Am. Neg. Rep. 561; 1 Thomp. Neg. § 8; Blood-Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Langridge v. Levy, 2 Mees. & W. 519, 6 L. J. Exch. N. S. 137; Allan v. State S. Co. 132 N. Y. 91, 15 L.R.A. 166, 28 Am. St. Rep. 556, 30 N. E. 482; Garvey v. Namn, 136 App. Div. 815, 121 N. Y. Supp. 442.

This case does not come within the exceptions from liability for the quality of proprietary remedies contained in the public health law.

Messrs. Rebadow & Ladd, for respondent:

The proof wholly fails to establish negligence.

Taking the most favorable view of plaintiff's case, and conceding, for the sake of

In Moran v. Dake Drug Co. 134 N. Y. Supp. 995, the plaintiff sought to recover damages for the negligence of defendant's clerk in selling bichloride of mercury tablets, instead of triple bromide tablets. The defense was that the plaintiff had called for the former, and not the latter drug. It was held that, although the plaintiff was alone in his statement as to what he ordered, and his testimony was disputed by the clerk the question of negligence was for the jury, and the verdict for plaintiff should be sustained.

It was also held in Moran v. Dake Drug Co. supra, that the question of plaintiff's contributory negligence in failing to read what was written on the package by the clerk was for the jury, the court saying that if one calls for a particular remedy at a drug store, and fails to read the writing which the clerk puts upon the package, it could not be said, as a matter of law, that he was guilty of contributory negligence.

In Goodwin v. Rowe, — Or. —, 135 Pac. 171, the proprietors of a drug store attempted to defeat liability for injury resulting from the application of an excessively strong solution, on the ground that, contrary to their directions, their clerk (who was unregistered) had applied the same solely under the direction and advice of a physician who was present in the store and had been consulted by the plaintiff. A statute provided that drugs should be sold by, and drug stores be in charge of, only registered pharmacists. The evidence was conflicting as to whether the injury was caused by the physician's erroneous directions, or by the clerk's failure properly to fill the prescription. It was held that the

the argument, that the impossible happened, plaintiff proved merely the happening of an accident, which is not enough to sustain an action in negligence.

Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; *Gould v. Slater Woolen Co.* 147 Mass. 315, 17 N. E. 531; *Piehl v. Albany R. Co.* 30 App. Div. 166, 51 N. Y. Supp. 755; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599, 5 Am. Neg. Cas. 268; *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 30 N. E. 750; *Ship v. Fridenberg*, 132 App. Div. 782, 117 N. Y. Supp. 599; *Paul v. Consolidated Fireworks Co.* 133 App. Div. 310, 117 N. Y. Supp. 698.

Defendant could not be charged with negligence, for the reason that the public health law exempted the defendant from responsibility.

Willard Bartlett, J., delivered the opinion of the court:

This case has been tried twice. Upon the first trial the plaintiff was successful, but the judgment entered upon the verdict in her favor was reversed by the appellate division, and upon the second trial, the evidence being the same, a verdict was di-

rected in favor of the defendant. From the judgment upon that verdict the plaintiff now appeals.

The defendant is a domestic corporation engaged in selling drugs and medicines in the city of Buffalo. The plaintiff purchased at its store a box of medicinal pills labeled as follows:

"Price 25 cents

"Kascara

"Kathartics

"Cure Constipation

"Faxon, Williams, and Faxon, Mfg.

"Druggists, Buffalo, N. Y.

On the reverse side:

"DIRECTIONS.

"KASCARA KATHARTICS can be taken at any time. As a laxative EAT one tablet. For constipation, a tablet at bed time, and one before breakfast, will prove satisfactory. In obstinate cases continue this treatment until cured. Children, one-quarter to one-half tablet, according to age."

On one side of the box:

"Stimulate the Liver,

"Invigorate the Bowels."

On the reverse side:

"Purely vegetable,

"Pleasantly effective."

verdict for the plaintiff might be sustained either on the ground that the defendants were liable at common law for the negligence of the clerk in failing properly to fill the prescription, or that they were liable for damages resulting from their failure to comply with the statute requiring sale of drugs only by registered pharmacists. The court said that any violation of the statute from which an injury proceeded was conclusive evidence of negligence.

In *Butterfield v. Snellenburg*, 231 Pa. 88, 79 Atl. 980, an action for damages against the proprietors of a drug store on the ground that a clerk had "negligently prepared and compounded a dangerous, poisonous, corrosive, and burning liquid," instead of a harmless prescription of "aromatic spirits of ammonia," it was held that there was no variance between the allegations and the proof, and that the plaintiff could recover, although there was no direct evidence that the liquid sold was compounded or other ingredients than those ordered, but evidence only of a failure properly to dilute the drug ordered.

It should be noted that in *Butterfield v. Snellenburg*, supra, the husband, as well as the wife, who was injured, recovered substantial damages from the druggist.

Anderson v. Meyer Bros. Drug Co. 149 Mo. App. 554, 130 S. W. 829, was an action against a wholesale drug company for damages for injuries sustained by the alleged negligence of the defendant in permitting poisonous matter to become mixed with a harmless drug and carelessly sold to the retailer as pure and free from poison, but 47 L.R.A. (N.S.)

the decision against the plaintiff is based upon the fact that she had previously accepted satisfaction of her claim and signed a release of the defendant, the principal question discussed being as to whether the release was fraudulently obtained.

In *Darks v. Scudder-Gale Grocer Co.* 146 Mo. App. 246, 130 S. W. 430, the court, after reviewing a number of authorities, said: "It will also be seen that in some cases the court is justified in declaring the act to be negligence as a matter of law. If a manufacturer or dealer in drugs puts a label upon the article indicating that it is harmless, and the label is false and the article poisonous, then, as a matter of law, he is liable, as proof of the fact is proof of the negligence, and it is not necessary to submit to the jury the question of whether such an act is negligence." The action in that case, however, was against a wholesale grocery company for selling wood alcohol instead of ginger extract.

As to liability of chemists for injuries produced by the application of a drug manufactured by them and applied by a veterinary surgeon, see the case of *Young v. Parke, D. & Co.* 49 Pa. Super. Ct. 29, holding that the chemists were not liable for an experimental intravenous application of the drug made by the surgeon, although the chemist's catalogue, which showed the ingredients and stated that the drug was intended chiefly for hypodermic use, also contained a reference to a magazine article by another veterinary surgeon, who claimed successfully to have used the same in the manner adopted in this case.

R. E. H.

The plaintiff testified, and in this she was corroborated by her husband, that the defendant's clerk from whom she purchased the box of tablets informed her that the preparation was the same as cascara sagrada only in tablet form. She made use of the tablets, taking them as she had been accustomed to take cascara sagrada for the purpose of a laxative; but the consequences were very different from those produced by that medicine. The plaintiff developed a case of mercurial salivation, and an examination of the tablets proved that each tablet contained one fifth of a grain of calomel combined with senna and podophyllin.

In behalf of the defendant it was proved that the tablets known as Kascara Kathartics were manufactured by Billings, Clapp, & Company, wholesale druggists of Boston, Massachusetts, well known to the trade as reputable manufacturers of high-grade patent and proprietary medicines; that the defendant purchased the tablets in question from these manufacturers, the goods being put up by them at the manufactory with the special label of the defendant printed thereon; and that Kascara Kathartics had been upon the market for about ten years. The quantities sold ranged from 500 to 1,000 pounds a year. From March, 1903, up to the time of the first trial in May, 1909, the defendant had sold about 900 boxes without complaint from any of its customers. It was stipulated that Kascara Kathartics was a patent or proprietary medicine, and it appeared that it was not the custom of retail druggists to analyze proprietary medicines.

The appellate division held that the proof utterly failed to establish the negligence of the defendant, because it did not know that the tablets sold to the plaintiff were dangerous, and, having purchased them of a long established manufacturing concern of excellent reputation, it was justified in placing reliance upon its vendor. The appellate division also seems to have been of the opinion that the defendant was protected by the following provision of the public health law (Consol. Laws 1909, chap. 45, § 235, subdiv. 2): "Every proprietor of a wholesale or retail drug store, pharmacy, or other place where drugs, medicines, or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals, or medicines sold or dispensed by him except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines."

Where the contents of a medicine are concealed from the public generally, and the manufacturer knows the contents and sells the medicine recommending its use for in-

dicated maladies and prescribing the mode in which it shall be taken, and an injury is thereby caused to a purchaser thereof, the manufacturer is liable to such purchaser for the injury which he has suffered. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118. In the case cited it was said that the purchaser "has a right to rely upon the statement and recommendation of the proprietor printed and published to the world; and if, thus relying, he takes the medicine and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained." The liability under these circumstances grows out of the misleading concealment of a material fact, as of the composition of a medicine, which the manufacturer knows or ought to know, and the accompanying representation to the purchaser that he may use the preparation with safety.

In the case at bar, however, we have to deal with a sale made not by the actual manufacturer, but by a corporation of retail druggists which purchased the medicine in large lots from the actual manufacturer. It being agreed that the compound sold was a patent or proprietary medicine, the corporation seeks to shield itself behind the exception in subdivision 2 of § 235 (formerly § 197) of the public health law, already quoted, which, after declaring that every retail druggist shall be held responsible for the quality and strength of the drugs which he sells, excepts "those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines." Is the benefit of this exception available to a retail druggist who holds himself out to a purchaser as the actual manufacturer of the medicine sold? I think not.

It is plain that if the sale had been made by the manufacturers themselves, Billings, Clapp, & Company, of Boston, the fact that Kascara Kathartics were comprehended within the class of patent or proprietary medicines would not in any wise have absolved Billings, Clapp & Company from responsibility for the strength and quality, which, of course, includes the character of the compound. I think that, when the defendant represented to the plaintiff by means of the statement contained in the label on the box, that Faxon, Williams, & Faxon were the manufacturers of the preparation, it rendered itself just as liable to the purchaser as the actual manufacturers would have been if the purchase had been made from them. In other words, the defendant, by reason of this representation, became responsible to the plaintiff for the strength

and quality of the preparation, notwithstanding its patented or proprietary character; and if the compound contained an injurious substance, instead of being purely vegetable as the label declared, the defendant became liable in law for the injury suffered by the purchaser in consequence of ignorantly taking the concealed poison.

The case is not all like *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, or *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956, where the suits were by third parties against the original manufacturer. Here the action is by a purchaser against the immediate vendor, and it is with the duties and obligations of such vendor that we are concerned. The basis of the action is the sale of a poison to a person who called for a harmless drug; and the law is well settled that in such a case evidence of negligence is necessary in order to make out a cause of action. Mere proof of the mistake is not enough in and of itself to charge the vendor with liability. *Allan v. State*, S. S. Co. 132 N. Y. 91, 15 L.R.A. 166, 28 Am. St. Rep. 556, 30 N. E. 482; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392. The negligence which must be established to render a druggist liable in such a case as this is measured by his duty; and, while this is only to exercise ordinary care, the phrase "ordinary care" in reference to the business of a druggist must be held to signify "the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicines." *Tremblay v. Kimball*, 107 Me. 53, 29 L.R.A.(N.S.) 900, Ann. Cas. 1912 C, 1215, 77 Atl. 405.

Within this rule, however, I think there was sufficient evidence of negligence to take the case to the jury. The defendant, although representing itself to be the manufacturer, and therefore presumably acquainted with all the ingredients going to make up the medicinal preparation which it sold to the plaintiff, really knew nothing about the nature of the compound save what one of its agents had learned from *Billings, Clapp, & Company*, to the effect that *Kascara Kathartica* were similar to *Cascarets*, and this witness admitted that he did not know what *Cascarets* contained. I think negligence could be predicated of the action of the agent of the defendant corporation in selling this medicine upon the representation that it was the manufacturer, without having taken any other

or further means to ascertain the true character of the compound. If it could justify itself under the exception in the public health law, already mentioned, it could escape liability even if the box of tablets had contained some deadly drug which had killed Mrs. Willson as soon as she took it. A construction of the statute which could lead to such results is hardly worthy of serious consideration.

If I am right in the views which have been expressed, the judgment should be reversed and a new trial granted with costs to abide the event.

Cullen, Ch. J., and Gray, Werner, Chase, and Hogan, JJ., concur.

Collin, J., dissents.

OKLAHOMA SUPREME COURT. (Division No. 1.)

C. D. WEBSTER, Plff. in Err.,
v.

WEBSTER REFINING COMPANY OF
OKMULGEE.

(36 Okla. 168, 128 Pac. 261.)

Corporation — property subscription — name and process.

1. Under § 39 of article 9 of the Constitution, which provides that "no corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, . . ." the right to use a party's name in organizing a corporation, and a method of refining gasoline, which was not patented, which was in use at a number of other places, and which was the result of a method of construction used by the plaintiff wherever he built refineries, is not property actually received to the amount of the par value thereof, for which capital stock of the corporation should be issued.

Same — bonus stock — promise — enforcement.

2. A contract between a corporation and its promoter, providing for the issuance to him of capital stock of the corporation in violation of § 39 of article 9 of the Constitution, will not be enforced by the courts;

Headnotes by AMES, C.

Note. — A search has disclosed no case aside from *WEBSTER v. WEBSTER REF. Co.* since the time of the preparation of the note to *O'Bear-Nester Glass Co. v. Antiexplor. Co.* 16 L.R.A.(N.S.) 520, upon the question as to payment for corporate stock with an unpatented formula, process, or invention.

As to bonus stock of corporations, generally, see note to *Dummer v. Smedley*, 38 L.R.A. 490.

nor will damages be awarded for the breach thereof.

(November 19, 1912.)

ERROR to the District Court for Oklahoma County to review a judgment in defendant's favor in an action brought to recover damages for breach of a contract to issue capital stock. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Merwine & Newhouse for plaintiff in error.

Messrs. Belford & Hiatt for defendant in error.

Ames, C., filed the following opinion:

The plaintiff was instrumental in promoting and organizing the defendant corporation. He had had many years of experience in building refineries, and entered into an agreement with the others who proposed to form the corporation, pursuant to which they were to pay him a salary as general manager during the construction of a plant, and \$5,000 par value of the capital stock of the corporation, for the use of his name, processes, and knowledge in erecting the refinery. The minutes of the corporation disclosing the agreement are as follows: "The next business was the fixing the salaries of the active managers of the business. It was voted to pay the general manager a salary of \$25 per week until further action is taken, and it was decided to defer taking action on the salaries of the other active managers until future meeting. The treasurer was directed to make an assessment of 25 per cent on the stock subscribed. A motion was made and carried that C. D. Webster was to be given 200 shares, i. e., \$5,000 worth, of the capital stock of the company full paid, for the use of his name, processes, and knowledge in erecting the refinery, same to issue at once and held in escrow by the treasurer until further action is taken by the board of directors." The general manager here referred to was the plaintiff. The testimony shows that he superintended the erection of the refinery, and that the corporation was organized with the use of his name; that during the erection he was paid a salary as general manager; that the plant which he erected contained what he calls his process for refining gasoline; that this was a process which he installed in all the plants which he had ever erected; that it had been a success; that some other refineries have copied it; that it was not patented; that it was not a secret formula, but a mere process in use in many plants, and one that might be used in any plant; that the plaintiff instructed all the men

under him concerning the use of his process, and it appears that there was no secret property right in it. After the plant was completed, the company declined to deliver him the capital stock, and he brings this action to recover damages for the breach of the contract. Upon the conclusion of the plaintiff's evidence, the court sustained a demurrer thereto, and judgment was entered for the defendant.

The case involves the construction of § 39 of article 9 of the Constitution (Williams's constitution and enabling act, § 256), which provides as follows: "No corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, and all fictitious increase of stock or indebtedness shall be void, and the legislature shall prescribe the necessary regulations to prevent the issue of fictitious stock or indebtedness. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after thirty days' notice given in pursuance of law." In the case at bar the plaintiff does not contend that he paid the money for this stock. The labor which he performed was paid for by his salary as general manager; and there was therefore no "labor done" for which the stock should be issued. Was there any "property actually received" by the corporation for which it should have issued the stock? It is elementary that the plaintiff's name was not "property actually received." Naming the corporation for him would not pay its debts or satisfy its creditors. The only other thing which the corporation received was his process for refining gasoline; but this was not a patented process. It was not even a secret formula. It was merely a method of construction which he used wherever he was employed to build a refinery, and which could be used by anyone else who knew it, or who could find it out from the many people who did know it. It was not a process which resulted in making more or better gasoline, although the evidence is to the effect that it was a good process. But it cannot be said that the evidence shows that it was of actual value, or that it was property actually received. Indeed, it has been held in Texas, in *O'Bear-Nester Glass Co. v. Antiexplo Co.* 101 Tex. 431, 16 L.R.A.(N.S.) 520, 130 Am. St. Rep. 865, 108 S. W. 967, 109 S. W. 931, that an unpatented formula is not property, within the meaning of a constitutional provision that no corporation shall issue stock except for property actually received; and

in *Gillett v. Chicago Title & T. Co.* 230 Ill. 373, 82 N. E. 891, it was held that the transfer of unpatented and unperfected inventions, to be used in the production of a proposed spectacular play, was a violation of the statute requiring stock to be paid for in money or money's worth to the full amount of the subscription; and in *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538, recovery by a judgment creditor against the stockholder was sustained, on the ground that the stock was not properly paid for by a transfer to the corporation of a number of patented inventions. In *Van Cleve v. Berkey*, 143 Mo. 109, 42 L.R.A. 593, 44 S. W. 743, it was held that the transfer to a company of an invention for an improved process for manufacturing flour, which subsequently proved to be of no value, could not be taken as payment for the capital stock of the company, under a statute similar to ours. It is not necessary for us to go so far as some of the courts have gone, because in the case at bar it is manifest that the corporation did not receive money or labor or actual property to the extent of the par value of the stock.

The evil which this constitutional provision was designed to stop was the so-called practice of watering stock of a corporation; and it is both our duty and our disposition to give this statute its natural construction,—the meaning which its words plainly disclose. The corporation is prohibited from issuing stock except for money, for labor done, or for property actually received to the amount of the par value thereof. These words have a very plain significance. They mean just what they say. Our attention is, however, called to the decision of the Supreme Court of the United States in *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482, which construes § 8 of article 12 of the Constitution of Arkansas of 1874, providing that "no private corporation shall issue stocks or bonds except for money or property actually received, or labor done, and all fictitious increase of stock or indebtedness shall be void," in which Justice Harlan, in delivering the opinion of the court, says (120 U. S. 299): "Recurring to the language employed in the Arkansas Constitution, we are of the opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict pri-

vate corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question for a given amount of its stock and bonds falls within the prohibition of the state Constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders. And, that subsequent holders of stock might not be misled, each certificate of stock states upon its face that the holder takes this stock subject to \$2,850,000 of mortgage bonds of the company, which are secured by two mortgages duly recorded. All that was done was to reorganize the Little Rock & Memphis Railroad Company upon the same basis, substantially, as to capital stock and bonded indebtedness, as existed in respect to these properties, rights, and privileges before the adoption of the state Constitution, and while they were held and controlled by the companies which preceded the appellant in the ownership. There was consequently no fictitious increase by appellant of its stock or indebtedness. Under these circumstances it cannot be fairly said that the bonds secured by the mortgage were issued without any consideration whatever actually received in property." It will be observed, however, that our Constitution goes a step further than that section of the Arkansas Constitution which was construed in that case. There it was held that, as the stock was issued for property actually received, and as the transaction was in good faith, it will be sustained. Our Constitution, however, inserts the words, "to the amount of the par value thereof," which are not found in the Arkansas Constitution, and which were inserted to prevent doubt upon the proposition.

The Alabama Constitution (1875, article 14, § 6) had a similar provision, omitting the words, "to the amount of the par value thereof." In *Fitzpatrick v. Dispatch Pub. Co.* 83 Ala. 604, 2 So. 727, an action was sustained by a stockholder to restrain the corporation from issuing a stock dividend on a mere statement that the capital had been invested in property which had more than doubled in value. In *Williams v. Evans*, 87 Ala. 725, 6 L.R.A. 218, 6 So. 702,

it was held that an agreement between a corporation and a subscriber for stock that \$5 of stock should be issued for \$1 of money was void, and that a sale by the subscriber of a portion of his subscription to one having knowledge was likewise void, and that an action would not lie for damages for breach of the contract. In *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* 92 Ala. 407, 12 L.R.A. 307, 25 Am. St. Rep. 65, 9 So. 129, it was held that at the suit of a creditor persons who had taken stock and paid for it in property manifestly worth a great deal less than the the par value of the stock could be required to respond for the unpaid portion of their subscription, although the courts would allow a margin for honest differences of opinion as to value. In *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522, recovery was refused upon a note given for stock to be afterwards issued to the maker at the ratio of \$2 in stock for \$1 in investment, on the ground that the performance or consummation of the contract necessarily involved a violation of the constitutional provision quoted, and therefore that the original note and renewals thereof were illegal and void.

We conclude, therefore, that, as the contract in the case at bar was to deliver stock for something which was not of value, much less of the par value of the stock, the agreement was in violation of our constitutional provision.

It is, however, earnestly contended that, even if this be true, the parties to the agreement cannot take advantage of it, but that it is only subject to attack by creditors; and in support of this position *First Nat. Bank v. Cornell*, 8 Hun [App. Div.] 427, 40 N. Y. Supp. 850; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, and *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, are cited. *First Nat. Bank v. Cornell*, instead of being 8 Hun, 427, should be 8 App. Div. 427, 40 N. Y. Supp. 850. It does not support the position of the plaintiff, as appears from the syllabus, which reads as follows: "A note received by a corporation in violation of Laws 1892, chap. 688, § 42, which forbids a corporation to issue stock except for money, labor, or property, is nevertheless valid in the hands of a person who advanced money to the corporation on the faith of the note; and therefore the obligation of the corporation for the money advanced is one for which the directors are liable, where they fail to file the annual report, as required by Laws 1892, chap. 688, § 30." In *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, supra, the court held that 47 L.R.A. (N.S.)

stockholders who had only paid 20 per cent of the par value of their stock were liable for the difference to the creditors of the corporation, but stated: "The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company, this was a perfectly valid agreement. It was not forbidden by the charter [of the company] or by any law or public policy, and, as between the company and its stockholders, was just as binding as if it had been expressly authorized by the charter." The latter part of this quotation shows that it is inapplicable to the case at bar, because here this agreement is forbidden by law, which makes public policy. It is also true that in that case the transaction had been completed, while in the case at bar it is a suit for a breach of the agreement. In *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311, supra, it is held that "a declaration that shares of stock issued as a bonus to purchasers of bonds are fully paid up and unassessable is conclusive in favor of the holders, as against the corporation and its stockholders, when the rights of creditors are not involved." But in that case the transaction was also a completed one, and based upon the proposition that the corporation itself, having issued the stock for less than par, would not be permitted to recover the difference from the stockholder. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, supra, seems also to hold that, as between the corporation and the stockholder, fraudulent overvaluation of property is binding, although voidable as to creditors and other stockholders prejudiced thereby.

In the case at bar we are not called upon to determine whether or not, if the defendant had issued to the plaintiff the stock in this case, it could have then recovered from him the difference between the par value of that stock and the value of the property which it received from him. We have to determine the question whether the courts will enforce the agreement of the corporation to deliver stock for property which is a wholly inadequate price, and the delivery of which is prohibited by the Constitution.

The Constitution provides that the corporation shall not issue its stock except for a consideration equal to the par value thereof. This represents the public policy of the state. It is intended to bind the corporation. It is intended to protect the public. It is intended to put corporations upon a real substantial basis, to prevent the watering of their stock. The Constitution is one instrument of the people.

"The courts are another. If the courts require a corporation to do that which the Constitution says shall not be done, the judicial arm is antagonistic to the Constitution itself; and it would seem to be a simple proposition that the courts will not compel that to be done which the Constitution prohibits doing. If this be true, then, to permit damages for the refusal by the corporation to do it would be to punish it for refusing to do that which the law says shall not be done, and indirectly would be to compel it to do that which is prohibited.

In *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.* 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879, it is said in the syllabus: "An *ultra vires* contract will not be specifically enforced in equity, nor will an action at law lie thereon; but if it has been partially or completely executed by either of the parties, he may, by proceeding in the proper court, recover to the extent of the benefit received by the other party."

In *Garrett v. Kansas City Coal Min. Co.* 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965, it is held: "A contract that a corporation shall issue stock as fully paid up, when, in fact, the payment is intentionally fictitious, is *ultra vires*, and therefore not enforceable in equity. Parties to an illegal agreement stand *in pari delicto*, and neither can enforce the agreement against the other. A party to a contract by which a large amount of paid-up capital stock in a corporation to be afterwards organized for the development of certain lands is to be issued to him in exchange for his equitable rights in options on those lands, and for his services in promoting the corporation, cannot procure the enforcement of such contract, where it is apparent on the face of the instrument that his interest in the land and his services, when taken together, are nothing like a fair equivalent for the face value of the stock which he is to receive. Such a contract contravenes the express provisions of the Constitution and statutes of Missouri, as well as the general policy of the law requiring that the subscribers to corporate stock should pay in money or money's worth."

In *Clarke v. Lincoln Lumber Co.* 59 Wis. 655, 18 N. W. 492, it is held: "Under the statute (§ 1753, Rev. Stat. as amended by chap. 93, Laws 1881) prohibiting the issue of stock by any corporation at less than its par value, and invalidating all stock so issued, a subscriber for stock under an agreement that it shall be issued to him at less than its par value, though his act is not expressly prohibited, is *in pari delicto* with the corporation, and cannot maintain

any action upon the contract or recover back money paid under it. Cases in which the contract was not prohibited by law, but was void because of the incapacity of a party, or because not made or evidenced in the manner prescribed, and in which the contract was declared void by law as to one party, in order to protect the other against injustice and oppression, distinguished."

In *Rogers v. Gladiator Gold Min. & Mill. Co.* 21 S. D. 412, 113 N. W. 86, it is held that an action will not lie against a corporation for breach of its contract to issue stock in violation of a similar constitutional provision.

In *Altenberg v. Grant*, 29 C. C. A. 165, 54 U. S. App. 568, 85 Fed. 345, in which the opinion is written by Circuit Judge Taft, and concurred in by Judge Lurton, now a member of the Supreme Court, a very similar question was involved, and it was held that an action would not lie for damages for breach of a contract to issue stock in violation of a similar constitutional provision. In the opinion it is said at page 186 of 29 C. C. A.: "Section 193 of the Constitution of Kentucky provides that 'no corporation shall issue stock or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time the said labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void.' The learned judge at the circuit held that the contract in this case was for an illegal purpose, because an execution of it would be in violation of this section. We concur in this view. The obvious meaning of the section is that stock and bonds shall only be issued in exchange for work or property when the market price of the labor or property shall be equal to the par value of the bonds or stock exchanged. It has been contended that the market price referred to in the section is the market price of the stock to be issued, and that, if it appears that the work done or property delivered is equal to this market price, the purpose of the section is fulfilled. This would be to render the section nugatory, and would justify a corporation in issuing stock for nothing, if it appeared to have no value in the market. It would thus defeat the plain intent of the section, which was to make the stock and bonds of a corporation worth their face value. The great abuses which have been perpetrated, and the deceits which have been practised upon the public,

in the organization of corporations by the issue of stock and bonds the par value of which has been grossly in excess of the real capital embarked in their business, are too well known to require comment. The framers of this section, and the people who adopted it, proposed to remedy these abuses by a specific requirement that no one should acquire stock or bonds from the corporation without having contributed to the capital, available for carrying on its business, cash, or its full equivalent in labor or property, equal to the par of the stock or bonds received. It is the duty of the court to construe and enforce the section so as to remedy, as far as possible, the evil at which it was directed."

Williams v. Evans, 87 Ala. 725, 6 L.R.A. 218, 6 So. 702, and *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522, involve a similar principle.

We believe, therefore, that under our Constitution such an agreement is prohibited, and that the court should not enforce it directly by compelling the issuance of the stock, or indirectly by giving damages for breach of the contract.

What we have said disposes of the questions involved in the case, and the judgment of the District Court should be affirmed.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.

L. K. SEYMOUR, Plff. in Err.,
v.

CITY OF OKLAHOMA CITY et al.

(— Okla. —, 134 Pac. 45.)

Public improvements — warrants — delinquency — right to penalty.

S. is the holder and owner of certain sewer warrants issued pursuant to § 990,

Headnote by WILLIAMS, J.

Note. — *Who is entitled to penalties for delay in paying improvement assessments.*

There have been but few cases which have considered the question under annotation. *SEYMOUR v. OKLAHOMA CITY* is in direct conflict with *Barber Asphalt Paving Co. v. Webster County*, 143 Iowa, 255, 121 N. W. 1072, where it was held that a contractor who had accepted special assessment certificates in payment of public improvements constructed by him was entitled to the penalties collected by the treasurer in cases where the assessment was allowed by the property owner to become delinquent. The 47 L.R.A.(N.S.)

Compiled Laws of Oklahoma 1909. The mayor and councilmen for each year made "a levy on each lot or piece of ground, for a sufficient sum in addition to other taxes, to discharge the maturing instalments" on each lot or piece of ground, with interest on the unpaid instalments for such year; such taxes being collected by the county treasurer. The holder of such warrants, on presentation of the same, claimed the penalty collected on such warrants, on account of the failure to pay the same as they matured. Held, that S., the holder of said warrants, was not entitled to said penalty.

(July 22, 1913.)

ERROR to the Superior Court for Oklahoma County to review a judgment in defendant's favor in an action to recover the penalty collected on certain warrants held by plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. G. A. Paul for plaintiff in error.

Messrs. C. W. Stringer, Sam Hooker, and J. W. Johnson, for defendants in error:

The power to levy a special assessment must be expressly or by clear implication conferred by the statute, and such power, when plainly granted, must be strictly construed and strictly followed by the authorities who are to levy and collect the taxes.

2 Cooley, Taxn. p. 1156; *Rochester v. Bloss*, 185 N. Y. 42, 6 L.R.A.(N.S.) 694, 77 N. E. 794, 7 Ann. Cas. 15; *Jackson Fire Clay Sewer Pipe & Tile Co. v. Snyder*, 93 Mich. 325, 53 N. W. 359; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *Stone v. Sapulpa*, 28 Okla. 864, 115 Pac. 1114.

The legislature cannot impose a liability in the nature of a penalty for the enforcement of a purely private right.

Chicago, R. I. & P. R. Co. v. Mashore, 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277.

A penalty is imposed upon the delinquent taxpayer upon the theory that the extra burden caused by his delinquency should be made to fall upon him instead

court said: "The excess collected beyond the statutory or contract limit is not interest (which is a premium paid for the use of money), but is a penalty, which a party to whom the debt or tax is due is entitled to exact, both as a stimulant to prompt payment and as compensation for possible injuries which the latter may suffer by reason of the delay. The aggregate of all the taxes thus levied is ordinarily a large sum, and its value to the contractor will evidently be diminished, if, instead of receiving it promptly when due, it is left outstanding for a long time, until collected in fragments from month to month, and year to year. If payment is delayed, it is he who is discom-

of the general taxpayer who is not in default; and that the public should be compensated for the delay and expense incident to the enforced collection of the taxes.

Engbretsen v. Gay, 158 Cal. 30, 28 L.R.A.(N.S.) 1062, 109 Pac. 880, Ann. Cas. 1912 A, 690.

The penalty is imposed for the benefit of the person or municipality upon whom rests the duty or obligation to enforce the collection of the delinquent tax.

Ibid.; *Pittsburg, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808.

There is no obligation resting upon the city or county to discharge the indebtedness evidenced by the tax warrants, except out of the special fund created by the special assessment; and their only obligation in the matter is to enforce the special assessments "as other taxes are collected."

Potter v. Whatcom, 25 Wash. 207, 65 Pac. 197; *Tacoma Bituminous Paving Co. v. Sternberg*, 26 Wash. 84, 66 Pac. 121; *German American Sav. Bank v. Spokane*, 16 Wash. 698, 47 Pac. 1103; *Snyder's Stat. (Okla.)* § 980.

The contractor's rights are based solely upon his contract, limited by the statutes conferring upon the municipality power to create the obligation by special assessment.

Stone v. Sapulpa, 28 Okla. 864, 115 Pac. 1114.

Williams, J., delivered the opinion of the court:

The plaintiff in error is the owner and holder of certain warrants issued pursuant

to § 990, Compiled Laws of Oklahoma 1909. He contends that he is entitled to said penalty, and that, unless the same is directed to be paid to him, it will be appropriated by the municipality.

Section 990, Compiled Laws of Oklahoma 1909, provides: "As soon as any district sewer shall have been completed, the city engineer or other officer having charge of the work shall compute the whole cost thereof, which shall also include all other expenses incurred by the city in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground in such district, exclusive of improvements, in proportion to the area of the whole district, exclusive of the public highways, and such officer shall report the same to the mayor and councilmen, and the mayor and councilmen shall thereupon levy and assess a special tax, by ordinance, against each lot or piece of ground within the district, which ordinance shall be published in some newspaper of general circulation in the city for four consecutive weeks, and if, at the expiration of such time, the amount named in such ordinance, together with the cost of publication, shall not be paid, then the mayor and councilmen shall cause tax warrants to be issued against such lots and pieces of ground in said district, which tax warrant shall recite the date of the passage of the ordinance making the assessments, the amount of the assessment, the description of the property against which the same is levied, and that the same will be levied against said property in three equal instalments, with in-

moded, and it would be strikingly unjust to hold that the penalty which the debtor pays for neglecting to discharge his obligation shall not go to his creditor, who has been injured, but to a party which has not the slightest interest in the tax when collected. This penalty is independent of the contract, and the right to exact it is not a right which the city or county has any power to grant or to take away. It is a right created by statute, which we quote as follows: 'All such taxes, with interest, shall become delinquent on the 1st day of March next after their maturity, and shall bear the same interest with the same penalties as ordinary taxes.' Code, § 825. It is the tax on which the penalties are assessed, and, if the tax is due to the contractor, it is difficult, indeed, to frame any good reason for saying that the penalty thereon should be paid to a stranger in interest. The tax is the substance or principal thing of which the statute treats, while the penalty is a mere incident thereto, and passes with it, even as the lien of the tax upon the property described in the certificate passes with it to an assignee of such instrument. . . . The fact that it is the duty of the city to make the assessments,

and of the county treasurer to collect the tax, and that incidental expense may attach to such duty, is immaterial. It was part of the city's contract to make the proper assessment and issue the required certificates in consideration of the plaintiff's undertaking to lay the pavement. The county treasurer is required by law to make the collection as part of the duties of his office, and for services so performed, neither he nor the county is entitled to exact compensation nor profit, except as the statute may provide for it. Counsel cite authorities to the effect that the imposition of such penalties is an act of sovereignty similar to that of eminent domain, and is intended to compel the delinquent taxpayers to meet in some degree the expense caused by the failure to make payment in due season. All this may be conceded, but it brings us not a step nearer the position which must be assumed in order to permit the appellants to receive the money here in controversy. The state, by the legislature, has permitted cities to exercise the taxing power in this manner, and, when the tax has been levied, to transfer the certificate therefor to the contractor, together with the right to have the tax enforced for his benefit,

terest thereon at the rate of 8 per cent per annum, levied each year, to become due on the 15th day of December next after each such levy, to pay the maturing instalments, and shall be signed by the mayor, and countersigned by the city clerk, which said tax warrants shall be delivered to the contractor: Provided that the aggregate amount of such warrants to be delivered to the contractor shall not exceed his contract price, and the city shall hold and retain, for its own indemnity, a sufficient amount of the same to cover other expenses than the contract price of executing the work." *Seas. Laws, 1903, p. 96.*

Section 991, also, provides: "The mayor and councilmen shall each year levy on each lot or piece of ground a sufficient sum

in addition to other taxes, to discharge the maturing instalment on each particular tract, with interest on the unpaid instalment for such year, certify the same to the county clerk to be collected as other taxes, and which money, when collected by the county treasurer, shall be paid to the holder of such certificate and indorsed thereon upon presentation of the certificate: Provided that the owner of any lot or piece of ground may redeem his property from such special assessment at any time by paying the amount of unpaid instalments to the county treasurer, and the interest thereon until the maturity of the next succeeding instalment, and upon presentation of the certificate against such property, the county treasurer shall pay the same in full and

with all the incidents which would attach to it in the hands of the city itself. To repeat, neither county nor city has any right in or interest whatever in these penalties. They are incident to the tax, and go with it to the certificate holder."

Where the collection of the tax assessment is enforced by one other than the city, it has been held, in Iowa cases, that the penalty allowed to the city in such cases does not apply. Thus, in *Des Moines Brick Mfg. Co. v. Smith*, 108 Iowa, 307, 79 N. W. 77, an action to enforce the lien of street paving certificates, it was contended by the plaintiff that it should be allowed the penalties provided for by statute, and not merely the statutory rate of 6 per cent interest allowed on delinquent assessments. Section 12, chapter 168, Acts of 21st Assembly, as amended by Acts of 22d Assembly, in effect, provides that improvement assessments shall be paid to the county treasurer with 6 per cent interest upon unpaid balances, and also that such assessments shall be collected in the same manner and bear the same penalties when delinquent as are provided by law for the collection of other taxes; but the court construed such provision to relate to cases only where collection is made by the treasurer, and as having no application to instances of the kind at bar, where extraordinary means are adopted. Nor, as especially contended, could there be any claim of the penalty under §§ 478, 479, of the Code of 1873, which provide that assessments may be collected by suit against the owner, and further provide that "any municipal corporation may be entitled to demand and recover, in addition to the amount assessed and interest thereon at 10 per cent from the time of the assessment, 5 per cent to defray the expenses of collection," etc. The court held that this penalty is given to the municipal corporation only in case it seeks to enforce payment of the assessment by civil action, and that the penalty could not be claimed where the action is by a private corporation, and not by the city.

And in *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006, an action against 47 L.R.A. (N.S.)

the county based on special tax certificates for special assessments for the cost of pavement around the county courthouse, the same ruling was made on authority of *Des Moines Brick Mfg. Co. v. Smith*, supra, as to a recovery of the penalty by a private corporation under § 479 of the Code of 1873.

Where a city purchases tax bills for street improvement assessments, under a statute which provides that tax bills shall be bid in for the city if no one will offer the amount thereof, the section providing that penalties and compound interest be imposed where the sale is to another than the city does not apply. *Lexington v. Woolfolk*, 117 Ky. 708, 78 S. W. 910.

In Missouri it seems that the holder of a tax certificate is entitled to the penalties imposed for delay in paying assessments.

Thus, in *Galbreath v. Newton*, 45 Mo. App. 312, an action by the assignee of an assessment certificate, the court said that the holder of the certificate was clearly entitled to recover interest at the rate provided by the charter from the date of the original tax bills; it was defendant's duty to pay such original bills immediately after their issue, or in default thereof for six months he was, by the terms of the law, charged with an additional sum equal to 15 per cent per annum from the date thereof.

And it is also evident from the following Missouri cases that the holder of the tax bill is entitled to the penalty, the question involved being other than the right thereto: *Bambrick v. Campbell*, 37 Mo. App. 460 (institution of suit on special tax bill as equivalent to demand); *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506, 85 S. W. 387; *Perkinson v. Schnaake*, 108 Mo. App. 255, 83 S. W. 301 (whether demand must be personal upon owner of property); *Eyerman v. Blakley*, 78 Mo. 145; *Seaboard Nat. Bank v. Woesten*, 176 Mo. 49, 75 S. W. 464 (validity of charter provision which allows holder of special tax bill penalty interest in case of delay in payment); *Stifel v. MacManus*, 74 Mo. App. 558 (necessity for notice).

J. H. B.

cancel the same and hold for delivery to the person making such redemption. The said assessment shall be a charge and lien against the property upon which assessed until fully discharged, but unmatured instalments shall not be deemed to be within the terms of any general covenant or warranty." *Sess. Laws, 1903, p. 97.*

Section 977, Compiled Laws of Oklahoma 1909 (*Sess. Laws, 1897, p. 89*) is as follows: "That in all cases where municipal improvements of any character are made by special assessments upon the abutting lots or upon blocks, or where a special assessment may be created by ordinance for the direct benefit of a limited locality in any municipal corporation, that then, and in all such cases, the municipal corporation may issue a tax warrant against each separate abutting lot, which shall be a valid lien thereon, and shall be extended, collected, and bear a like penalty with other taxes of the state, county, or municipal corporation." This section was continued in force by virtue of § 2 of the schedule of the Constitution (*Leatherman v. Addington, — Okla. —, 132 Pac. 129*), and now appears as a part of the Revised Laws of Oklahoma 1910 (§ 710). Said tax warrants as issued by their terms provided for interest at the rate of 10 per cent per annum. Plaintiff in error contends that he is not only entitled to this interest, but also the penalty.

In *Shultz v. Ritterbusch, — Okla. —, 134 Pac. 961*, it was held: "Comp. Laws 1909, §§ 726, 727, construed, and as to that part which authorizes the collection of 7 per cent per annum upon assessments prior to maturity, and, if not paid when due, 18 per cent per annum thereafter until paid. Held, that such provision is not in violation of the Constitution, which prohibits the general assembly to pass any local or special law 'fixing the rate of interest,' for in no sense is said 18 per cent 'interest,' but is in reality a penalty to secure prompt payment, imposed for the neglect of duty." In 13 *Am. & Eng. Enc. Law, 2d ed. p. 69*, it is said: "The only general rule that can be laid down in reference to this matter is that, in the absence of any constitutional or statutory provision directing otherwise, the proceeds of fines and penalties imposed must go to that government, whether national, state, county, or municipal, whose laws or ordinances have been violated by the act or omission of the offender." See also *Garfield County v. Huett, 35 Okla. 713, 130 Pac. 927; Stout v. State, 36 Okla. 744, 45 L.R.A.(N.S.) 884, 130 Pac. 553.*

Section 7, article 10, of the Constitution (§ 272, *Williams' Anno. Const.*) provides: 47 *L.R.A.(N.S.)*

"The legislature may authorize county and municipal corporations to levy and collect assessments for local improvements upon property benefited thereby, homesteads included, without regard to a cash valuation." A discretion is thus especially committed to the legislature to enact laws carrying into effect said constitutional provisions. *Lowther v. Nissley, — Okla. —, 135 Pac. 3.* Courts, as a rule, will not revise the exercise of such discretionary powers, unless the same are in conflict with some other provision of the Constitution. *Atwater v. Hassett, 27 Okla. 292, — L.R.A.(N.S.) —, 111 Pac. 802; Lowther v. Nissley, supra.* This is a plain grant of power, authorizing the county and municipal corporations to levy and make assessments for local improvements upon property benefited thereby, homesteads included, without regard to cash valuation. It is an undefined grant, without any express words of limitation. Such grant, however, is limited to the extent that the power exercised thereunder must not conflict with the grant of powers to the other departments of the government, and such other provisions of the Constitution as §§ 7, 23, and 24 of article 2, and § 2 of article 14 (§§ 15, 31, 32, and 313, *Williams' Anno. Const.*), of the Constitution of this state.

Section 6774, Revised Laws of Oklahoma 1910, provides: "All penalties, interests, and forfeitures which may accrue to the counties on delinquent taxes shall be turned into the sinking fund, and all rebates upon taxes allowed by the county commissioners shall be paid out of the sinking fund, and shall take precedence for payment out of such fund over all other charges except interest charges."

Section 6775, Revised Laws of Oklahoma 1910, also provides: "Whenever any money shall remain in the sinking fund of any municipality on the last day of June of any year, against which no charges are outstanding, it shall be turned into such fund for the following year, and the levy for the following year reduced accordingly."

Penalties imposed by contract for non-performance thereof are expressly made by statute void. The penalty provision, not the entire contract, is, as a rule, rejected, and rendered void. Revised Laws (*Okla.*) 1910, §§ 974 and 975.

"A stipulation or condition in a contract, providing for the payment of an amount which shall be presumed to be the amount of damages sustained by a breach of such contract, shall be held valid, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Revised Laws (*Okla.*) 1910, § 976.

We have been cited to no statutory provision in force in this state to the effect that the penalty provided for in § 977, *supra*, to wit, "a like penalty with other taxes of the state, county, or municipal corporation," should be paid to the holder of such warrant. Obviously, without such a statutory provision, if it were permissible to pass such an act, the contention that the plaintiff in error is entitled to receive such penalty is not well founded. We are not to be understood as expressing any opinion as to the validity of such a statute.

The judgment of the lower court is affirmed.

All the Justice concur, except Dunn, J., absent, and not participating.

PENNSYLVANIA SUPREME COURT.

SAMUEL ROSENBERG

v.

NATHAN CUPERSMITH

and

ALEXANDER J. KIRKLAND, Intervener,
Appt.

(240 Pa. 162, 87 Atl. 570.)

Mechanics' lien — effect of mortgage foreclosure.

1. A mechanics' lien on property subject to mortgage is destroyed by sale of the

Note. — Remedy of holder of mechanics' lien, after judicial sale of property under a prior or contemporaneous lien, and before distribution of fund.

It will be observed that the note does not purport to cover the substantive question as to priority among liens; or the question as to the remedy of the holder of a mechanics' lien paramount to that under which the property is sold.

The question here considered is one of practice, and naturally the procedure is not uniform in the different states. In addition to the variations in the Codes of Practice in force in the different states, there are many variations in the special remedies provided by the different mechanics' lien statutes in the different states, so that no uniform rule can be stated.

It may, however, be stated that in most jurisdictions the judicial sale by other lien holders divests the lien as to the property, at least where the lien upon which the sale was made is prior; and where the statutory action is wholly *in rem*, no action can be maintained upon the divested lien for the purpose of ascertaining the amount of the claim or fixing its standing, but in all such cases the claimant has a corresponding lien upon the fund arising from the sale, and may have his standing fixed and the

property in the foreclosure proceedings under the mortgage, and the lien holder is remitted to the proceeds of the sale.

Pleading — failure to raise issue — effect.

2. A mechanics' lien on mortgaged property cannot be enforced after the property is sold in foreclosure proceedings under the mortgage, although that issue is not raised in the *scire facias* proceedings to enforce the lien.

Scire facias — judgment to ascertain amount of claim.

3. There is no right to judgment on a *scire facias* to enforce a mechanics' lien after the lien has been displaced by foreclosure of a mortgage on the property, merely to ascertain the amount of the claim.

(March 31, 1913.)

APPEAL by intervener from a judgment of the Court of Common Pleas No. 5 for Philadelphia County, denying defendant's motion for judgment notwithstanding a verdict for plaintiff in a *scire facias* proceeding to enforce a mechanics' lien. Reversed.

The facts are stated in the opinion.

Mr. Harry G. Sundheim, for appellant:

When the premises in question were sold at sheriff's sale upon a writ issued out of common pleas court No. 2, court of common pleas No. 5, out of which the *sci. fa.* sur mechanics' lien issued, *eo instanti*, was

amount of his claim ascertained by the court distributing the fund. Where, for any reason, his lien is not divested of course, his surest remedy is to pursue the property in the hands of the purchaser.

Effect of sale to divest lien.

It should be noted that in *ROSENBERG v. CUPERSMITH*, the court, in holding that the mechanics' lien was divested and the holder was remitted to the fund, carefully points out that the mortgage antedated the mechanics' lien, and that the *scire facias* on the latter did not issue until the day of sale.

The same conditions existed in *Lieb v. Bean*, 1 Ashm. (Pa.) 207, that is, the mortgage antedated the mechanics' lien and the sale on the mortgage took place before the issue of *scire facias* on the mechanics' lien, and it was held that the sale divested the lien, since the mortgage had priority over the lien. In this case the mortgagee was the purchaser and simply receipted his claim to offset the purchase price, and the holding was to the effect that if the claimant had a right of action *in personam* against the purchaser, it could not be enforced by *scire facias* on the divested lien, since that is a statutory action *in rem*.

In *Anshutz v. McClelland*, 5 Watts, 487, it was held that the sale of the property

devested of jurisdiction of the subject-matter, and therefore the plaintiff could proceed no further in this cause of action.

Hill v. Tionesta Twp. 129 Pa. 525, 19 Atl. 855; Musselman's Appeal, 101 Pa. 165; Black v. Black, 34 Pa. 354; McConkey v. Peach Bottom Slate Co. 3 Pa. Dist. R. 596.

The lien was discharged by the judicial sale.

27 Cyc. 291; Phillips, Mechanics' Liens, 409; Edridge v. Madden, 7 W. N. C. 228; Twelves v. Williams, 3 Whart. 485, 31 Am. Dec. 542.

Claimant had no right to proceed on sci. fa. after sheriff's sale.

upon a writ issued upon one of several mechanics' liens, all being for materials furnished at about the same time in building the house, devested the liens of all the others.

In Matlack v. Deal, 1 Miles (Pa.) 254, the scire facias sur mechanics' lien had been issued, and there was an appeal from an award of arbitrators in favor of the plaintiff thereon, but before the case could be tried the property was sold on an older lien; it was held that claimant's lien was devested and extinguished.

And the rule that a judicial sale devests a mechanics' lien on the same property was recognized in Twelves v. Williams, 3 Whart. 485, 31 Am. Dec. 542, but not applied because of a written agreement to the contrary.

In Edridge v. Madden, 7 W. N. C. 226, where the building was in course of construction when it was sold to satisfy a pre-existing mortgage, and the mechanics' lien was filed some time after the sale, it was held that there was no lien upon the property in the hands of the sheriff's vendee.

In Ritchey v. Risley, 3 Or. 184, it was held that a lien created by filing a mechanics' lien after another such lien had been filed, and suit brought thereon, was devested by a judicial sale upon the earlier lien, although the work upon which the later lien was based was commenced either before or at the same time as that upon which the earlier lien was based.

But in Koken Iron Works v. Robertson Ave. R. Co. 141 Mo. 228, 44 S. W. 269, where property had been sold upon a judgment entered after commencement of the mechanics' lien proceedings in an action commenced prior to the suit on the mechanics' lien, and the claimant had made application to participate in the distribution of the funds arising from the sale, but no decision had been made upon the claim, it was held that "a prior judgment and sale in favor of a different lien creditor is not a bar to the plaintiff's right to have a judgment of lien entered against the same property."

In Clark v. Parker, 58 Iowa, 509, 12 N. W. 553, where the building was sold at judicial sale upon a prior mechanics' lien, which was a lien upon the building alone, while a later mechanics' lien bound both

Phillips, Mechanics' Liens, 3d ed. § 411; Anshutz v. M'Clelland, 5 Watts, 487; McLaughlin v. Smith, 2 Whart. 121; Williams v. Controllers, 18 Pa. 275; Foster v. Fowler, 60 Pa. 30; Lieb v. Bean, 1 Ashm. (Pa.) 207.

The sheriff's sale on a prior mortgage having devested lien, claimant cannot proceed on sci. fa. to determine amount of his claim.

Anshutz v. M'Clelland, 5 Watts, 487; Andrews v. Fishing Creek Lumber Co. 161 Pa. 204, 28 Atl. 1018; Vulcanite Paving Co. v. Philadelphia Rapid Transit Co. 220 Pa. 608, 17 L.R.A. (N.S.) 884, 69 Atl. 1117.

the building and the land, it was held that the judicial sale of the building did not devest the lien of the second claimant as to the land.

But it was held in Hoy v. Peterman, 28 La. Ann. 289, that a claim against a building by one as builder and mechanic is devested by a judicial sale of the whole property to satisfy another lien, where claimant failed to demand a separate appraisement of the building.

Scire facias to fix the amount.

In ROSENBERG v. CUPERSMITH, the claimant's most serious contention seems to have been that, conceding the divestiture of the lien by the sale, the claimant retained the right to proceed to judgment on his scire facias in order to have the amount of his claim ascertained; but the court points out that an action *in rem* cannot be maintained to ascertain the amount of any claim against the owner of the property, when the lien against the property is devested. and that when the statutory purpose cannot be fulfilled by the action, the right of action is gone. This holding was in complete harmony with that of Lieb v. Bean, *supra*, and it is supported in every detail by the holding in Anshutz v. M'Clelland, *supra*, where it was also contended that the action could be maintained for the purpose of ascertaining the amount of the claim. See quotation from this case in the reported case.

In Matlack v. Deal, *supra*, it was held that the proceedings on scire facias should be stayed, since the lien upon the property had been devested.

There are other cases, such as Williams v. Controllers, 18 Pa. 275 (cited in the opinion in ROSENBERG v. CUPERSMITH), and Norton v. Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506, that sustain the principle that where the proceeding is wholly *in rem*, and for any reason the right to a lien against the property fails, the action fails; but such cases do not involve judicial sales, so no effort has been made to collect them.

Cases arising under statutes which give a personal action, and fix a lien upon the property as a result of the personal judgment, are not in point here; nor is the ques-

Messrs. Bernard Harris and Israel K. Levy for appellee.

Mestrezat, J., delivered the opinion of the court:

This is a *scire facias sur mechanics' claim*, and the assignments of error are to the refusal of the court below to direct a verdict for the defendant, and to enter judgment for the defendant *non obstante veredicto*. On September 12, 1908, Rosenberg, the plaintiff and appellee, filed a mechanics' lien for work and material against the premises at 622 South Second street, Philadelphia, which were at the time owned by Nathan Cupersmith, with whom

Rosenberg contracted. Cupersmith was afterwards adjudged a bankrupt, and his trustee sold the premises to Alexander J. Kirkland, the defendant. The property was subject to a mortgage given by Cupersmith, dated and recorded in 1906. A *scire facias* was issued on the mortgage on October 28, 1909, in common pleas No. 5 of Philadelphia county; and a judgment was entered thereon on November 23, 1909. On this judgment a *levari facias* was issued, on which the property was sold at sheriff's sale on January 5, 1910, to E. B. Colby, to whom the sheriff acknowledged and delivered a deed on January 17, 1910. The appellee issued a *scire facias* on his mechanics' claim

tion as to lienor's right to personal judgment in a separate action here considered. On this latter question, see note to *Erickson v. Russ*, 32 L.R.A. (N.S.) 1072.

Claim upon the fund.

In the cases cited, *supra*, the question of claimant's rights in the distribution of the fund was not directly in issue, since there was no attempt to claim the fund, so that the cases could have been decided without the court's saying anything about the fund; hence in some of them the court simply indicates in a general way that claimant's remedy, if he has any, is by claim against the fund. In every case in which it was held that the lien was devested, however, it is shown, at least by implication, that there resulted some remedy as against the fund, the extent of the remedy being dependent upon the relative standing of the liens. And other cases cited, *infra*, confirm this view.

Thus, in *ROSENBERG v. CUPERSMITH*, the court points out definitely that the lien is transferred to the fund, and that claimant must maintain his claim as to priority, etc., before the auditor who distributes the fund, just as he would have to do in court on the *scire facias* where that action is maintainable.

In *Lieb v. Bean*, *supra*, it was said that claimant's remedy was against the fund, but since the mortgage was the prior lien, and there was no surplus, he had no remedy; but if he believed there was unfairness in the sale, he could bring suit to set it aside, etc.

And in *Anshutz v. McClelland*, *supra*, it was said that since all the liens were on an equality, and there was no priority, the fund, which was not enough to pay all, should be divided *pro rata* among them.

In *Matlack v. Deal*, *supra*, all the proceeds had been absorbed by prior creditors; hence there was no fund to which claimant's lien could attach.

The right of the holder of a mechanics' lien to claim the fund arising from a judicial sale of the property, and to have the amount of his claim ascertained and its standing determined before the court or the

auditor who distributed the fund, has been recognized in *Safe Deposit & T. Co. v. Columbia Iron & Steel Co.* 176 Pa. 536, 35 Atl. 229; *Re Denkel*, 1 Pearson (Pa.) 213; *Field v. Oberteuffer*, 2 Phila. 271; *Norris's Appeal*, 30 Pa. 122; *McCay's Appeal*, 37 Pa. 125; *Hahn's Appeal*, 39 Pa. 409; *Philbrick v. Ignatz Florio Co-Op. Asso.* 137 App. Div. 613, 122 N. Y. Supp. 341; and *Ritchey v. Risley*, 3 Or. 184.

In *McLaughlin v. Smith*, 2 Whart. 121, after issue of *scire facias sur mechanics' lien*, but before judgment thereon, the property was sold by judicial sale upon another lien. It was admitted that he had a lien upon the fund for his claim in preference to a judgment creditor, but the question was as to the costs on the *scire facias*. The court said: "A mechanic or a materialman is bound to issue his *scire facias* in a given time, or lose his lien; and where the building has been judicially sold before he has prosecuted it to judgment, what is he to do? He is not to lose the costs; and yet he cannot proceed to judgment of revival, as the lien has been discharged by the sale. Must he proceed to judgment for costs? That would induce a useless and senseless increase of the burden on the fund, and retard the distribution of it, while it would benefit no one. The costs of the *scire facias* were therefore properly allowed."

It was held in *Yearsley v. Flanigen*, 22 Pa. 489, that where the property is sold before the expiration of the time allowed by law for filing the mechanics' lien, the claim may be made upon the fund with the same effect as it could be made if it had been entered of record.

It was held in *Andrews v. Fishing Creek Lumber Co.* 161 Pa. 204, 28 Atl. 1018, that where the property is sold at judicial sale while a *scire facias sur mechanics' lien* is pending in court, the claimants have a right to have their claim adjudged and its amount and priority determined before the auditor appointed to distribute the fund, but have no right to have a portion of the fund impounded to await the outcome of the *scire facias* proceedings; and if they fail or refuse to submit their claim to the auditor, they lose their claim upon the fund.

J. W. M.

on January 5, 1910. An affidavit of defense was filed by Kirkland, who had become an intervening party defendant. A replication was filed by the plaintiff, and issue thus made was brought to trial on May 7, 1912. The trial court directed a verdict for the plaintiff, and subsequently refused judgment for the defendant *non obstante veredicto*. Kirkland has taken this appeal.

The appellant contends that the mechanics' lien was discharged by the sheriff's sale under the prior mortgage, and that thereafter the plaintiff had no right to proceed with the scire facias, but could look only to the proceeds of the sheriff's sale for payment of his claim. The appellee maintains that the appellant is bound by the issue he raised on the merits of the case, that he was estopped from questioning the jurisdiction of the court at the trial of the cause, and that the issue raised by the pleadings was not destroyed by the sheriff's sale. The learned court below misapprehended the legal principles applicable to the facts of the case. It does not need the citation of authorities to sustain the proposition settled by all our decisions on the subject, that in this state a mechanics' lien is discharged by a judicial sale of the real estate bound by the lien. It is equally well settled and in harmony with all our cases, that the purchaser at such sale takes the property discharged of the lien, and that the claimant is remitted to the fund produced by the sale for satisfaction of his claim. In the present case, as will be observed, the lien premises were sold January 5, 1910, the date of issuing the scire facias on the mechanics' claim, on a mortgage antedating the mechanics' lien, and it follows that the lien was divested, and the claimant's right to pursue the premises in satisfaction of his claim was gone.

It is, however, contended by the appellee, that the issue raised by the pleadings was not destroyed by the sheriff's sale on the mortgage, and that he could proceed to judgment on the scire facias issued on his claim. But this contention has neither principle nor precedent to support it. A mechanics' lien is created by statute to enable those furnishing labor or materials to enforce their claim against the building and its curtilage. A scire facias on the claim is not a personal action, so that a judgment thereon may be enforced personally against the owner of the premises. It is a proceeding distinctly *in rem*, and its sole purpose is to compel payment of the claim out of the *res* or property liened. The writ is one of the steps in the procedure to enforce payment of the claim by subjecting the building and curtilage to sale. Where there

is no lien or the lien has been divested, a scire facias will not lie, and as the right to maintain the writ depends upon a subsisting lien, when, for any reason, the lien falls, the right to enforce it by scire facias falls with it. This may occur at any time subsequent to the creation of the lien, and when it does the proceeding is arrested.

The authorities fully sustain our conclusion. *Anshutz v. McClelland*, 5 Watts, 487, was a scire facias sur mechanics' lien. The trial occurred after a judicial sale of the property, and the defendants contended there could be no recovery on the ground that the proceeding was *in rem*, and the sale divested the lien. In sustaining this contention it was said by Kennedy, J., delivering the opinion, that the sale divested the lien, that the proceeding by scire facias is *in rem*, "and therefore it is only to be sustained upon the ground that the claim is a lien upon the house, so that the moment the claim ceases to be a lien, the right of the party to proceed by or maintain a writ of scire facias ceases also." It was further said by the learned justice: "It is a total misapprehension of the real object of suing out the scire facias to suppose that such was the design of authorizing either the impetration or the prosecution of it, because, as has been shown, it cannot be sustained if the claim or debt mentioned in it never was a lien, or that, though once a lien, it has ceased to exist. The only object of the scire facias is to have execution against the building; but if that cannot be had, then the great object of the writ is gone; the ascertainment of the amount of the debt, for which the plaintiff in the scire facias claims to have execution against the building, is only incidental and preliminary to the award of execution, in order that the amount of the money to be levied may be rendered certain and known." In *Williams v. Controllers*, 18 Pa. 275, it was held that a mechanics' lien could not be filed against a public schoolhouse, and, in sustaining a judgment for the defendant on a scire facias, it was said that "where there can be no execution, there can be no action." In *Lieb v. Bean*, 1 Ashm. (Pa.) 207, the premises were sold on a judgment on a prior mortgage after the filing of the mechanics' claim. On the trial of the scire facias issued on the claim it was held that the lien was extinguished, *King, P. J.*, saying: "The writ of scire facias upon a claim is a proceeding strictly *in rem*; its valid existence depends on the fact of a subsisting lien, to realize which is the object of the writ and the fruit of it. But, the lien having been divested and extinguished by the sale of the property by the sheriff, to which it attached,

there is nothing to support the proceeding upon, and the plaintiff cannot recover in this form of action."

It is true, as suggested by appellee's counsel, that the cases cited above were decided under legislation prior to the act of 1901, but there is nothing in the latter act that conflicts with those decisions. The principle there announced is applicable under any mechanics' lien law, unless the statute provides otherwise.

There is no force in the argument that the claimant has the right to proceed to judgment on the scire facias for the purpose of having the amount of his claim ascertained. That is not the purpose of the writ. If no execution can issue on a judgment on the scire facias by reason of the nonexistence of the lien, there is no reason for determining in the proceeding the sum due the claimant. We have distinctly ruled that the claimant is not entitled to proceed to judgment on the scire facias to determine the amount of his claim. *Anshutz v. M'Clelland*, supra. When the lien is divested by a judicial sale, the claimant must resort for payment to the fund produced by the sale. His lien follows the fund, and is payable out of it. If the sale takes place before the expiration of the time allowed for filing of liens, the claim may be made upon the fund without filing a lien. *Yearsley v. Flanigen*, 22 Pa. 489. The claimant must, however, establish before the auditor his right to priority of lien and payment out of the fund, as he would be required to do on trial in court on the scire facias on the lien in order to entitle him to a judgment there. *Andrews v. Fishing Creek Lumber Co.* 161 Pa. 204, 28 Atl. 1018; *Safe Deposit & T. Co. v. Columbia Iron & Steel Co.* 176 Pa. 536, 35 Atl. 229. The mechanics' lien act of June 4, 1901 (P. L. 431), makes provision for resort to the fund by a lien claimant where the premises have been sold under legal process and the fund is in court for distribution. Section 56 of the act declares: "In every distribution hereafter made under legal proceedings in any court, if any portion of the funds for distribution shall have been realized because of labor or materials furnished to any structure or other improvement by the party whose estate is to be distributed, any distributee claiming for labor done or labor or materials furnished to such structure or other improvement shall be entitled to priority against the portion of the fund thus realized."

We see no force in the contention of the appellee that the appellant was prevented by his pleadings from objecting on the trial to further proceedings on the scire facias. 47 L.R.A. (N.S.)

Conceding, for the moment, that on the merits of the case he would have been confined in his defense to the averments of his affidavit, he could raise at any time the right of the court to adjudicate the cause. He might, and possibly should, have raised the question earlier, but it was not too late at the trial.

The judgment of the court below is reversed, and judgment is now entered for the defendant *non obstante veredicto*, without prejudice to the right of the plaintiff to present and prosecute his claim against the proceeds of the sale of the real estate against which the lien was filed.

PENNSYLVANIA SUPREME COURT.

SCRANTON GAS & WATER COMPANY
v.

DELAWARE, LACKAWANNA, & WEST-
ERN RAILROAD COMPANY, Appt.

(240 Pa. 604, 88 Atl. 24.)

Water — right to use for railroad purposes.

A railroad company owning land on a stream has no right as against the lower riparian owners to pump the water into a reservoir several miles distant, for general railroad purposes, such as use in locomotives, shops, and stations.

(May 5, 1913.)

Note. — The right of a railroad company as riparian owner to take water from a stream for its engines is covered in the note to *Harris v. Norfolk & W. R. Co.* 31 L.R.A. (N.S.) 543. No other case, except *SCRANTON GAS & WATER Co. v. DELAWARE, L. & W. R. Co.*, has been found passing upon the question here involved since the earlier note was written.

However, in *Cheda v. Southern P. Co.* — Cal. App. —, 134 Pac. 717, it appeared that a stream was formed largely by the outlet of two springs, and that the defendant company, after a continuous and uninterrupted appropriation and diversion of the water from one of these outlets for use other than for irrigation, for more than the prescriptive period, and adverse to the rights of the plaintiff, who was a riparian owner below the junction of the two outlets, abandoned the right of diversion at that place, and commenced the diversion of water from the other outlet, which flowed through land owned by it, the spring itself being situated upon defendant's land; and it was held that the company, having acquired by prescription the right to divert the water from one outlet, had a right, as against plaintiff, when the easement at that point was released, to go upon its own land and take an equal amount of water from the same source of supply.

H. C. Sh.

A PPEAL by defendant from a decree of the Court of Common Pleas for Lackawanna County in plaintiff's favor in a suit to restrain defendant from diverting the waters of a certain stream. Affirmed.

The facts are stated in the opinion.

Messrs. D. R. Reese, John McGahren, J. H. Oliver, John G. Johnson, and S. B. Price, for appellant:

The resolution of a water company appropriating water of a stream, without further action before or after, does not entitle it to complain of the use of the water by another riparian owner.

Under its charter, the plaintiff company does not obtain a right to take all the waters of Roaring brook.

Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co. 6 Pa. Dist. R. 305, Am. & Eng. Enc. Law, 2d ed. p. 410; Philadelphia & R. R. Co. v. Pottsville Water Co. 182 Pa. 418, 38 Atl. 404; Lord v. Meadville Water Co. 135 Pa. 122, 8 L.R.A. 202, 20 Am. St. Rep. 864, 19 Atl. 1007; Aetna Mills v. Waltham, 126 Mass. 422; Saunders v. Bluefield Water Works & Improv. Co. 58 Fed. 133.

A water company riparian owner cannot enjoin a railroad company, also a riparian owner on the same stream, from taking water for the use of its engines, at a time when the flow of the stream is four times the amount needed for both parties.

Pennsylvania R. Co. v. Miller, 112 Pa. 34, 3 Atl. 780, 28 Am. & Eng. Enc. Law, 955; Rudolph v. Pennsylvania & Schuylkill Valley R. Co. 186 Pa. 541, 47 L.R.A. 782, 40 Atl. 1083; Hollister v. Erie & W. Valley R. Co. 11 Lack. Jur. 247; Philadelphia & R. R. Co. v. Pottsville Water Co. 182 Pa. 418, 38 Atl. 404; Wheatley v. Chrisman, 24 Pa. 298, 64 Am. Dec. 657, 11 Mor. Min. Rep. 24; Clark v. Pennsylvania R. Co. 145 Pa. 449, 27 Am. St. Rep. 710, 22 Atl. 989; 2 Farnham, Waters, 1585, § 467; 30 Am. & Eng. Enc. Law, 2d ed. 355, 356; Philadelphia v. Spring Garden, 7 Pa. 348; Brown v. Kistler, 190 Pa. 499, 42 Atl. 885; Elliot v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85; Canton v. Shock, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. St. Rep. 557, 63 N. E. 600; Cummings v. Barrett, 10 Cush. 186; Standard Plate Glass Co. v. Butler Water Co. 5 Pa. Super. Ct. 564; Sandwich v. Great Northern R. Co. L. R. 10 Ch. Div. 707, 27 Week. Rep. 616; Wilkes-Barre Water Co. v. Lehigh Coal & Nav. Co. 3 Kulp, 394; 1 Gould, Waters, 398, § 206; Fifield v. Spring Valley Waterworks, 130 Cal. 552, 62 Pac. 1054; New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co. 44 N. J. Eq. 398, 1 L.R.A. 133, 15 Atl. 227; Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co. 6 Pa. Dist. R. 305; Hetrich v. 47 L.R.A. (N.S.)

Deachler, 6 Pa. 32; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Miller v. Miller, 9 Pa. 77, 49 Am. Dec. 545; Bliss v. Kennedy, 43 Ill. 67.

A railroad riparian owner may take water for the use of its engines by reason of long-continued use, and acknowledgment of the right to use in deeds and contracts to which complaining riparian owner is a party.

11 Am. & Eng. Enc. Law, 2d ed. 441; Share v. Anderson, 7 Serg. & R. 63, 10 Am. Dec. 421; Smith v. Loafman, 145 Pa. 628, 23 Atl. 395; 2 Farnham, Waters, p. 2774.

Messrs. O'Brien & Kelly, F. W. Wheaton, and Alexander Simpson, Jr., for appellee:

The act of the defendant was far beyond its right as a riparian owner of the little piece of land, part of its right of way, through which the stream ran.

A riparian owner may make reasonable use of the waters for extraordinary purposes in connection with the use of his land, provided he does not sensibly or materially diminish the flow; but he cannot take the water from the stream where the same passes over his land, and convey it away to some different piece of land, and there use it, whether he thus sensibly affects the flow of the stream or not.

Miller v. Miller, 9 Pa. 76, 49 Am. Dec. 545; Wheatley v. Chrisman, 24 Pa. 302, 64 Am. Dec. 657, 11 Mor. Min. Rep. 24; Pennsylvania R. Co. v. Miller, 112 Pa. 34; 3 Atl. 780; Haupt's Appeal, 125 Pa. 211, 17 Atl. 436; Philadelphia & R. R. Co. v. Pottsville Water Co. 182 Pa. 418, 38 Atl. 404; Wilkes Barre Water Co. v. Lehigh Coal & Nav. Co. 3 Kulp, 389.

Whether, at the time the defendant was pumping water from the stream, there was a surplus of water flowing into the dam below, is of no moment.

Luther v. Luther, 216 Pa. 1, 64 Atl. 868; Zook v. Pennsylvania R. Co. 206 Pa. 603, 56 Atl. 82; Thompson's Appeal, 126 Pa. 371, 17 Atl. 643.

For an unreasonable use of the stream by an upper riparian proprietor, an action will lie in favor of a lower proprietor, notwithstanding the latter has suffered no actual damage.

Water Comm. v. Perry, 69 Conn. 461, 37 Atl. 1059; Morrill v. St. Anthony Falls Water-Power Co. 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; Heilbron v. Fowler Switch Canal Co. 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790; Stowell v. Lincoln, 11 Gray, 434; Tillotson v. Smith, 32 N. H. 94, 64 Am. Dec. 355; Harrop v. Hirst, L. R. 4 Exch. 43, 38 L. J. Exch. N. S. 1, 19 L. T. N. S. 426, 17

Week. Rep. 164, 1 Eng. Rul. Cas. 547; *Norbury v. Kitchin*, 15 L. T. N. S. 501; *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 230; *Creighton v. Evans*, 53 Cal. 55, 8 Mor. Min. Rep. 123; *Delaware & H. Canal Co. v. Torrey*, 33 Pa. 149; *Clark v. Pennsylvania R. Co.* 145 Pa. 450, 27 Am. St. Rep. 710, 22 Atl. 989; *Gould v. Eaton*, 117 Cal. 539, 38 L.R.A. 181, 49 Pac. 577; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Griffiths v. Monongahela R. Co.* 20 Pa. Dist. R. 534, 232 Pa. 639, 81 Atl. 713, Ann. Cas. 1912 D, 13; *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.* 167 Pa. 136, 31 Atl. 484.

Elkin, J., delivered the opinion of the court.

The purpose of filing this bill was to restrain defendant railroad company from diverting the waters of Roaring brook from their natural course above No. 7 dam, and making use of them for locomotives, repair shops, passenger station, freight station, roundhouse, and other general railroad purposes in the city of Scranton. The only rights the railroad company have in the waters of the stream in question are those of a riparian owner of land adjacent to Roaring brook. We therefore agree with the learned court below that this controversy in its last analysis centers around the rights of the defendant as a riparian owner. The question for decision here is not what the water company under its charter powers did or attempted to do, but whether the railroad company, being the owner of a small strip of land at the point where it pumped the water from the stream, can convey it through mains off the riparian land to a reservoir 2 or 3 miles distant, there to be used as a supply for general railroad purposes as above indicated. If the railroad company does not have the legal right to thus divert the water from its natural channel, the controversy is within very narrow limits, and most of the questions raised in the court below and here have no material bearing on the case. If the railroad company did what it has no right to do, it is no answer to say that the water company has violated its contract, or transgressed the law in other respects.

Collateral issues relating to the charter powers of the water company and other matters incident to the business transactions of the parties can have no controlling effect in this controversy, because the precise question for decision is the right of the railroad company to divert the water of the stream from its natural course and convey it through, over, and away from the riparian land to a reservoir several 47 L.R.A. (N.S.)

miles distant, to be used for general railroad purposes.

In a long and unbroken line of cases it has been held that the diversion of water from its natural course in a stream by a riparian owner, for purposes other than those incident to the proper enjoyment of the riparian land, is unlawful. The upper riparian owner has a right to the use of the water of the stream on his land for any legal purpose, provided he returns it to its channel without contamination or substantial diminution. *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Atl. 780. In the present case the water diverted, and about which complaint is made, was not used on the riparian land for any purpose, nor was it returned to the stream at any point above the land of the complaining lower riparian owner. It is argued that a riparian owner may use and enjoy the flowing water of a stream in such reasonable manner as not to injure unnecessarily the rights of others, and a number of authorities are cited in support of this position. Several of our own cases are relied on to sustain the proposition that a riparian owner has the right to the use of the stream as an incident to the riparian land, for ordinary purposes, and also for purposes sometimes called extraordinary, provided in such extraordinary use he does not materially diminish its quantity or impair its quality. *Pennsylvania R. Co. v. Miller*, supra; *Clark v. Pennsylvania R. Co.* 145 Pa. 439, 27 Am. St. Rep. 710, 22 Atl. 989; *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 563. In this connection *Brown v. Kistler*, 190 Pa. 499, 42 Atl. 885, is cited as deciding that an upper riparian owner has the right to use the water for household purposes and for watering stock, and also for manufacturing and other purposes, to an extent that is not unreasonable in view of the size of the stream. It is true that it has been so held in the cases mentioned and in other cases not cited. But in no decided case in our state has it been held that a riparian owner had the right to do what appellant has undertaken to do in the present case, that is, pump the water away from the riparian land, to be used at distant points for purposes in no way connected with the use of the land or incident to its enjoyment. To so hold now would be to take a long step in advance of any case yet decided in Pennsylvania.

It is settled law that riparian owners have no ownership of running water, nor have they any right to divert or sell it for general use, and are limited in their own use of it to ordinary purposes incident to the enjoyment of the riparian land, and

in exceptional cases to what is called extraordinary uses upon the land itself, provided such extraordinary use does not materially diminish the flow of the stream or impair the quality of the water. But the extraordinary use must be upon the riparian land, and this is the utmost limit to which our cases have gone. To further extend the doctrine would be to disregard settled principles of law. As we view it, there is no escape from the conclusion that appellant, standing alone on its rights as a riparian owner, cannot lawfully divert the water of Roaring brook for general railroad uses in the city of Scranton.

But even conceding this to be true, learned counsel for appellant ably and earnestly contend that appellee is not in position to raise the question, and has no standing to ask for equitable relief. Several reasons are urged in support of this position; the main one being that, for the purposes of this case, appellee must be regarded as a riparian owner, and not as a water company enjoying its rights under the power of eminent domain. The answer to this position is that it does not matter whether appellee be regarded merely as a riparian owner, or as a water company having properly exercised the right of eminent domain in the condemnation of the stream, because in either event it has standing to complain of what was done by appellant in diverting the water from the stream, and conveying it away from the riparian land for purposes in no way incident to the enjoyment of the land itself. The situation would be different if the water so diverted was used upon the riparian land. In that case its right to complain would depend very largely upon how the amount of water diverted affected the flow of the stream, and, when it was returned to its natural course, how it impaired the quality of the water. These questions do not arise in the present case, and so far as the record discloses there is no evidence to show that the diverted water was returned to its natural course. It was certainly not returned to Roaring Brook at any point above No. 7 dam. The thing complained of here is not that the water was diverted for a temporary use on the riparian land and then permitted to flow back into the stream, but that it was pumped through mains away from its natural channel a distance of several miles, and there used for purposes in no way incident to the land to which the right was riparian. We therefore conclude that appellee had standing to complain of the unlawful diversion of the water, even if it be regarded merely as a lower riparian owner. This makes it unnecessary to discuss several interesting questions relating

to the proper exercise by a water company of the right of eminent domain in condemning a stream of water. This subject was discussed in *Boalsburg Water Co. v. State College Water Co.* 240 Pa. 198, 87 Atl. 609, in an opinion recently handed down. That case is authority for the admission in evidence of the minutes of a water company containing resolutions to condemn the water of a stream in a court proceeding in which the validity of the condemnation was involved. Resolutions to appropriate the water of a stream is the first step to be taken in a condemnation proceeding, and, when a water company claims a right under the power of eminent domain, it is proper to show by the minutes what was done in this respect. This is the answer to those assignments of error in which this question was raised. It is not necessary for the purposes of the present case to discuss or determine the rights, powers, and duties of the appellee water company as a public service corporation, and we do not do so. These questions have no proper place in determining the rights of the parties to this controversy, and we therefore refrain from either discussing or deciding them. *Obiter dicta* observations are always unsatisfactory, and frequently misleading and dangerous.

It is strongly urged that the appellant company has the right by prescription and by contract to divert the water about which complaint is made. This right is asserted under the agreement of 1866, the deed of 1897, and the long-continued use of the water at certain points for railroad purposes. The answer to this position is obvious. No attempt is made in this proceeding to interfere with these rights of the railroad company. Whatever rights, if any, appellant may have by deed or covenant or by prescription, it may still enjoy; but we cannot undertake to determine just what those rights are in this case, except that they do not include the right to supply water for general railroad purposes in the city of Scranton. No such right was ever asserted by the railroad company until within a recent period, and then it was challenged by appellee. We do not put this upon the ground that the railroad company by so doing was interfering with the water company in supplying water under its charter to the inhabitants of Scranton. This would be an untenable position under the law. If the railroad company could secure a water supply for its own purposes so as not to divert the water of a stream to the injury of riparian owners, or if it should condemn the water of a stream not already appropriated under the right of eminent domain, as it may have the

right to do under proper circumstances, its right to thus furnish its own water supply could not be seriously questioned by the water company or by anyone else. But when the railroad company stands on its rights as a riparian owner, and claims the use of the water for extraordinary purposes, it must show that the extraordinary use is upon the riparian land. If it stands upon its rights under a contract or by prescription, it is confined to such uses and at such points as the contracting parties stipulated in their agreement, or permitted without objection for a long period of years. In the present case these rights are not denied by appellee, and the court below did not enjoin the use of the water at certain designated points for general railroad purposes. The decree of the court leaves the railroad company in the enjoyment of all the rights claimed by it for a long period of years. What is enjoined is the extension of those rights into new fields and to distant points where a much larger supply of water is required. In thus defining the rights of the parties, we think the learned court below was clearly right.

The standing of appellee to ask equitable relief by way of injunction in a case of this character is ruled by *Griffiths v. Monongahela R. Co.*, 232 Pa. 639, 81 Atl. 713, Ann. Cas. 1912 D, 13. As has been hereinbefore pointed out, this is not a case where a lower riparian owner seeks to enjoin the extraordinary use of water on the riparian land. The thing complained of here is not the unlawful diversion of water for temporary uses on the riparian land, but for general railroad purposes off the land and several miles distant. It is unnecessary to discuss many incidental questions raised by this appeal, and to do so would only prolong the opinion without giving any light to aid in the decision of the precise question involved.

Decree affirmed at cost of appellant.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA v.

WILMER T. POTTS, Appt.

(241 Pa. 325, 88 Atl. 483.)

Criminal law — error in name of juror — effect.

A true verdict in a criminal case will

Note. — Mistake as to name of juror in criminal case as ground for arrest of judgment, new trial, or reversal.

This note does not cover the question whether a mistake in the name of a juror
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not be set aside because a juror was inadvertently given a wrong christian name on the slip placed in the wheel, so that defendant's counsel investigated the qualifications of the wrong man, if the occupation and residence were correctly given, and no objection was made to him.

(May 28, 1913.)

APPEAL by defendant from a judgment of the Court of Oyer and Terminer for Chester County convicting him of murder in the first degree. Affirmed.

The facts are stated in the opinion.

Messrs. W. Butler Windle and J. Paul MacElree, for appellant:

One whose name was not in the jury wheel, and was therefore not on the venire, cannot be summoned by the sheriff to serve as a juror, cannot assume the name of another and serve, nor can he serve at all, except where talesmen are summoned.

Rex v. Tremearne, 5 Barn. & C. 254, 7 Dowl. & R. 684, 4 L. J. K. B. 157, 29 Revised Rep. 234; *Dyott v. Com.* 5 Whart. 78; *Burton v. Ehrlich*, 15 Pa. 236; *Field v. Johnson*, 5 W. N. C. 404; *Com. v. Elvin*, 5 Pa. Dist. R. 593; *Com. v. Spring*, 5 Clark (Pa.) 240; *Hieter v. Kaufman*, 20 Pa. Co. Ct. 198; *First Nat. Bank v. Ahlers*, 20 Pa. Co. Ct. 505; *Com. v. Baturin*, 24 Pa. Co. Ct. 181.

Defendant has an absolute right to have another trial, if the conclusion is properly reached that he was not tried by "twelve jurors regularly selected and summoned," and that such defects have not been cured under the act of 1814.

Messrs. Harris L. Sproat, Truman D. Wade, and William Tregay, for the Commonwealth:

Where the identity of jurors whose names were put in the wheel, with those who were drawn and summoned, is not disputed, mere mistakes in the initials, the Christian names, and the spelling of the surnames of the jurors, do not furnish grounds for quashing the venire after a plea of "not guilty" has been entered.

Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433; *Jewell v. Com.* 22 Pa. 94; *Fife v. Com.* 29 Pa. 429; *Burton v. Ehrlich*, 15 Pa. 236; *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

Brown, J., delivered the opinion of the court:

Though this appeal is from judgment of

will warrant a challenge to the array of the quashing of the venire. Nor does it cover cases where a person other than the one drawn, served. This latter class would, of course, cover cases of wrongful impersonation as well as cases of innocent mistake.

death, it is not alleged that any error was committed on the trial of the case, nor is nor is there any complaint that the verdict returned against the appellant was not justified by the evidence. The sole assignment is that the court erred in not granting a new trial upon the discovery, some time after the verdict had been rendered, that, when the name of James T. McCullough was called as a juror, one John T. McCullough responded, and, after having been sworn, took a seat in the jury box.

It is very clear from the depositions taken in connection with the motion for a new trial, that John T. McCullough did not intentionally impersonate another, but allowed himself to be accepted as a juror under the honest belief that he was the juror intended to be called. When the jury wheel was being filled for the year 1913, one of the jury commissioners gave to their clerk the name of John T. McCullough, with his occupation as a watchman and his residence West Chester. The clerk inadvertently wrote the name of James T. McCullough, adding, however, the occupation and residence given to him by the commissioner, and the slip, so written, was placed in the wheel. At that time John T. McCullough was a watchman and had for years been a

resident of West Chester. There had not been, so far as can be gathered from the depositions, any resident in the town known by the name of James T. McCullough. The slip as placed in the jury wheel was drawn out when the jurors were selected for the term of court at which the prisoner was tried, and it so appeared on the venire. After ineffectual efforts to serve notice upon James T. McCullough to serve as a juror, a notice was sent to John T. McCullough, who returned it to the sheriff, believing that a mistake had been made. When this was brought to the notice of Michael Cook, the jury commissioner who had directed the name of John T. McCullough to be placed in the wheel, he explained to the sheriff that John T. McCullough was the correct name of the juror to be summoned, and thereupon a new notice was made out and served upon him. It was in response to this that he appeared in court. After the jurors had been drawn for the term of court at which the appellant was tried, one of his counsel made some investigation as to James T. McCullough, but found no one of that name living in West Chester. He did, however, learn that a James H. McCullough, a lineman, had been a resident of the town and had lived at 131 East Union street, but

The general rule is that a mere mistake as to the name of a juror in a criminal case does not constitute sufficient ground to warrant arresting the judgment or the granting of a new trial or a reversal, at least in the absence of material prejudice which could not have been avoided by the exercise of due diligence upon the impaneling of the jury.

As ground for arrest of judgment.

This phase of the question seems to have arisen in but one case. In *Munshower v. State*, 56 Md. 514, it was held that a mistake in the middle name of a juror, the name drawn from the jury box having been "Joseph H. Brown," and the one who answered thereto having been sworn under the correct name of Joseph B. Brown," did not furnish sufficient grounds for arrest of the judgment, where there was "no mistake as to the identity of the person," "Joseph B. Brown" having been the name which should have been, and was in fact intended to have been, put in the box.

As ground for new trial.

A number of cases have involved the question whether or not a mistake as to the name of a juror constitutes sufficient ground for the granting of a new trial, the general rule, as above stated, being that a new trial will not be granted unless the accused, by reason of previous ignorance of the misnomer, was prejudiced thereby. The ques-

tion, however, is one calling for the exercise of the discretion of the trial judge, and his decision will not ordinarily be disturbed.

Thus, in *Chadwick v. United States*, 72 C. C. A. 348, 141 Fed. 225, a case almost identical as to facts and decision with *Com. v. Potts*, it was held that a motion for a new trial made after verdict, and based on the ground that the given name of one of the jurors who served on the trial differed from the name on the jury list as drawn, the real name being "Bentley Crane," and the name drawn from the jury box being "Butler Crane," raised a question calling for the exercise of the discretion of the trial judge, and that denial of such motion might well be made where it appeared that the juror who served was the one summoned and actually intended, that he appeared in good faith, and that the mistake was purely a clerical one, there being no person of the name on the list. The court did say, however, that if there had been wilful misconduct upon the part of anyone, or if there had been, in fact, one of the name drawn competent for jury service in the case, a serious question would have been raised, provided the defendant had been misled into accepting one juror when he had reasonable ground for believing that he was securing another.

So, in *State v. Canton*, 131 La. 255, 59 So. 202, it was held that a motion for a new trial was properly overruled where it was predicated upon the fact that one "John C. Matranga" served upon the jury, whereas

had moved to Philadelphia some time before the wheel was filled. The excuse given for having permitted John T. McCullough to be sworn as a juror is that it was assumed he was the McCullough about whom counsel for the prisoner had made inquiries. The court below properly held that this was unavailing. John T. McCullough, the juror who sat in the box, was the man whose name the jury commissioner intended to put in the wheel. He was accurately described as to residence, occupation, middle letter, and last name, the only misdescription being as to his first name, and, when he was examined on his *voir dire*, his frank answers were sufficient to put counsel for the prisoner upon notice that they ought to make further inquiry as to his identity. Not having done so, it is now too late to complain of his eligibility to serve as a juror. When the jury wheel was being filled, he was a watchman; but, when examined on his *voir dire*, he testified that he lived in West Chester, was a laborer, taking employment wherever he could find it, and that his residence was 113 East Minor street,—not 131 East Union street, where James H. McCullough, the lineman, had formerly lived. Here was knowledge brought directly to counsel for the prisoner

that the jury was not the man about whom they had inquired after the jury list had been posted in the proper office, and, with such knowledge, he was accepted by them and sworn. The verdict rendered by him and the eleven other jurors was a true one, not only in law, but in fact. If the objection now made to the juror were sufficient to set aside a righteous judgment, "the administration of criminal justice would be wholly impracticable. Very few cases would stand. It is almost impossible to avoid mistakes like these. The occurrence of them does not diminish the safety of an innocent man, and whatever may be the humanity of the law, the escape of the guilty is not one of its objects. It would be a great public misfortune if a person charged with an offense could sit by while he is tried by a jury to whom he makes no objection, and after a verdict against him on the merits of his cause, set it aside on account of accidental and unavoidable irregularities in the summoning or calling of the jurors, by which he was not prejudiced." Black, Ch. J., in *Jewell v. Com.* 22 Pa. 94.

The assignment of error is overruled, the judgment is affirmed, and the record remitted for the purpose of execution.

the name under which he was called, because of a clerical error, was "John C. Maranga," it appearing that Matranga was a qualified juror, and that he was the identical person qualified by the jury commissioners, and it not being shown either that the juror intentionally concealed his true name, or that the defendant had suffered from the acts of the juror.

And in *Cason v. State*, 134 Ga. 786, 68 S. E. 554, where a juror's name appeared on the jury list as "Sterling Whitfield," and the man summoned was "Starling Whitfield," and the evidence introduced clearly showed that the two were identical, and that there was a mere error in spelling the juror's name, it was held that the fact that the court held the juror competent, and directed the clerk to correct the spelling of the name on the list of jurors drawn, furnished no ground for a new trial.

And in *Pressley v. State*, 19 Ga. 192, it was held that it was too late, after trial and verdict, to insist that a defendant had been deprived of his rights by the fact that the name "Ogilvie" appeared on the list of jurors furnished the prisoner's counsel, instead of that of "Olive," which was the right name, although not so written on the clerk's list, until the name of "Olive" was called in forming the jury, where the variance was detected and the list corrected by order of the court.

So, in *Moon v. State*, 68 Ga. 687, it was held that the decision of the trial judge as to the competency of a juror named "Newton D. Reid," who was entered on the panel 47 L.R.A. (N.S.)

by the name of "M. D. Reid," did not furnish grounds for a new trial.

And in *Goodhue v. People*, 94 Ill. 37, where it appeared that one of the panel who was named "A. F. Nichols" was summoned by the name "Burt Nichols," and in the list furnished accused was put down as "Burt Nichols," the court said: "The utmost care should be taken to give to every defendant in criminal cases every reasonable opportunity to prepare for trial, and among other things to notify them in due time as to what men constitute the panel out of which the jurors for his trial are to be called, and where it is made to appear to the court that a defendant has been put to a disadvantage from a failure in this regard, his conviction ought to be set aside. It is not, however, every title inaccuracy which may occur in this regard for which a trial should be set aside. In this case it seems plain that the accused suffered no injury from the irregularity."

And in *State v. Caymo*, 108 La. 218, 32 So. 351, it was held that the court correctly refused to grant a new trial because of the fact that the name of one of the jurors was by birth "George Garrett," whereas he was selected under the name "George Perry," it appearing that he was a qualified juror, that he was known in the community in which he had lived all his life by the name "George Perry," and that, as a matter of fact, he himself had not previously known of the parental name.

And see *Anderson v. State*, 5 Ark. 444, wherein a juror who signed the verdict

"Austin England" was the person on the panel and jury who answered to the name "Austin Engles," in which the court said that if the name was entered on the venire wrongly, it was an objection to be made at the time the juror was presented.

As ground for reversal.

Likewise, there seems to be but little question but that a mistake as to the name of a juror does not ordinarily constitute sufficient ground for reversal.

Thus, in *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 Ann. Cas. 430, where "Joseph S. Davis" was called as a juror, and the name on the list was written "John S. Davis," there being no such person, it was held that the misnomer could not be made the basis of an assignment of error, where the question whether the discrepancy afforded a ground of challenge was not determined on the preliminary examination of the juror.

And in *State v. Dubord*, 2 La. Ann. 732, it was held that a verdict would not be set aside on appeal because of a variance between the names of the jurors who served and those on the list furnished to the accused before trial. The court, after saying that such an objection must come when such jurors were presented, continued as follows: "The law has carefully protected his [defendant's] rights in this respect, and furnished him with every facility for making such objections as he may have to urge to jurors. He can complain neither of surprise nor injustice. He had in his possession, for two days previous to the trial, a list of the jurors who were to be presented to him. When J. N. Otto was presented, a reference to the list, furnished expressly for the purpose of enabling him to make his challenges, must have shown him that J. M. Otto was the person whom he had the right to insist on having presented. He had the right before exercising his challenge to inquire whether the juror offered was the juror summoned, and if it appeared that he was not, to insist that he be set aside. No objection was made to the persons in question on this or other grounds, and no right secured by law to the prisoner was denied to him on the trial. Not only was objection to the jurors waived, but the record shows that they were expressly accepted by the prisoner."

And in *Jewell v. Com.* 22 Pa. 94, where the name "Wilson Woodburn" appeared on the panel returned with the venire, but on the jury roll the name was originally entered "Wilson Woodford," and was afterwards changed by the clerk so as to read "William Woodford," which name was called with no response, although "Wilson Woodford" was then present, it was held that such mistakes did not constitute reversible error. See this case as quoted in *Com. v. Potts*.

So, in *Dove v. Com.* 82 Va. 301, where there was a mere clerical error in entering the names of the jurors in the daily 47 L.R.A.(N.S.)

record, in that one day "George T. Moon" appeared to be a member of the jury, while on a subsequent day it appeared that "George T. Morris" was a juror, it was held that such misnomer did not constitute ground for reversal, at least where no effort was made in the trial court to take advantage of the alleged irregularity.

So, in *White v. State*, — Ala. App. —, 62 So. 454, it was held that a defendant could not complain on appeal that the name of one juror was misspelled in the venire, "Marion S. New" being in attendance to serve under the name "Marion S. Nero," where the court required the state to use one of its strikes in eliminating the name of "Marion S. Nero" from the venire.

And in *Bone v. State*, — Ala. App. —, 62 So. 455, it was held that the accused was not prejudiced by the fact that a certain juror's name was not correctly placed upon the list served on him, where such juror was challenged by the state for cause before the defendant was required to strike.

And that an appellate court will not review the exercise of the discretion vested in the trial court, either to grant or deny a new trial because of a mistake in a juror's name, see *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225.

But see *United States v. Wilson, Baldw.* 78, Fed. Cas. No. 16,730, wherein "John Byrly" had been returned by the name of "John Byerly;" "Mathew Pennypacker" by the name "Nathan Pennypacker," and "George H. Pauling" by the name "George M. Pauling," and the court, upon sustaining an objection to their being served, said: "It would be a mistrial if it should appear by the record that the juror sworn was not the same person who was summoned and returned on the venire." G. J. C.

VERMONT SUPREME COURT.

STATE OF VERMONT

v.

LOUIS LAPOINT.

(— Vt. —, 88 Atl. 523.)

Burglary — pushing open car door.

1. Pushing open a car door found ajar sufficiently to effect an entrance, and the

Note. — Burglary by pushing open door already partly open.

As stated in *State v. Sorenson*, — Iowa, —, 138 N. W. 411: "There is a conflict in the authorities on this question. The numerical majority of the cases favor the contention of the defendant to the effect that, if a door be partly open, it is not a 'breaking' to push the same further open. Indeed, the older cases were practically unanimous to this effect. . . . In the later cases some of the courts have repudiated this rule as being unreasonable and illogical. . . . The majority of this

entering into the car to commit larceny, is a sufficient breaking to constitute burglary.

Appeal — exception — sufficiency.

2. An exception to a refusal to charge as requested, and to the charge given as a substitute, is too general to be of avail.

Same — ascertainment of intent.

3. An exception to an instruction in a prosecution for burglary, that "an intent to steal may be inferred from the larceny alone," as improper under the circumstances of the case, does not raise the question that the court charged that the only way intent could be determined was from the surrounding circumstances, thus excluding the testimony of accused.

Same — circumstantial evidence — amount necessary.

4. Failure to instruct in a prosecution for burglary that, in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis consistent with respondent's innocence; is not error where accused had testified to the entry and subsequent larceny.

(October 13, 1913.)

EXCEPTIONS by respondent to rulings of the Chittenden County Court made during the trial of an information charging him with burglary, which resulted in his conviction. Conviction affirmed.

The facts are stated in the opinion.

court is disposed to follow the lead of the last-cited cases, and to hold that, if a door be so nearly closed that the accused could not enter through the opening without pushing the door further open, then such pushing will constitute a 'breaking' within the meaning of the law. The minority, including Justice Weaver and the writer hereof [Justice Evans], are disposed to concede the force of logic in the majority view. In view, however, of the great weight of previous authority to the contrary, they think that the present holding savors somewhat of the *ex post facto*. It has always been in the power of the legislature to adopt a definition of 'breaking' in accord with the present holding, but it has not done so. In § 4791 it did provide that an entry without breaking should be punishable where such entry was in the nighttime and the building a dwelling house. In all other respects the definition of burglary is left to judicial decision. In view of the uniform judicial definition so long followed by the courts, and acquiesced in by legislatures, it is the minority view that an innovation ought not to be lightly adopted. On the other hand, it must be said that no previous case is overruled by the present holding, and that some of the previous utterances of this court are somewhat suggestive of the direction now taken by the majority holding."

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Messrs. Joel W. Page and Guy M. Page, for respondent:

The court erred in his definition of breaking, and in charging the jury that the respondent, upon his own statement, *viz.*, that he assisted in farther opening a door already 1 inch open, was guilty of breaking within the statute.

2 Bishop, New Crim. Law, p. 56, § 91; State v. McBeth, 49 Kan. 584, 31 Pac. 145; 1 McClain, Crim. Law, § 500, p. 481; 7 Dane, Abr. 136; 6 Cyc. 174; 2 Am. & Eng. Enc. Law, 659-601; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; State v. Powell, 61 Kan. 81, 58 Pac. 968; Carter v. State, 68 Ala. 96; State v. Moore, 117 Mo. 395, 22 S. W. 1086; State v. Hecox, 83 Mo. 538, 5 Am. Crim. Rep. 98; State v. Boon, 35 N. C. (13 Ired. L.) 244, 57 Am. Dec. 555; Sims v. State, 136 Ind. 358, 36 N. E. 278; Finch v. Com. 14 Gratt. 643; Com. v. Stephenson, 8 Pick. 354; Beales Cas. 787; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1; Green v. State, 68 Ala. 539; Rex v. Lewis. 2 Car. & P. 628; State v. Cash, 38 Kan. 50, 16 Pac. 144; May, Crim. Law, § 257, p. 244; Bishop, Crim. Law, § 312; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 566; 4 Bl. Com. p. 226; 3 Co. Inst. chap. 14, p. 64; note to People v. Richards, 2 Am. St. Rep. 385; State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216; Scott v. State, 122 Ga. 138, 50 S. E. 49; May v. State, 40 Fla. 426, 24 So. 498; State v. Reid, 20 Iowa, 413; Com. v. Steward, 7 Dane, Abr. 136, 1 Beal Cr. C.

In accord with the majority holding in the Sorenson Case, is *STATE v. LAPOINT*: and in *Martin v. State*, 1 Tex. App. 525. under a statute similar to the Iowa statute referred to by Justice Evans in the Sorenson Case, *supra*,—although it appeared that the defendant had entered through an open outer window and a closed and latched inner door,—the court said: "Under our statute the entry into the house at night includes every kind of entry but one by the free consent of the occupant, or of one authorized to give consent, and it is not necessary that there should be any actual breaking when the entry is made at night. In this state, whenever any force is applied, even if it be the pushing wider a partly open door, or pushing up a window partly raised, so as to enable the person to enter the house without the free consent of the occupant, or of one authorized to give consent, with the intent to steal the property of another from said house, the party so entering said house is guilty of burglary."

And a formal plea of guilty of burglary in the first degree, entered upon the minutes of the court and never withdrawn, is not nullified by the subsequent statement of the accused that he found partly open for ventilation the cellar door through which he gained admission to the house; nor is a sentence on such plea invalid on the

176; *Com. v. Hays*, 7 Dane, Abr. 136, 1 Beal. Cr. C. 176; *Rex v. Smith*, 1 Moody, C. C. 178, 14 Am. Crim. Rep. 98; *Crabtree v. Robinson*, L. R. 15 Q. B. Div. 312, 54 L. J. Q. B. N. S. 544, 33 Week. Rep. 936, 50 J. P. 70; *Rex v. Robinson*, 1 Moody, C. C. 327, 14 Am. Crim. Rep. 97; *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 370; *Rose v. Com.* 15 Ky. L. Rep. 272, 40 S. W. 245; note to *People v. White*, 17 L.R.A. (N.S.) 1103; *Archbold Crim. Pl. & Pr.* Pomeroy's Notes, p. 1077, 1910 ed. p. 719; *Whart. Crim. Law*, 1912 11th ed. pp. 1191, 1192, 1198, 1199, §§ 971, 979, 981; 2 Russell, Crimes, p. 3; *Clark & M. Crimes*, pp. 941, 942.

It was error for the court to charge as he did concerning the evidence of intent.

Crawford v. Joslyn, 83 Vt. 361, 76 Atl. 108, Ann. Cas. 1912C, 428; *Stearns v. Gosse*, 58 Vt. 38, 3 Atl. 193; *Hulett v. Hulett*, 37 Vt. 581; *Gordon v. Tabor*, 5 Vt. 103; *State v. O'Grady*, 65 Vt. 66, 25 Atl. 905; *Sawyer v. Phaley*, 33 Vt. 69; *State v. Totten*, 72 Vt. 73, 47 Atl. 105.

The court assumed something not in evidence directly bearing upon the issue whether the doors were closed. This was error.

Redding v. Redding, 69 Vt. 500, 38 Atl. 230; *Davis v. Rutland R. Co.* 82 Vt. 24, 71 Atl. 724.

An instruction that the circumstances must be not only consistent with guilt, but inconsistent within any other reasonable hypothesis, is only another form of the

reasonable doubt rule applied to evidence which is circumstantial.

State v. Bean, 77 Vt. 384, 60 Atl. 807.

And the respondent in proper cases is entitled to have the rule given in its form as applied to circumstantial evidence, notwithstanding the general reasonable doubt rule is stated.

Hunt v. State, 7 Tex. App. 212; *State v. Marston*, 82 Vt. 250, 72 Atl. 1075; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Taft v. Taft*, 80 Vt. 256, 130 Am. St. Rep. 984, 67 Atl. 703, 12 Ann. Cas. 959.

It was the duty of the court to give this instruction irrespective of requests, and failure to give it is error.

State v. Hopkins, 56 Vt. 250; *Westmore v. Sheffield*, 56 Vt. 239; *Donahue v. Windsor County Mut. F. Ins. Co.* 56 Vt. 374.

In order to prove the *corpus delicti*, it was necessary to prove the doors were at least shut.

State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216.

There being any uncertainty as to the *corpus delicti*, the respondent must be acquitted.

State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312.

And in the absence of evidence which tends to establish the *corpus delicti*, of course, the court should direct a verdict.

State v. Cady, 82 Me. 426, 19 Atl. 908; *State v. Smith*, 28 Iowa, 565; *United States*

ground that such statement shows that the element of breaking necessary to constitute the crime of burglary in the first degree was absent. *People ex rel. Hubert v. Kaiser*, 150 App. Div. 541, 135 N. Y. Supp. 274, affirmed in 206 N. Y. 46, 99 N. E. 195.

The earlier cases, however, as stated in the *Sorenson Case*, supra, seem to have been unanimous to the effect that it is not a burglarious "breaking" to push farther open a door which is already partly open. Thus, in *Com. v. Steward*, 7 Dane, Abr. 136, although the manner of the burglary does not appear from the report, the court is said to have held, *inter alia*, that, "if a window be a little pushed up, or a door a little opened, etc., so that one passing by may see the owner has not properly shut his house, it is not a burglarious breaking to enter, though a further pushing up of the window or opening of the door be necessary for the person to enter."

And in *Com. v. Hays*, 7 Dane, Abr. 136, although the defendant "got into the house by a window," "the court stated the law to be, as to breaking and entering, as it was stated above in the case of *Steward*."

So, in *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376, although the accused was alleged to have entered through a wholly closed transom, the court said, *obiter*: 47 L.R.A. (N.S.)

"The law on the point is that, if the owner leaves his doors . . . partly open, . . . it will be such negligence or folly on his part as is calculated to induce or tempt a stranger to enter; and if he does so . . . by pushing open the partly opened door, . . . it will not be burglary."

And likewise, in *Rose v. Com.* 19 Ky. L. Rep. 272, 40 S. W. 245, and *Com. v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556, cases of breaking and entering through a window, the rule is expressly recognized, *obiter*, that an entry effected by pushing open farther a door already partly open is not such "breaking" and entry as to constitute burglary.

And in *State v. Long*, 5 Ohio S. & C. P. Dec. 617, the court charged the jury that if a car door is partially open, and the only force used is to open it farther, pushing it upon slides, or upon such other device as is used in hanging it, this does not constitute a forcible breaking in the sense in which the statute defining burglary uses the term.

As to burglary by raising a window already partly open, see note to *People v. White*, 17 L.R.A. (N.S.) 1102.

As to burglary by forcing a screen door or window, see notes to *State v. Henderson*, 17 L.R.A. (N.S.) 1100, and *Collins v. Com.* 38 L.R.A. (N.S.) 770.

A. C. W.

v. Fullerton, 7 Blatchf. 177, Fed. Cas. No. 15,178.

Messrs. Theodore E. Hopkins and Henry B. Shaw, for the State:

The act of the respondent in applying force to the car door, which he found slightly open "about an inch," whereby the door was pushed open about halfway, and his climbing into the car through the opening which he thus made, constituted a breaking and entering.

People v. White, 153 Mich. 617, 17 L.R.A. (N.S.) 1103, 117 N. W. 161, 15 Ann. Cas. 927; Claiborne v. State, 113 Tenn. 261, 68 L.R.A. 859, 83 S. W. 352; Com. v. Stephenson, 8 Pick. 355; State v. Sorensen, — Iowa, —, 138 N. W. 411; State v. Henderson, 212 Mo. 208, 17 L.R.A. (N.S.) 1100, 110 S. W. 1078; Hays v. State, 51 Tex. Crim. Rep. 111, 100 S. W. 928; State v. Conners, 95 Iowa, 485, 64 N. W. 295; State v. Moon, 62 Kan. 809, 64 Pac. 609; May v. State, 40 Fla. 426, 24 So. 498; Collins v. Com. 146 Ky. 698, 38 L.R.A. (N.S.) 769, 143 S. W. 35.

The exception "to the charge as a whole as prejudicial to the respondent, and also to all parts of the charge as are inconsistent with the general points and general theories of law expressed or referred to in the requests to charge," is too general to be sustained.

State v. Sargood, 77 Vt. 81, 58 Atl. 971.

Munson, J., delivered the opinion of the court:

The respondent was tried on an information in two counts, the first of which charged burglary and the second larceny; and a conviction was had on the first count. The place entered was a freight car forming part of a train moving from Richmond to Waterbury. The only direct evidence as to the breaking was that of the respondent, who testified that he and his associate found the door of the car open about an inch, and pushed it open about halfway, and climbed in. The respondent has raised, by several motions and exceptions, the question whether this was sufficient to constitute a breaking.

It may be conceded at the start that by all the earlier cases, and by the great weight of authority to the present day, the further opening of a door left ajar, or of a window slightly raised, is not such a breaking as is essential to the crime of burglary. This being the situation, our examination of the cases will have reference mainly to the reasons given for the rules adopted, and the consistency with which the rules have been applied.

Blackstone says that "if a person leaves his doors and windows open, it is his own

folly and negligence." Book 4, *226. This is the same as saying that the law will not undertake to protect, by its penalties, a man who is not diligent to protect himself. But this is not the rule in other branches of the criminal law; and we do not see that the fact that this crime consists merely of an entrance with intent to commit a further crime calls for any distinction. A man may recklessly and unnecessarily pass through a group of men excited to the point of violence, but if he is assaulted the penalty will follow. A man may issue a check so carelessly drawn as to afford an attractive opportunity for alteration, but the man who makes the alteration will be guilty of forgery. A woman may associate with men under circumstances of great imprudence, but if a criminal advantage is taken of her situation, the act will nevertheless be rape. Then why should not one who is tempted to enter a dwelling with felonious intent, by seeing a door which has carelessly been left ajar, be held guilty of burglary?

But let us keep the discussion within the limits of the law of the subject. A man may have locks on all his doors and windows, and if he closes the doors and windows without turning a lock, this is not to be accounted negligence. But if, in addition to the nonuse of his fastenings, he leaves a window sash slightly raised, his negligence becomes a shield to the intruder. This distinction evidently turns upon the theory, prominent in both early and recent cases, that the manifest carelessness of the householder tempts the passer-by to enter. It is doubtless true that a window partly raised or a door standing ajar may attract attention and be a temptation to one who might not be disposed to try a window or door to see if it was unfastened. But other conditions quite as likely to attract attention and tempt the observer have been held sufficient to support the charge; for instance, a network of twine covering a window space otherwise open, or a chain attached to the outside of a door and hooked over a nail. Com. v. Stephenson, 8 Pick. 354; State v. Hecox, 83 Mo. 531, 5 Am. Crim. Rep. 98. And one court has disagreed upon, and left undecided, the question of breaking, where the covering of a window opening was a cloth hanging from two nails in the top of the window frame. Hunter v. Com. 7 Gratt. 641, 56 Am. Dec. 121.

The word "breaking" implies the use of force, but it is universally held that the slightest force will be sufficient. It is evident that the question of force has no bearing upon the distinctions affecting this case as they are established by the decisions. The mere lifting of a closed window is a

sufficient breaking, but the further raising of a partially opened window is not. The pushing open of a closed but unlatched door is a sufficient breaking, but the pushing back of one found standing ajar is not. And yet the force used in the two cases of either class is of the same character and degree, differing only in the continuance of the effort.

It is said by way of a general designation that the thing moved or displaced to permit the entrance must be something which is relied upon as a security against intrusion and a means of safety to person and property. The cases show how little this means. No provision for safety is required beyond what is included in the barest construction of a building intended to meet the requirements of civilized life. The occupant may rely upon substances and conditions which are altogether wanting in real security, provided no opening whatever is left. The requirement, as applied to the ordinary means of entrance, is limited to measures which are about equally adapted to guard against the entering of strangers bent on crime and the unceremonious intrusion of friends.

It has always been held that an entrance through a chimney is a breaking. It is said that a chimney is as much closed as the nature of things will permit,—that it is a necessary opening and needs protection. The pushing open of a closed but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling house, is a breaking. *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376. But if it were left to hang slightly away from the frame, it would not be a breaking to push it further, unless it were held otherwise on the ground that the position of the transom was such that the condition in which it was left would not be likely to attract attention. In other words, if such a transom is left in a position to serve in the slightest degree the purpose for which it was put on hinges, an entrance by way of it will not be a breaking. If an upper sash sustained only by a pulley weight is left in position, it will entitle the household to the protection of the law. *Rex v. Haines, Russ. & R. C. C.* 451. But if it be left a little lowered, an entrance effected by pulling it down will not subject the intruder to the penalty. As far as the law is concerned, the necessities of convenient, unobstructed, and adequate ventilation have thus far yielded to the theories which burden the inmate with the duty of protecting the outsider from temptation. The incongruity of this situation cannot well be overlooked in a time when the necessity of a constant and abundant supply of fresh air is so generally recognized. What-

ever reasons may formerly have existed for making this distinction, there seems to be none for maintaining it longer.

The offense consists in breaking and entering with felonious intent; and the real breaking is the removal of the obstruction which, if left as found, would prevent the entering. The fact that a quarter of an inch of the space needed to effect an entrance existed before the intruder commenced operations ought not to relieve him from the penalty. The point has never before been brought to decision in this state. The only cases we know of which directly support the view taken are *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 108 Am. St. Rep. 833, 83 S. W. 352; *People v. White*, 153 Mich. 617, 17 L.R.A.(N.S.) 1102, 117 N. W. 161, 15 Ann. Cas. 927; *State v. Sorensen*, — Iowa, —, 138 N. W. 411. Convenient references to the cases generally will be found in the notes to *People v. Richards*, 2 Am. St. Rep. 383, and *State v. Vierek*, 139 Am. St. Rep. 1047.

The respondent submitted twenty-three requests to charge, some of which were complied with. He excepted to the refusal to charge in accordance with each request, and to the charge as given on the subject-matter of each. The exception was too general to be of avail.

Complaint is made that the court charged that the only way the intent could be determined was from the surrounding circumstances, thus excluding from consideration the respondent's testimony regarding his intent. The exception taken was to the charge that "an intent to steal may be inferred from the larceny alone," as improper under the existing circumstances of the case. There was nothing in this to direct the court's attention to the point now argued.

It is claimed that the court misstated the testimony as to the door being closed when the train left St. Albans, and as to its being closed until after the car was looked over at Bolton, and in saying that the respondent's evidence tended to show that Bolton was the place where the car was broken into. The first statement was incorrect, but harmless, the second was justified by the testimony of the conductor, and no exception was taken covering the third.

The court charged fully on the subject of reasonable doubt as applied to the element of intent. The respondent excepted to the failure to charge that, in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis consistent with the respondent's innocence. The respondent's testimony negatived the existence of an intent to steal at

the time of entering. The evidence of felonious intent adduced by the state, unless of confessions by the respondent, is necessarily circumstantial. It has not yet been held in this state that the failure to give the above instruction, where the evidence is wholly circumstantial, is error; and it certainly ought not to be so held in respect to burglarious intent, where the respondent has testified to the entering and to a subsequent larceny, and has also testified regarding his intent.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

GEORGIA SUPREME COURT.

A. J. WELLS, Plff. in Err.,
v.

PEARL M. THOMPSON.

(— Ga. —, 78 S. E. 823.)

Will — probate — solemn form.

1. To probate a will in solemn form, the burden is on the proponent to prove the due

Headnotes by FISH, Ch. J.

Note. — Necessity of procuring depositions of attesting witnesses to will who are beyond the jurisdiction of the court.

This note relates to the probate of wills requiring attesting witnesses, which are in form properly executed and attested, where an attesting witness is without the jurisdiction; it presupposes, also, that such absent witness would have been a necessary witness if he were within the jurisdiction.

The manner of execution of a will and the manner of its probate are matters of statute. The subject of the note, therefore, is one of statutory construction, and often the statutes are explicit upon the subject.

Dealing then with statutes which in general require that a will must be attested by a certain number of witnesses, etc., it is necessary to distinguish the *factum* from the proof. An illustration of this is shown in the answer to the question as to whether the competency of the attesting witnesses is to be determined as of the time of attestation or of probate (see the note to Bruce v. Shuler, 35 L.R.A.(N.S.) 686). It is, of course, at once apparent that the proof of execution by all the attesting witnesses cannot be assured, for some or all of them may be dead at the time of offering the will for probate; and where the will was validly executed, but the witnesses are dead, secondary evidence of execution is admitted.

For the general subject of necessity of

execution of the instrument and the testamentary capacity of the testator at the time of its execution.

Same — manner of proof — absence of witnesses.

2. The statutory rule that a will must be proved in solemn form by all the attesting witnesses is of necessity dispensed with, where the production of all is impossible because some may be beyond the jurisdiction of the court, or cannot be found, or are dead or insane, or otherwise incompetent as witnesses at the time of the trial. In such cases the due execution of the will may be proved by the subscribing witnesses who can be produced, and proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the others.

Same — depositions of nonresident witnesses.

3. While the interrogatories or depositions of attesting witnesses who reside beyond the jurisdiction of the court may be taken, it is not necessary to take them if the will can be proved by other legal and satisfactory evidence.

Same — presumption as to execution.

4. Where there is an attestation clause to an instrument offered for probate as a will, reciting all the facts essential to its due execution as a will, and it is shown

calling subscribing witnesses to prove attested instruments, see the note to Garrett v. Hianshue, 35 L.R.A. 321.

Cases relating to the proof required for the recording of foreign wills are omitted. See Re Hagar, 48 Misc. 43, 96 N. Y. Supp. 96.

The question of diligence in searching for a missing witness is also without the scope of this note.

General rule.

It is the rule that where the testimony of an attesting witness to a will would be necessary if he were within the jurisdiction of the court, but he is beyond its jurisdiction, secondary evidence may be admitted. *Bowling v. Bowling*, 8 Ala. 538; *Re Allison*, 104 Iowa, 130, 73 N. W. 489; *Turner v. Turner*, 1 Litt. (Ky.) 101; *McKeen v. Frost*, 46 Me. 239; *Ela v. Edwards*, 16 Gray, 91; *Engles v. Bruington*, 4 Yeates, 345, 2 Am. Dec. 411; *Denny v. Pinney*, 60 Vt. 524, 12 Atl. 108; *Smith v. Jones*, 6 Rand. (Va.) 33.

Thus, a party should have an opportunity to show that a missing attesting witness is without the state, in order that proof may be made of handwriting. *Smith v. Jones*, 6 Rand. (Va.) 33.

And it was held in *Re Allison*, 104 Iowa, 130, 73 N. W. 489, that the absence of the attesting witnesses who resided in another state not only rendered competent the testimony of the proponent, who was present at the execution of the will and testified to the circumstances, but such evi-

that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills.

Evidence — probate of will — knowledge of testator.

5. That the alleged testator knew the contents of the instrument offered for probate, and desired to execute it as a will, may be considered on the trial of an issue of *devisavit vel non*.

Will — probate — construction.

6. In a proceeding to probate a will in solemn form, the only issue is *devisavit vel non*, and therefore the matter of construing the terms of the instrument offered for probate is not up for determination.

Evidence — sufficiency.

7. The evidence submitted in behalf of the proponent as to the due execution of the instrument offered for probate, and as to the testamentary capacity of the alleged testatrix at the time of its execution, was sufficient to make out a *prima facie* case for the probate of the paper as a will, and, no evidence having been adduced for the contestant, the court erred in directing a verdict in favor of the latter.

(June 13, 1913.)

dence continued to be competent, although the depositions of such absent witnesses had been taken by consent on matters rendered necessary by the filing of objections to the probate.

In *Winding Gulf Colliery Co. v. Campbell*, — W. Va. —, 78 S. E. 384, it was held that the statute authorizing the taking and use of a deposition of an absent witness to a will, residing out of the state, is permissive, cumulative, and not exclusive. But here the residence of the absent witness was unknown.

In *Nalle v. Fenwick*, 4 Rand. (Va.) 585, where two of the attesting witnesses were out of the state, and every legal means had been taken to produce their attendance without effect, the court inclined to the opinion that it presented the same question as if the witnesses were dead; but this was not necessary to the decision of the case. The court said: "It was said in the argument that the mode prescribed in the act 'prescribing the method of proving certain wills,' 12 Hen. Stat. at L. 502, ought to have been pursued; but I consider the provisions of that statute as made in aid of parties claiming under a will, and giving them an additional mode of proceeding; not depriving them of any which they might have pursued before."

The principle is the same as if the witnesses were dead. *Ela v. Edwards*, 16 Gray, 91 (where there was no attestation clause, but the will was holographic); *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311; *Bowen v. Neal*, 136 Ga. 859, 72 S. E. 340; see also *Nalle v. Fenwick*, supra. 47 L.R.A. (N.S.)

ERROR to the Superior Court for Turner County to review a judgment in favor of objector in a proceeding for the probate of the alleged will of Mrs. Evie Brown, deceased. Reversed.

Statement by Fish, Ch. J.:

A. J. Wells, the nominated executor of the alleged will of Mrs. Evie Brown, applied for the probate of the same in solemn form. A caveat was filed by Mrs. Pearl M. Thompson, who claimed to be the sole heir at law of Mrs. Brown. The grounds of the caveat were in substance as follows: (a) Mrs. Brown, at the time the alleged will purports to have been executed, was not of sound and disposing mind and memory, but was then a lunatic, and continuously so remained until the date of her death; (b) if Mrs. Brown signed the alleged will at all, she did not do so freely and voluntarily, "but she was moved thereto by the undue influence and persuasions of . . . said A. J. Wells;" and (c) that the pretended will was void because A. J. Wells was not the son-in-law of Mrs. Brown at the time of her death, as his wife, the daughter of Mrs. Brown, had died without issue prior to the death of Mrs. Brown.

There is great reluctance to send the original will out of the jurisdiction (*Engles v. Brington*, 4 Yeates, 345, 2 Am. Dec. 411; *Crockett v. Crockett*, Meigs, 95; *Denny v. Pinney*, 60 Vt. 524, 12 Atl. 108); and it has been said that taking a deposition of an absent witness without sending the will would be no better than secondary evidence of a statement (*Bowling v. Bowling*, 8 Ala. 538).

The rule applies, at least in America, in cases of trial of issues of *devisavit vel non*. *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311; *Crockett v. Crockett*, Meigs, 95.

In *Bailey v. Stiles*, 2 N. J. Eq. 220, a bill to establish a lost will, the court, in establishing the will, held that a witness moving out of the jurisdiction need not be examined, although the party might take his disposition if it were desired to do so.

Judicial explanations of the rule.

In *Turner v. Turner*, 1 Litt. (Ky.) 101, supra, the court said: "It has also been frequently decided that where subscribing witnesses were out of the state, in case of other writings, their testimony might be dispensed with; and we see no objection to applying this doctrine to the case of wills, where one of the witnesses has proved that the testator did comply with the law in publishing the will. It is true, the act of assembly points out the mode in which a *dedimus* may issue to take the proof of a will; but it does not compel parties to resort to it. It only furnishes the means of taking the proof where it cannot other-

Mrs. Thompson, at the time of the filing of the application, had two children, both of whom were minors, and a guardian *ad litem* was appointed for them. The case was tried in the superior court of Turner county on appeal from the court of ordinary of that county. On the trial the instrument sought to be probated was put in evidence by the proponent. The second item thereof was as follows: "I give to my daughter, Mrs. A. J. Wells, and my son-in-law, A. J. Wells," a described house and lot in the city of Ashburn, this state. In the third item two designated lots in the same city were given to Mrs. Pearl M. Thompson for and during her life, with remainder to such children as she might leave surviving her. In a subsequent item all

other property owned by Mrs. Brown was given to her two daughters, Mrs. A. J. Wells and Mrs. Pearl M. Thompson, share and share alike. The instrument purported to be signed by Mrs. Evie Brown and four attesting witnesses, namely, M. J. Miller, C. W. Graham, J. N. Raines, and J. H. Allen. The name of the latter purported to be signed officially as a notary public of Turner county, Georgia. The following attestation clause immediately followed the purported signature of Mrs. Brown, and preceded the purported signatures of the four witnesses: "Signed and published by Mrs. Evie Brown as her last will and testament, in the presence of the undersigned, who subscribed our names as witnesses at the instance and request of said testator,

wise be had. And if legal testimony of another character can be adduced, a party ought not to be excluded from its benefit until he resorts to a *dedimus*."

Upon a feigned issue to try the validity of a will to which testatrix was said to have affixed her mark, one of the witnesses was examined, and the defendants claimed that a commission should issue to the other, who resided in another state; but the court, in holding that this was not necessary, said: "Better evidence will not be demanded than is in the party's power to give. The supreme court has no power to oblige the register of wills to deliver out an original paper lodged with him for probate, to be carried into another state; nor has it any control over a witness out of its jurisdiction. I think it is doubted in one of the books whether the same credit is to be given to the handwriting of a witness beyond sea, as if dead: Per Lord Hardwicke, *Grayson v. Atkinson*, 2 Ves. Sr. 460. But from the cases cited on the part of the plaintiffs, it appears that wherein subscribing witness to a deed or other written instrument is beyond the reach of the process of the court, his handwriting may be proved as if he were dead. See *Holmes v. Pontin*, Peake, N. P. Cas. 100. For this is all that can reasonably be expected from the party under such circumstances. To attempt to prove a mark to a will would be idle and ridiculous." The issue, however, was found for the defendant on other grounds, but the handwriting of the witness was fully proved. *Engles v. Bruington*, 4 Yeates, 345, 2 Am. Dec. 411.

In *Crockett v. Crockett*, *supra*, the court said, in holding upon an issue of *devisavit vel non*, where one of the witnesses to a will resided out of the state, that proof of his handwriting might be taken: "When the attesting witnesses to a deed, will, or other instrument, reside without the jurisdiction of the court in another state or foreign country, the secondary proof of handwriting is admissible. To transmit original documents from Maine to Louisiana, or from Tennessee to Calcutta, docu-

ments in which, frequently, others besides the parties litigant may be deeply interested, for the purpose of being proved by attesting witnesses, aside from the delay inconsistent with the speedy decision of causes, would so imperil the loss of the instruments themselves that such a practice would not be tolerated."

In *Denny v. Pinney*, 60 Vt. 524, 12 Atl. 108, *supra*, the court said: "The English practice adopted by this court requires the proponent only to proceed and examine such of the attesting witnesses as are within reach of process. . . . He must be within reach of process, and legally obtainable at the trial. It was no more the legal duty of the proponent to procure the deposition of such a witness, who resided beyond the reach of process, than it was the duty of the contestants. . . . To make such a deposition of value, the instrument proposed must be produced to the witness identified. It would be difficult and objectionable to do this."

In *Chase v. Lincoln*, 3 Mass. 236, where the court was not satisfied that the absent witness could not be summoned, it was said: "They must therefore all be produced, if living, and under the power of the court. If it be impossible to procure any one of them, the court will proceed without him *ex necessitate rei*. But no such impossibility appears in this case."

Under particular statutes—examples.

Upon an issue of *devisavit vel non*, where the statutes required that a will that is contested should be proved by all the living witnesses, if to be found, and all the witnesses resided without the state, and the depositions were taken of two of these witnesses, but there was no proof of the handwriting of one of these deposing witnesses to the will, it was held that, the signature of the testator and of the two other witnesses being proved, the will was sufficiently admitted to probate, and that the statute was not to be construed literally; it admitted of exceptions where the witnesses were incompetent or their at-

and in her presence, and in the presence of each other, this the 1st day of April, 1909." By evidence introduced by the proponent, it was shown that two of the persons who appeared to be attesting witnesses to the instrument had removed from this state, and that one of them, Miller, was, at the time of the trial, a resident of the state of South Carolina, and that the other, Graham, was then a resident of the state of Florida. It appeared that the places where these witnesses respectively reside in such states were known. The interrogatories of neither of these two nonresident witnesses were taken. Miller's brother testified that he knew Miller's signature, and that his signature to the instrument was genuine. No one testified as to a knowledge

of the handwriting of Graham. Raines and Allen, the other two persons who appeared to be subscribing witnesses to the instrument, were introduced by the proponent and testified on the trial. Raines's testimony was to the effect that Mrs. Brown signed the instrument sought to be probated in his presence, and that he signed it as a witness in her presence. He could not remember seeing Graham, Allen, and Miller, the other three persons who purported to be attesting witnesses, sign the instrument, but he testified that they were present when it was signed. On cross-examination he testified: "Now, I don't remember having seen Mr. Allen there." Raines further testified to the effect that he had boarded in the same house with

tendance could not be compelled, and the reason in such cases is the same as if the witnesses were dead. *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311.

So, in *Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355, it was held sufficient, under the same statute, to prove the handwriting of one of the attesting witnesses who had removed from the state.

In *Bowling v. Bowling*, 8 Ala. 538, where one of the witnesses resided without the state, it was held that the statute that provided that depositions of a witness might be taken where the witnesses resided out of the state, was directed apparently to cases where all the witnesses so resided without the state, and that in such case it probably authorizes the sending out of the will.

WELLS v. THOMPSON finds support in the *dictum* in *Bowen v. Neal*, 136 Ga. 859, 72 S. E. 340, where there were two surviving attesting witnesses both within the jurisdiction of the court, and only one of them had been examined upon a probate in solemn form. The court said: "One of the two attesting witnesses who were in life at the time the will was offered for probate was called and examined, but the other was not examined. If the latter had been without the jurisdiction of the court, testimony of one who was familiar with the signature and the handwriting of the absent witness would have been competent to prove the signature, just as in the case of a dead witness."

But in *Duckworth v. Hibbs*, 38 Ind. 78, it was held that a will was not properly admitted to probate where the clerk took the testimony of one nonsubscribing witness and issued and received the deposition of a nonresident subscribing witness, on the ground that, while the statute provided that proof of the handwriting of a nonresident witness might be received, the statute as to the issuing of depositions did not apparently contemplate an uncontested proceeding, and the will statute required that the testimony should be written down, subscribed by the witness, examined and attested by the clerk, with his signature and

seal of office. The court passed no opinion as to whether depositions might have been issued to a subscribing witness upon a contested proceeding heard in court.

It may be noted, while without the scope of this note, that, where the statute provided that when the residence of a witness is unknown, such proof shall be taken of the handwriting of the testator and of the witnesses, dead, insane, or absent, and of such other circumstances, as would be sufficient to prove such a will on a trial at common law, and one attesting witness testified, it was held that the will was sufficiently proved by taking proof of the handwriting of the testator and of an absent witness who had run away from some trouble he had had in the state, and could not be located as the evidence showed that he was a wanderer without a fixed place of abode. *Thompson v. King*, 95 Ark. 549, 129 S. W. 798.

Often the statute is clear and explicit upon the point.

Thus, in *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831, it was held that where one of the three attesting witnesses was dead, and another was without the state, proof of the genuineness of their signatures and of the signature of the testatrix was evidence of their attestation and subscribing, under the statute which provided that all wills in writing must be proved by one or more of the subscribing witnesses, or if they be dead or out of the state, etc., then by proof of the handwriting of the testator and one of the subscribing witnesses.

So, in *Scott v. Herrell*, 31 App. D. C. 45, where one witness was dead and another a nonresident it was held that a will had been sufficiently proved on the testimony of the third of the three attesting witnesses who testified to the signing by the nonresident witness. Where the statute provided that, if the testimony of the resident witness is taken, and any other witness resides out of the District, it shall be sufficient to prove the signature of such nonresident witness; and that the will shall thereupon be admitted to probate.

Mrs. Brown for three years or more prior to her death, and was accustomed to see her on an average of three times daily. She spoke to him three or four times about making her will, and asked him to recommend to her someone to draw it up. She informed witnesses several times how she desired to dispose of her property, and the disposition made of it in the instrument was the same as she has informed him she wished to make of it. He conversed with her frequently, and there was nothing in her conduct to indicate that she was not of sound mind. Her memory was bad the last six months of her life. Allen's testimony was in substance as follows: He knew Mrs. Brown several years prior to her death. He went frequently to the house where Mrs. Brown resided. She signed the paper offered for probate, and he himself,

Raines, Graham, and Miller also signed it. She requested the witness to sign it. He went on: "She signed it in my presence and in the presence of others. . . . She said that she understood it. I conversed with her, and she was rational as she ever was. She read the paper over. She knew what she was giving to Mrs. Thompson and what she was giving to Mrs. Wells. I said to her: ' . . . Mrs. Brown, I want to fix it just like you want it, and if it is not like you want it I will fix it;' and she said: 'The property is divided just like I want it, and I want to have it witnessed up to-day.'"

At the conclusion of the evidence introduced in behalf of the proponent,—and when no evidence had been adduced for the contestant,—the court directed a verdict in favor of the latter. No exception was taken

Where the statute provided for the identification of the handwriting of witnesses absent (*i. e.*, not present in the county), the court said that when the identification was made, "those parties, though dead or out of the jurisdiction of the court, become, to all intents and purposes, active, living witnesses in court, giving testimony, as if under the sanctity of an oath. . . . If this was not so, it would be practically impossible to prove the due execution of any contested will." *Farleigh v. Kelley*, 28 Mont. 421, 63 L.R.A. 319, 72 Pac. 756.

But where the statute provided for secondary evidence where a witness "resided out of the state," and one of the witnesses was temporarily abroad and expected home in a few weeks, it was held that, as the witness had no residence abroad, he was not a nonresident and must be produced in court. *Stow v. Stow*, 1 Redf. 305.

Where the statute did not require the testimony of absent witnesses (that is, those residing without the state) to be taken unless it was asked for by one of the parties, it was held that it was error to refuse to admit the will to probate without the testimony of such witness, where the surrogate's court found the jurisdictional facts and the testimony of such witness had not been asked for by any of the parties. *Re Clark*, 75 Hun, 471, 27 N. Y. Supp. 681.

English cases.

The early English cases of bills in chancery to establish wills are in confusion on the subject.

In *Grayson v. Atkinson*, 2 Ves. Sr. 455, 1 Dick. 158, upon a bill to establish a will, where the two attesting witnesses who were examined did not prove that the will was acknowledged to the third attesting witness, who was beyond sea, nor that he signed in their presence, Lord Hardwicke declined to declare the will proved.

On the contrary, in *Carrington v. Payne*, 47 L.R.A. (N.S.)

5 Ves. Jr. 404, which was a bill in chancery to establish a will, where the testimony of two of the attesting witnesses was taken, but the third was in Jamaica, it was held that his testimony might be dispensed with, his handwriting being proved. Upon the question whether it was necessary to send out a commission to examine him, the master of the rolls said: "That it was not necessary to have his examination; but it was the same as if he was dead, observing that the heir at law did not make a point of it, but submitted it to the court; and in *Fitzherbert's Case*, 4 Bro. Ch. 231, one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad."

And in *Bootle v. Blundell*, 19 Ves. Jr. 494, on an issue of *devisavit vel non*, not raising the question of this note, Lord Eldon said that it was the rule in chancery that all the witnesses must be examined, and, after referring to the case of a dead witness as an exception, he said: "So, in another case in 1741, *Billing v. Brooksbank*, as the witness, being out of the Kingdom, could not be examined, Lord Hardwicke considered that another case of exception out of the general rule, which I repeat is that all the witnesses must be examined; that general rule admitting necessary exceptions, and perhaps not applying where the will is not wholly, but only partially, in question." (*Billing v. Brooksbank* does not seem to be reported.)

But it seems to have been the practice in such cases, when possible, to carry out the effect of the will without declaring it proved.

Thus, in *Fitzherbert v. Fitzherbert*, 4 Bro. Ch. 231, on a bill to establish a will, and for an account, one of the witnesses being abroad, it was held that there might be an account without declaring the will to be well proved.

So, in the obscurely reported case of *Hare v. Hare*, 5 Beav. 629, 12 L. J. Ch. N. S. 344, 7 Jur. 337, where, on a bill to

by the proponent on the ground that the court was without authority to direct a verdict at the conclusion of the evidence for the proponent, and where the contestant had introduced no evidence. Proponent moved for a new trial on the usual general grounds that the verdict was contrary to law and the evidence, etc., and upon the following special ground: "One of the grounds upon which the court directed said verdict was that the evidence adduced showed that Mrs. A. J. Wells, one of the beneficiaries under said will, died without issue prior to the death of the testatrix, Mrs. Evie Brown, which left only two legatees named in the will, her son-in-law, A. J. Wells, and her daughter, Mrs. Pearl Thompson, and that because of the death of Mrs. A. J. Wells, A. J. Wells was no longer a son-in-law, and as a matter of law could no longer be a

beneficiary under said will." Error was assigned upon the direction of a verdict on this ground, because it was contrary to law, and that the words "my son-in-law, A. J. Wells," as used in the will, were merely *descriptio personæ*, and did not designate the character in which Wells was to take under the will. A new trial was refused, and the proponent excepted.

Messrs. J. T. Hill and J. W. Dennard, for plaintiff in error:

The words, "my son-in-law, A. J. Wells," are not words of limitation, and do not designate the character in which he becomes a legatee, but are merely *descriptio personæ*.

30 Am. & Eng. Enc. Law, 2d ed. 706; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Jones's Estate, 211

establish a will as to real estate, etc., one of the witnesses resided out of the jurisdiction, and his handwriting was proved, as was also the fact of his being out of the jurisdiction, and the execution of the will was proved by the other witness, it seems to have been held that the proper course was not to declare the will well proved, but to enter the evidence as read, and direct the trusts of the will to be carried into execution.

So, where a witness could not be found (Binfield v. Lambert, 1 Dick. 337), or where there was not positive evidence of his being abroad (Wood v. Stane, 8 Price, 613).

And a commission was issued in a case arising in the court of probate as late as 1864, on a proceeding to bring in the probate of a will, etc., and show cause why it should not be revoked. One of the attesting witnesses was in New Zealand, and it was ordered that his testimony be taken on commission, and that the original will should be annexed to the commission. There was no objection to this course on the part of any counsel. Forster v. Forster, 10 Jur. N. S. 594, 33 L. J. Prob. N. S. 113.

Miscellaneous.

In St. Mary's Home v. Dodge, 257 Ill. 518, 101 N. E. 46, where an effort was made to prove a lost will, and only one of the attesting witnesses was sworn, the only reason given for not producing the other being that he was not in the city at the time of the trial, it was held that, under the statute, the proponent must produce the subscribing witnesses as witnesses in the probate court, if they are still living and sane, and are within the jurisdiction of the court.

In Apperson v. Cottrell, 3 Port. (Ala.) 51, 29 Am. Dec. 239, where a will had been admitted to probate on the testimony of two out of the three subscribing witnesses, the court refused to allow the point to be 47 L.R.A. (N.S.)

made on appeal that the third witness was not accounted for, on the ground that it did not appear that there was any objection below, nor did the record show that his absence had not been satisfactorily accounted for.

So, in Bugnao v. Ubag, 14 Philippine, 163, where one of three subscribing witnesses was not examined, and no reason appeared in the record for his absence, the court passed the point, as counsel did not make any comment upon it, but stated that the absence of the proof by an attesting witness ought to be explained or accounted for in the record, the court here inferring that there must have been some good reason for it.

And, where a will had been proved twenty years before on the testimony of two of the attesting witnesses, without accounting (apparently) on the record for the absence of the third, the court said: "We must also suppose that there was a legal excuse for the absence of the third subscribing witness to the will. Various reasons may have existed, which would furnish such an excuse; and as to this also, it was not customary to state such reasons in the decree. It is not now a question whether the will ought to be proved upon the testimony of two of the witnesses, without accounting for the absence of the third. The law is settled that it cannot be so done. But this very rule of law requires us to believe that the absence of the third witness was accounted for in this case, upon the common presumption before mentioned." Brown v. Wood, 17 Mass. 68.

It may be noted that if Barnes v. Barnes, 66 Me. 286; Green v. Green, 5 Ohio, 278, and Jones v. Roberts, 96 Wis. 427, 70 N. W. 985, concern the subject of this note, they are not so reported as to be of value upon it.

Re Dates, 35 N. Y. S. R. 338, 12 N. Y. Supp. 205, is not discussed, as it was decided under an obscure statute now amended, the court not referring to the question raised by the obscurity. B. B. B.

Pa. 364, 69 L.R.A. 940, 107 Am. St. Rep. 581, 60 Atl. 915, 3 Ann. Cas. 221; Mellon's Estate, 28 W. N. C. 120.

Prior to signing the will, testatrix stated that she understood it and its contents, and read it over.

This is all the law requires or expects.

Beall v. Mann, 5 Ga. 456; Meeks v. Lofley, 99 Ga. 171, 25 S. E. 92.

Messrs. J. B. Hutcheson and J. H. Tipton, for defendant in error:

The Code expressly provides for the examination of witnesses to a will by commission.

Deupree v. Deupree, 45 Ga. 417.

Where a will is probated in solemn form, all of the attesting witnesses who are in life, and within the jurisdiction of the court, are necessary witnesses.

Bowen v. Neal, 136 Ga. 859, 72 S. E. 340.

When it is sought to prove a will in solemn form, where one of the subscribing witnesses is absent, it is competent to prove the signature of such witness, after proving that the witness is inaccessible.

Brown v. McBride, 129 Ga. 92, 58 S. E. 702.

The rule as to when a witness is inaccessible is discussed in Robinson v. State, 128 Ga. 254, 57 S. E. 315; Taylor v. State, 126 Ga. 557, 55 S. E. 474.

The attesting witness Raines made it appear that testatrix did not have testamentary capacity. It was especially important in this case that the other two witnesses be heard on the question of capacity.

Schouler, Wills & Administration, § 73, p. 343; Bowen v. Neal, 136 Ga. 861, 72 S. E. 340.

It was not shown that testatrix ever had the capacity after the death of Mrs. Wells to know and realize the change, and to make any change in her will.

18 Am. & Eng. Enc. Law, 2d ed. 748; Walker v. Williamson, 25 Ga. 549.

Mr. J. B. Williamson also for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

Upon the trial of the issue *devisavit vel non*, the burden was upon the proponent to prove the due execution of the instrument offered for probate as the will of Mrs. Brown,—that is, that she signed it as her will,—and that it was attested and subscribed in her presence by three or more attesting witnesses (Civil Code, § 3846), and that she, at the time of its execution, was mentally capable of making a will.

To successfully carry this burden,—it being a proceeding to probate a will in solemn form,—it was incumbent upon the proponent to prove the paper offered to be the

will of Mrs. Brown by all the witnesses purporting to attest it who were at the time of the trial in existence and within the jurisdiction of the court, or by proof of their signatures and that of the alleged testatrix, Mrs. Brown, if the witnesses, or any of them, were beyond the jurisdiction of the court. Civil Code, § 3856.

It was shown on the trial that two of the persons whose names appeared as attesting witnesses, *viz.*, Graham and Miller, were at that time nonresidents of this state, and were therefore not within the jurisdiction of the court. The proponent has no means of compelling these two non-resident witnesses to attend the trial in person, and it was not obligatory upon him to procure, and to introduce in evidence upon the trial, their interrogatories or depositions, notwithstanding the declaration in Civil Code, § 3861, that "witnesses to wills may be examined by commission, in the same cases, and under the same circumstances, as other witnesses in other cases." This provision is merely permissive, and a will may be admitted to probate upon other legal and satisfactory proof, without the interrogatories or depositions of nonresident witnesses. The fact that the depositions of a witness could have been taken does not prevent proof of his handwriting. Denny v. Pinney, 60 Vt. 524, 12 Atl. 108; Allison v. Allison, 104 Iowa, 130, 73 N. W. 489; Turner v. Turner, 1 Litt (Ky.) 101; Re Clark, 75 Hun, 471, 27 N. Y. Supp. 681; Wilson v. Collum, Ir. L. R. 12 C. L. 150; McKeen v. Frost, 46 Me. 239. Civil Code, § 5834, provides: "Whenever the subscribing witnesses to an instrument in writing are dead, insane, incompetent, or inaccessible, or, being produced, do not recollect the transaction, then proof of the actual signing by, or of the handwriting of, the alleged maker, shall be received as primary evidence of the fact of execution." The general rules of evidence are applicable in regard to the admissibility of evidence to prove the execution, existence, and genuineness of a will. Gillis v. Gillis, 96 Ga. 1-18, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107; 40 Cyc. 1284. How could the trial court compel a witness in a foreign jurisdiction to appear there before commissioners, that his interrogatories or depositions might be taken? Moreover, wills are documents of too important and valuable character to require them to be sent into foreign jurisdictions that the interrogatories or depositions of witnesses there may be taken,—the instrument may be lost or destroyed in transmission,—and, besides, there is no method by which commissioners may be required to return the paper to the trial

court of this state. The statutory rule requiring that a will must be proved in solemn form by all the attesting witnesses of necessity dispensed with, when the production of all is impossible because one or more may be beyond the jurisdiction of the court, or cannot be found, or are dead or insane, or otherwise incompetent to testify at the time of trial. In such cases the execution of the will may be proved by the subscribing witnesses who can be produced, and proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the others. 40 Cyc. 1307, 1308; 14 Enc. Ev. 417. Numerous cases are cited in these encyclopedias in support of the principle announced. There is nothing in conflict with the propositions hereinbefore stated in the decisions in *Deupree v. Deupree*, 45 Ga. 417, *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702, or *Bowen v. Neal*, 136 Ga. 859, 72 S. E. 340, relied on by counsel for defendant in error. The rulings in these cases considered in connection with the facts involved tend to support what we now hold. In the *Deupree Case*, which was tried in Oglethorpe county, the proponent moved for a continuance on the ground that two of the attesting witnesses resided in the county of Meriwether, this state; that they had been served with subpoenas and were absent; that the expenses of attending court had been tendered to both of such witnesses, and, further, that the other subscribing witness resided in the state of Alabama. A continuance was refused, and the ruling was upheld by this court on the ground that the witnesses did not reside in the county in which the trial was had, and under the general law of the state were not compelled to attend court in another county. It was further held that the interrogatories of all the witnesses could be used. In *Brown v. McBride* there were three witnesses to the instrument offered for probate. One of them testified by interrogatories that he and the other two witnesses signed the instrument in the presence of the testator, and in the presence of each other, but that, according to his recollection, the testator did not sign it in the presence of this witness, and that he did not know whether the other two witnesses were present when the testator signed. It was proved on the trial that one of the other witnesses was dead, and that the other, some fifteen years before the trial, had left the county, and had not been heard of since. It was shown that the signature to the instrument was the genuine signature of the testator. It was held by this court: "When it is sought to prove a will in solemn form, where one of the subscribing witnesses is absent, it is

competent to prove the signature of such witness after proving that the witness is inaccessible. Such proof for the purpose mentioned is equivalent to proof that the witness is dead or beyond the jurisdiction of the court." It was further held that the evidence was of such character as to support the verdict in favor of the validity of the will. In *Bowen v. Neal* one of the witnesses was dead, and it was said proof of his handwriting could be shown. The case was decided adversely to the proponent on the ground that only one of the three witnesses was introduced to prove the will, when it did not appear that the other subscribing witness was shown to be beyond the jurisdiction of the court, as he resided in another county of this state, and his interrogatories could have been taken.

In the case now before us, Raines, whose name appeared as an attesting witness, testified that he saw Mrs. Brown sign the instrument offered for probate, and that he signed it as a subscribing witness in her presence. Allen, whose name also appeared as an attesting witness, testified that he saw Mrs. Brown sign the instrument, that he signed it as a subscribing witness, and that he saw Graham, Miller, and Raines, whose names appeared as attesting witnesses, sign the instrument as subscribing witnesses, and that Mrs. Brown signed the will in his presence and in the presence of others. It thus appears that two of the subscribing witnesses testified upon the trial, and that the evidence of one of them, Allen, showed that the instrument was executed in accordance with all the requirements of the law. His testimony was to the effect that the signature of Mrs. Brown, as well as the signatures of all four of the witnesses, was genuine; and Raines' testimony was to the effect that Mrs. Brown's signature and his own were genuine. There can be no more satisfactory evidence of the genuineness of a signature than the testimony of one who saw it written (3 Chamberlayne, *Modern Law of Evidence*, § 2177), and the evidence of Allen and Raines as to the execution of the instrument sought to be probated was, in the circumstances of the case, sufficient to make out a prima facie case. Moreover, there was evidence of Mrs. Brown's knowledge of the contents of the instrument and her desire to execute it as her will, and besides there was a full attestation clause reciting compliance with all formalities of execution; and these were matters for consideration in passing upon the question of will or no will. 40 Cyc. 1286-1304.

In *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788, it was held: When the attestation clause to an instrument offered

for probate as a will "recites all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills, and this is so though there may be on the part of one or more of the witnesses a total failure of memory as to some or all of the circumstances attending the execution."

In a proceeding to probate a will in solemn form, the issue and the only issue is *devisavit vel non*. The jury must find that the paper offered for probate is or is not the will of the decedent. The construction of the terms of the instrument are not in such a proceeding before the court for determination. *Wetter v. Habersham*, 60 Ga. 193; *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107. Therefore, even if the provision in the instrument offered for probate in the present case, devising to Mrs. A. J. Wells, the daughter of Mrs. Brown, and her son-in-law, A. J. Wells, certain realty, could be construed as being inoperative by reason of the fact that Mrs. Wells died prior to Mrs. Brown, and that therefore he was not the latter's son-in-law at the time of her death, this could not be a valid reason why the instrument should not be probated as the will of Mrs. Brown.

There was ample evidence, in the absence of any showing to the contrary, of the testamentary capacity of Mrs. Brown to make a will at the time the instrument offered for probate was executed.

It follows from what has been said that the verdict directed by the court against the proponent was contrary to the evidence, and the judgment refusing a new trial is therefore reversed.

All the Justices concur.

KANSAS SUPREME COURT.

MANUEL S. MCINTOSH

v.

STANDARD OIL COMPANY, Appt.

(89 Kan. 289, 131 Pac. 151.)

Negligence — contributory — intoxication.

1. Upon the issue whether, at a particular time, a person was exercising due care for his own safety, evidence that he was intoxicated is ordinarily admissible, not as

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constituting or conclusively establishing negligence on his part, but as being a circumstance to be considered in determining the matter.

New trial — refusal to permit cross-examination.

2. The refusal of the trial court to allow the defendant to cross-examine the plaintiff upon an important matter can be urged as a ground for a new trial, without a showing as to what answers the plaintiff would have returned if the rejected inquiries had been permitted. The provision of Code Civ. Proc. § 307 (Gen. Stat. 1909, § 5901), that when the ground of a motion for a new trial is error in the exclusion of evidence, such evidence shall be produced at the hearing, does not apply to that situation.

Pleading — unsafe working place.

3. The issue of negligence in an employer in failing to exercise due care to provide for his employee a safe place in which to work may be presented by allegations of specific acts or omissions, without in so many words referring to the safety of the working place.

(Johnston, Ch. J., dissents.)

(April 12, 1913.)

Note. — Intoxication as affecting negligence.

- I. Intoxication no excuse, 731.
- II. When it amounts to contributory negligence.
 - a. Generally, 733.
 - b. With relation to trespassers, 734.
 - c. With relation to persons injured at crossings, 735.
 - d. With relation to persons rightfully on track, 736.
 - e. With relation to passengers, 736.
 - f. With relation to persons injured on highways, streets, etc., 737.
 - g. With relation to miscellaneous matters, 739.
- III. Question for the jury, 740.
- IV. Presumption and burden of proof, 740.
- V. Intoxication as evidence of negligence.
 - a. Admissibility, 740.
 - b. Weight and sufficiency, 742.
- VI. Employment of persons having habits of intoxication, 742.

This note is confined strictly to the preliminary question of negligence or contributory negligence as affected by intoxication. It does not purport to cover the ultimate question of liability for injuring an intoxicated person, since that question may involve and depend upon questions other than that of his negligence, *e. g.*, the question whether the misconduct charged against the defendant amounts to wantonness or wilfulness, against which contributory negligence is not a defense. Nor does

APPEAL by defendant from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Frank Hagerman, E. R. Adams, and A. L. Berger, for appellant:

Under a plea of contributory negligence, it is competent for the defendant to prove that the plaintiff was intoxicated at the time of the accident.

Beach, Contrib. Negl. 3d ed. § 390; 7 Enc. Ev. 779; 29 Cyc. 534; Alexander v. Humber, 86 Ky. 565, 6 S. W. 453; Buddenberg v. Charles P. Chouteau Transp. Co. 108 Mo. 394, 18 S. W. 970, 4 Am. Neg. Cas. 704;

Cogdell v. Wilmington & W. R. Co. 130 N. C. 313, 41 S. E. 541; Ford v. Umatilla County, 15 Or. 313, 16 Pac. 33; Seymer v. Lake, 66 Wis. 651, 29 N. W. 554; Trumbull v. Ertekson, 38 C. C. A. 536, 97 Fed. 891; Wabash R. Co. v. Monegan, 94 Ill. App. 82; Wright v. Crawfordsville, 142 Ind. 636, 42 N. E. 227; Sharpton v. Augusta & A. R. Co. 72 S. C. 162, 51 S. E. 553; Bageard v. Consolidated Traction Co. 64 N. J. L. 316, 49 L.R.A. 424, 81 Am. St. Rep. 498, 45 Atl. 620, 7 Am. Neg. Rep. 290; Kingston v. Ft. Wayne & E. R. Co. 112 Mich. 40, 40 L.R.A. 131, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467; Illinois C. R. Co. v. Cragin, 71 Ill. 177; Northern P. R. Co. v. Craft, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124; Smith v. Norfolk & S.

the note cover the question of intoxication as affecting the applicability of the doctrine of last clear chance, as that question logically presupposes the antecedent negligence of the intoxicated person, and deals simply with the question as to the effect of his unconsciousness or insensibility, from intoxication to interrupt his antecedent negligence, and thus characterize it merely as a condition or remote cause, and not a proximate cause, of his injury. See, in this connection, note in 31 L.R.A.(N.S.) 1032, as to intoxication of person on railroad track as affecting applicability of doctrine of last clear chance.

Generally, as to care due to sick or otherwise helpless person to whom no contract relation is sustained, see note in 69 L.R.A. 513.

The earlier cases upon the present subject are collected and discussed in the note to Kingston v. Ft. Wayne & E. R. Co. 40 L.R.A. 131.

I. Intoxication no excuse.

As stated in the earlier note, voluntary intoxication does not excuse one from the duty to use the same degree of care and prudence to protect himself against danger that is required of a sober man under the same circumstances, i. e., ordinary care. Rolleston v. Cassirer, 3 Ga. App. 161, 59 S. E. 442; South Chicago City R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075 (action against traction company for injuries received in attempting to board street car); Wilcke v. Henrotin, 241 Ill. 169, 80 N. E. 329 (action against traction company for injuries received by being thrown from a moving street car); Illinois C. R. Co. v. Holland, 147 Ky. 699, 145 S. W. 389 (action against railway company for injuries received while walking in switch yard); Louisville & N. R. Co. v. Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115 (action against railway company for injuries received in alighting from a train); Louisville & N. R. Co. v. Payne, 31 Ky. L. Rep. 1173, 104 S. W. 752 (circumstances similar to those in last case); Madisonville v. Stewart, — 47 L.R.A.(N.S.)

Ky. —, 121 S. W. 421 (action against a city for injuries received by falling into a hole in a sidewalk); Bageard v. Consolidated Traction Co. 64 N. J. L. 316, 49 L.R.A. 424, 81 Am. St. Rep. 498, 45 Atl. 620, 7 Am. Neg. Rep. 290 (action against traction company for injuries received by being run over by street car); Cotner v. St. Louis & S. F. R. Co. 220 Mo. 284, 119 S. W. 610 (action against a railway company for injuries received by being struck by a train); Union P. R. Co. v. Smith, 5 Neb. (Unof.) 631, 99 N. W. 813 (action against a railway company for the death of one killed by a train); Vizacchero v. Rhode Island Co. 26 R. I. 392, 69 L.R.A. 188, 59 Atl. 105 (action against traction company for death of one killed by a trolley car); Paris & G. N. R. Co. v. Robinson, 104 Tex. 482, 140 S. W. 434 (action against railway company for the death of one caused by falling from moving train); Burleson v. Morrisville Lumber & Power Co. — Vt. —, 86 Atl. 745 (action against mill owner for injuries received by workman while at work in mill).

So, it has been said that voluntary drunkenness is no excuse for negligence, either primary or contributory. Herrick v. Washington Water Power Co. — Wash. —, — L.R.A.(N.S.) —, 134 Pac. 934. Although the point is not within the scope of the note, it being covered in the note in 31 L.R.A.(N.S.) 1031, it may be observed that, notwithstanding the above proposition, it was held in the Herrick case that negligence arising from drunkenness culminates with insensibility or unconsciousness, so as to permit the application of the doctrine of last clear chance, even though the danger was not actually discovered, and the negligence of the defendant consisted of the breach of its duty to discover the danger.

And in Murphy v. Wabash R. Co. 228 Mo. 56, 128 S. W. 481, it was said: "Drunkenness excuses neither a crime nor a negligent act. So much is clear law. But at root a drunken man is as much entitled to life or limb as a sober man. In no system of ethics known to us has A any more right to negligently injure B when drunk than he would have to injure him when

R. Co. 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863; *Bradwell v. Pittsburgh & W. E. Pass. R. Co.* 153 Pa. 105, 25 Atl. 623; *Galveston, H. & S. A. R. Co. v. Harris*, 22 Tex. Civ. App. 16, 53 S. W. 599; *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Salina v. Trosper*, 27 Kan. 544; *O'Keefe v. Kansas City Western R. Co.* 87 Kan. 322, — L.R.A.(N.S.) —, 124 Pac. 416; *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, 4 Am. Neg. Rep. 405.

Instructions on matters not in issue are erroneous.

Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554; *Brown v. Chicago, R. I. & P. R. Co.* 59 Kan. 70, 52 Pac. 65; *Telle v. Leavenworth Rapid Transit R. Co.* 50 Kan. 455, 31 Pac.

1076; *Southern Kansas R. Co. v. Griffith*, 54 Kan. 428, 38 Pac. 478; *Missouri P. R. Co. v. Griffith*, 69 Kan. 130, 76 Pac. 436; *Atchison, T. & S. F. R. Co. v. Powers*, 58 Kan. 544, 50 Pac. 452; *St. Louis & S. F. R. Co. v. Elrod*, 78 Kan. 868, 98 Pac. 215; *Schwarzschild & S. Co. v. Weeks*, 66 Kan. 800, 72 Pac. 274.

Messrs. T. P. Anderson and E. K. Robb, for appellee:

If the verdict of the jury was right, error in instructions would not vitiate it.

Davis v. Threlkeld, 58 Kan. 763, 51 Pac. 226.

Plaintiff was in the exercise of proper care; if he was, then he was guilty of no negligent act, and if he was guilty of no

sober. Drunk or sober, a man is a man and a brother in the law of negligence.

We take it that in right reason the drunkard is dealt with as if sober,—no more, no less. He is held up, on his part, to the same high-water mark of duty and responsibility,—so are those who deal with him. The woeful list of sorrows and ills flowing from drunkenness is long enough and sad enough without adding new terrors by judicial construction."

Again, a drunken man must be held to the consequences of that condition. Otherwise, a premium is put upon misbehavior. If he, by voluntarily rendering himself unable to care for himself, can invite injury and recover from another ignorant of his condition therefor, notwithstanding his own direct contribution to the cause of it, the sober and careful man is put to a disadvantage in such cases. This seems and is unreasonable. *Winfrey v. Missouri, K. & T. R. Co.* 114 C. C. A. 218, 194 Fed. 808.

So, one who has voluntarily brought intoxication upon himself is chargeable with the result of his acts, and will be deemed in law to be guilty of contributory negligence in the same degree and to the same extent as if he had been and remained duly sober. He may not plead and prove his own voluntary self-intoxication to his profit. If he does so plead and prove, he will not thereby excuse himself in the doing of any act which would have constituted negligence on his part, had he remained sober. *Little Rock R. & Electric Co. v. Billings*, 31 L.R.A. (N. S.) 1031, 98 C. C. A. 467, 173 Fed. 903, 19 Ann. Cas. 1173.

And the fact that one who was injured by being struck by a car was intoxicated at the time is no legal excuse for his failure to clear the track. *O'Brien v. Washington Water Power Co.* 71 Wash. 688, 129 Pac. 391.

So, the fact that a man is intoxicated when he goes upon a street railway track and lies down upon it will not excuse him from the consequences of his own negligence in so doing. *Goff v. St. Louis Transit Co.* 199 Mo. 694, 9 L.R.A.(N.S.) 244, 98 S. W. 49.

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And where a passenger is rightfully put off from a street car because of his intoxicated condition, and he undertakes to walk to his home upon the car track, and falls from a bridge into a stream, receiving injuries from which he subsequently dies, his death is to be charged to his intoxication, and no recovery therefor can be had against the traction company. *Keeshan v. Elgin, A. & S. Traction Co.* 229 Ill. 533, 82 N. E. 360.

Again, the voluntary intoxication of one who is killed while attempting to board a moving train after leaving it at a station to make purchases, which renders him reckless, but not helpless, does not relieve him from the duty of exercising ordinary care for his own safety, such as is required of a sober man under like conditions. *Yazoo & M. Valley R. Co. v. Dyer*, — Miss. —, 59 So. 937.

And if a person, by reason of failure to exercise ordinary prudence, places himself in a position upon a railway train which is dangerous to one in full control of his bodily powers, or dangerous to the person in question only because of his lack of self-control, the fact of his intoxication will not excuse him; if his act would have been negligent in a sober man, he is none the less guilty of negligence if intoxicated. *Wheeler v. Grand Trunk R. Co.* 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103.

And it has been said that a trespasser upon a railroad track does not have, simply because he is drunk, an immunity from the charge of contributory negligence, which a sober person would not enjoy. *St. Louis, I. M. & S. R. Co. v. Jordan*, 65 Ark. 429, 47 S. W. 115.

Accordingly, in an action against a city for injuries received by falling into a hole in a street, it is incorrect to instruct the jury that ordinary care on the part of the plaintiff, who was drunken, was "such care as ordinarily prudent persons similarly situated" would have exercised, that is, persons as drunk as plaintiff is claimed to have been. Such a person is under the duty of exercising such care to protect himself from injury as an ordinarily prudent per-

negligent act, even if he was intoxicated, that fact did not contribute to his injury.

Where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court, there can be no reversal.

Clements v. Inez Oil & Gas Co. 87 Kan. 418, 124 Pac. 423; Woods v. Lipton County, 128 Ind. 289, 27 N. E. 611.

Issues may be enlarged by the acts of the parties at the trial.

Rockefeller v. Ringle, 77 Kan. 518, 15 L.R.A.(N.S.) 737, 94 Pac. 810; Edwards v. Sourbeer, 73 Kan. 224, 84 Pac. 1033; Missouri Valley R. Co. v. Caldwell, 8 Kan. 244; Gilson v. Hays, 2 Kan. App. 460, 43 Pac. 93; Pohl v. Fulton, 86 Kan. 14, 119

Pac. 716, Ann. Cas. 1913 B, 1014; Bear v. Cutler, 86 Kan. 67, 119 Pac. 713.

Mason, J., delivered the opinion of the court:

Manuel S. McIntosh, a teamster in the employ of the Standard Oil Company, was engaged in hauling oil with a wagon drawn by three mules. While he was filling the tank on his wagon from a standpipe in the storage yard, the team ran away. McIntosh was injured. He sued the company, alleging that the runaway was caused by an empty barrel being negligently loosened from a rick and permitted to roll toward and close to the mules. He recovered a judgment, from which the defendant appeals.

son would have exercised if sober. Covington v. Lee, 28 Ky. L. Rep. 492, 2 L.R.A.(N.S.) 481, 89 S. W. 493.

And in an action against a street railway company for injuries received while attempting to board a car, an instruction is objectionable which allows plaintiff to recover, although intoxicated, if he was using such care as a prudent person ordinarily exercises under the same circumstances, including the fact of his intoxicated condition. If the plaintiff, by intoxication, exposed himself to danger and received his injuries for the want of such care as a reasonably prudent person would have exercised if sober, he would be guilty of contributory negligence. South Chicago City R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075.

But in an action against a street railway company for the death of a passenger who was alleged to have been negligently allowed to alight at a dangerous place, it has been said that the corollary of the rule that if a carrier receives a drunken person as a passenger with actual knowledge that he is so intoxicated as to be incapable of taking care of himself, it is required to exercise toward him care commensurate with his condition, must be that his duty to care for his own safety should be measured by his condition as to sobriety, or such a duty as a person in his then condition would ordinarily use under like circumstances. Bennett v. Seattle Electric Co. 56 Wash. 407, 105 Pac. 825.

And in an action against a traction company for the death of a passenger alleged to have been allowed to alight at a dangerous place, it is erroneous to instruct the jury that any act committed by him after alighting from the car which would be negligent in a sober man would be equally negligent on his part if intoxicated; if that were true, then the carrier would owe no greater duty to an intoxicated passenger than it owes to a sober one, whereas the true rule is that a carrier owes to a passenger a duty commensurate with his condition. Sullivan v. Seattle Electric Co. 44 Wash. 53, 86 Pac. 786.
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And while it is the general rule that voluntary intoxication will not excuse a person for the failure to use the degree of care reasonably expected of a sober person, that rule ought not to be applied where a passenger is forcibly placed upon the train in a drunken and insensible condition by an officer of the law, and is received in that condition by the defendant company for transportation, and is deposited by the railway company's servant in a place which is unsafe to one insensible and unable to care for himself. Burke v. Chicago & N. W. R. Co. 108 Ill. App. 565.

Of course, when, as in Mooney v. Pennsylvania R. Co. 203 Pa. 222, 52 Atl. 191, the intoxication of the person injured, and not the negligence of defendant, was the cause of the injury, there can be no recovery.

II. When it amounts to contributory negligence.

a. Generally.

A man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscle as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor. The law of contributory negligence imposes upon one who has voluntarily disabled himself by reason of intoxication, the same degree of care and prudence which is required of a sober person. If the voluntary intoxication of a person leads him to place himself in an exposed position, or prevents the full use of his faculties, so that injury results therefrom, and, but for such intoxication, the injury would not have resulted, then such injured person is guilty of contributory negligence. The mere fact, however, that a person at the time he may receive an injury is intoxicated, is not of itself evidence of contributory negligence, but is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury. Win-

The answer alleged in general terms that the plaintiff's own carelessness contributed to his injuries, without specifying the acts or omissions relied upon as constituting such contributory negligence. No motion was made to make the allegations in this regard more definite. The defendant offered evidence for the purpose of proving that at the time of the injury the plaintiff was intoxicated. The offer was refused, and complaint is made of that ruling. Upon the issue whether, at a particular time, a person was exercising due care for his own safety, evidence that he was under the influence of liquor is clearly admissible, not as conclusively establishing that he was negligent, but as having an obvious bearing upon the matter. 29 Cyc. 534; note in

19 Ann. Cas. 1176. The plaintiff contends, however, that if the exclusion of this evidence was error, it was not prejudicial, because intoxication on his part could not constitute negligence in itself, and there was no evidence that, if he was intoxicated, his condition in that respect in any way contributed to his injury. In support of this view it is argued that the plaintiff did everything that could have been required of a reasonably prudent man, and therefore his condition as to drunkenness or sobriety was immaterial. This amounts to asserting that there was no evidence whatever that the plaintiff was guilty of contributory negligence in any respect. We think, under all the evidence, it was a fair question for the jury, whether the plaintiff's own con-

frey v. Missouri, K. & T. R. Co. 114 C. C. A. 218, 194 Fed. 808.

So, the question of the alleged negligence of an injured party does not absolutely depend upon his mental or physical condition as to sobriety. His condition in this regard is without doubt an incident for the jury, but does not of itself preclude his recovery for injuries from others. Lyons v. Dee, 88 Minn. 490, 93 N. W. 899, 13 Am. Neg. Rep. 542.

Thus the fact that one who was injured while attempting to alight from a train was intoxicated at the time is not *per se* contributory negligence. Louisville & N. R. Co. v. Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

And a tenant who undertakes to go down stairs upon the leased premises while in an intoxicated condition is not necessarily guilty of contributory negligence such as to preclude a recovery for his injury. The "intoxicated condition" which will constitute contributory negligence on his part, such as to preclude his recovery against the landlord, means that he was in such a state as to be incapable of giving the attention to what he was doing that a sober man of prudence and reasonable intelligence would give. Kenney v. Rhinelander, 28 App. Div. 246, 50 N. Y. Supp. 1088, affirmed in 163 N. Y. 576, 67 N. E. 1114.

So, the intoxication of one killed by a railway train, in order to be a defense to an action for his death, must have contributed to the accident. Gulf, C. & S. F. R. Co. v. Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

And in an action against a railway company for the death of an employee run over by an engine, the intoxication of the deceased will not bar a recovery for his death, unless it rendered him unable to exercise the caution and care required of an ordinarily prudent person under the same conditions, and such lack of care caused or contributed to his death. Missouri, K. & T. R. Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852.

While, however, as a matter of law, intoxication is not conclusive evidence of con-

tributory negligence such as will prevent a recovery for injury, still such intoxication is evidence of negligence from which the jury are at liberty to infer such negligence as will bar the action, if the attendant facts so warrant. Rhyner v. Menasha, 107 Wis. 201, 83 N. W. 305.

b. With relation to trespassers.

In conformity with the scope of the note outlined at the beginning, the present subdivision deals merely with the question of intoxication in relation to antecedent negligence, and does not consider the possible effect of unconsciousness or insensibility from voluntary intoxication to interrupt antecedent negligence, and thus supply one of the requisites of the doctrine of last clear chance. On that point, see note in 31 L.R.A.(N.S.) 1032.

And generally, apart at least from the doctrine of last clear chance,—as to which, see note in 31 L.R.A.(N.S.) 1032,—one who voluntarily becomes intoxicated, and in an intoxicated condition sits or lies down upon a railway track, is guilty of contributory negligence. Hall v. Western & A. R. Co. 123 Ga. 213, 51 S. E. 311; Central of Georgia R. Co. v. Moore, 5 Ga. App. 562, 63 S. E. 642, 21 Am. Neg. Rep. 65; Burgess v. Atchison, T. & S. F. R. Co. 83 Kan. 497, 112 Pac. 103; Dugan v. Chesapeake & O. R. Co. 24 Ky. L. Rep. 1754, 72 S. W. 291; Gilliam v. Texas & P. R. Co. 114 La. 272, 39 So. 166; Jones v. New Orleans Great Northern R. Co. 122 La. 354, 47 So. 679; McClanahan v. Vicksburg, S. & P. R. Co. 111 La. 781, 35 So. 902; Union P. R. Co. v. Smith, 5 Neb. (Unof.) 631, 99 N. W. 813; Coatney v. St. Louis & S. F. R. Co. 151 Mo. 35, 51 S. W. 1036; Ayers v. Wabash R. Co. 190 Mo. 228, 88 S. W. 608; Stewart v. North Carolina R. Co. 136 N. C. 385, 48 S. E. 793; Taylor v. Houston Electric Co. 38 Tex. Civ. App. 432, 85 S. W. 1019; New York, N. H. & H. R. Co. v. Kelly, 35 C. C. A. 571, 93 Fed. 745.

So, one who is put off from a train in a drunken condition, but not so drunken as to be helpless, or to be no longer capable

duct was such as to preclude a recovery, and the trial court was evidently of that opinion, for the question was submitted for their determination. If it were conceded or conclusively established that the plaintiff did everything for his own protection that a sober man could have done, then doubtless evidence of his drunkenness would not be material. But it was for the jury to decide precisely what took place, and the plaintiff's condition as to sobriety might have a bearing in determining this. And whether, if he was drunk, that fact lessened his effectiveness in preventing or escaping danger, was likewise a matter to be passed on by them.

The statute requires that where the ground of a motion for a new trial is error

in the exclusion of evidence, such evidence shall be produced at the hearing of the motion. Code Civ. Proc. § 307 (Gen. Stat. 1909, § 5901). The abstract does not show that at the hearing of the motion for a new trial in this case any evidence was produced that the plaintiff was in fact intoxicated when he received his injury. This omission prevents a reversal upon the ground of the exclusion of the testimony of the witness produced by the defendant at the trial, but the question of the materiality of evidence regarding the plaintiff's condition as to sobriety is presented in another aspect: One of the rulings complained of is the refusal of the trial court to allow the plaintiff to be cross-examined upon that subject. We do not

of volition and of exercising the necessary motion to get off the track, and who is subsequently killed by another passing train, falls within that rule. *Seaboard Air-Line R. Co. v. Smith*, 3 Ga. App. 1, 59 S. E. 199; *Brown v. Louisville & N. R. Co.* 103 Ky. 211, 44 S. W. 648.

In some cases *e. g.*, *Murphy v. Wabash R. Co.* 228 Mo. 56, 128 S. W. 481; *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, 10 Am. Neg. Rep. 60; *Cincinnati, N. O. & T. P. R. Co. v. Marra*, 119 Ky. 954, 70 L.R.A. 291, 115 Am. St. Rep. 289, 85 S. W. 188; *Missouri, K. & T. R. Co. v. Malone*, — Tex. Civ. App. —, 110 S. W. 958, an intoxicated person has been allowed to recover, either upon the ground that defendant was guilty of wanton or wilful misconduct, against which contributory negligence is not a defense, or under the doctrine of last clear chance, which presupposes negligence in the first instance. And in some cases, *e. g.*, *Felton v. Newport*, 44 C. C. A. 530, 105 Fed. 332, this result has been reached under the rule of comparative negligence; as apparent from the scope of the note, however, these cases are not in point so far as they involve the ultimate question of liability for injury to the intoxicated person, but only so far as they assume to hold, as a preliminary point, that the intoxication of the person did not relieve him of the charge of negligence in the first instance.

And under a statute giving the jury power in negligence cases against railroad companies, to fix the damages according to their estimate of the relative negligence of the parties, where both are negligent, the fact that one goes upon the railroad track in an intoxicated condition and lies down and goes to sleep thereon, and is killed in such position, does not necessarily require the jury to award nominal damages only; this would leave out of consideration the degree of negligence of which the defendant company might have been guilty. *Ibid.*

c. With relation to persons injured at crossings.

Apart, at least, from the doctrine of last 47 L.R.A. (N.S.)

clear chance (as to which in its relation to intoxication, see note in 31 L.R.A. (N.S.) 1031), it is clear that the fact that one struck at a railroad crossing was intoxicated does not relieve him of the charge of contributory negligence, if, by reason thereof, he failed to exercise such care for his safety as might be expected of a reasonably prudent man; though, if he did exercise such care, he will not be charged with negligence merely because he was intoxicated. *Hoffman v. Peoria, B. & C. Traction Co.* 164 Ill. App. 270; *Louisville & N. R. Co. v. Cummins*, 111 Ky. 333, 63 S. W. 594; *Illinois C. R. Co. v. Proctor*, 122 Ky. 92, 89 S. W. 714; *Southern R. Co. v. Sanders*, 145 Ky. 679, 141 S. W. 77; *Baltimore & O. R. Co. v. State*, 96 Md. 67, 53 Atl. 672; *Shelly v. Brunswick Traction Co.* 65 N. J. L. 639, 48 Atl. 562, 9 Am. Neg. Rep. 533; *Balser v. Chicago, St. L. & P. R. Co.* 7 Ohio N. P. 482, 9 Ohio S. & C. P. Dec. 523; *Mercer v. Southern R. Co.* 66 S. C. 246, 44 S. E. 750; *Galveston, H. & S. A. R. Co. v. Harris*, 22 Tex. Civ. App. 16, 53 S. W. 599; *Dallas Consol. Electric Street R. Co. v. English*, 42 Tex. Civ. App. 393, 93 S. W. 1096; *Cunningham v. Erie R. Co.* 137 App. Div. 506, 121 N. Y. Supp. 706.

Thus, while the intoxication of one who is killed by a railway train at a crossing is not a bar to the right of recovery for his death, the fact that he was so intoxicated as to be bordering on mental aberration is a circumstance to be considered in determining the question of his contributory negligence. *Wabash R. Co. v. Monegan*, 94 Ill. App. 82.

And in an action against a railway company for the death of one killed by a train at a place where the public were in the habit of crossing the track, evidence that deceased was under the influence of intoxicating liquor to such an extent as to enable a witness to pronounce him "considerably organized," but that he was not so affected by liquor as would necessarily deprive him of the use of his faculties and senses, and render his act in endeavoring to cross the track when and where he did negligence *per se*, is not such as would require the

think the statute referred to applies to that situation. The defendant could not be bound by the testimony of the plaintiff. It had a right to cross-examine him before the jury with reasonable fullness and freedom, asking any pertinent questions relating to the circumstances of his injury, for the purpose of testing his credibility, as well as of bringing out his version of all the details of the transaction, for use in the preparation of the defense. The ruling complained of did not result merely in the exclusion of certain evidence; it in effect denied the right of cross-examination of the adverse party upon a vital matter lying peculiarly within his knowledge, by unduly restricting its scope, and was prejudicial whether or not the plaintiff would have re-

turned such an answer to any particular question as would have been obviously against his interest. The situation in this regard is the same as that presented in *Polley v. Kansas City Oil Co.* 89 Kan. 272, 131 Pac. 577. The probability that the ruling affected the result seems sufficient to require a new trial.

The plaintiff was permitted to rely upon evidence that the mules were frightened by the noise made by the rolling of several barrels, instead of by a barrel coming toward and near to them, as alleged in the petition, and an amendment to meet this situation was allowed after the verdict was returned. These rulings are complained of. They seem to have been well within the discretionary power of the court, and as

question of his contributory negligence by reason of his intoxication to be withdrawn from the jury, and a peremptory instruction of a verdict for the defendant given. *Texarkana & Ft. S. R. Co. v. Frugia*, 43 Tex. Civ. App. 48, 95 S. W. 563.

But the mere fact that the plaintiff had been drinking on the afternoon or evening of the accident will not defeat his recovery, if his intoxication was not of that degree which would prevent his exercising ordinary care. *Balser v. Chicago, St. L. & P. R. Co.* 7 Ohio N. P. 482, 9 Ohio S. & C. P. Dec. 523.

d. With relation to persons rightfully on track.

The rules in this class of cases are similar to those already stated. Thus, in an action against a street railway company for injuries alleged to have been received while plaintiff was standing in the street, by reason of the fact that he was negligently run into and thrown down by a trolley car operated by the defendant company, the voluntary intoxication of the plaintiff may be considered by the jury in determining whether such person, at the time of the accident, was taking such care for his safety as is required of a reasonably prudent man under the circumstances. *Heinel v. People's R. Co.* 6 Penn. (Del.) 428, 67 Atl. 173.

And if one who is injured by a train is at the time so much under the influence of liquor that he is incapable of exercising, and does not exercise, for his own safety, that degree of care which would be exercised by a sober and ordinarily prudent man under similar circumstances, and thus contributes to his injuries, he cannot recover. *Cincinnati, N. O. & T. P. R. Co. v. Reed*, 154 Ky. 380, 157 S. W. 721.

And the same rule holds in the case of an action by an employee against a railway company for injuries received in switching cars. *Worcester v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 91 S. W. 339.

So, in an action against a traction company for the death of one run over by a 47 L.R.A.(N.S.)

street car, if it appears that the deceased, while in an intoxicated condition, stepped immediately in front of a moving car, where he was struck by the fender, no recovery can be had. *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886.

But, as pointed out in *O'Brien v. Washington Water Power Co.* 71 Wash. 688, 129 Pac. 391, in order to bar a recovery for injuries caused by being struck by a car, the negligence of the plaintiff resulting from his intoxication must have been the proximate cause of the accident. This question, however, is not within the scope of the note.

e. With relation to passengers.

In an action against a carrier for injuries to, or the death of, a passenger caused by his falling or being thrown from a moving train or car, or caused in attempting to alight, his intoxication at the time of the accident does not in itself constitute negligence. *Kansas City Southern R. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603; *Paris & G. N. R. Co. v. Robinson*, 104 Tex. 482, 140 S. W. 434.

If he used that degree of care incumbent upon him to use under the circumstances, that is sufficient; the question is not whether or not he was drunk, but whether or not he exercised ordinary care. *Lawson v. Seattle & R. R. Co.* 34 Wash. 500, 76 Pac. 71, 16 Am. Neg. Rep. 253.

The fact that he was intoxicated at the time of the accident does not of itself constitute contributory negligence; it is only a circumstance to be considered as bearing upon the question whether there was such negligence. *Hughes v. Chicago, R. I. & P. R. Co.* 150 Iowa, 232, 129 N. W. 956; *Paris & G. N. R. Co. v. Robinson*, *supra*.

Nor in such a case is it correct to instruct a jury that, in addition to the existence of a state of intoxication, they must further find that, on account thereof, plaintiff became careless or reckless in regard to his safety, and thus caused or contributed to his injury. An intoxicated person might become neither careless nor reckless, and at

the question cannot arise at a new trial it is not now important. Complaint is also made of an instruction that the defendant was bound to exercise ordinary care to provide for the plaintiff a safe place in which to work, when the petition did not in so many words charge negligence in that regard. It was a fair question for the jury whether the place where the plaintiff was doing the work assigned him was rendered unsafe for the purpose, by allowing the empty barrels to be handled in the manner testified to. The petition attributed the negligence complained of to the superintendent of the yard. The instructions spoke of the defendant's failure to exercise proper care "by its foreman, or other person having charge of said barrels." This

is urged as an undue broadening of the issues, but is not subject to that criticism. The refusal of an instruction asked by the defendant seems to have been justified upon the ground that, so far as it was necessary, it was covered by the general charge.

Upon the ground indicated the judgment is reversed and a new trial ordered.

Johnston, Ch. J., dissenting:

I do not concur in the interpretation given to § 307 of the Civil Code. To entitle a party to a new trial of a cause, or to a review of a decision excluding evidence or denying a fair opportunity to produce evidence at the trial, the evidence sought to be shown must be produced on the motion for a new trial. This requirement is

the same time might so far lose control of his muscular action as to be unable to avoid injury. *Hughes v. Chicago, R. I. & P. R. Co. supra.*

Moreover, the fact that he was intoxicated at the time of the accident does not necessarily affect the right to recover for his injuries or death, unless such intoxication substantially and essentially contributed to such injury or death (*Cogdell v. Wilmington & W. R. Co. 130 N. C. 313, 41 S. E. 541*, petition for rehearing allowed on other points, *132 N. C. 852, 44 S. E. 618*); or unless it was a direct contributing cause to the injury, as distinguished from a mere conditions, in the absence of which the injury would not have occurred (*Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 Ann. Cas. 485*); or unless it is shown to have affected his conduct and contributed to his injury (*Midland Valley R. Co. v. Hamilton, 84 Ark. 81, 104 S. W. 540*); or unless such intoxication was the proximate cause of the injury (*Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891*).

Thus, where a passenger upon a railway train is so intoxicated as to be incapable of standing or walking or caring for himself in any way, and the company's servants, knowing his condition, assist him from the train and help him part way up the station steps, and leave him there, where they know or ought to know that he is in great danger of falling and being seriously injured, and he does so fall, the jury would be warranted in finding that he is free from any negligence that is a direct and proximate cause of his injury. *Black v. New York, N. H. & H. R. Co. supra.*

So, generally, if, notwithstanding such intoxication, he was still exercising the ordinary care of a prudent and sober person for his own safety, and if the accident occurred by reason of other causes, his intoxication thus not contributing to it, the fact of his intoxication will not defeat a recovery against the company. *Kansas City Southern R. Co. v. Davis, 83 Ark. 217, 103 S. W. 603; Wileke v. Henrotin, 146 Ill. App. 47 L.R.A.(N.S.)*

481; *Fox v. Michigan C. R. Co. 138 Mich. 433, 68 L.R.A. 336, 101 N. W. 624, 5 Ann. Cas. 68, 17 Am. Neg. Rep. 286; Wheeler v. Grand Trunk R. Co. 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103; Rangier v. Seattle Electric Co. 52 Wash. 401, 100 Pac. 842.*

And where a railroad company accepts as passenger one whom they know at the time, because of his intoxication, to be mentally and physically incapable of self-protection, and he loses his life because of their negligence while in their care, in an action for the death, such company cannot raise the question of contributory negligence. *Price v. St. Louis, I. M. & S. R. Co. 75 Ark. 479, 112 Am. St. Rep. 79, 88 S. W. 575.*

And where train operatives know that a passenger is intoxicated, and that, because of such intoxication, he has placed himself in a dangerous position, the fact of his intoxication does not excuse them from the duty to use reasonable and ordinary care to prevent injuring him. *Winfrey v. Missouri, K. & T. R. Co. 114 C. C. A. 218, 194 Fed. 808.*

But if, in an action against a carrier for injury to or the death of a passenger, it appears that his intoxication at the time of the accident contributed to his injury or death as a proximate cause thereof, that fact will preclude a recovery against the company. *Midland Valley R. Co. v. Hamilton, 84 Ark. 81, 104 S. W. 540; Allen v. Springfield Consol. R. Co. 142 Ill. App. 510; Bageard v. Consolidated Traction Co. 64 N. J. L. 316, 49 L.R.A. 424, 81 Am. St. Rep. 498, 45 Atl. 620, 7 Am. Neg. Rep. 290; Ruffin v. Atlantic & N. C. R. Co. 142 N. C. 120, 55 S. E. 86; Houston & T. C. R. Co. v. Bryant, 31 Tex. Civ. App. 483, 72 S. W. 885.*

f. With relation to persons injured on highways, streets, etc.

In an action against a municipality for injuries or death alleged to have been caused by reason of a defect or obstruction in the highway, the intoxication of the injured person is a proper subject for the jury to consider in determining whether, at

in plain English and applies to "all cases." No exception is made where the evidence excluded is sought to be obtained on cross-examination, nor where a party to the case is the witness whose testimony is sought. The testimony of a party to the case may be obtained, and he may be subjected to a cross-examination the same as any other witness, and the testimony proposed to be obtained from him can be shown on the motion for a new trial without difficulty. There is no exception of that kind in the statute, and, furthermore, I can see no reason why such an exception should be made. The restriction of the cross-examination of a party or other witness is only

a denial of a fair opportunity to produce evidence, and the Code expressly provides that, whether it is evidence excluded, or the want of a fair opportunity to produce evidence, the proposed evidence must be produced on the hearing of the motion for a new trial. If the evidence sought to be obtained from the party, either by direct or cross examination, is immaterial, a new trial should not be granted, and the theory is that its materiality must be shown on the hearing of the motion for a new trial, or the motion should be denied.

Petition for rehearing denied.

the time of the accident, he exercised such reasonable care as a sober, prudent, and reasonably careful person would have exercised under similar circumstances (*Ander-son v. Wilmington*, 6 Penn. (Del.) 485, 70 Atl. 204); so is the intoxication of the driver (*Thuis v. Vincennes*, — Ind. App. —, 73 N. E. 141).

But in order to avail as a defense, such intoxication must have proximately contributed to the injury or death. *Thuis v. Vincennes*, supra; *Guzman v. Herencia*, 4 Porto Rico Fed. Rep. 105.

So, in an action against a town for injuries received in falling upon a slippery sidewalk, it is erroneous to instruct the jury that intoxication of the injured person is evidence of contributory negligence, and that from it alone they may infer such negligence; unless it appears to have been negligent for plaintiff to be on the walk in an intoxicated condition, or unless the evidence shows that his intoxication in some way aided in bringing about his injury, his condition would not be available to the town as a defense. *Sylvester v. Casey*, 110 Iowa, 256, 81 N. W. 455, 7 Am. Neg. Rep. 236.

And in an action against a city for injuries alleged to have been received by reason of a defective sidewalk, if plaintiff, although intoxicated, was capable of exercising, and did exercise, the care which the law requires of a sober person, the fact of his intoxication becomes immaterial. *Epelett v. Sault Ste. Marie*, 144 Mich. 392, 108 N. W. 360; *Stout v. Columbia*, 118 Mo. App. 439, 94 S. W. 307.

Moreover, in an action against a city for injuries received by reason of a defective sidewalk, plaintiff is under no obligation to show that, because he was intoxicated, he was exercising greater care than would be required on his part if he were sober. *Epelett v. Sault Ste. Marie*, supra.

But in an action against a city for injuries alleged to have been received by reason of a defective condition of the street, it is erroneous to instruct the jury that the influence of liquor on the plaintiff at the time of the injury was "of no consequence" unless "he was incapable of exercising ordinary care," since such instruction in effect

directs them to disregard his actual condition unless his intoxication was so excessive as to produce imbecility or stupefaction. This is contrary to well-settled rules of law. His condition was an important element in determining whether he was at the time in the exercise of ordinary care. Accordingly, the intoxication of the plaintiff in any degree at the time of the accident is a fact or circumstance proper to be considered by the jury. *Rhyner v. Menasha*, 97 Wis. 523, 73 N. W. 41.

And where, in an action against a city for injuries received by falling into a hole in the street, there is evidence sufficient to show intoxication of the plaintiff, and the jury so finds, the testimony being that he was "pretty drunk," "pretty well drunk," "good drunk," "very staggered," such evidence tends strongly to show that he was in such a state of intoxication as to be unable properly to care for himself, that he was so intoxicated as to be incapable of conducting himself with ordinary care. *S. C. subsequent appeal*, 107 Wis. 201, 83 N. W. 305.

And where the intoxication of a footman upon the street of a municipality causes him to leave the sidewalk and pass to a place of danger which the exercise of slight precaution would have disclosed, such conduct, while not necessarily negligence *per se*, is negligence in fact of the most pronounced sort, and will bar his recovery for the resulting injury. *Schoeler v. Rockford*, 160 Ill. App. 217.

Also, in an action for injuries received by falling into a hole in a public street, if it appears that the plaintiff's drunken condition was such that it prevented him from using that care to protect himself from harm that an ordinarily prudent person would have exercised under the same circumstances if sober, and that his lack of care contributed directly to his injury, then he ought not to recover in his action. *Covington v. Lee*, 28 Ky. L. Rep. 492, 2 L.R.A. (N.S.) 481, 89 S. W. 493.

And the same rule applies in an action against a town for injuries received by reason of driving off a high bank beside a highway. *Wood v. Westport*, 185 Mass. 587, 70 N. E. 1018.

And in an action against a town for the death of a person, alleged to have been caused by a defect in the highway, where the uncontradicted evidence shows that, at the time of his death, the deceased was in a state of maudlin intoxication, almost helpless, and incapable of exercising any care, a verdict that he was not intoxicated, or that he was capable of exercising ordinary care, should be set aside. *Carpenter v. Rolling*, 107 Wis. 559, 83 N. W. 953.

g. With relation to miscellaneous matters.

In an action by a railroad employee for injuries alleged to have been received by reason of the negligence of an engineer, the jury may consider the fact that plaintiff was intoxicated at the time of the injury, in determining whether he was guilty of contributory negligence or a failure to exercise due care. A man who voluntarily becomes intoxicated neither gains nor loses in his civil right. The law, in the administration of those rights, treats all people alike, as normal, sober people, so far as this question of drunkenness is concerned. Therefore, if plaintiff was intoxicated, and failed to exercise that care which every prudent man would have exercised under the same or similar circumstances, he will have to take the consequences. His intoxication or drunkenness will not excuse him. On the other hand, if he did exercise the degree of care which every prudent man would have exercised under the same or similar circumstances, then, if he was drunk or intoxicated, that fact within itself would not bar his right of recovery. *Seaboard Air-Line R. Co. v. Chapman*, 4 Ga. App. 706, 62 S. E. 488.

And the same rule applies in an action against a railway company for injuries received by falling into an open and unguarded stairway leading from the platform of its station house to the basement of the same. *Chicago & E. I. R. Co. v. Lawrence*, 96 Ill. App. 635.

So, in an action for injuries received by reason of the falling of a beer keg from a wagon while it was being driven along a city street, it is proper for the jury to consider the condition of the driver of the wagon with reference to his intoxication at the time; his intoxication would tend to characterize the manner in which he was managing the team and the wagon at the time the accident occurred. *Cooke Brewing Co. v. Ryan*, 223 Ill. 382, 79 N. E. 132.

But the mere fact that the plaintiff was intoxicated at the time of the injury does not necessarily preclude his recovery. *Lyons v. Dee*, 88 Minn. 490, 93 N. W. 899, 13 Am. Neg. Rep. 542 (action by the operator of an elevator against the owner of a hotel for injuries received by falling down an open elevator shaft).

His intoxication will not bar his recovery unless it is shown to have caused the accident or in some measure contributed to it. *L.R.A.(N.S.)*

it. Finding v. Gitzen, — Colo. App. —, 131 Pac. 1042 (action against an employer for the death of an employee, caused by his falling from an elevator cage which he was engaged in painting for defendant). Or unless it is shown to have been the direct and proximate cause of the accident. *Clarke v. Philadelphia & R. Coal & I. Co.* 92 Minn. 418, 100 N. W. 231, 16 Am. Neg. Rep. 439. (action against a coal company for injuries received by reason of falling through a coal hole in a sidewalk alleged to have been negligently left open by defendant).

In *Plouffe v. Canada Iron Furnace Co.* 10 Ont. L. Rep. 37, 5 Ont. Week. Rep. 758, where one came to his death by drowning; or exposure near to a hole in the ice alleged to have been left unguarded by defendant company, and where the evidence showed that he was at the time in a state of intoxication, the court submitted to the jury the following question: "Could the deceased, by the exercise of ordinary and reasonable care, have avoided the accident which occasioned his death? And if so, in what respect or how could the deceased have avoided the accident?" The jury's answer, "Yes, he might have taken another road, or if sober, on a bright night, he might have avoided the hole," was held to be one not in favor of contributory negligence.

But if, by reason of his intoxication, the injured person was rendered incapable and failed to exercise ordinary care, such as would be expected of a reasonably prudent man under the circumstances, and his lack of care directly contributed to the accident, no recovery can be had. *Cogdell v. Wilmington & W. R. Co.* 130 N. C. 313, 41 S. E. 541, petition for rehearing allowed on other points in 132 N. C. 852, 44 S. E. 618 (action against railway company for the death of one, alleged to have occurred by reason of defendant's negligence); *Scholl v. Belcher*, 63 Or. 310, 127 Pac. 968 (action against the proprietor of a hotel for the death of a guest who fell from a porch and lay all night upon the ground, thereby contracting an illness which caused his death); *Burleson v. Morrisville Lumber & Power Co.* — Vt. —, 86 Atl. 745 (action by an employee against a mill owner for injuries received while at work in the mill); *Conrad v. John W. Graham & Co.* 54 Wash. 641, 132 Am. St. Rep. 1137, 103 Pac. 1122 (action against a merchant for negligence in selling the wrong kind of chemical used in a magazine lamp, causing an explosion and injury to the plaintiff).

And where a tenant is injured by falling on a stairway upon leased premises, he cannot recover against the landlord, if, with knowledge of the condition of the stairs, he was heedless or careless or negligent, because he had put himself in such a condition through intoxication that he was incapable of attention. *Kenney v. Rhineland*, 28 App. Div. 246, 50 N. Y. Supp. 1088, affirmed in 163 N. Y. 576, 57 N. E. 1114.

III. Question for the jury.

"Intoxication affects different men in different ways. In some it quickens the intellectual faculties and sharpens the physical senses; and in some the first are for a time destroyed and the latter blunted. It largely depends upon the kind of man and liquor. The question as to the effect of intoxicating liquors upon a man is ordinarily one of fact for the jury, and not for the courts. It can be said, however, that drunkenness never places one beyond the protection of the law, nor gives another the right to injure or kill him. Intoxication may be evidence of negligence of an act done by one while under its influence, and, in some cases, may be conclusive as to some acts alleged as negligence, but ordinarily it is simply evidence for the jury to consider, in connection with all the facts and attendant circumstances, in determining whether an act done by the party while under such influence was negligence." *Texarkana & Ft. S. R. Co. v. Frugia*, 43 Tex. Civ. App. 53, 95 S. W. 563.

So, in an action against a city for injuries received by falling into a hole in a sidewalk, the question whether plaintiff was drunk or sober at the time of the accident is one to be decided by the jury. *Madisonville v. Stewart*, — Ky. —, 121 S. W. 421.

In actions for personal injuries or death, such as are here being considered, the question whether the injured person was at the time of the accident so intoxicated as not to be capable of exercising ordinary care and prudence for his own safety, and thus to be guilty of contributory negligence, is one of fact for the jury. *Goff v. St. Louis Transit Co.* 199 Mo. 694, 9 L.R.A.(N.S.) 244, 98 S. W. 49 (action against street railway company for the death of a person run over by a car); *Wack v. St. Louis, I. M. & S. R. Co.* — Mo. App. —, 157 S. W. 1070 (action against a railway company for the death of one killed at a crossing); *Wheeler v. Grand Trunk R. Co.* 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103 (action against railway company for injuries received by being thrown from a moving train); *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171 (action against city for injuries received by falling upon a sidewalk).

And this question has been held to be one for the jury, even though there is some evidence tending to show such contributory negligence from witnesses uncontradicted at the trial. *Wack v. St. Louis, I. M. & S. R. Co.* supra.

In these cases, also the question as to what extent, if at all, the intoxication of the injured person may have contributed to the accident, or may have been the proximate cause thereof, is a question for the jury. *Blair v. Lewiston, A. & W. Street R. Co.* — Me. —, 85 Atl. 792 (action against traction company for the death of one thrown from a moving car); *Camp v. Washash R. Co.* 94 Mo. App. 272, 68 S. W. 96 (action against railway company for

injuries received by being thrown from a wagon because of the alleged defective condition of an approach to a crossing); *Donoho v. Metropolitan Street R. Co.* 30 Misc. 433, 62 N. Y. Supp. 523 (action against street railway company for injuries received by falling from a crowded car); *Cogdell v. Wilmington & W. R. Co.* 130 N. C. 313, 41 S. E. 541, petition for rehearing allowed on other points in 132 N. C. 852, 44 S. E. 618 (action against railway company for one's death, alleged to have occurred by reason of the negligent construction of defendant's car); *Gulf, C. & S. F. R. Co. v. Matthews*, 99 Tex. 160, 88 S. W. 192, subsequent appeal, in 100 Tex. 63, 93 S. W. 1068 (action against railway company for the death of a person run over by a train); *O'Brien v. Washington Water Power Co.* 71 Wash. 688, 129 Pac. 391 (action against traction company for injuries caused by being struck by a car); *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303 (action against city for injuries received by falling into a hole in a street).

And it has been said that where the question of the contributory negligence of one killed by a train would under the circumstances be one of fact if a sober man had been killed under the same circumstances, it will usually be a question of fact for the jury even when the injured person was intoxicated. *Texarkana & Ft. S. R. Co. v. Frugia*, 43 Tex. Civ. App. 48, 95 S. W. 563.

IV. Presumption and burden of proof.

In an action against a city for injuries received by falling into a hole in a sidewalk, where it appears that the hole existed, and that the accident occurred after dark, and at a time when the electric lights were not burning, the fact that the plaintiff fell therein creates no inference that he was drunk or negligent. *Madisonville v. Stewart*, supra.

By statute in North Carolina the burden of proving that the death of one, alleged to have occurred by reason of the negligence of another, actually occurred by reason of his own contributory negligence, is imposed upon the defendant. *Cogdell v. Wilmington & W. R. Co.* supra.

V. Intoxication as evidence of negligence.

a. Admissibility.

In actions such as these for personal injury or death, evidence that the injured person was, at the time of the accident, under the influence of intoxicating liquors, is admissible as bearing upon the question of his exercise of due care or contributory negligence. *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075 (action against street railway company for injuries received while attempting to board a car); *Pittsburgh, C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969 (action against railway company for in-

juries received while passing along the streets of a city); *McINTOSH v. STANDARD OIL Co.* (action by a teamster against his employer for personal injuries); *Louisville & N. R. Co. v. Gardner*, 140 Ky. 772, 131 S. W. 787 (action against railway company for death of one killed at a crossing); *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447 (action against a city for injuries alleged to have been received by reason of a defect in the highway); *Guertin v. Hudson*, 71 N. H. 505, 53 Atl. 736 (action against a town for injuries alleged to have been received because of a defective highway); *Sharpton v. Augusta & A. R. Co.* 72 S. C. 162, 51 S. E. 553 (action against traction company for injuries received by being struck by a car); *International & G. N. R. Co. v. Jackson*, 41 Tex. Civ. App. 51, 90 S. W. 918 (action against railway company for the death of one killed by train backing into a station).

As was said in *South Chicago City R. Co. v. Dufresne*, *supra*, while voluntary intoxication does not constitute negligence in law, proof of the fact is competent to be considered in determining whether the person was taking that care for his safety which a reasonably prudent man who was sober would take under the same circumstances. Intoxication in any degree would affect the faculties to some extent, and it may be of such a character that the intoxicated person has practically lost control of his faculties, and become unable to exercise the care that would reasonably be expected of a sober person under the same circumstances. If the intoxication was of such a degree, the jury might properly conclude that it was the sole cause of the accident.

So, in an action against a railway company for the death of one killed by an engine at a crossing, where the evidence shows that when he was picked up his breath smelled of liquor, and that he had been drinking beer shortly before being injured, evidence that he was drinking earlier in the day and so continued throughout the day is proper and should be admitted as tending to show that his faculties of sight and hearing were at the time of the injury less acute than those of a sober and ordinarily prudent man. It is important that the jury should have the fullest information and light as to the situation, to enable them to determine truly the question of care on the part of the deceased. *Wabash R. Co. v. Prast*, 101 Ill. App. 167.

And in an action against a street railway company for injuries received by being thrown from a crowded car, testimony of witnesses as to whether they would characterize the acts of the injured person at the time of the accident as the acts of a man under the influence of intoxicating liquor, or as those of a sober man, is admissible, and its rejection is reversible error. *Donoho v. Metropolitan Street R. Co.* 30 Misc. 433, 62 N. Y. Supp. 523.

Also, in an action against a railway company for the death of one run over by a

train upon a railway bridge, where it appears that he was lying upon the track apparently asleep at 3:40 A. M., that he was in the habit of drinking intoxicants whenever he went to town, and that he had been to town the day before the accident, testimony that a certain witness saw him intoxicated a day or two before the accident is properly admitted as bearing upon the question of contributory negligence. *Lavee v. Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 136 S. W. 1129.

But in actions of this kind, evidence that the injured person has a general habit of using intoxicating liquors, without reference to the question of his intoxication at the time of the accident, is inadmissible. *Madisonville v. Stewart*, — Ky. —, 122 S. W. 421 (action against city for injuries received by falling into a hole in a sidewalk); *Shelly v. Brunswick Traction Co.* 65 N. J. L. 639, 48 Atl. 562, 9 Am. Neg. Rep. 533 (action against street railway company for injuries received by reason of plaintiff's wagon being run into by defendant's trolley car); *Browne v. Bachman*, 31 Tex. Civ. App. 430, 72 S. W. 622 (action against city for injuries received by falling into a ditch in a public street). But see VI.

Likewise, it is incompetent to show what the general habits of the injured person for sobriety are. *Louisville & N. R. Co. v. Gardner*, 140 Ky. 772, 131 S. W. 787 (action against railway company for the death of a person killed at a crossing); *Chesapeake & O. R. Co. v. Riddle*, 24 Ky. L. Rep. 1687, 72 S. W. 22 (similar action); *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447 (action against city for injuries alleged to have been received by reason of a defect in a highway); *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, 4 Am. Neg. Rep. 465 (action against city for injuries sustained by falling from a sidewalk into a hole in an alley). But see VI.

And evidence of that kind is inadmissible even in rebuttal of evidence that he was intoxicated at the time. *Louisville & N. R. Co. v. Gardner* and *Carter v. Seattle*, *supra*.

And it is inadmissible even when introduced in anticipation of evidence subsequently introduced by the defendant to the effect that at the time of the death the deceased had a strong odor of whisky about him. *Chesapeake & O. R. Co. v. Riddle*, *supra*.

So, in an action against an employer for the death of an employee, where the evidence tending to show intoxication at the time is very shadowy, evidence that he had been intoxicated on former occasions is properly excluded. *Lind v. Uniform Stave & Package Co.* 140 Wis. 183, 120 N. W. 839.

And in an action against a railway company for injuries alleged to have been received by reason of the negligent backing of a train against him, where there is no claim that he was under the influence of liquor at the time of the accident, evidence that about two months previous someone had seen him take a drink and had given

him a temperance lecture, that another had seen him drink the day before, or had seen him on some prior occasion under the influence of liquor, is inadmissible. *DeWalt v. Houston E. & W. T. R. Co.* 22 Tex. Civ. App. 403, 55 S. W. 534.

b. Weight and sufficiency.

Intoxication is not negligence of itself; it is merely an evidentiary fact tending to prove negligence. *Cogdell v. Wilmington & W. R. Co.* 130 N. C. 313, 41 S. E. 541, petition for rehearing allowed on other points in 132 N. C. 852, 44 S. E. 618; *Herrick v. Washington Water Power Co.* — Wash. —, — L.R.A.(N.S.) —, 134 Pac. 934.

One cannot voluntarily put it out of his power to use due care to protect himself, and recover for the consequences from others. Voluntary drunkenness that wholly or partially paralyzes the will power and the control of one's muscles and senses is such lack of that care which one owes to himself that it may be in fact and in law contributory negligence to any other cause that, co-operating with it, results in his injury. *Covington v. Lee*, 28 Ky. L. Rep. 492, 2 L.R.A.(N.S.) 481, 89 S. W. 493.

VI. Employment of persons having habits of intoxication.

It has been held that in an action by an employee against his employer for injuries alleged to have been received by reason of the negligence of a fellow workman, evidence that such fellow workman was at the time under the influence of liquor, that he had been drunk as often as once in two weeks for the last twenty-five years, that his sprees frequently lasted a week or more, and that the natural result of the long-continued and excessive use of liquor was to produce such an effect upon his system that he would be likely to act as he did at the time of the accident, is admissible. *Curtis v. Laconia Car Co. Works*, 73 N. H. 516, 63 Atl. 400. Such evidence tends to prove that the company so employing him ought to have anticipated an accident if they continued to employ such a workman.

And in an action against a railway company for the death of an employee, caused by the train being backed upon him while at work, where it appears that the conductor and the brakeman of the train were intoxicated at the time, testimony as to their habits with reference to the use of intoxicating liquors on other occasions, both while on and off duty, is properly admitted. *Missouri, K. & T. R. Co. v. Jones*, — Tex. Civ. App. —, 75 S. W. 53.

But in an action against a mining company for injuries alleged to have been received by reason of the negligence of a fellow workman, evidence as to the drinking habits of such fellow workman, when there is no testimony tending to show that he was intoxicated on the day of the in-

jury, or that his intoxication contributed thereto, or that any carelessness or inebriety on his part had anything to do with the accident, is inadmissible, and its admission over objection is prejudicial error. *Miller v. Bullion-Beck & C. Min. Co.* 18 Utah, 358, 55 Pac. 58. And see *V. a.*

H. C. Sh.

NEBRASKA SUPREME COURT.

FRANCES M. FARRINGTON

v.

F. E. FLEMING COMMISSION COMPANY
et al. and
MERCHANTS' BANK OF ST. JOSEPH,
Intervener, Appt.

(— Neb. —, 142 N. W. 297.)

Garnishment — intervention.

1. When a garnishee answers that he has money in his hands belonging to the judgment debtor, it is proper to allow one who claims the money, and is not a party to the proceedings, to appear and contest the right of the plaintiff to apply the money on his claim.

Same — process — effect.

2. The effect of service upon the garnishee is to impound the funds in his hands. It is the duty of the garnishee to pay the money in his hands to the party having the better right as determined by the court. Only the interest of the attachment debtor can be applied upon the plaintiff's claim.

Same — bank deposit — outstanding check.

3. Before the enactment of § 188 of the negotiable instrument act (Laws 1905, chap. 83), this court held that the holder of a check might maintain an action thereon against the bank on which it was drawn, if the maker of the check had a general deposit in the bank subject to the check when it was presented to the bank. This was upon the ground that, as between the maker and holder, the check transferred the deposit *pro tanto*. Without determining in this case the effect of that section on the rights of the bank, it is held that, when the holder in good faith has paid the maker in full for the check, the deposit is not subject to garnishment at the suit of another creditor of the maker.

(June 16, 1913.)

A PPEAL by intervener from a judgment of the District Court for Richardson County in plaintiff's favor in an action brought to recover money paid by plaintiff to defendant for goods which it failed and

Headnotes by SEDGWICK, J.

Note. — See note to *Kaesemeyer v. Smith*, 43 L.R.A.(N.S.) 100, for check as affecting garnishment of deposit.

refused to deliver, supported by garnishment of defendant's bank account. Reversed.

The facts are stated in the opinion.

Messrs. Waggener & Challiss and Edwin Falloon, for appellant:

One to whom a depositor in a bank gives a check thereon for value, with intent to transfer the credit, becomes at least the equitable owner of the fund, and so is entitled thereto as against one thereafter garnishing as a creditor of the depositor.

Dillman v. Carlin, 105 Wis. 14, 76 Am. St. Rep. 902, 80 N. W. 932; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *German Sav. Inst. v. Adae*, 1 McCrary, 501, 8 Fed. 106; *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847; *Cope v. C. B. Walton Co.* 77 N. J. Eq. 512, 76 Atl. 1044; *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 477; *Fonner v. Smith*, 31 Neb. 107, 11 L.R.A. 528, 28 Am. St. Rep. 510, 47 N. W. 632.

Messrs. Reavis & Reavis, for appellee Farrington:

Before an intervener may become a party, he must have or claim an interest in the subject-matter of the litigation.

Moline, M. & S. Co. v. Hamilton, 56 Neb. 132, 76 N. W. 455; *Danker v. Jacobs*, 79 Neb. 437, 112 N. W. 579; *Kimbrow v. Clark*, 17 Neb. 403, 22 N. W. 788; *Meyer v. Keefer*, 58 Neb. 220, 78 N. W. 506; *Smith v. Gale*, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674.

The execution and delivery of a check or draft do not operate as an equitable assignment of the fund.

National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805.

Sedgwick, J., delivered the opinion of the court:

The plaintiff began this action in the county court of Richardson county against the defendant the F. E. Fleming Commission Company, to recover money claimed to be due from that company, and procured the Richardson County Bank, doing business at Falls City, Nebraska, to be summoned as garnishee; the commission company at that time having a deposit account in that bank. Afterwards the Merchants' Bank of St. Joseph, Missouri, intervened, and claimed \$1,200 of the deposit. The commission company was a corporation doing business at St. Joseph, Missouri, and drew a check for \$1,200 upon its account in the Richardson County Bank in favor of the Merchants' Bank of St. Joseph, and 47 L.R.A.(N.S.)

received the money thereon from that bank. There were several transactions between the commission company and the St. Joseph bank; but, as no question is made in this case upon those transactions, we state simply the legal effect thereof. The garnishment above stated was not issued and served upon the Richardson County Bank until after the commission company had given the check to the St. Joseph bank, and received the money thereon. It will be seen that the controversy here is between the plaintiff and the St. Joseph bank. It appears from the answer of the garnishee that, when it was served with process, it held in the deposit account of the commission company the sum of \$1,237.56. The district court entered a judgment in favor of the plaintiff, and against the commission company, for the amount of the plaintiff's claim, and ordered the Richardson County Bank, as garnishee, to apply the deposit in payment of the judgment. The St. Joseph bank has appealed.

The intervener insists that the check of the commission company which was paid by the intervener creates an equity in the deposit in his favor as against the commission company, so that that deposit was not liable to attachment in the suit of a third party against the commission company. The plaintiff contends (1) that § 188 of the negotiable instrument act (Laws 1905, chap. 83) applies, and that under that section the holder of a check has no equitable right in the deposit on which the check is drawn; (2) that the St. Joseph bank "has no standing in court, either to have its claim heard, or to appeal from a determination of its claim adverse to its contention." The contention is that the matter in litigation was the disputed claim of the plaintiff against the commission company, and that, as the St. Joseph bank was not interested in that claim, it could not intervene under § 1047, Anno. Stat. 1911 (Code § 50a). But the matter in litigation was not only the claim of the plaintiff against the commission company, but also the deposit in the bank, and if the St. Joseph bank was interested in, and entitled to, that deposit, it would be entitled to protect that interest. We think the court did not err in allowing the St. Joseph bank to appear and resist the application of the deposit to the payment of the plaintiff's claim against the commission company.

Section 188 of the negotiable instrument act is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts

or certifies the check." Before the enactment of that section, this court held that the holder of a check might maintain an action thereon against the bank upon which it was drawn, if the maker of the check had a general deposit in the bank subject to check at the time the check was presented to the bank. *Fonner v. Smith*, 31 Neb. 107, 11 L.R.A. 528, 28 Am. St. Rep. 510, 47 N. W. 632. The courts of some of the states held the same doctrine, but the Supreme Court of the United States and the courts of other states held that under such circumstances the holder of the check could not maintain an action against the bank, and that his right of action was against the maker of the check alone. *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897. This holding of the Supreme Court of the United States was expressly put upon the ground that the relation of depositor and banker is that of debtor and creditor. The moment the deposit is made it becomes part of the property of the bank under a contract to repay the amount to the depositor or to his order at such time and in such amount as he may direct. The funds are no longer the funds of the depositor, but of the bank; and the depositor is the creditor for the principal sum. He has a right to draw for them in such sums as he may see fit. The obligation of the banker to the depositor is perfect. The latter may maintain an action for the whole deposit, he may countermand any and all the checks he has given; if he has funds when the check is presented, he may maintain an action on the case for a refusal by the banker to pay his check. The effect would be that a right of action for the same money in the hands of a third party existed in two persons upon one promise at the same time. The conflict in the two lines of cases was as to the position of the bank with reference to the fund, and not as to the equitable rights in the deposit of the maker and holder of the check respectively. It appears to us that the holding of the Supreme Court of the United States and of those courts that followed that decision was more applicable to the common-law practice and proceedings; and the reasoning of Mr. Justice Maxwell in *Fonner v. Smith*, *supra*, was more applicable to the practice and proceedings under the Code. Under the Code practice, it seems more natural to allow the action to be brought by the holder of the check as the real party in interest than to limit the liability of the bank to the old common-law "action on the case" by one who would appear in equity to have transferred his interest in the deposit to another. If the effect of the negotiable instrument act is to adopt the 47 L.R.A. (N.S.)

rule that no action against the deposit bank can be maintained upon the check by the holder "unless and until it accepts or certifies the check," which it is not necessary now to decide, still that section is not applicable to the facts in this case. This plaintiff is not claiming under the negotiable instrument act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty as garnishee is to pay the money to the party having the better right to it, as determined by the court. The commission company had money on general deposit in the garnishee bank and procured that money from the St. Joseph bank by drawing its check against that deposit in favor of the St. Joseph bank. The St. Joseph bank clearly has a better right to the deposit than the commission company has, and this plaintiff by garnishment could obtain no better right than her debtor had.

The order of the District Court applying the deposit on the plaintiff's judgment is reversed, and the cause remanded, with instructions to enter a judgment for intervenor bank against the commission company for \$1,200 with protest fees and interest from the date of the check, and order the garnishee to pay the money in his hands into court to be applied on said judgment. All costs to be taxed against the plaintiff.

Fawcett, Barnes, and Hamer, JJ., not sitting.

NEW MEXICO SUPREME COURT.

STATE OF NEW MEXICO EX REL. PARSONS MINING COMPANY

v.

J. T. McCLURE, District Judge, et al.

(— N. M. —, 133 Pac. 1063.)

Venue — transitory action — proceeding against insolvent corporation.

1. A proceeding in insolvency against a

Headnotes by PARKER, J.

Note. — Right of receiver to take property from possession of stranger.

I. Scope of note, 745.

II. The rule in general, 745.

III. Particular applications.

1. Purchasers or assignees, 749.

2. Officers of corporations, 751.

3. Sheriffs or other receivers, 752.

4. Persons claiming lien or set-off, 753.

5. Trustee or agent, 754.

corporation under chapter 79, Laws of 1905, is a "transitory action" in the nature of quo warranto, and the venue thereof, under § 2950, Comp. Laws, 1897, may be in the county where either the plaintiff or the defendant resides.

Courts — conflicting actions — prior jurisdiction.

2. As between courts of concurrent jurisdiction, the first acquiring jurisdiction of the subject-matter of an action is permitted, with certain exceptions, to retain it to the end. Applied to one district court having jurisdiction of an insolvency proceeding against a corporation, under chapter 79, Laws of 1905, in which a mortgagee of the insolvent corporation is made a party defendant and answers, setting up his mortgage, and another district court in which, pending the former proceeding, said

mortgagee has obtained a decree of foreclosure and sale of the insolvent's property thereunder, the former district court is entitled to retain the jurisdiction first acquired by it, and to administer said estate, to the exclusion of any such decree by the latter court.

Receiver — property in custody of stranger — rights — determination.

3. A receiver cannot ordinarily take into custody property found in possession of a stranger to the record, claiming title. But where such stranger intervenes in the receivership proceedings, and submits his rights to the court for adjudication, he is not entitled to a writ of prohibition to restrain the court from determining those rights.

(May 16, 1913.)

IV. Liability of receiver for wrongfully taking possession, 755.

V. Theory of interference, 756.

VI. Writ of prohibition, 757.

VII. Miscellaneous, 758.

I. Scope of note.

This note is confined to cases where the receiver attempted to take property held by a stranger, either without authority of the court or under authority issued in a summary proceeding. Cases are therefore excluded where the receiver brought an action to recover possession. The note does not include the question as to when a receiver should be appointed, or as to the proper parties in applications for receivership. Cases where temporary receivers were appointed under the bankruptcy act are excluded, as the principles involved do not appear to be entirely similar to those in ordinary cases. The note also excludes the question, in general, of interference with the receiver's possession, it being assumed in the note that the receiver is seeking to acquire, rather than that he has already acquired, possession. Several cases are, however, included where the third party was summarily ordered to deliver the property to the receiver, on the ground that such party was interfering with the receiver's constructive possession, or had taken the property from the receiver and must restore it to him.

II. The rule in general.

The general rule is in accord with *STATE EX REL. PARSONS MIN. CO. v. McCLURE*, and is well established, that a receiver cannot ordinarily, through summary proceedings, take into custody property found in the possession of strangers to the record claiming adversely. *Ex parte Hollis*, 59 Cal. 405; *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121; *Stuparich Mfg. Co. v. Superior Ct.* 123 Cal. 290, 55 Pac. 985; *Levi v. Karriek*, 13 Iowa, 344; *Metcalfe v. Commonwealth Land & Lumber Co.* 113 Ky. 751, 68 S. W. 1100; *Olmsted v. Rochester & P. R. Co.* 46 Hun, 552, 12 N. Y. S. R. 551; *Re Muehlfeld*, 16 47 L.R.A. (N.S.)

App. Div. 401, 45 N. Y. Supp. 16; *Burger v. Tobias*, 1 Ch. Sent. 6.

The principles upon which these cases generally rest are that the receiver merely stands in the place of, and has no greater rights than, the party over whose property he has been appointed receiver; that everyone is entitled to his day in court; and that summary proceedings are not suitable to try conflicting claims to title.

The courts have frequently pointed out that the proper course to pursue in cases where a receiver desires to obtain possession of property in the hands of a stranger to the suit, claiming adversely, is either for the receiver to bring an action against the third party, or for the plaintiff to make him a party to the suit and have the receivership extended as to him. *Wheaton v. Daily Teleg. Co.* 59 C. C. A. 427, 124 Fed. 61; *Steele v. Walker*, 115 Ala. 485, 67 Am. St. Rep. 62, 21 S. 942; *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Green v. Hicks*, 1 Barb. Ch. 309; *Olmsted v. Rochester & P. R. Co.* 46 Hun, 552, 12 N. Y. S. R. 551; *Re Muehlfeld*, 16 App. Div. 401, 45 N. Y. Supp. 16; *Robeson v. Ford*, 3 Edw. Ch. 441; *Cassilear v. Simons*, 8 Paige, 273; *Parker v. Browning*, 8 Paige, 386, 35 Am. Dec. 717; *State ex rel. Boardman v. Ball*, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975.

And in proceedings supplementary to execution, where the question has sometimes arisen whether the court could summarily determine conflicting claims to property in the possession of the judgment debtor or of strangers to the action, the rule has been laid down in the following, among possibly other, cases, that the question could not be so determined, but that the proper course was to appoint a receiver who should bring an action to test the question of ownership: *Teller v. Randall*, 40 Barb. 242; *West Side Bank v. Pugsley*, 47 N. Y. 368; *Rodman v. Henry*, 17 N. Y. 482; *Crounse v. Whipple*, 34 How. Pr. 333; *Stewart v. Foster*, 1 Hilt. 505; *Thompson v. Sage*, 47 Misc. 357, 94 N. Y. Supp. 31; *Sherwood v. Buffalo & N. Y. City R. Co.* 12 How. Pr. 136; *Friedman v. Stein*, 138 N. Y. Supp. 928; *People ex rel.*

APPPLICATION for a writ of prohibition to prevent respondent as judge of the District Court of Chaves County from proceeding with an action against the Eagle Mining & Improvement Company. Writ denied.

The facts are stated in the opinion.

Messrs. Wilson, Bowman, & Dunlavy, for relator:

Where the want of jurisdiction appears upon the record, the question of want of jurisdiction may be raised at any time, even after judgment, and submission of the party to jurisdiction is no waiver.

2 Street, Fed. Eq. Pr. 829; 2 Spelling, Extr. Rem. 2d ed. § 1755; High, Extr. Legal Rem. § 762; Thomson v. Tracy, 60 N. Y. 31.

Williams v. Hulburt, 5 How. Pr. 446; Edgerton v. Hanna, 11 Ohio St. 323.

But where the property is in the possession of a lessee who accepts the lease with knowledge of the appointment of the receiver, the latter may obtain possession by summary proceedings. Thornton v. Washington Sav. Bank, 76 Va. 432. It was said: "As a general rule, the court will not interfere in a summary way as against the possession of a stranger to the action claiming by paramount title, but will leave the question of title to be tried by a proper action to be brought for that purpose. When, however, the possession is withheld by persons who are parties to the suit, or by others claiming under such parties, with notice of the appointment of the receiver, there can be no question as to the authority of the court to interfere in a summary way, and enforce its order for the surrender of the property by attachment or by a writ of possession."

That the rule laid down above, that a receiver cannot, by summary methods, take property from the possession of a stranger claiming adversely, does not apply where the property is claimed by a mere agent or trustee who claims no adverse interest, see cases under III. 5, *infra*.

And in Prentiss v. Brennan, 2 Grant, Ch. (U. C.) 322, it was said: "When the court appoints sequestrators or a receiver, the duty devolves upon it of putting its own officers in possession of the property which the appointment was intended to affect, and it will not shrink from the performance of this duty, although it may involve an adjudication upon the rights of third persons; and it is possible that when the subject is thoroughly investigated, and the law upon it finally settled, it may be found that the distinction which has been adverted to is not wholly without foundation,—namely, that where the property of which possession is sought is in the possession of the defendant to the suit, or his agent or tenant, or a person claiming in privity of title under him, the court will in the first instance undertake the determination of the right, having it in its power to direct the

The unlawful assumption of jurisdiction, either of the entire cause or subject-matter, or of something collateral or incident thereto, is the criterion by which to determine whether the prohibition is the proper remedy.

Thomas v. Mead, 36 Mo. 232; Casby v. Thompson, 42 Mo. 133; State v. Price, 8 N. J. L. 358; People ex rel. New York Consol. Stage Co. v. Common Pleas Ct. 43 Barb. 278; Jasper County v. Spitler, 13 Ind. 235; People ex rel. Scannell v. Whitney, 47 Cal. 584.

The order appointing a receiver is invalid and without effect, if it fails to comply with the statute.

Dreyspring v. Loeb, 113 Ala. 263, 21 So. 73; Capital City Water Co. v. Weatherly,

institution of legal proceedings for the information of its conscience, should it be found necessary; but that where the property in question is claimed by a third party, by title paramount or adverse, it will in all cases direct an action or suit to be commenced and prosecuted for the establishment of the defendant's title against the adverse claimant." The court also said it was careful not to dispose of the question of property upon motion except in simple cases. In that case, where there was a conflict in the evidence as to the third party's rights to the property, it was held that it was improper to decide the question upon motion, but that a suit should be brought for that purpose.

But in Davis v. Briggs, 52 Hun, 614, 1 Silv. Sup. Ct. 326, 5 N. Y. Supp. 323, it was held that where a third party sets up a claim to the property under an agreement which is void upon its face, the court may, in proceedings supplementary to execution, order such party to deliver the property to the receiver appointed in the proceedings. It was said, however, that had the third party made a claim to the property other than under an agreement void upon its face, a suit would have been necessary to determine the rights of the parties.

A receiver is not justified in taking possession by summary methods of property in the possession of a third party claiming title or an interest therein, on the theory that the rights of such party will be fully protected in the receiver's hands, since the holder of the property under such circumstances has a right to retain possession and management of the property undisturbed by an order to which he is a stranger. Reed v. Baker, 42 Mich. 272, 3 N. W. 959, holding that the court had no power to make an order against an assignee who was a stranger to the suit, declaring the assignment void and directing the defendant in the suit to assign the property to the receiver; State ex rel. J. M. Arthur Mach. Co. v. Superior Ct. 7 Wash. 77, 34 Pac. 430, holding that a writ of prohibition would issue to restrain a court, through its receiver, from summarily taking possession

108 Ala. 412, 18 So. 841; High, Receivers, 4th ed. 158; 23 Am. & Eng. Enc. Law, 1047; Montgomery v. Merrill, 18 Mich. 338; Fleischauer v. Dittenhoefer, 17 Jones & S. 311.

Where there is no injunction against the institution of actions against an insolvent corporation, any person having claims against it may prosecute them to final judgment.

Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648; Allen v. Olympia Light & P. Co. 13 Wash. 307, 43 Pac. 55.

Until a receiver was duly appointed and qualified, no jurisdiction over the *res* attached to the district court for Chaves county, and said court could not administer the property of the Eagle Mining & Improve-

ment Company to the exclusion of other courts having jurisdiction of the *res*, until the receiver had qualified.

The order appointing the receiver and entering the injunction *nunc pro tunc* as of September 18, 1908, cannot affect any intervening valid rights acquired by the Parsons Mining Company, and the court of Chaves county had no jurisdiction to enter such order.

Black, Judgm. 2d ed. § 130; Grover v. Hawthorne, 62 Or. 69, 121 Pac. 805; Wilmerding v. Corbin Bkg. Co. 126 Ala. 268, 28 So. 640; Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670.

The property was not *in custodia legis* at the time of the foreclosure proceedings,

of property held by a sheriff under prior attachment. See also Pease v. Smith, 63 Ill. App. 411, under II. 3, *infra*.

In Wheaton v. Daily Teleg. Co. 59 C. C. A. 427, 124 Fed. 61, also, the court ruled against the contention that property in the possession of a stranger claiming the right of set-off should be delivered to a receiver upon summary order, because, if it ultimately appeared that the third party was entitled thereto, the court would make restitution. It was said that, as regards parties to the action, it is largely within the discretion of the court whether the custody of the assets shall be changed; but if it is in the possession of a third party claiming adversely, the receiver cannot interfere with the possession except by suit making the stranger a party to the action.

In State Bank v. First Nat. Bank, 34 N. J. Eq. 450, it was said that the institution of a proceeding by petition is limited to those instances in which the legislature has expressly authorized its use, or in which such use has the sanction of long-established practice.

It has been said that in some cases the order appointing the receiver directs him to take possession of certain specific property, and that, in such cases, it has been held that the person holding the property could not question the authority of the receiver under the order; but that no case had been found holding that the receiver, without other authority than that of the order appointing him, had the right to interfere with personal property in the possession of third persons under claim of title. State ex rel. Hunt v. Superior Ct. 8 Wash. 210, 25 L.R.A. 354, 35 Pac. 1087, holding that a writ of prohibition would issue to restrain interference by a receiver of a corporation with property in the possession of strangers to the suit holding the property under a valid attachment issued prior to the receivership proceedings, where the order appointing the receiver simply directed him to take the property of the corporation. This case was approved and followed in State ex rel. Shelly v. Superior Ct. 8 Wash. 659, 35 Pac. 1092.

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But in Havemeyer v. Superior Ct. 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121, it was said that, even in cases where a specific description of the property is appropriate in an order of the court appointing a receiver, the receiver has no right to take property from the possession of a stranger to the action.

It has been said that it is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of the court; as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself, by force and without an express order of the court directing him to do so. Parker v. Browning, 8 Paige, 386, 35 Am. Dec. 717; Davies v. Davies, 20 Abb. N. C. 171.

It has been said, also, that a receiver, although an officer of the court, is entitled to no privilege that would not be accorded to any other suitor; that, in seeking relief, he must come by the same process that other suitors are required to use, and must prosecute his suit in the same manner that any suitor would be required to do. State Bank v. First Nat. Bank, 34 N. J. Eq. 450.

A court has no power to issue an order to a sheriff to put a receiver into possession of property held by a stranger to the action, without, at least, giving the latter an opportunity to show cause against the order. St. Louis, K. & S. R. Co. v. Wear, 135 Mo. 264, 33 L.R.A. 341, 36 S. W. 366, 658.

A court cannot punish for contempt a stranger to a suit in which a receiver is appointed, who claims title to the property, for refusal to comply with a summary order to deliver it to the receiver, but the latter should resort to his remedy by action. White v. Gates, 42 Ohio St. 109. In this case the party in possession was the wife of the defendant to the suit, and claimed the property as a gift from her husband; and the court had found, before making the order upon her to deliver the property, that it had been placed in her hands for the purpose of defrauding his creditors. But it was said that, however plain it might seem

and jurisdiction had not attached to the res at the time of said proceedings.

Erie R. Co. v. Ramsey, 45 N. Y. 637; Waters-Pierce Oil Co. v. State, 47 Tex. Civ. App. 162, 103 S. W. 836; Re Schuyler's Steam Tow Boat Co. 136 N. Y. 169, 20 L.R.A. 391, 32 N. E. 623; Squire v. Princeton Lighting Co. 72 N. J. Eq. 883, 15 L.R.A. (N.S.) 657, 68 Atl. 176; Minchin v. Second Nat. Bank, 36 N. J. Eq. 436; Eagle Min. & Improv. Co. v. Lund, 15 N. M. 696, 113 Pac. 840.

Courts have refused to consider property as in the custody of the law from the time of the institution of the suit and the service of process on the defendant.

Minchin v. Second Nat. Bank, 36 N. J. Eq. 436; Graham Button Co. v. Spielmann,

50 N. J. Eq. 120, 24 Atl. 571; Merry v. Wilcox, 92 Hun, 210, 36 N. Y. Supp. 1050; Re Waterbury, 8 Paige, 380; VanAlstyne v. Cook, 25 N. Y. 489; Re Gies Lithographic Co. 7 App. Div. 550, 40 N. Y. Supp. 146; Jones v. Arena Pub. Co. 171 Mass. 22, 50 N. E. 15; Smith v. Sioux City Nursery & Seed Co. 109 Iowa, 51, 79 N. W. 457; Clark v. Brockway, 1 Abb. App. Dec. 351; Re Lewis & F. Mfg. Co. 89 Hun, 208, 34 N. Y. Supp. 983; Temple v. Glasgow, 25 C. C. A. 540, 42 U. S. App. 417, 80 Fed. 441; Horn v. Pere Marquette R. Co. 151 Fed. 626.

Mr. Lorin C. Collins, also for relator:

The action in the district court of Chaves county was and is *in rem*.

to the court that the claim of ownership was wholly unfounded, while it might order the person having the property in his possession to deliver it to the receiver, it had no power to enforce the order as for a contempt.

And in Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225, the court said it was well settled that where the order did not expressly direct the receiver to take the specific property, but to take possession only of all the assets, and to institute suit to recover the property in question, the receiver had no right to seize property in the possession of a stranger claiming title, however manifest the fraud through which it was acquired; that the receiver's duty was to demand the property, and upon a refusal to bring suit for recovery.

A stranger who, believing that property in his possession belongs to another than a corporation for which a receiver is appointed, refuses in good faith to comply with the receiver's demand for the property, is not guilty of contempt of court. State v. Denham, 30 Wash. 643, 71 Pac. 196.

An order directing the receiver to take property in the possession of a stranger to the suit has been said to be void as against the latter. Metcalfe v. Commonwealth Land & Lumber Co. 113 Ky. 751, 68 S. W. 1100.

And in Hook v. Bosworth, 12 C. C. A. 208, 24 U. S. App. 341, 64 Fed. 443, the court said it could not assent to the proposition that such an order was voidable merely, and not void.

In Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819, where it was held that a chattel mortgagee might seize the property when it was not in the actual or constructive possession of a corporation or its receiver, the court said: "Since the corporation was neither in the actual nor constructive possession of the property in dispute, the receiver, by his appointment, took no greater right than a right to acquire possession in one of the methods which might have been pursued by the corporation itself, had a receiver not been appointed. . . . The remedy of the receiver, under the facts 47 L.R.A. (N.S.)

shown, was the same as that of any individual interested in the foreclosure."

The rights of third parties claiming adversely cannot be summarily determined upon a petition in proceedings supplementary to execution, and a receiver appointed to take charge of and sell the property to satisfy the judgment, where a statute provided that if it appears that a party alleged to have property of the judgment debtor claims an adverse interest therein, the court may authorize the judgment creditor to institute an action therefor, and forbid the transfer of the property until final judgment, the power of the court to make orders in such proceedings being limited to those named in the statute. Spaulding v. Coeur D'Alene R. & Nav. Co. 6 Idaho, 638, 59 Pac. 426.

In Republic L. Ins. Co. v. Swigert, 135 Ill. 150, 12 L.R.A. 328, 25 N. E. 680, it was said that it could hardly be claimed that a court of chancery, in the absence of legislative sanction, is authorized to clothe its receivers with power to seize and enforce a property right which belonged only to parties who were not before the court nor asking its assistance.

And in Christie v. Burns, 83 Ill. App. 514, the court said that the order appointing a receiver gives him no authority as against the rights of parties over whom the court has not acquired jurisdiction; that the court cannot summarily determine the rights of parties in possession who claim under deeds alleged to have been executed and delivered before the proceedings were instituted, when they have not been subjected to the jurisdiction of the court.

It was held in Musgrove v. Gray, 123 Ala. 376, 82 Am. St. Rep. 124, 26 So. 643, that the fact that the corporation for which a receiver was appointed had been dissolved did not affect the question whether the receiver could proceed summarily to take property from a stranger to the suit claiming to hold it under contract with the corporation; since, from all that appeared, the contract might be of such a nature that the dissolution would not affect the rights of third parties claiming under it.

Brown, Jurisdiction, chap. 8, p. 232, § 58.

An action *in rem* must be brought in the county in which the *res* or a portion thereof is situated.

Jemez Land Co. v. Garcia, 15 N. M. 316, 107 Pac. 683; Turrill v. Walker, 4 Mich. 177; Re Jewett, 69 Kan. 830, 77 Pac. 567; Vickery v. Omaha, K. C. & E. R. Co. 93 Mo. App. 1; Security Mut. L. Ins. Co. v. Reas, 141, 106 N. W. 1037; Etowah Mill. Co. v. Crenshaw, 116 Ga. 406, 42 S. E. 709; Hammel v. Fidelity Mut. Aid Asso. 42 Wash. 448, 85 Pac. 35; Dwelle v. Hinde, 18 Ohio C. C. 618, 8 Ohio C. D. 177; Atkins v. Fraker, 32 Wis. 510; Watts v. White, 13 Cal. 321, 13 Mor. Min. Rep. 11; Williams v. Ewing, 31 Ark. 234; Montgomery

v. Commercial Bank, Smedes & M. Ch. 632; Webber v. Truax, 1 N. Y. City Ct. Rep. 242; Bunch v. Bunch, 26 Ind. 401; Ring v. McCoun, 10 N. Y. 268; Elwyn v. Jackson, 14 La. 411.

The court not having jurisdiction of the *res*, and the *res* not being under the control of the court, all orders made by it were null and void.

2 Chitty, Gen. Pr. 307; Renaud v. Con-selyea, 5 How. Pr. N. S. 346; Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334.

A writ of prohibition should be granted, because the district court of Chaves county never had jurisdiction to appoint a receiver.

Havemeyer v. Superior Ct. 84 Cal. 327,

In Comer v. Felton, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 731, it was said that a writ of assistance to put a receiver in the possession of property should not be issued against any but a party to the suit in which it is sought, his privies, or one coming into possession during the suit.

Where a receiver appointed by a Federal court is in possession of property, a receiver subsequently appointed by a state court will not be put into possession through a writ of assistance from the state court; and the fact that the jurisdiction of the Federal court is denied does not affect the rule. Gelpeke v. Milwaukee & H. R. Co. 11 Wis. 454. It was said that the authorities "only go to the extent of allowing the writ against third persons under circumstances where it is clear that such third persons went into possession *pendente lite*, and claimed under the parties to the suit by title accruing subsequent to its commencement; or when, if their title was paramount, the possession was subsequent, and was taken by fraud and collusion with the parties to the action, and for the purpose of defeating its objects; or when it was evident that such third person had no possessory rights whatever. I know of no case where it has been adjudged that the possession of a stranger who sets up a superior title, in pursuance of which he claims to have entered and to hold, might be thus disturbed. In such cases it has been the uniform rule to leave the parties to their remedy by action."

In Hook v. Bosworth, 12 C. C. A. 208, 24 U. S. App. 341, 64 Fed. 443, it was held that, since a receiver should not have been appointed for a corporation which was not a party to the suit, there could be no recovery by the receiver in a summary proceeding by petition, of money in the possession of the corporation. The court said: "We should do violence to a fundamental principle of the law to uphold the right of receivers of one corporation to take possession of the property of another not a party to the suit in which such appointment is made. No one should be concluded without his day in court."

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III. Particular applications.

1. Purchasers or assignees.

A receiver cannot upon motion question the validity of a transfer of the property made prior to his appointment, where the assignee is not a party to the action. Re Castle, 41 Hun, 637, 2 N. Y. S. R. 362.

A purchaser in possession who is a stranger to the suit is not guilty of contempt of court for refusing to surrender the property to a receiver who was not directed to take possession, but only to complete a sale of the property and hold the proceeds subject to the order of the court. Wardlaw v. Herrington, 125 Ga. 828, 54 S. E. 699.

Where it appears that money in the possession of a third person has been assigned by the judgment debtor, and, at the time of the appointment of a receiver in the proceedings supplementary to execution, does not belong to the debtor, a third party in possession is not in contempt as violating an injunction restraining him from parting with property of the debtor, by paying the same to the assignee, and refusing to comply with the receiver's demand for the property. Re Duryea, 17 App. Div. 540, 45 N. Y. Supp. 703.

In People v. United States Law Blank & Stationery Co. 24 Misc. 535, 53 N. Y. Supp. 852, where the court denied a motion to punish for contempt an assignee of a corporation for refusal to deliver property to its receiver, it was said that, the title of the assignee being apparently valid, the remedy of the receiver was by action.

In Brown v. Gilmore, 16 How. Pr. 527, persons who, under direction of a receiver, seized property in the possession of a third party claiming title as purchaser, were held liable for damages. In regard to the contention that the alleged sale was fraudulent, the court said that this was an issue which could not be litigated in this action; that the question here was whether the sale was valid *inter partes*; that, while it was true the receiver not only stood in the place of the debtor, but represented the creditors, in neither capacity was he justified in

10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121.

There was no *lis pendens* when the Parsons Mining Company bought this property, of which the receiver is now in possession.

Paine v. Root, 121 Ill. 82, 13 N. E. 541; Wade, Notice, § 351; Andrews v. Paschen, 67 Wis. 414, 30 N. W. 712; San Jose v. Fulton, 45 Cal. 319; Freeman, Judgm. 2d ed. § 196.

The relator having been a purchaser in the open market from one buying at a judicial sale (the court having full and plenary jurisdiction), and having gone into possession, must have a trial of the right

forcibly seizing the property after it had been sold, and the sale, by an actual and complete transfer, had been made valid as between him and his vendor; that as representing the vendor, the receiver could not impeach his own transfer, and as representing the creditors, he could not adopt the course in question, because, even if transferred with a design to delay and defraud them, the property did not for that reason belong to them, so that they or their representatives could exercise an absolute and immediate control over it; that the only way the receiver could intervene in behalf of the creditors would be by instituting a suit to impeach and set aside the transfer.

In Robeson v. Ford, 3 Edw. Ch. 441, where the property had been sold and left by the purchaser in the possession of an agent for use by the former owner, it was held that the receiver of the latter could not, by summary proceedings, take possession of the same.

In National Bank v. Goolsby, 12 Tex. Civ. App. 362, 35 S. W. 713, an injunction was issued to restrain a receiver from taking property from a stranger who had purchased and taken possession before the institution of the receivership action.

Although stockholders in an action for the appointment of a receiver of a corporation appear in opposition to the appointment of the receiver, they are not parties to the action in the sense that the court can summarily order the receiver put into possession of property held by them under claim of ownership by a conveyance from the corporation. Havemeyer v. Superior Court, 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121. The court said that the stockholders were not parties in their character as purchasers; that it might be true that the stockholders of a corporation were in a certain sense parties to the action to forfeit its franchise, but they were not parties in any other sense, than that they were bound by the consequences of such judgment as the court had power to give; that the corporation, before its dissolution, could sell its property to its stockholders, and if the latter purchased and entered into possession, they had the same right in their character as 47 L.R.A. (N.S.)

by due process of law before it can be dispossessed.

McCombs v. Merryhew, 40 Mich. 725; State ex rel. Moses v. Mitchell, 2 Bail. L. 225; Reg. v. County Ct. Judge, L. R. 20 Q. B. Div. 167, 57 L. J. Q. B. N. S. 136, 58 L. T. N. S. 54, 37 Week. Rep. 174; White v. Gates, 42 Ohio St. 111; Mays v. Wherry, 3 Tenn. Ch. 34; Sea Ins. Co. v. Stebbins, 8 Paige, 567; Baker v. Backus, 32 Ill. 80; Olmsted v. Rochester & P. R. Co. 46 Hun, 552.

Having no jurisdiction, the relator is entitled to the writ, because the remedy by appeal would be too slow and not adequate.

purchasers that any other strangers would have.

In Metcalfe v. Commonwealth Land & Lumber Co. 113 Ky. 751, 68 S. W. 1100, it was held error for the court summarily to dispossess a purchaser of the property at tax sale, who, finding no one in possession, had taken peaceable possession thereof after the appointment of the receiver, the court regarding the latter as not in actual possession at the time the purchaser took control, but as having dispossessed himself by abandoning the property.

In Coleman v. Salisbury, 52 Ga. 470, it was held that the court properly refused to issue a summary order for the payment to a receiver of a sum of money which had been deposited upon interest with a bank, subject to the order of the court, and which had been turned over with the other property of the bankrupt to assignees for the benefit of creditors.

A receiver cannot, by petition in the suit in which he was appointed, make a judgment creditor a party thereto, so as to set aside a sale of the property to him, where the judgment was recovered and execution levied prior to the appointment of the receiver, although the sale occurred thereafter. Cherry v. Western Washington Industrial Exposition Co. 11 Wash. 586, 40 Pac. 136. It was said that the purchaser not having been a party to the receivership action, his right should not have been determined or inquired into in that action.

A stranger who, after notice of the appointment of a receiver of the rents and profits of the property, collects rent and refuses to pay it to the receiver, claiming title as assignee of the rents prior to the receiver's appointment, is not guilty of contempt of court. Bowery Sav. Bank v. Richards, 3 Hun, 367.

One who makes a contract with a receiver for the purchase of the property becomes so far a party to the suit as to render him liable to summary proceedings by petition to compel payment of the purchase money. McCarter v. Finch, 55 N. J. Eq. 245, 36 Atl. 937.

See also Olmsted v. Rochester & P. R. Co.; Levi v. Karrick; Reed v. Baker; and Christie v. Burns, under II. supra; also Dewey v. Finn, under IV. infra.

Havemeyer v. Superior Ct. 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121; Merced Min. Co. v. Fremont, 7 Cal. 130, 7 Mor. Min. Rep. 309; Kirby v. Superior Ct. 68 Cal. 604, 10 Pac. 119; Appo v. People, 20 N. Y. 540; Gist v. Cole, 2 Nott & M'C. 461, 10 Am. Dec. 616; Ex parte Smith, 23 Ala. 94; Hutson v. Lowry, 2 Va. Cas. 42; French v. Noel, 22 Gratt. 454; Jones v. Owen, 5 Dowl. & L. 669, 18 L. J. Q. B. N. S. 8, 13 Jur. 261; Marsden v. Wardle, 3 El. & Bl. 695, 2 C. L. R. 1707, 23 L. J. Q. B. N. S. 263, 18 Jur. 578, 2 Week. Rep. 455; Thompson v. Ingham, 14 Q. B. 710, 19 L. J. Q. B. N. S. 189, 14 Jur.

429; Ramsay v. Court of Wardens, 2 Bay, 180; Ingersoll v. Buchanan, 1 W. Va. 184; Arnold v. Bright, 41 Mich. 210, 2 N. W. 16; Jones v. Schall, 45 Mich. 379, 8 N. W. 68.

Messrs. Gibbany & Black for respondent.

Parker, J., delivered the opinion of the court:

This is a proceeding for a writ of prohibition against John T. McClure, as judge of the district court of Chaves county, and against said district court. The facts giv-

2. Officers of corporation.

There is a conflict of authority upon the question whether officers of a corporation for which a receiver is appointed can be compelled by summary proceedings to deliver to the receiver the property of the corporation claimed by them adversely, when they are not personally parties to the suit. There appears to be ground for a distinction in this regard between strangers to the suit in general and officers of a corporation which is a party thereto, because it is only through the officers in charge of the property of the corporation that a direction to the corporation to deliver the property to a receiver can be carried out.

The view that officers of an insolvent corporation may be compelled in summary proceedings to deliver to a receiver assets of the corporation, although they are not personally parties to the suit, and claim adversely, is supported by the case of Brandt v. Allen, 76 Iowa, 50, 1 L.R.A. 653, 40 N. W. 82, where, however, the officer in question appeared and answered and offered testimony in the summary proceedings. But the decision does not appear to rest solely, at least, upon the ground that jurisdiction had been acquired by appearance and answer in the summary proceedings, for it was said that the court had jurisdiction to require the officers to answer the petition, and to compel them to surrender all the property to the possession of which the receiver was entitled.

The language of the court in Tolleson v. People's Sav. Bank, 85 Ga. 171, 11 S. E. 599, sustains the general proposition that officers of a corporation for which a receiver is appointed can be compelled by summary methods to turn over its assets to the receiver, although the officers are not personal parties to the suit. But in this case the officer in question did not apparently claim title, but admitted that all the assets were in his possession. It was, however, said: "When a court acquires jurisdiction over a corporation as a party, it obtains jurisdiction over the official conduct of the corporate officers so far as that conduct may be involved in the remedy against the corporation which the court is called upon to enforce. So far as that remedy requires

affirmative action by the corporation pending the suit, such action can be had only through the officers or agents of the corporation. Without obedience on their part to commands addressed to the corporation, there can be no obedience to such commands whatever. Any refusal by the officers to do, in behalf of the corporation, an act which the court has commanded the corporation to perform, and which it can perform alone through them, is an obstruction by such officers to the order of the court, and stands on the same footing as would the interference by a stranger to hinder or prevent the doing of the act by the officers, were they disposed to do it, and were they to endeavor to do it accordingly." The decision, however, appears to rest upon the ground that the officer, upon service of a rule to show cause why he should not turn over the assets of the corporation, appeared and answered the rule, and took part in the proceedings, it being said that these facts gave the court such jurisdiction as would authorize it to deal with him as for contempt in not turning over the assets in obedience to the order.

On the other hand, it has been held that an officer of a corporation for which a receiver is appointed, although served as an officer with the summons, is not a party to the action, so as to give the court jurisdiction to enter an order against him adjudging that he wrongfully took securities of the corporation prior to the commencement of the action, and that he return them to the receiver. State ex rel. Boardman v. Ball, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975.

In Edrington v. Pridham, 65 Tex. 612, the court apparently regarded officers of a corporation for which a receiver was appointed liable to punishment for contempt for failure to obey an order to deliver the company's property to the receiver; but no adverse claim appears to have been asserted by them. It was held, however, that it was not proper in proceedings as for contempt to render judgment for the delivery of the property to the receiver to be enforced by execution.

And in Ex parte Hollis, 59 Cal. 405, it was held that the fact that one was president of a corporation for which a receiver

ing rise to the controversy may be briefly stated as follows:

One R. E. Lund, being a judgment creditor of the Eagle Mining & Improvement Company, instituted a proceeding against said corporation as an insolvent, under the provisions of chapter 79 of the Laws of 1905, seeking an injunction against the further exercise of its corporate functions by it, and seeking the appointment of a receiver of its assets. The corporation answered, setting up that all of its property had been conveyed by mortgage deed to one J. H. Fulmer, Jr. Thereupon Fulmer was ordered to be made a party defendant. Upon final hearing, the court made the following finding: "Upon the pleadings and the proofs submitted, it is found by the

court that the defendant corporation is insolvent, and cannot, as now conditioned, conduct its business in the future with safety to the public or advantage to the stockholders. A decree may accordingly be drawn, granting the relief prayed in the complaint, and as provided by chapter 79 of the Laws of A. D. 1905." Thereupon a decree was entered appointing a receiver, but omitting to adjudge insolvency, or to enjoin the further exercise of corporate functions by the corporation. This decree was brought to the territorial supreme court by writ of error, and the writ was dismissed, on the ground that, there being no injunction, the order appointing a receiver was interlocutory, and not review-

was appointed, and verified the answer of the corporation in the proceedings, did not make him a party thereto, so as to render him liable for contempt for failure, upon demand of the receiver, to deliver the property which he claimed adversely. It was said that process against the corporation brought it alone into court; that it alone was a party and not its officers or stockholders; that the court had no control or jurisdiction over the president or over his property, and it could not, by a mere order to show cause why he should not be punished for contempt, make him, as an adverse claimant, a party to the proceedings and adjudge his right to the property in a summary way; that instead of proceeding by summary methods, the court should have made an order directing the receiver to institute suit to set aside the alleged fraudulent conveyances under which the president claimed title.

In *Stuparich Mfg. Co. v. Superior Ct.* 123 Cal. 290, 55 Pac. 985, it was held that the rule that a receiver could not summarily take possession of property in the possession of a stranger to the action, claiming adversely, applied where the property was in the possession of the plaintiff in the action, who held it as president of a company which was not a party, and which claimed title.

A court cannot, in summary proceedings by order served upon them personally, compel officers of a foreign corporation against which judgment has been recovered, to execute for the corporation a conveyance to a receiver appointed in the proceedings, of real estate located in another state, where the statute provides that if it appears that the judgment debtor has an equitable interest in real estate in the county in which the proceedings are had, the receiver may, under certain conditions, be ordered to sell the same. *Bennett v. Valley Min. Co.* 142 Iowa, 53, 120 N. W. 654.

The right of the court to make a summary order to compel officers of the local branch of a lodge to turn over property of the lodge to a receiver thereof, although the local branch and officers were not

parties to the suit, is recognized in the case of *Baldwin v. Hosmer*, 101 Mich. 119, 25 L.R.A. 739, 59 N. W. 432. But the court refused to punish the officers for contempt for failure to obey the order, as it appeared that the rights of garnishees, not parties, were involved, it being said that contempt proceedings were not appropriate to determine conflicting claims to the property.

See also *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121, under III. 1, supra; and *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* under V. infra.

3. Sheriffs or other receivers.

In *Elwell v. Goodnow*, 71 Minn. 390, 73 N. W. 1095, it was held that the court could not summarily order a sheriff who held property taken in a replevin action, to deliver the same to a receiver appointed in another suit. It was said that the court had no more power to proceed against the sheriff summarily than it had against any other person not a party to the action; that the fact that he was an executive officer of the law, and held the property as such, in no way affected the jurisdiction of the court over him.

And in *Pease v. Smith*, 63 Ill. App. 411, it was held that the court should not have made an order directing a sheriff who held property of a corporation under a writ of execution levied before the appointment of a receiver, to deliver the property to the receiver, although the order also directed the receiver to hold the property subject to the lien of the execution. The court said that the levy in the execution gave the plaintiff therein not only a prior right to the proceeds of the property, but gave the sheriff the prior right to its possession.

The decision in *State ex rel. Krish v. Superior Ct.* 36 Wash. 91, 78 Pac. 461, that where the property of a corporation has been seized by the sheriff under a writ of attachment, the sheriff, although not a party to a subsequent action in which a receiver is appointed for the corporation, may be compelled by petition in that action to de-

able. *Eagle Min. & Improv. Co. v. Lund*, 15 N. M. 696, 113 Pac. 840.

Upon the remanding of the case to the district court, the *Eagle Mining & Improvement Company* offered to file an amended answer, setting up certain occurrences since the writ of error was sued out, and hereinafter mentioned, which application was denied. Thereupon, on October 4, 1911, the cause came on for final hearing, and the district court, reciting its former findings, and that its former decree by inadvertence failed to award the injunction, entered a final decree adjudging insolvency, awarding injunction, and appointing the same receiver, who had never qualified under his former appointment, and ordered said decree to take effect *nunc pro tunc* as of September 18,

liver the property to the receiver, rests upon the ground of alleged insolvency of the corporation at the time the writ of attachment was issued; that the "assets of an insolvent corporation are a trust fund for the benefit of all its creditors;" and that therefore the question of the receiver's right to take the property depended upon the question of the insolvency of the corporation, which might be determined in the summary proceedings. In regard to the rule laid down in *State ex rel. Hunt v. Superior Ct.* 8 Wash. 210, 25 L.R.A. 354, 35 Pac. 1087, that a "receiver is not authorized to take possession of the property in possession of the sheriff under an attachment levied prior to the appointment of the receiver, where the sheriff and the attaching creditor were not made parties to the action in which the receiver was appointed," the court said that, in the case then before it, the sheriff and the attaching creditor were brought into the case by citation, and were thereby afforded an opportunity to have their rights adjudicated upon a hearing; and that the statement in the *Hunt Case* that "under such circumstances, the receiver must resort to an action at law to obtain possession," meant any suitable action in accord with legal principles; and that, under the circumstances in this case, the court might determine the question by the summary method adopted.

In *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 731, where the controversy as to the possession of property was between two receivers of the same court, it was held that the court had jurisdiction in a summary proceeding to pass upon the rights of the parties.

In *People v. Central City Bank*, 53 Barb. 412, while the question of procedure was not discussed, it appears that the court upon motion passed upon the question as to which of two receivers appointed by different justices of the supreme court was entitled to the property, and ordered the receiver having it in his possession to deliver it to the other receiver.

The Federal court has no power to appoint a receiver and authorize him to take 47 L.R.A. (N.S.)

1908, the date of the original decree in the case. On March 15, 1912, the relator intervened in the cause, and set up that it was the owner of the property sought to be administered by the court through the receivership, by reason of a certain foreclosure proceeding prosecuted to final decree and sale in the district court of Lincoln county, and by conveyance to it from the said J. H. Fulmer, Jr., the purchaser at the foreclosure sale; that no receiver of the property of the *Eagle Mining & Improvement Company* had qualified, and hence none was made party defendant; that R. E. Lund, the plaintiff in the receivership case, was made a party and answered; that the receiver appointed by the *nunc pro tunc* decree of October 4, 1911, qualified, and was assuming

possession of property held by a receiver previously appointed by a state court. *Shields v. Coleman*, 157 U. S. 188, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. In this instance the receiver of the Federal court had taken the property from the possession of the receiver appointed by the state court, and the United States Supreme Court reversed the decision of the Federal court overruling a motion for the vacation of its order, and for a return of the property to the receiver of the state court.

In *Ward v. Swift*, 12 Jur. 173, 6 Hare, 309, where a receiver attempted to take possession of property held by another receiver, the court said that the former should have first sought direction from the court as to how to proceed.

Until the question of priority and right to property has been determined, a receiver in possession is not guilty of contempt for refusing to comply with a demand for the property by another receiver appointed by another court of equal jurisdiction. *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488. But it having been found that the other receiver was entitled to the possession of the property, an order was made upon the receiver holding the same to deliver it accordingly.

See also *State ex rel. J. M. Arthur Mach. Co. v. Superior Ct.*; and *Gelpeke v. Milwaukee & H. R. Co.* under II. supra; *Andrews v. Paschen*, under III. 4, infra; and *Albany City Bank v. Schermerhorn*, under V. infra.

4. *Persons claiming lien or set-off.*

As to effect of appointment of receiver on right to set-off, see note in 17 L.R.A. 458. And as to right to set-off against receiver of claims purchased after insolvency, see note to *Stone v. Dodge*, 21 L.R.A. 280.

As to effect of attachment of real estate to defeat the right to possession of receiver subsequently appointed by another court, see note to *Beardelee v. Ingraham*, 3 L.R.A. (N.S.) 1073.

In *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450, it was held that a receiver of a

possession of the property and interfering with the possession of intervener, relator here. It prayed for a decree that it owned the property, and for an order to the receiver to refrain from further interference with the same. A demurrer was interposed to the petition of intervention, but, so far as appears, the same remains undisposed of.

Subsequently, the receiver being still in charge, relator filed a motion in the receivership case to be permitted to install certain machinery, which should not become subject to the receivership. The court denied the motion, but made an order permitting the installation of the machinery provided it became a part of the estate, and as such subject to the administration of the court through the receivership.

bank could not recover by petition, from a stranger to the action, an amount which the latter had collected from a debtor of the bank after the receiver's appointment, and claimed to hold as his own property, in satisfaction of a debt to it from the bank.

And in *Wheaton v. Daily Teleg. Co.* 59 C. C. A. 427, 124 Fed. 61, it was held that a bank, not a party to the proceedings, could not be compelled by summary order to turn over to a receiver of a corporation a balance alleged to be owing the latter, which the bank claimed to be entitled to apply toward payment of a note due it from the corporation.

But in *Bowling Green Sav. Bank. v. Todd*, 64 Barb. 146, affirmed in 52 N. Y. 489, it was held that a receiver of a bank might recover upon motion a sum of money received after his appointment by attorneys for the bank; but that the attorneys had a lien for services, the value of which should be deducted from the sum paid the receiver. See, in this connection, *Bowker v. Haight & F. Co.* under V. *infra*; also other cases under that division where the property was received by strangers subsequent to the receiver's appointment.

A receiver cannot by motion, in an action in which neither the sheriff nor an attachment creditor is a party, set aside an attachment sued out against the property after his appointment, but before his qualification, where the property was already in the possession of the sheriff under earlier attachments. *Andrews v. Paschen*, 67 Wis. 413, 30 N. W. 712.

See also *State ex rel. Hunt v. Superior Ct.*; and *Kidder v. Beavers*, under II. *supra*; *Horn v. Pere Marquette R. Co.* under V. *infra*; and *Re Flynn*, 157 App. Div. 241, 141 N. Y. Supp. 807, under VII. *infra*.

5. Trustee or agent.

While a receiver cannot ordinarily by summary methods take possession of property held adversely by a stranger to the suit, a different rule prevails where the stranger holds merely as trustee or agent, and does not claim an adverse interest. In 47 L.R.A. (N.S.)

It appears that the domicile of the Eagle Mining & Improvement Company is at Parsons, in Lincoln county, in the sixth judicial district, and that all of its property was situated in said county of Lincoln, all of its business done there, all of its officers residing there, while the action for the injunction and receivership was begun and prosecuted in Chaves county, in the fifth judicial district. Most of the property is real estate in the form of mining property.

A consideration of this case naturally involves three propositions, which may be stated as follows: (1) Is the subject-matter of the action within the general scope of the jurisdiction of the Chaves county court? (2) If within the general jurisdiction of that court, what effect did the pro-

the latter instance it is generally held that the receiver can recover possession by summary proceedings.

In *Miles v. New South Bldg. & L. Asso.* 95 Fed. 919, it was held that a stranger to a suit for the appointment of a receiver of a corporation, who held assets of the corporation, not adversely, but merely as trustee for its bondholders and creditors, might be compelled by summary proceedings to deliver the property to the receiver. The court said: "This claim of the right to retain it does not mean a bare refusal to surrender it. It means the assertion of some right or interest in the property; not a mere possession or a holding of the property for others who are parties to the suit, or whose rights are protected by the suit. The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents, and employees of the defendant. . . . The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself, but as trustee, and so, in a sense as the agent, for those interested in the assets, including the defendant in the case. In modern litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all of the assets should be required to sue each bailee and agent separately, or that all should be made parties to the main suit, should they merely refuse to surrender the assets. When a receiver is appointed for a corporation doing business by agents in many states, to make the appointment serve its purpose the court should have jurisdiction to require a surrender of the property to the receiver."

The case of *Re Cohen*, 5 Cal. 494, holding that the court had jurisdiction to punish for contempt strangers to the suit for refusal to obey a summary order to deliver property to the receiver, may be explained upon either of two grounds: That the parties were agents or employees of the firm for which the receiver was appointed

ceedings have upon the jurisdiction of courts of concurrent jurisdiction? (3) Was the manner of seizing possession of the property lawful; and, if not, does the conduct of the relator waive the error?

1. A decision of the first proposition above mentioned required an examination into the nature of the action provided by chapter 79, Laws 1905. This act was adopted bodily from the corporation act of New Jersey of 1896, to be found in Parker's New Jersey Corporations, and in which all of the New Jersey decisions are cited and digested. In that state the courts have interpreted the statute in numerous cases. In *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258, 55 Atl. 259, the United States circuit court of New Jersey

(although this is not directly stated); or that, by their appearance and answer in the summary proceedings, jurisdiction over them was acquired. It was said: "Courts of equity unquestionably have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of defendant or his agent; and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. This power does not conflict with the provision of law which provides that no man shall be deprived of his property without due process of law. The surrender to the receiver does not affect the right of property or the ultimate decision of the case, any more than does the levy of an attachment. The design is to secure the property so that it may be handed over to the party who shall be adjudged entitled to its possession."

In *Sullivan v. Colby*, 18 C. C. A. 193, 34 U. S. App. 432, 71 Fed. 460, the court, in reference to a petition for a rule to show cause why a stranger in possession of real estate should not surrender the same to the receiver, said: "We entertain no doubt of the power or jurisdiction of a court of equity to enter such rules, and upon the hearing to determine and enforce the rights of the receiver against a party accused of interference with the receiver's possession or management, unless, in his answer to the rule, he should set up some right or title of which he had and should claim the right of trial by jury, in which case, as we suppose, the rule would be discharged without any attempt to determine or adjudge the truth of the answer."

See, in this connection, *Prentiss v. Brennan*, 2 Grant, Ch. (U. C.) 322, under II. *supra*.

IV. Liability of receiver for wrongfully taking possession.

A receiver is liable in tort for seizing property belonging to and in the possession 47 L.R.A.(N.S.)

had taken jurisdiction of the asphalt company, and of all of its assets, and, through a receiver, was distributing the same to its creditors, and the objection was made that the New Jersey court had no jurisdiction under the statute to entertain the proceedings, the jurisdiction having been assumed by the Federal court. The New Jersey court, after pointing out that the Federal court was not assuming to strip the corporation of its power to exercise its corporate functions, but was administering the corporate assets under its general equity powers, overruled the objection and proceeded to discuss the nature of the statutory proceedings. The court said: "Both sides, I think, conducted their argument somewhat under a misconception in regard

of a stranger to the suit. *Kirk v. Kane*, 97 Mo. App. 274.

And it was held also in *Kirk v. Kane*, *supra*, that the fact that the receiver took and held possession under an order of court was not a defense to an action of tort against the receiver.

It has been said that a receiver who takes property from the possession of one not a party to the proceedings does so at his personal risk. *Tapscott v. Lyon*, 103 Cal. 297, 37 Pac. 225.

But in *Tapscott v. Lyon*, *supra*, it was held that a receiver was not liable in an action for conversion for the taking of property from the possession of a stranger, where, upon demand, the latter voluntarily surrendered the property to him.

In *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303, it was said that a receiver may frequently, under color of office, get possession of property which does not belong to him, and his official character ought not to be a defense to his tortious action, or deprive parties of their rights; that as a wrongdoer he is liable personally, whether liable officially or not.

And in *Farmers' & M. Nat. Bank v. Scott*, 19 Tex. Civ. App. 22, 45 S. W. 26, it was said that "if the receiver wrongfully took possession of the property of another who was not a party to that controversy, and for which a receiver was not asked, he would be regarded in the light of any other trespasser, and the true owner could maintain an action against him to recover possession of the property of which he had been illegally deprived."

In *Olney v. Tanner*, 10 Fed. 101, also, it was said that a receiver who meddled with property fraudulently transferred would be liable to an action of trespass, and his appointment as an officer of the court would not protect him, unless the fraudulent grantee was made a party to the suit and the transfer directly assailed.

In *St. Paul Hotel Co. v. Segrave*, 48 Misc. 657, 96 N. Y. Supp. 308, it was held that a receiver was personally liable to a hotel company, a stranger to the suit, for money wrongfully collected from its guests.

to the nature of this act, or at least upon the idea that the suit brought under that act is an action for a receiver,—an action necessarily to reach assets and effect their distribution through a receiver. I do not find that that is the main purpose and object of our statute, and the history of our statute strongly indicates that that view is erroneous. In my opinion, our statute, originally passed, as I said, in 1829, provides for a proceeding more in the nature of a quo warranto than a creditors' bill. It provides for a proceeding which can be pursued to a finish, even though the corporation has no assets whatever. Whether a receiver shall be appointed under our statute or not is wholly discretionary with the court, and the receivership is not the es-

sential object of the suit. The discretionary power to appoint a receiver can only be exercised at the time the injunction is ordered, or at some time thereafter. . . . As in the New York act, the direct object of the suit is accomplished by an injunction placing the corporation under disabilities,—restraining it from the exercise of any of its franchises. As in the New York act, the receivership is purely discretionary, and, when created, follows the decree for an injunction. A decree for an injunction might go, although there were no assets. The order appointing the receiver could never be made unless the decree passed at the same time, or had already passed, disabling the corporation by the injunction. . . .

"Insolvency is one of the jurisdictional

A receiver who takes property from the possession of a stranger to the suit, claiming adversely, is liable individually therefor, and the party bringing an action against him is not guilty of contempt. *Dewey v. Finn*, 18 N. Y. Week. Dig. 558, 30 Hun, 651, affirmed in 96 N. Y. 661. The order appointing the receiver did not in terms extend to the property in question, and the third party claimed it as purchaser. The court said: "When property is in the possession of a third party, and claimed to be owned by him, the same cannot be taken by a receiver, nor can the third party be ordered to deliver the same to the receiver. When such property is forcibly taken by a receiver, the order appointing him cannot justify the taking. . . . The third party, whose property is seized and carried away from his possession, is entitled to the usual remedies given by common law, and, for asserting such right, where he has not been made a party to a prior proceeding or had notice thereof, he ought not to be punished as for a contempt."

To the same effect are *Brein v. Light*, 36 Misc. 112, 72 N. Y. Supp. 1087, affirmed in 37 Misc. 771, 76 N. Y. Supp. 935, and *Re Young*, 7 Fed. 855, holding that a stranger who brought an action against the receiver for taking the property from his possession was not guilty of contempt. In the latter case the court said that the defendant was not sued as a receiver, but as an individual for taking and retaining possession of property not included in the order of the court, and that for interfering with it, he was a mere trespasser.

It has been said that where the property is in the possession of a third party under claim of title, the court will not protect the officer who attempts by violence to obtain possession, any further than the law will protect him. *Parker v. Browning*, 8 Paige, 386, 35 Am. Dec. 717.

In *Parker v. Browning*, supra, persons whose property it was alleged had been forcibly taken from them by the receiver, without direction from the court, under pretense that it was the property of the defendant in the action in which the receiver was ap-
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pointed, were, upon petition to the court, authorized to bring an action in trespass against the receiver for damages.

See also *Brown v. Gilmore*, under III. 1, supra.

V. Theory of interference.

While this note does not attempt to deal with the general question of interference with the receiver's possession, several cases are included in which the property was summarily ordered returned to the receiver, or in which the receiver obtained relief against strangers interfering with his constructive possession,—these cases, however, being merely illustrative of the general power of the court to proceed by summary methods against strangers who interfere with the receiver's possession of the property.

Upon the theory that there had been a wrongful interference with the receiver's right to possession, it was held in *Horn v. Pere Marquette R. Co.* 151 Fed. 626, that a receiver might, by summary proceedings, recover assets in the hands of strangers claiming a lien or set-off, where they were received subsequent to and with knowledge of the receivership. The court said that the right of the receiver to maintain an intervening petition in such a case did not depend upon whether the actual possession of the receiver had been disturbed; that if the fund in question did not come into the actual possession of the defendant in the summary proceeding prior to the appointment of the receiver, its conduct in preventing him from obtaining possession of that which he was appointed to receive was a defiance of the court's order; and in respect to such deposit a petition by the receiver to prevent interference and compel surrender was not bad practice, and did not deprive the defendant of a full and orderly hearing; and that its rights would be as fully protected as in an independent suit. But it was said that the receiver could not have proceeded summarily to recover funds actually in the hands of a third party at the date of his appointment against which a lien in good faith was asserted.

The rule was laid down in *Albany City*

facts upon which the decree goes. The decree itself is that the corporation shall be enjoined from the exercise of its franchises. That is the decree. It is often said that our statutory suit is a proceeding *in rem*,—that the status of the corporation is permanently fixed by this decree. True enough. But the status is not the status of a corporation as insolvent. It is the status of a corporation with respect to the exercise of its franchises. The status that is determined and fixed by the decree is that of a corporation under disabilities, enjoined from exercising its franchises. . . .

"Now, I think it will be perceived that our statutory suit is a proceeding more in the nature of a quo warranto than a creditors' bill for a receivership. In the case

of a creditors' bill, the direct object is the sequestration of the assets by a receiver, and any injunction is ancillary to that object. If there are no assets, and consequently no receivership, it would be a strange case which would afford any function for an injunction. On the other hand, in the case of a quo warranto suit, the direct object is to procure a forfeiture of the corporate franchises,—practical corporate death; and a receivership in those states where there can be a receivership in a quo warranto case is purely ancillary and dependent upon the necessities of the particular case,—dependent upon the existence of assets to be received and distributed. . . . If a corporation is insolvent to the extent defined by our statute, it is not material

Bank v. Schermerhorn, 9 Paige, 372, 38 Am. Dec. 551, that if the tenant of property for which a receiver has been appointed has attorned to the receiver, or has agreed to account to him for the landlord's share, the sheriff who disturbs this constructive possession of the receiver by levying execution on the property might be compelled by summary proceedings to restore the property; but that if the receiver was not in possession thereof, either by himself or his tenants by appointment, he could not enforce a delivery of the property to him by contempt proceedings against the sheriff who had levied thereon, although he might have an equitable right to recover the property by a bill for that purpose.

And in *Erie R. Co. v. Heath*, 8 Blatchf. 536, Fed. Cas. No. 4514, where it appears that shares of stock had been abstracted from the possession of the receiver, it was held that the court had power to compel by summary process the restoration of the property, whether the party taking the property was or was not a party to the suit.

That third parties who have forcibly taken property away from a receiver may be summarily ordered to restore it, see also *Levy v. Stanion*, 33 App. Div. 632, 53 N. Y. Supp. 472, where it was held that the court might simply order the return of the property without committing the wrongdoers for contempt.

In *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. 937, it was held that the action of the vice president of a railroad company for which a receiver had been appointed, in collecting money for carrying the mail, after the appointment of the receiver, and depositing it in a bank to the credit of the company, instead of paying it to the receiver, constituted a contempt of court which could be enforced summarily by petition for an attachment.

And in *Bowker v. Haight & F. Co.* 146 Fed. 257, upon motion of a receiver of a corporation, an order was made for the payment to him of a sum which an attorney of the corporation received as a retainer subsequently to, and with knowledge of, the receiver's appointment.
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In *Bien v. Robinson*, 208 U. S. 423, 52: L. ed. 556, 28 Sup. Ct. Rep. 379, upon writ of error to the Federal Supreme Court to review the order made in *Bowker v. Haight & F. Co.* supra, it was held that the contention that, by the summary proceedings, there was an unconstitutional denial of the right to a trial by jury, and that property was taken without due process of law, was too frivolous to serve as the basis of a writ of error, where the party was merely required in such proceeding to make a payment, after due notice and opportunity to be heard, of what he had received in violation and with knowledge of the receivership and of the injunction restraining interference with the property.

In *Lake Shore & M. S. R. Co. v. Felton*, 43 C. C. A. 189, 103 Fed. 227, it was held that a receiver could proceed summarily by petition against strangers to the suit who, under claim of right, were operating cars over a track belonging to the defendant in the receivership action. It was said that where, as in this instance, the property concerned was already in the possession of the court, and the act complained of was a disturbance of that possession, it was not unusual to allow the receiver to proceed by petition, giving the defendant the opportunity of making defense by answer or other pleading; and that the question whether a receiver should proceed against a stranger by bill or petition was one which rested to a certain extent in the discretion of the court.

In *Bibber-White Co. v. White River Valley Electric R. Co.* 107 Fed. 176, it was held that, although assets had never come into the actual possession of a receiver, a summary proceeding by petition might be maintained to recover them from a stranger who had wrongfully interfered after the receiver's appointment.

VI. Writ of prohibition.

Generally, as to when a writ of prohibition will issue, see note to *Walcott v. Wells*, 9 L.R.A. 60. And as to nature of writ of prohibition, see note in 3 L.R.A. 57.

whether it has or has not assets, or, if it has assets, what their value may be; the suit proceeds to final decree in any case.

"The result, therefore, is that the motion to dismiss this bill is denied. The bill will be retained (in spite of the fact that all the assets of the corporation are in the possession of a receiver of the Federal court, and at present there seems to be no reason why any receiver should be appointed by this court) for the accomplishment of the statutory object of the suit, which has no essential relation to the sequestration or distribution of assets."

See also *Pierce v. Old Dominion Copper Min. & Smelting Co.* 87 N. J. Eq. 399, 58 Atl. 319, to the same effect, referred to and

approved in *Eagle Min. & Improv. Co. v. Lund*, 15 N. M. 696, 113 Pac. 840. In the New Jersey cases it is said that the proceeding is a proceeding *in rem*; but it is clearly pointed out in those cases that the *res* is the status of the corporation, not its assets.

The sequestration and administration of the assets of the corporation is merely incidental to the main object of the proceeding, and is in the nature of an execution. If this is the correct interpretation of the statute, of which we have no doubt, it follows that the action is in its nature a personal and transitory one, and falls within the first subdivision of § 2950, Comp. Laws 1897, which provides that transitory actions may be brought in the county where

In regard to the propriety of issuing a writ of prohibition to restrain summary interference with property in the possession of a stranger claiming adversely, it was said in *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121: "When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court, he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted, just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or if the title is in doubt, permit an action to be brought against him to try the title. But when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court; the wrong is in the order of the court, not in the receiver's transgression of the order. In such case it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrongdoer, or in such an action as may be brought against a private person who has committed a trespass."

It has been held that a writ of prohibition will issue to a court which has undertaken by summary process to place a receiver in possession of property held adversely by strangers to the suit, although the receiver has in the meantime assumed complete possession of the property, so long as there remains further judicial action which may be arrested by prohibition. *Havemeyer v. Superior Ct.* supra.

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Prohibition will issue to restrain further action, and to restore the property to a stranger, where, without opportunity given to show cause against the order, the court has directed the sheriff to put a receiver into possession of property held by the stranger. *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 264, 33 L.R.A. 341, 36 S. W. 366, 658. The court said that where a judge assumes to exercise a judicial power not granted by law, it mattered not, so far as concerned the right to prohibition, whether the assumed power was in a case which the court was not authorized to entertain at all, or was merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court; that the writ of prohibition would not ordinarily be granted where the usual modes of review by appeal or writ of error offered an adequate remedy, but might properly be granted where they were inadequate.

And in *Havemeyer v. Superior Ct.* supra, the court said that where a receiver had wrongfully been put into possession of property, and a writ of prohibition is issued to restrain further judicial action, the writ may also require a restoration of the property to the adverse claimant.

VII. Miscellaneous.

In *Re United States Reflector Co.* 8 N. Y. Civ. Proc. Rep. 120, it was said that an owner, without being liable to contempt, could take possession of property which a receiver claimed, but of which he had never attempted to take possession.

In *Ex parte Davidson*, 57 Fed. 883, it was held that where the parties and subject-matter were within the jurisdiction of the court, and the defendant in the summary proceedings voluntarily set forth by answer his claim to the property, he could not afterward raise an objection to the form of the proceeding.

It has been held that a judgment debtor in proceedings supplementary to execution cannot, because of lack of interest, raise the objection to an order directing payment to a receiver of money in the hands of a third

either the plaintiff or the defendant resides, and does not fall within the fourth subdivision of the section, which provides that, when lands are the object of a suit, such suit shall be brought in the county where the lands are situated.

We have hesitated to adopt this conclusion by reason of a practical question involved. Under this holding a corporation having a domicile in one corner of the state may be sued by a creditor residing in the extreme opposite corner of the state, and thus be subject to great costs and inconvenience. But, no matter what the consequences may be, we cannot see our way clear to adopt any other doctrine. The remedy, if any is needed, lies with the leg-

islative, and not with the judicial, department.

In this connection, we have not failed to notice the provisions of § 83 of the corporation act hereinbefore mentioned. The section is as follows: "Any creditor or claimant who shall lay his claim before such referee may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the referee, and thereupon an issue shall be made up between the parties, under the direction of the district court, and jury impaneled, as in other cases, to try the same in the district court of the county in which the corporation car-

party, that, before the appointment of a receiver, he had assigned the same to a stranger, and had given the holder of the fund notice thereof. *Dienst v. Gustaveson*, 85 N. Y. Supp. 371.

The New York statute provides that in proceedings supplementary to execution, where it appears that the judgment debtor has property belonging to him, "or that one or more articles of personal property capable of delivery, his right to the possession whereof is not substantially disputed," are in the possession of another person, the court may order the property delivered to the receiver. See *Re Flynn*, 80 Misc. 79, 140 N. Y. Supp. 799.

Under this statute it has been held that a third party who claims to have a lien upon securities in his possession, but who, upon the admitted facts, does not as matter of law have a valid lien, may be required by summary order to deliver the securities to the receiver of the debtor, since his claim is not substantial, within the meaning of the statute. *Re Flynn*, 157 App. Div. 241, 141 N. Y. Supp. 807. It was said "the dispute must be apparently substantial. If it be based upon controverted facts, then a judge has no power to determine the facts on such an application, but should remit the receiver to his action. If, however, the dispute arises on conceded facts, and is confined to questions of law which have been well settled, can the third party, by disputing the existence of well established legal rules, create a substantial dispute which will deprive a judge of power to make an order under said section? I think not. The determining fact is not the existence of a mere dispute, but the apparent substantiality of the dispute."

The statute has, however, been construed not to authorize the court to make an order upon the wife of the judgment debtor to pay to the receiver a sum of money received by her from her husband as compensation for work done, and expended by her prior to the institution of the proceeding. *Broderick v. Archibald*, 61 App. Div. 473, 70 N. Y. Supp. 617.

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It has been held also under the New York statute that since one of two joint tortfeasors cannot compel the other to deliver to him property which has been acquired through their wrongful acts, a joint tortfeasor cannot be compelled upon motion to surrender property thus acquired to a receiver of the other tortfeasor against whom a judgment has been obtained, since the property is not indisputably that of the judgment debtor. *Bauer v. Betz*, 4 N. Y. S. R. 92.

In *Lilienthal v. Wallach*, 32 Fed. 241, the court said that, by the terms "substantial dispute" in the New York statute, was meant a bona fide controversy, not a mere colorable dispute designed only to render the law ineffective, and to defeat the remedy. But the court refused to punish the third party for contempt for disposing of the property, saying that while there was not the appearance of even a colorable bona fide claim on his part to the property, yet its reluctance to pass summarily upon a question of this kind, involving a considerable amount, was so great that it would deny the motion to punish for contempt, provided, before a specified time, the third party deposit in court the proceeds of the property, or give bond to pay any judgment that might be recovered in an action by the receiver.

Among other possible cases construing the terms "substantially disputed" in the New York statute, where the judgment debtor was himself ordered to deliver the property to the receiver, see *Frost v. Craig*, 18 N. Y. Civ. Proc. Rep. 296, 9 N. Y. Supp. 528.

A statutory provision that receivers appointed for dissolved corporations "shall be held to supersede an assignee of the corporation in possession" has been construed not to authorize the court appointing the receiver to make a summary order for the property upon an assignee who is under the jurisdiction of another court. *Com. v. Order of Vesta*, 156 Pa. 531, 27 Atl. 14.

Sureties on the bond of a former receiver cannot be compelled by summary proceedings to pay to his successor a sum of money alleged to be due from their principal, since

ried on its business or had its principal office, as in other civil cases, and the claim shall be docketed as other civil cases in said court; the verdict of the jury shall be subject to the control of the court as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk to the receiver and referee, and the creditor shall be considered in all respects as having proved his debt or claim for the amount so ascertained to be due; and in all cases in which no trial by jury shall be demanded, the court shall have jurisdiction to pass upon the claims presented, and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just."

This section was adopted from § 77 of the New Jersey corporation act (2 Comp. Stat. 1910, p. 1849), which is as follows: "Any creditor or claimant who shall lay his claim before such receiver may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the receiver, and thereupon an issue shall be made up between the parties, under the direction of one of the justices of the supreme court, and a jury impaneled, as in other cases, to try the same in the circuit court of the county in which the corporation carried on its business or had its principal office; the verdict of the jury shall

be subject to the control of the supreme court, as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk of the supreme court to the receiver; the creditor shall be considered, in all respects, as having proved his debt or claim for the amount so ascertained to be due; and in all cases in which no trial by jury shall be demanded, the court of chancery shall have jurisdiction to pass upon the claims presented, and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just."

It appears that the legislature attempted to adapt the New Jersey law to our situation, but that the adaptation is perhaps faulty, in that it is not clear and specific as to just what is meant. In New Jersey the chancery court has, we understand, territorial jurisdiction throughout the state, and it is clearly pointed out in their act that the jurisdiction of the main insolvency proceeding is vested in a court other than the one in which issues of fact are to be tried by a jury. In our jurisdiction, however, the several district courts are courts of both common-law and chancery jurisdiction, and possess all of the general original jurisdiction in their respective districts, with some minor exceptions, and to the exclusion of other district courts. At first glance it would seem anomalous for an issue to be framed under the direction of one district court, to be tried

they are not parties to the suit, and do not have funds subject to the order of the court. *Thurman v. Morgan*, 79 Va. 367.

In *Reed v. Gold*, 102 Va. 37, 45 S. E. 868, the right of a receiver of a corporation to proceed by a motion to recover assessments made by the court against stockholders of the company was sustained upon the ground that a motion for a judgment for money was, under the statute, an action at law, the notice taking the place of the writ and declaration.

Strangers to a receivership suit who claim and are awarded funds in the possession of the court, and who undertake to make restitution if the decree awarding the funds to them is reversed, may be compelled in summary proceedings, upon reversal of the decree, to restore the property to the receiver. *Charters v. Candler*, 94 Ga. 210, 21 S. E. 518.

In *Wood v. New York & N. E. R. Co.* 61 Fed. 236, where the court said that a question of title was involved, it was held that a receiver could not maintain a petition in the suit in which he was appointed against strangers thereto, to prevent alleged unjust discrimination in transportation of freight, and to secure equal privileges.

A stranger who claims to hold premises without rent, under an agreement with the 47 L.R.A.(N.S.)

owner made prior to the giving of a mortgage, cannot be compelled by summary order to pay rent to a receiver appointed in proceedings to foreclose the mortgage. *American Mortg. Co. v. Sire*, 103 App. Div. 396, 92 N. Y. Supp. 1082. It was said the rent alleged to be due could be recovered only in an action against the tenant.

In *Reid v. Middleton*, Turn. & R. 455, where it did not appear whether one in possession of the property was or was not a tenant, it was held that, without making him a party to the action, a motion was proper that he deliver possession or attorn to the receiver, it being said that he could then come in and inform the court whether he was a tenant.

In several English and Canadian cases, where the question of procedure was not discussed, the court, in a proceeding apparently of a summary nature, passed upon the right of a receiver to possession of property in the hands of a third party. Among possible other cases of this class are the following: *Reg. v. County Ct. Judge*, L. R. 20 Q. B. Div. 167, 57 L. J. Q. B. N. S. 136, 58 L. T. N. S. 54, 37 Week. Rep. 174; *Prentiss v. Brennan*, 1 Grant, Ch. (U. C.) 484; *Prentiss v. Brennan*, 2 Grant, Ch. (U. C.) 18; *Kirk v. Houston*, 5 Ir. Eq. Rep. 498. R. E. H.

to a jury in another district court of equal dignity and general character of jurisdiction. In other words, if a district court has jurisdiction of a given subject-matter, it would seem that its jurisdiction should be adequate to dispose of every issue that might arise in the course of the litigation. But the legislature, we assume, could provide, if it so desired, for just such a result as has been outlined, and the question is whether it is so provided by the act in question.

Some little light is thrown upon the question by the adaptation of the law from New Jersey act. In New Jersey it clearly appears that the issues are to be tried by a jury in a court other than that in which the main insolvency proceeding is pending, and the legislature followed the New Jersey act as closely in terms as possible under our circumstances. While not conclusive, this is persuasive as to the legislative intent that the venue of the main cause may be in one county, and the venue of an issue of fact before a jury in another county. Again, our district courts possess both common-law and chancery jurisdiction. While our district courts, so possessed of both jurisdictions, are presided over by the same judge, still the functions of the court in the two classes of cases are as distinct as those of the English courts of chancery and the English common-law courts. And when the district court entertains an insolvency proceeding of this kind, it sits as a court of chancery, and when it tries an issue to a jury, it sits as a court of law, with entirely different powers and functions.

But a more careful inspection of our act itself leads to the conclusion that the legislature contemplated that the venue of the main action and that of the issue at law might be in different counties or even in different districts. It is to be observed that the venue of the issue at law alone is fixed by the act, wherein it provides: "And thereupon an issue shall be made up between the parties, under the direction of the district court, and a jury impaneled, as in other cases, to try the same in the district court of the county in which the corporation carried on its business or had its principal office, as in other civil cases, and the claim shall be docketed as other civil cases in said court." And it is seen that this venue may be either in the county where the corporation carried on its business, or in the county where it had its principal office. It is a matter of common observation that corporations may have, and do have, their principal office in a given county, and may transact all of their business in another county or district. A corporation having
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its principal office in Sante Fe county may do all of its business in Dona Ana county, for instance. The word "business," in this connection, evidently means the acts of the corporation whereby they come in contact with the public, and is the equivalent of "occupation." It does not refer to the internal management of the corporation, such as the holding of directors' and stockholders' meetings and the like, else the business of the corporation would always be done at its principal office. Once admitted that the venue of the main insolvency proceeding, and that of the trial of an issue to a jury, may be in different counties, or even in different districts of the state, it seems clear that § 83 was not intended to and does not control the venue of the main action. As a practical question, we assume that the issue may be framed under the direction of the district court in which the main insolvency proceeding is pending, and that the same may be filed by either of the parties in the proper district court, as provided by the act, and as an ordinary action at law in a civil case.

2. A discussion of the second proposition necessitates a determination of when jurisdiction of a subject-matter attaches, and what effect the same has upon the concurrent jurisdiction of other courts. It is to be remembered that Fulmer, the mortgagee, was a party to the proceedings in the Chaves county court, served with process, and answering, setting up his mortgage. It is likewise to be observed that under the act (chapter 79, Laws of 1905) ample provision is made for the determination of every question of law or fact involving the validity, priority, or other characteristic of any claim of any creditor of the insolvent corporation, and for the payment of the same out of the estate of the insolvent. It is further to be observed that the parties before the Lincoln county court, where the mortgage of Fulmer was foreclosed, were the same as the parties before the Chaves county court. It is true that in the Lincoln county court the form of the procedure was somewhat different, in that it was strictly a foreclosure proceeding; but Lund, the plaintiff in the Chaves county proceeding, was made a defendant, and the question as to the priority of the claims of Fulmer and Lund, respectively, was litigated. In the Lincoln county proceeding the fact of the pendency of the Chaves county proceeding was called to the attention of the court by the answer of Lund. While these proceedings, as before said, were slightly different in form, the essential elements of the two were the same in each instance. In the Chaves county proceeding the mortgage could not be foreclosed in

form, but the question of its validity, its relative priority, and the subjection of the insolvent estate to its payment, were all within the scope of that proceeding. We therefore consider the two proceedings as identical in substance and effect.

It is a fundamental rule of law, subject to some exceptions to be hereafter noticed, that, as between courts of concurrent jurisdiction the first acquiring jurisdiction of a subject-matter of an action is permitted to retain it to the end. 1 Freeman, Judgm. 4th ed. § 118a; Young v. Hamilton, 135 Ga. 339, 31 L.R.A. (N.S.) 1057, 69 S. E. 593. Ann. Cas. 1912A, 144; State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 15 L.R.A. (N.S.) 963, 123 Am. St. Rep. 468, 107 S. W. 487, 14 Ann. Cas. 198; Coleman v. State, 83 Miss. 293, 64 L.R.A. 807, 35 So. 937, 1 Ann. Cas. 406. This doctrine has often been applied under various circumstances. Thus, in Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564, a contest arose between a trustee under a trust deed to secure the payment of certain bonds of railroad, and a set of minority bondholders who were seeking to oust the trustee from its office, and to prevent its action in the Federal court to foreclose the mortgage. The proceeding was first instituted in the Federal court. The Supreme Court of the United States, in passing upon the question, says: "The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

In McDowell v. McCormick, 57 C. C. A. 401, 121 Fed. 61, an action by a creditor was brought against an insolvent corporation in a court of general jurisdiction in the state of Indiana, which court appointed a receiver. Subsequently, on the application of another creditor, another court of Indiana, of co-ordinate general jurisdiction, also appointed a receiver, who thereupon 47 L.R.A. (N.S.)

took possession of the insolvent corporation's property. It was held that the first-named court acquired complete and exclusive jurisdiction of the subject-matter, irrespective of any actual seizure of the property, and the record of such proceedings was admissible in evidence to prove title to the property as against title asserted by the second appointee. It is said by the court: "When the complaint on behalf of another creditor was filed in the La Porte superior court, and summons was served and appearance entered, that court was without present jurisdiction of the subject-matter; 'for the property could not be subject to two jurisdictions at the same time.' Covell v. Heyman, 111 U. S. 176, 182, 28 L. ed. 390, 392, 4 Sup. Ct. Rep. 355, 358. Possession of the property obtained by its receiver was, of course, nugatory, as were any orders for the sale thereof."

In Louisville Trust Co. v. Knott, 65 C. C. A. 158, 130 Fed. 820, the minority stockholders of the corporation filed a bill in the state court for an inspection of its books, the ascertainment of its debts and liabilities, together with a sale and distribution of its assets, and other equitable relief. The majority stockholders appeared in that case, but, pending the same, filed a creditors' bill for the appointment of a receiver in the Federal court, who, when appointed, took possession of the assets, which the Federal court refused to surrender to a receiver subsequently appointed by the state court. It was held that the state court had first acquired jurisdiction of the subject-matter of the administration of such corporation's assets, though it had not first taken physical control thereof, and hence was entitled to their surrender by the receiver of the Federal court. The court says: "To avoid such conflict, most liable to arise between the Federal and state courts, it has come to be settled, as we think, that, wherever a state or Federal court has lawfully taken jurisdiction of a case for the purpose of subjecting assets within its territory to the charge or disposition which the law applicable to the case requires, such assets are thereby brought *in custodia legis*, subject to the power and control of the court, and that no other court of co-ordinate jurisdiction can, in a suit commenced while the assets are in that situation, lawfully deprive the court which has already acquired the right of control, of the possession of them; this because the possession of the *res* is indispensable to the exercise of its jurisdiction by the court, to the end that it may be impressed by its decree. It does not seem to us important that a receiver had not actually been appointed. An appointment of a receiver

would rest upon considerations of convenience, and might be made at any time during the progress of the case, if occasion should arise. The conversion of the assets might be made without the employment of a receiver at all. Besides, the appointment goes upon the ground that the court has acquired control of the assets. He is a mere agent of the court. The possession is that of the court, and not his own. It is quite true that in many cases the rule has been stated in terms no broader than to include an actual possession by the court consequent upon a seizure. But it is seen that generally in such cases the exigency did not make it necessary to go beyond that limit. When the question we are now considering has been actually presented, the decisions have been quite uniformly in accord with the rule which we have indicated as the correct one."

In *Sullivan v. Algrem*, 87 C. C. A. 318, 160 Fed. 366, it is said: "The legal custody of specific property by one court of competent jurisdiction withdraws it, so far as necessary to accomplish the purpose of that custody, until that purpose is completely accomplished, from the jurisdiction of every other court. The court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court, and entitles the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal."

In *Lang v. Choctaw*, P. & G. R. Co. 87 C. C. A. 307, 160 Fed. 355, Judge Sanborn states the doctrine in the same form.

In *Waters-Pierce Oil Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 836, there was a conflict of jurisdiction between the state court and the Federal court as to the custody of the estate of the Waters-Pierce Oil Company, whose charter had then been lately forfeited by the state of Texas. In that case it is said: "There is a rule, not only one of comity, but which, by force of judicial decisions of the highest court in the land, has become one of jurisdiction, a rule so universally recognized that no court will question it; and it may be stated to be that, when the power of a court of jurisdiction is first invoked to seize and administer property, its jurisdiction is exclusive, and no other court of concurrent jurisdiction can

interfere to materially disturb or hinder the former in the exercise of its authority and jurisdiction over the res." The court further says: "When did the property become in *custodia legis*, and when did the jurisdiction of the trial court attach? For the purpose of this controversy we need not discuss the conflict of decisions, which on the one hand holds that the jurisdiction is complete from the filing of the bill, and upon the other that it does not attach until service of subpoena; for here, in this instance, it is clear that the defendant corporation was in court properly served, and appeared in the receivership proceeding. When service is had, or there is the equivalent by appearance, if there could be any doubt as to which of the two lines of decisions should prevail, the weight of reason and authority is clear to the effect that the jurisdiction of the court will, under the doctrine of relation, after order made, commence from the time of the filing of the bill for appointment, although no possession has been taken by the receiver of the property sought to be administered by the court. This principle is well settled."

See *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317, for specific application of this principle to cases of other general character of the case at bar. See also numerous cases collected in the note to *Young v. Hamilton*, Ann. Cas. 1912 A, 150.

It seems clear from the foregoing authorities, and upon principle, that the Chaves county court, upon the filing of the bill and the service of process in the proceeding, which contemplated the adjudication of the question of insolvency, the awarding of an injunction against the corporation, if found insolvent, stripping it of its corporate powers, adjudicating the claims of all of its creditors, subjecting its estate to the payment of the same, absorbed all of the jurisdiction concerning the corporation and its property, to the exclusion of all courts of co-ordinate jurisdiction.

As before stated, an exception to the general rule exists as to actions *in personam*, as the exception is usually stated. The early and leading case pointing out this exception is *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257. In that case a United States marshal was sued for trespass, and he defended himself on the ground that his acts were performed under a writ from the proper Federal court, and Mr. Justice Miller, speaking for the court, says: "It is scarcely necessary to observe that the rule thus announced [the general rule heretofore mentioned] is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more

than one court having jurisdiction of the same matters. . . . But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

In commenting upon the illustration of the principle given in this case, Mr. Justice Field, in the circuit court, in the case of *Sharon v. Terry*, 1 L.R.A. 572, 589, 13 Sawy. 387, 36 Fed. 337, 359, uses the following language: "The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: First, where the same plaintiff has asked in the different suits a determination of the same matter, as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudu-

lent and illegal, and therefore vitiating the several obligations, or where the jurisdiction of a court of equity, as well as a court of law, is invoked by him with reference to the matter. Of course, a decision first rendered in either suit may be pleaded in the others. The plaintiff must abide the adjudication which he has sought. And, second, where the cases are upon contracts or obligations which from their nature are merged in the judgment rendered; the subject upon which the first suit is founded having thus ceased to exist."

But it is apparent that the case at bar does not fall within the exceptions. In this case the same parties, the same questions, the same relief, could be obtained in both proceedings, with some additional relief to the plaintiff. But so far as the mortgagee, Fulmer, is concerned, the two cases are exactly alike in all particulars, except the technical form of procedure, and of subjecting the property to the payment of this debt.

In connection with this exception to the general rule, and as illustrative of the same, reference is made to *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258, 55 Atl. 259; *Squire v. Princeton Lighting Co.* 72 N. J. Eq. 883, 15 L.R.A. (N.S.) 657, 68 Atl. 176; and *Gallagher v. True American Pub. Co.* 15 N. J. Eq. 171, 138 Am. St. Rep. 514, 71 Atl. 741. In each of these cases the action was *in personam* upon a legal demand against an insolvent corporation, and judgments were obtained after the filing of a proceeding against the defendant corporation as an insolvent, but before an adjudication of insolvency and the award of an injunction. It was held that, until an adjudication of insolvency and the awarding of an injunction, creditors of the corporation might pursue their legal remedies *in personam*, and thereby acquire a preferential claim again the insolvent estate. But these cases in no way affect the general doctrine above stated.

It seems clear, therefore, that upon the filing of the bill and the service of process in the Chaves county court, that court absorbed the whole jurisdiction over the defendant corporation, its creditors, and its estate, and that the Lincoln county court had no jurisdiction then to entertain the foreclosure proceeding.

3. A serious question is presented by reason of the manner in which the Chaves county court took possession of the estate of the insolvent corporation. The receiver who was finally appointed and qualified found in possession of the property a stranger to the record, claiming to own the property, and protesting against any interference with its possession. This cannot ordi-

narily be done. See *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121. Rights to property cannot ordinarily be tried in a summary manner by the appointment of a receiver who arbitrarily takes possession of the same. The more orderly and proper method in cases where property is found in the possession of a stranger to the record, claiming ownership and right to possession of the same, and which is sought to be taken into possession as the property of another person, is to authorize the receiver to bring a suit to try the title. But whether in this case the facts justified the taking of the possession of the property under the circumstances shown by the record or not, the relator being privy in estate with the mortgagee, Fulmer, it is not necessary for us to decide, by reason of the subsequent conduct of the relator.

It appears, as before seen, that the relator intervened in the Chaves county proceeding, and there set up its title to the property, and asked to have the same relieved from the custody of the receiver. Upon that petition issues can be made up, and the question of the jurisdiction of the Lincoln county court, under whose decree the relator holds, can be fully adjudicated. The relator has submitted its case to the Chaves county court, and must be held to await its judgment, which, it is to be presumed, will be correct.

For the reasons stated, the alternative writ of prohibition will be discharged; and it is so ordered.

Roberts, Ch. J., and Leib, District Judge, concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

A. W. GOULD et al., Respts.,
v.

R. C. MCCORMICK and Wife, Appts.

(— Wash. —, 134 Pac. 676.)

Appeal — memorandum decision — findings and conclusions.

1. A memorandum decision by the trial court before which a case is tried without a jury cannot be considered as findings of fact and conclusions of law.

Note.—see notes to *Beissel v. Vermilion Farmers' Elevator Co.* 12 L.R.A. (N.S.) 403, and *Mackenzie v. Minis*, 22 L.R.A. (N.S.) 1003, on termination of contracts of employment containing stipulations permitting rescission by the employer if the work is not satisfactorily performed. 47 L.R.A. (N.S.)

Principal and agent — discharge — dissatisfaction.

2. Under a contract by an architect to draw plans and superintend the construction of a building to the "entire satisfaction" of the owner for a percentage of the cost of the building, which describes the character of the work and materials to be employed, the owner cannot discharge him without reasonable ground for dissatisfaction.

Damages — wrongful discharge of architect.

3. The damages for wrongfully discharging an architect who had undertaken to draw plans for and superintend the construction of a building for a percentage of its cost are the difference between the contract price and what it would have cost them to complete their undertaking at the time of their discharge.

Mechanics' lien — right of architect.

4. An architect has a lien on a building for furnishing plans for it and superintending its construction, under a statute providing that every person performing labor upon or furnishing material for a building has a lien upon the building therefor.

Same — excessive claim — effect.

5. The right to a mechanics' lien is not lost by claiming an excessive amount in the notice, if it was not done wilfully or in bad faith.

(August 19, 1913.)

A PPEAL by defendants from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover a balance due on a contract for the construction of a building, for the establishment and foreclosure of a lien for the same and for an attorney's fee. Affirmed.

The facts are stated in the opinion.

Mr. John W. Roberts for appellants.

Messrs. Peters & Powell, for respondents:

Where the contract is no longer executory, but work has gone into the subject-matter of the contract to the benefit of the promisee, then the work need only be satisfactory to a reasonable person.

Hawkins v. Graham, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312; *Daggett v. Johnson*, 49 Va. 345; 9 Cyc. 632; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906; *Pope Iron & Metal Co. v. Best*, 14 Mo. App. 502; *Clark v. Rice*, 46 Mich. 308, 9 N. W. 427; *May v. Hoover*, 112 Ind. 455, 14 N. E. 472; *Doll v. Noble*, 116 N. Y. 230, 5 L.R.A. 554, 15 Am. St. Rep. 398, 22 N. E. 406; *Union League Club v. Blymyer Ice Mach. Co.* 204 Ill. 117, 68 N. E. 413; *Pollock v. Pennsylvania Iron Works Co.* 13 Misc. 194, 34 N. Y. Supp. 130; 9 Enc. Pl. & Pr. p. 624;

Silsby Mfg. Co. v. Chico, 11 Sawy. 183, 24 Fed. 893; Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126.

The measure of damages is the contract price for that proportion of the work actually done at the time of the contractor's dismissal and contract price for that uncompleted, less the reasonable cost of completing the same.

Chase v. Smith, 35 Wash. 635, 77 Pac. 1069; Anderson v. Hilker, 38 Wash. 635, 80 Pac. 848; Gabrielson v. Hague Box & Lumber Co. 55 Wash. 346, 133 Am. St. Rep. 1032, 104 Pac. 635; Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548; Flaherty v. Miner, 123 N. Y. 382, 25 N. E. 418; McClelland v. Snider, 18 Ill. 58, 2 Mor. Min. Rep. 531; Hollinsead v. Mactier, 13 Wend. 274; Hillyard v. Crabtree, 11 Tex. 265, 62 Am. Dec. 475; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; Austin v. Austin, 47 Vt. 311; Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; Boyd v. Meighan, 48 N. J. L. 404, 4 Atl. 779; Phelps v. Beebe, 71 Mich. 554, 39 N. W. 763; Allen v. McKibbin, 5 Mich. 449.

Plaintiffs were entitled to a lien for their services.

Hughes v. Torgerson, 96 Ala. 346, 16 L.R.A. 600, 38 Am. St. Rep. 105, 11 So. 209; Parsons v. Brown, 97 Iowa, 699, 66 N. W. 880; Knight v. Norris, 13 Minn. 473, Gil. 438; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Von Dorn v. Mengedocht, 41 Neb. 525, 59 N. W. 800; Mutual Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 389; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Bank of Pennsylvania v. Gries, 35 Pa. 423; St. Clair Coal Co. v. Martz, 75 Pa. 384; Phoenix Furniture Co. v. Put-In-Bay Hotel Co. 66 Fed. 684.

Main, J., delivered the opinion of the court:

This is an action upon a contract. The plaintiffs are copartners, doing business under the firm name of Gould & Champney. The defendants are husband and wife. On August 4, 1909, the plaintiffs entered into a written contract with the defendant Robert McCormick, wherein it was provided that the plaintiffs were to draw plans and specifications for a nine-story building which McCormick desired to construct upon lots 1 and 2, block 28, Maynard's addition to the city of Seattle. The contract, so far as material, was as follows:

"Second party (respondents) also agrees to take charge of and supervise the construction of the building, and to faithfully superintend the same to the end that the construction may be strictly in accordance with said plans and specifications and pursued in accordance with good workmanship, 47 L.R.A. (N.S.)

and only the best materials of the several kinds specified employed or used in such construction. And the second party agrees to devote whatever time that may be necessary, and to employ at their own expense whatever assistance that may be necessary to fully superintend the construction of said building to the entire satisfaction of the first party (appellant R. C. McCormick). Should the first party desire a clerk of the works, then such clerk or superintendent shall be at his expense.

"The second party further agrees, from time to time, to supplement said plans to such additional drawings as may be necessary to interpret and fully exemplify the work, and shall be ready at all times to interpret and explain said plans and specifications or any part thereof, and shall do all work that may be necessary to reconcile any apparent confliction, and will make such additional drawings and provide such additional specifications as first party may from time to time require, to the end that said work may be constructed in the best possible manner, economically, and to the satisfaction of the first party."

For providing the plans and specifications and superintending the construction of the building the plaintiffs were to receive 5 per cent of the cost thereof. Under the agreement, plans and specifications for a hotel building were prepared. The erection of the building was begun. Thereafter, and on August 18, 1910, when the building was about one third completed, McCormick discharged the plaintiffs from further service under the contract. Subsequently the building was completed by the appellants without employing other architects. On or about December 23, 1910, this action was begun for the purpose of recovering the balance due the plaintiffs on the contract, establishing and foreclosing a lien for the same, and for an attorneys' fee. The cause was tried to the court without a jury. During the trial it was stipulated, in the event the court should enter a judgment foreclosing the lien, that it should fix the amount of the attorneys' fee to be allowed the plaintiffs. At the conclusion of the trial the court took the matter of the decision under advisement. On October 18, 1911, the trial court caused to be filed in the case a memorandum decision. In this decision the court found: "In the above-entitled cause I find that there is no evidence of any acts or omissions on the part of the plaintiffs which justified their dismissal from the defendants' service, or which would justify a reasonable man to suspect them of wrongdoing or incompetency. I find, moreover, that the fair cost of the structure which they were engaged to work

upon, and upon which their commissions are to be paid, is \$325,000. I find that there is no evidence which enables me to segregate the value of that part of the work done at the time of their dismissal from that part which they were bound to do in order to fulfil all of their obligations under their contract of employment. In such a case a true measure of damages is the whole sum agreed to be paid for the completed work. . . . Plaintiffs admit, however, that the completion of the contract would involve an outlay by them of \$1,500, and I think this should be deducted from their whole compensation. On this basis plaintiffs would be entitled to recover 5 per cent of \$325,000, or \$16,250, less \$1,500 outlay and \$8,000, already paid, is \$6,750, for which amount, with interest and an attorneys' fee of \$1,500, the plaintiffs are entitled to a lien upon the realty described in the complaint." Thereafter, and on November 24, 1911, judgment was entered in favor of the plaintiffs for \$7,239.37, and in addition thereto an attorneys' fee in the sum of \$1,500. The defendants appeal.

The questions which are chiefly material are: (1) Did the memorandum decision constitute findings of fact? (2) Construction of the contract as to the right to terminate. (3) Were there reasonable grounds for dissatisfaction? (4) The measure of damages. (5) Does a right of lien exist? (6) Was the notice of claim of lien valid?

I. On October 18, 1911, the trial judge caused to be filed in the cause a memorandum decision, a portion of which is above set out. To this, through inadvertence, the appellant filed exceptions as though it were findings of fact and conclusions of law. The exceptions, however, were subsequently withdrawn. No findings of fact and conclusions of law were signed and filed, unless the memorandum decision can be considered as such. It is argued that the memorandum decision constitutes findings of fact and conclusions of law, and, inasmuch as there are no exceptions thereto, there is nothing for the court to consider. But under the rule as stated in the case of *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292, the memorandum decision cannot be considered as findings of fact and conclusions of law. In that case, speaking of a memorandum decision, it was said: "It is apparent, we think, that the entry of March 29th was in no sense a judgment, nor intended as such. It was nothing more than the decision or ruling of the court upon the matters taken under advisement."

II. It is urged that by the terms of the contract there was reserved to the appellants the right to terminate the services of respondents whenever they might be dis-

satisfied, providing the dissatisfaction was not in bad faith. In other words, that there was preserved to the appellants an unqualified option to terminate the contract whenever in fact they became dissatisfied, regardless of whether or not there was any reasonable ground for such dissatisfaction. By examination of the contract it will be seen that the building was to be constructed: (1) Strictly in accordance with the plans and specifications; (2) with good workmanship; (3) with the best of materials; (4) that its construction was to be superintended to the entire satisfaction of the appellants; and (5) that such additional drawings and specifications as might be required from time to time were to be prepared by the respondents, to the end that the work might be constructed in the best possible manner, economically, and to the satisfaction of the first party. These provisions specify the character of the workmanship, the character of the material, the character of the superintendence, and in addition, that the building be constructed in the best possible manner, economically, and to the satisfaction of the appellants. Where from the language of the contract it is doubtful whether the parties intended that one party thereto should have the unqualified option to terminate it in case of dissatisfaction, or whether the intention was to give the right to terminate only in the event of dissatisfaction based upon some reasonable ground, the contract will be construed as not reposing in one of the parties the arbitrary or unqualified option to terminate it. In other words, in cases of doubt, the contract will be construed as giving the right to terminate only when there is a reasonable ground for dissatisfaction.

In *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312, speaking of a contract of the same general character as the one here under consideration, it was said: "In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant." Where the contract provides that the work or material shall be of a specified character and to the satisfaction of one of the parties, the right to terminate exists only when there is dissatisfaction and the same is based upon reasonable grounds.

In *Doll v. Noble*, 116 N. Y. 230, 5 L.R.A. 554, 15 Am. St. Rep. 398, 22 N. E. 406, the court was considering a contract for polishing, staining, and rubbing the woodwork of two houses. The contract provided that the work was to be done "in the best workmanlike manner under the supervision of William Packard, superintendent, and to the

entire satisfaction of William Noble, the party of the first part, owner." The trial court, in submitting the cause to the jury, instructed them in effect that, while the contract provided it was to be done to the owner's satisfaction, that clause must be regarded as qualified by the other provisions of the contract that it was to be done in the best workmanlike manner, and that was the test of a correct and full performance of the contract. Thereupon counsel for the owner requested the court to instruct the jury that the defendant was entitled, under the contract, to have the work done to his "entire satisfaction" before the plaintiff became entitled to final payment, to which the court responded: "I so charge, subject to the qualification which I have already made. He must not attempt to defeat a just claim by arbitrarily and unreasonably saying he is not satisfied. The work must be done according to the contract." Upon these instructions error was predicated. The court of appeals, in passing upon the question, said: "The ruling of the court was correct."

We think that the contract in the present case did not give to the appellants the arbitrary option to terminate it whenever they might be dissatisfied, but that it could only be terminated providing there was some reasonable basis for such dissatisfaction. Had it been the intention to give to the appellants the unqualified or arbitrary option to terminate the contract whenever they might be dissatisfied it would seem that that portion of the contract which describes the character of the work and material would be entirely superfluous.

The cases of *Tatum v. Geist*, 46 Wash. 226, 89 Pac. 547, and *McDougall v. O'Connell*, 72 Wash. 349, 130 Pac. 362, 131 Pac. 204, are not out of harmony with the views herein expressed; the distinction being that the contract which the court was construing in each of those cases gave the absolute or unqualified option to terminate in case of dissatisfaction, while in the present case the contract, considering all the language used, gives the right to terminate only when the dissatisfaction is based upon some reasonable ground.

III. The contract not giving to the appellant the arbitrary option to determine when he was satisfied, it becomes necessary to ascertain from the evidence whether there was any reasonable ground for dissatisfaction. While no formal findings of fact have been made upon this question, yet it appears from the written opinion of the trial judge that in his judgment there was no evidence justifying the dismissal of the respondents. He said: "I find that there is no evidence of any acts or omissions on the 47 L.R.A. (N.S.)

part of the plaintiffs which justified their dismissal from the defendants' service, or which would justify a reasonable man to suspect them of wrongdoing or incompetency." The evidence in the record touching this matter is so voluminous as to make its review here utterly impracticable. It is sufficient to say that from a consideration of the evidence we are of the opinion that the view of the trial court was right, and should be sustained.

IV. Since the contract was breached by the appellants without just cause, it becomes necessary to determine by what standard the amount of recovery is to be measured. This measure, where the price is fixed in the contract, is the difference between the price thus fixed and the cost of performance.

In *Sedgwick on Damages*, 9th ed. vol. 2, § 614, the rule is stated thus: "Where a contract price is fixed in the contract, this becomes the standard of value of the contract; the profit being the difference between the contract price and the cost or value of performance. The application of this rule may be examined in cases of several sorts. In the first class of cases the plaintiff, on his side, undertakes to perform some act for the defendant, and in return the defendant agrees to pay money for the plaintiff's act. In such a case the profit of the contract is represented by the contract price, less the cost of performing the act to be done by the plaintiff."

In *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069, it is said: "The contractor was entitled to recover for the work performed at the contract rate; and such profit, if any, as he would have made on the balance of the work had he been allowed to complete it. The respondent is to be placed in the same condition that he would have been placed in, had he been permitted to proceed without interference."

In the present case the price fixed in the contract for preparing the plans and specifications and superintending the work of the construction was 5 per cent of the cost of the building. The approximate cost of the building was \$325,000. At the time the respondents were discharged, it appears from the evidence that the cost to them of completing the contract would have been \$1,500. Prior to this time they had been paid the sum of \$8,000. On this basis, then, applying the rule as above stated, there was a balance due in the sum of \$6,750.

V. It is contended that the court erred in entering a judgment establishing and foreclosing the lien. If a right of lien exists for plans and specifications prepared by an architect which were used in the construction of a building, and for services of the

architect in the superintendence thereof, it must be by virtue of the statute, as no such lien was known to the common law. Rem. & Bal. Code, § 1129, provides: "Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any mining claim, building, . . . has a lien upon the same for the labor performed or material furnished . . ." The courts of many of the states have been called upon to construe statutes containing substantially the same language, for the purpose of determining whether or not the right of lien existed for plans and specifications and superintendence of the architect. While the decisions upon this question are by no means harmonious, the great weight of authority, as well as the better reason, appears to support the view that the lien exists where the language of the statute is general. It will be noted that the language of the statute above quoted is general and comprehensive in its terms. Had the legislature intended it not to be sufficiently broad to include the labor of the architect in preparing plans and specifications according to which the building was constructed, and in superintending the construction thereof, it would doubtless have made use of more restrictive terms.

In Phillips on Mechanics' Liens, 3d ed. § 158, the views of the author are expressed to this effect: "The labor and skill of an architect and superintendent of work upon a building are properly a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they enter into and help to form the value of the building, and there is no sound reason in the nature of things why the person who performs such labor and furnishes such skill should not receive the same protection as the carpenter or mason. Hence, under a statute which provides that 'whoever performs labor or furnishes materials . . . for erecting . . . a house shall have a lien,' etc., and 'any person entitled to a lien as aforesaid shall make an account in writing of the item of labor, skill, materials, . . . or either of them, as the case may be,' etc., it includes persons who furnish plans and specifications for and superintend the work."

In Hughes v. Torgerson, 96 Ala. 346, 16 L.R.A. 600, 38 Am. St. Rep. 105, 11 So. 209, under a statute which gave a right of lien for "work or labor upon a building or improvement on land," it was held that this language was broad enough to include the architect who prepares the plans and specifications and superintends the erection of the building. It was there said: "An archi-

tect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as anyone who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes."

In the case of Knight v. Norris, 13 Minn. 473, Gil. 438, under a statute which gave a right of lien to "whoever performs labor or furnishes materials or machinery for erecting, constructing, altering, or repairing any house . . . or other building . . . shall have a lien to secure the payment of the same," it was held that an architect was entitled to a lien for plans and specifications and superintending the construction of a building. It was there said: "The labor and skill of an architect and superintendent of the work upon a building are a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense, they enter into and help to form the value of the building, and we can conceive of no sound reason in the nature of things why the person who performs such labor, and furnishes such skill, should not receive the same protection as the carpenter, the mason, the lumber dealer, or the hardware merchant; and, as before remarked, we are of opinion that the services for which the plaintiff claims a lien are covered by the statute." To the same effect, see also: Spaulding v. Burke, 33 Wash. 679, 74 Pac. 829; Parsons v. Brown, 97 Iowa, 699, 66 N. W. 880; Knight v. Norris, supra; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Von Dorn v. Mengedocht, 41 Neb. 525, 59 N. W. 800; Mutual Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 389; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Bank of Pennsylvania v. Gries, 35 Pa. 423; St. Clair Coal Co. v. Martz, 75 Pa. 384; Phoenix Furniture Co. v. Put-In-Bay Hotel (C. C.) 66 Fed. 684.

While, as already indicated, the authorities are not unanimous in supporting this view, yet a critical examination of the cases which take the opposite view will show that the statutes being construed in some of them were less general in terms than is the statute of this state.

VI. Finally, it is claimed that the notice of claim of lien was filed for an excessive amount, and for that reason the lien must fail. In support of this contention the case of Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721, is cited. In that case it was held that where nonlienable items had been wilfully included in the lien notice to such an amount that, when taken in connection with the facts and circumstances of the case,

clearly established bad faith, the whole lien should fail. The rule of that case is not applicable to the facts here presented. The evidence does not show either bad faith, or that the claim for lien was wilfully filed for an excessive amount.

The judgment will be affirmed.

Mount, Morris, Ellis, and Fullerton, JJ., concur.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

APPLETON WATERWORKS COMPANY v. RAILROAD COMMISSION OF WISCONSIN.

(— Wis. —, 142 N. W. 476.)

Eminent domain — water plant — acquisition — compensation.

1. In a proceeding before the railway

Headnotes by WINSLOW, Ch. J.

Note. — Compensation to be paid a public utility company upon taking its plant.

- I. Introductory, 771.
- II. Water and light companies.
 - a. In general, 772.
 - b. Property that must be taken, 773.
 - c. Property for which compensation must be made, 773.
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 2. Valuation of material plant, rights, and franchises.
 - (a) Valuation not confined to material plant, 774.
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 - (c) Condition of plant, 778.
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 - (e) Fact that utility company is a going concern or has an established business, 779.
 - (f) Good will, 781.
 - (g) Franchise.
 - (1) In general, 781.
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 - aa. In general, 783.
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 - dd. Earning power, 784.

commission, brought by a municipal corporation under § 1797m—82, Stat. 1911, for the purpose of fixing the compensation to be paid for a waterworks plant operated by a public utility corporation under an indeterminate permit, the commission must award "just compensation," which means fair and reasonable value at the time possession of the property is actually taken. Though, under the provisions of the law, payment may be deferred in the discretion of the commission for a reasonable time after possession is taken, legal interest must in that case be provided for in the order from that time until the payment is made, in order to constitute "just compensation." **Damages — eminent domain — costs of action.**

2. The order in such a case cannot rightly require the municipality to pay, in addition to such just compensation, the costs of an action which may be thereafter brought by the utility corporation against the commission to alter or amend the order, whether such action be successful or not.

Same — permit to operate.

3. No allowance can be rightly made in such order for the value of the indeterminate permit, for the reason that such permit has ceased to exist.

II. d, 2—continued.

- ee. Taking under eminent domain, 784.
- (h) Right to lay pipes in streets, 784.
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- (j) Policy of state in dealing with public service corporations, 785.
3. Value as dependent upon earning power.
 - (a) In general, 785.
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4. Capitalization of income, 787.
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6. Prior arbitration, 788.
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- e. Severance of plants, 788.
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- g. Property not directly connected with plant, 789.
- h. Limitation upon compensation, 789.
- i. Deduction on account of unreasonable rates previously received, 789.
- j. As of what time rights are determined, 790.
- k. Adjustment of mortgage indebtedness, 790.
- l. Interest, 790.
- m. Costs, 791.
- n. Penalty, 791.

Same — cost of reproduction — consumer's burden.

4. If the commission, in reaching its conclusion as to "just compensation," takes into consideration, in connection with other data bearing thereon, an estimate of the present cost of reproduction of the plant, such estimate cannot rightly include the cost of work which may be legally assessed, and in the exercise of good business judgment ought to be assessed, against the consumer; *e. g.*, in the present case, the cost of trenching, and of breaking up and relaying permanent pavements, for the laying of new service pipes from the main to the corporation cock in the curb.

Same — going value.

5. "Going value" is that element of value which comes from the fact that the business is a going concern. It is not franchise value, nor the value of good will. It is difficult to separate or measure in dollars, because the value of the plant and business is inherently indivisible, and this latter value is obtained by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them as inseparable parts of a harmonious entity, and exercising the judgment as to the value

of that entity. In this way the "going value" goes into the final result.

Evidence — to impeach award of railway commission.

6. In an action brought under Stat. 1911, §§ 1797m-83 et seq., to alter or amend the order of the commission, testimony of the commissioners as to what transpired on the hearing or during their deliberations cannot be introduced to impeach their award; nor can they be examined as to the mental processes by which they reached their results, the relative importance given by their minds to each element of value, or the legal and economic principles which they deemed to have a bearing on the result. Where the record is silent, however, they may be sworn to show what issues they considered, what matters of fact were actually submitted and passed upon, and sometimes to show that they acted under mistake of fact as to the issues submitted to them.

Eminent domain — award — review — scope.

7. In the action named in the last subdivision, there is no trial *de novo* of the whole matter of just compensation, but the court only examines into and decides upon the specific claims of error or unreasonableness made by the plaintiff; hence in this ac-

III. Street railways.

- a. Statutes, 791.
- b. What property is included, 791.
- c. Physical property as a basis, 792.
- d. Freedom from burdens imposed subsequent to organization of company, 793.
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IV. Toll roads, bridges, and waterways.

- a. In general, 795.
- b. For what compensation must be made, 796.
- c. Physical plant.
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 - (a) In general, 797.
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 4. Changes after award, 798.
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- e. Value of capital stock, 799.
- f. Earning power, 799.
- g. Competition, 800.
- h. True measure is value to owner, 800.

I. Introductory.

In the valuation of plants of public utility companies, there are certain elements to be considered. There is the structure to be valued. As a structure, independent of use, 47 L.R.A. (N.S.)

the value may not be equal to the cost. But when the structure is considered as a structure capable of being used at its location, its value is increased, and still more is it increased when it is in actual use and being used in an established business. There is a still further increase in value when this use is exclusive, either practically or legally,—more of an increase, of course, in the latter case.

The valuation of the franchise presents peculiar difficulties. By some courts the value of a plant over and above the value of the material parts is treated as franchise value. It is apparent that this includes value due to the fact that the plant is a going concern and has an established business. Other courts treat the franchise as merely the rights given the company by the governmental power, and exclude the value due to an established business; while in still other cases no attempt is made to separate franchise values from other elements. This latter is true in a great majority of the cases.

The modern tendency to confer extensive powers in regard to public utility companies upon public service commissions is likely to modify and largely determine the valuation of the plants of such companies in the future.

The object in view is to determine the compensation to be paid the company whose property is being taken, and the judicial tendency is not to place so much stress upon a technically correct valuation of the various elements which make up this compensation,—especially where there is no showing that on the whole the compensation is not just.

The note is confined to a discussion of

tion brought by the utility company, claiming error in that the award was too small in certain particulars, there could be no reduction of the award, and the acceptance by the plaintiff of the amount of the award pending the action was not a waiver of the right to further prosecute the same.

Damages — interest on award in eminent domain — acceptance by receiver.

8. It appears that, during the proceedings to fix compensation before the commission, the plaintiff corporation was placed in the hands of a receiver appointed in a combined foreclosure and creditors' action in the proper Federal court, and that upon petition of the city to that court, and by consent of the receiver and the plaintiff corporation, an order was entered by the court

November 29, 1911, directing the receiver to surrender the plant to the city December 1, 1911, and requiring the city to pay the sum awarded by the commission as compensation on or before February 7, 1912. Held, that the receipt of the money pursuant to this order did not operate to waive the right to interest on the award from the date of the turning over of the plant; it appearing from the petition of the city that the intention of the parties was that the payment should not affect the rights of the parties in this action.

(May 31, 1913.)

CROSS APPEALS from a judgment of the Circuit Court for Dane County in a proceeding to alter or amend an order of the railroad commission fixing com-

compensation upon the taking of public utility plants for use by the body taking, and excludes the taking of plants or parts of plants, the land on which they are located being desired for other purposes.

The exact question annotated has not been passed upon in the course of the taking over of the telegraph and telephone lines in England. Cases passing upon collateral questions, such as the right of a railroad company which has received a lump sum for its telegraph lines to recover additional compensation upon subsequent requirements (such as *Reg. v. Metropolitan R. Co.* 50 L. T. N. S. 6), have in general been excluded, unless it is decided that compensation can be had, and the question is as to the amount thereof.

So, also, cases have been excluded (such as *Cowes & N. R. Co. v. Board of Trade*, 43 L. J. Q. B. N. S. 242, 22 Week. Rep. 807) passing upon the question as to whether a railroad company has such an interest as the government is required to purchase, under an agreement by which a telegraph company erected its lines on the railroad right of way, and was to remove them at the end of the term, and during the term allow the railroad company the use of one wire for its own purpose, but not for public use or for profit.

Likewise questions such as arose in *Reg. v. Coleridge*, 45 L. J. Q. B. N. S. 649, 34 L. T. N. S. 752, as to whether a railroad that has entered into a traffic agreement with another road, by which the other road assumes the operation of the first road, is entitled to compensation for the telegraph lines after the other road has obtained compensation.

So, cases passing upon the compensation to be paid an officer of a telegraph company upon a taking of the telegraph line under the English statute, such as arose in *Reg. v. Postmaster General*, 38 L. T. N. S. 89, 26 Week. Rep. 322, 47 L. J. Q. B. N. S. 435, L. R. 3 Q. B. Div. 428, have been excluded.

As to allowance for depreciation in plant, in fixing rates for public service corporation, see note to *Pioneer Teleph. & Teleg. Co. v. Westenhover*, 38 L.R.A.(N.S.) 1209, 47 L.R.A.(N.S.)

As to the establishment, regulation, and protection of ferries, see note to *Sistersville Ferry Co. v. Russell*, 59 L.R.A. 513.

See note, especially subdivision II. b, 2, to *State ex rel. Hallauer v. Goswell*, 61 L.R.A. 33, as to establishment and regulation of municipal water supply.

As to elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic, see notes to *Pennsylvania R. Co. v. Philadelphia County*, 15 L.R.A.(N.S.) 108, and to *State ex rel. McCue v. Northern P. R. Co.* 25 L.R.A.(N.S.) 1001.

II. Water and light companies.

a. In general.

In a great majority of the cases involving water and light plants, the taking has been under some agreement between the municipality or other body taking, and the utility company, or under provisions in the charter of the company or ordinance granting the franchise, and they are not strictly eminent domain proceedings.

In *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746, the gas and electric company was seeking to compel the city to take its plant, under a statute providing that any municipality which decides to establish such a plant shall purchase the property of any such plant within its limits, which elects to sell and comply with the act.

And in *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 975, the action took the form of a bill to enforce a contract with the water company to sell its plant.

So, the purchase has been under a reserved power in the charter, or ordinance granting the franchise. *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735; *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063; *Falmouth v. Falmouth Water Co.* 180 Mass. 325, 62 N. E. 255; *Tisbury v. Vineyard Haven Water Co.* 193 Mass. 196, 79 N. E. 256; *Monongahela Water Co's Case*, 223 Pa. 323, 72 Atl. 625.

In *Covington Gaslight Co. v. Covington*,

pensation to be paid for plaintiff's waterworks plant; plaintiff appealing from so much of the decree as rejected certain claimed items of compensation, and defendant appealing from so much as allowed certain others. Affirmed in part.

Statement by Winslow, Ch. J.:

This is an action brought under the public utility act to alter or amend an order of the railroad commission fixing the compensation to be paid by the city of Appleton for the taking of the plaintiff's waterworks plant in that city.

The works were constructed in 1882, pursuant to an ordinance passed by the city council in 1881, authorizing the use of the streets, and making a contract for water

service for twenty years. The plaintiff acquired title to the works in 1892, and in 1907 filed a declaration under § 1797m—77, statutes, surrendering its franchise, and obtained an indeterminate permit under the utility act.

In January, 1908, the city applied to the railroad commission for an order requiring the plaintiff to make its service more adequate and fixing rates, and during the same month one J. A. Hawes was appointed receiver of the company in a creditors' action in the United States court. In May, 1910, the commission made an order requiring improvements to be made in the plant, and postponing the fixing of rates until the improvements were made. In July, 1910, an election was called to determine whether the

22 Ky. L. Rep. 796, 58 S. W. 805, an assignee of the city was purchasing under a reserved power in the ordinance granting the franchise.

In other cases the utility company agreed to sell its plant under a statute which authorized the municipality to engage in furnishing the utility to the public, but required it to purchase the plant of any company located within its jurisdiction, which desired to sell. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

In the case of *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6, this question of compensation to a public utility company is considered exhaustively, and,—the case being cited frequently throughout the note, a short statement of the facts seems advisable. The action was begun by the *Kennebec Water District*, a corporation, to procure, by virtue of the provisions of its charter, judicial appraisal and condemnation of the entire plant, property and franchises, rights and privileges of the *Maine Water Company*, a corporation. The *Kennebec Water District* was a quasi municipal corporation constituting the inhabitants of a city and village, for the purpose of supplying the inhabitants of the district and also two other towns with water for domestic and municipal purposes. An act authorized and empowered it to acquire by purchase, or by the exercise of the right of eminent domain, the plant of a water company which operated within said district, and it further provided, for the purpose of fixing the valuation of the property in case of disagreement, for the appointment of three appraisers who, upon hearing, should "fix the valuation of said plant, property, and franchises at what they are fairly and equitably worth, so that said *Maine Water Company* shall receive just compensation for all the same." Before the property was valued, the parties, in accordance with the provisions of the act of the legislature, filed written requests for instructions which they desired and contended ought to be 47 L.R.A. (N.S.)

given by the court to the appraisers to guide them in determining the valuation of the property to be taken over. Upon this request for instructions, the court rendered the opinion in question. The case of *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537, arose in a similar manner.

The compensation to be paid the public utility company, however, depends largely upon the statute authorizing the taking, or upon the statute or ordinance reserving the power to purchase, and is not dependent upon the form of action in which the question arises.

The damages to be awarded to a water company must be determined according to the legislative act which gives the corporation taking the property power thus to take. *Ibid.* See this case II. e, *infra*.

b. Property that must be taken.

It was admitted in *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6, that every item of property held by the water company in the water district at the date of the appraisal, whether specifically named in the act authorizing the taking, or not, must be taken, and just compensation paid therefor.

It was held in *Omaha Water Co. v. Omaha*, 89 C. C. A. 205, 162 Fed. 225, 15 Ann. Cas. 498, affirmed in 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615, that property beyond the corporate limits of the city was included in the property that must be taken, where the part extending outside the corporate limits was a part of the system, and the municipalities in which it had been extended were really parts of the larger city. The statutes of the state in this case were held to authorize the owning and operating of the entire system of waterworks, including the parts beyond the city boundaries.

c. Property for which compensation must be made.

A water company is entitled to compensation for its right in a great pond granted it by the legislature for the purpose of sup-

city should purchase the plant, which election was held August 23, 1910, and resulted in a majority for the purchase. In September the city filed with the commission and served on the plaintiff notice of the result of the election, and the commission set a time for hearing. At the hearing in October following, all the evidence introduced in the rate case was received by stipulation, together with some additional evidence. December 7, 1910, the commission made its order fixing the value of the entire property at \$255,000, and directing that the city pay said sum to the receiver on or before July 1, 1911, "provided, however, that if an action be commenced and prosecuted to alter or amend this order herein made, as prescribed in § 1797m—83, the time within

plying water to the public, especially where it was compelled to make compensation to riparian proprietors on the stream flowing out from the pond, whose property was damaged by the taking of the water, and has incurred other expenses in the construction of the waterworks. *Gardner Water Co. v. Gardner*, 185 Mass. 190, 69 N. E. 1051.

The water company is entitled to an award for waters, lands, or water rights taken by it after the expiration of a year from the enactment of the law granting its charter, notwithstanding the act provides that it shall take effect upon its passage, and shall become void unless the work is completed within one year, since it was not intended by this provision to prevent the extension of the work to meet the growing necessities of the town or its inhabitants. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063.

The municipality need not make compensation for an entire reservoir which is used by the water company for supplying another town with water. *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 975.

Where, at the time of granting a franchise, personal property was transferred by the city to the water company, and it was provided that no compensation should be paid to the water company for such property upon a taking of the plant of the company by the city, and among the items of property so transferred was a contract with the owner of the water power to supply power for pumping, which bound such owner to put in water wheels for power for the city, and furnish to such city for waterworks purposes at the place where such wheels were located sufficient water for the operation thereof, evidence on the part of the water company that it constructed a flume for conducting the water from the mill pond to the wheels of the pumping station, in pursuance of an agreement with the owner of the water power whereby the latter paid it compensation for doing the work, is sufficient to authorize a finding of arbitrators that such flume was not included in the property for which compensa-

tion must be made. *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555.

which such payment shall be made as aforesaid be, and the same is, extended for a period of six months after the final determination of such action."

The plaintiff seasonably brought the present action under §§ 1797m—83 to 1797m—87, to alter and amend said order, and after the same was commenced the complainants in the creditors' action in the Federal court, together with the receiver, Hawes, filed an ancillary bill in that court against the water company, the commission, and the city of Appleton, to vacate the purchase proceeding entirely, and enjoin the trial of the present action. That court refused to grant the injunction, and the ancillary action was dismissed. The receiver during this time remained in possession of the property and

d. Methods of determining compensation.

1. In general.

The method of determining the compensation to be paid the public utility company for its plant is important. It is a common contention on the part of the governmental body seeking to take, that such compensation is confined to the material plant, and therefore, to arrive at the compensation, the value of the material plant need only to be estimated. It is apparent, however, where the plant has been in successful operation, that there is some value due to the fact that it is a going concern, and also a value due to the rights arising under the franchise. Without discussing these elements at this place, it is sufficient to say that something besides the bare material plant must be taken into consideration in determining the compensation to be made.

A contention frequently made by the utility company is that the value of its plant is dependent upon the earning power. And it has also been contended that a capitalization of its income is a method of arriving at such value. These various methods of determining compensation are discussed in detail in this subdivision. It should be kept in mind that the method of valuation depends to a large extent upon statute or ordinance, and these should be first consulted on this question.

2. Valuation of material plant, rights, and franchises.

(a) Valuation not confined to material plant.

The valuation of the physical plant is to be considered, but the compensation is not confined to this.

Under a statute providing that the price

operated the plant. The foreclosure of a \$250,000 mortgage on the works had also been commenced in the Federal court and consolidated with the creditors' action, and Mr. Hawes had also become receiver in the foreclosure action. On November 29, 1911, upon petition of the city addressed to the Federal court, an order was made by that court, with the consent of the plaintiff and the receiver. Directing that the receiver surrender the plant to the city December 1, 1911, and that the city pay the receiver \$255,000 therefor on or before February 1, 1912, which time was subsequently extended by order of the court to the 7th of the same month, on which date the entire sum was paid to the receiver.

Upon the trial of this action plaintiff con-

tended that the compensation fixed by the commission was unlawful in the following particulars: First, that it did not include interest from the time the city should take possession until payment of the compensation; second, that it did not include costs and disbursements of the plaintiff, in case judgment should be rendered in favor of the plaintiff in an action brought by it pursuant to §§ 83 to 86, inclusive, to alter and amend the order of the commission; third, that it did not include the value of the indeterminate permit or franchise of the plaintiff; fourth, that it did not include the value arising from the existence of permanent pavements over service pipes; fifth, that it did not include the value arising from the cost of excavating and filling

to be paid for the plant whether gas or electric, or both, shall be its fair market value for the purposes of its use (no portion of such plant to be estimated, however, at less than its market value for any other purpose), including, as an element of value, the earning capacity of such plant and also the market value of any other locations or similar rights acquired by the owners of such plant or plants with the intention of using the same in connection with such plant or plants. The valuation ought not to be confined to the bare physical plant. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746. The court states that the land, building, pipes, wires, etc., belonging to the company, were to be valued in view of their arrangement for and adaptability to the purposes for which they were provided, and of their earning capacity as a going concern, in ascertaining which special regard was, by the terms of the statute, to be paid to their actual earnings.

The value of the structure is to be considered under a statute requiring a fixing of the valuation of the plant, property, and franchises taken, so that the company shall receive just compensation therefor, but this value is enhanced by the fact that it is being used in, and in fact is essential to, a going business concern. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

The compensation that must be made for the plant of a water company is not confined to compensation for the physical property as a going concern, but must include franchises, under a contract requiring the "property" of the company to be paid for. *Monongahela Water Co.'s Case*, 223 Pa. 323, 72 Atl. 625.

The value of the bare physical property of a waterworks company put together into a waterworks system as a complete structure, irrespective of any franchise or anything which the property earns or may earn in the future, is not the true measure of compensation under an agreement requiring the city to pay the fair and equitable value of the whole works. *National Water-* 47 L.R.A. (N.S.)

works Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

After stating that the valuation of a water company's plant is not to be confined to the mere physical property, the court in *Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615, says: "The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items, making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

But under a statute excluding the right of a waterworks company to compensation for profits, such a company, which has accepted a charter subject to the right of the corporation to acquire it upon paying the value of its works and property at the end of a specified time, is entitled to compensation based upon the valuation of the existing property of the company, without any allowance for compensation for future profits, or for the taking away from it of the right to supply water to its customers at a profit. *Cornwall v. Cornwall Waterworks Co.* 29 Ont. Rep. 350.

It is stated in this case that the arbitrators are not necessarily to be governed by the sum expended by the company in erecting the work, and purchasing the property, but they are to fix compensation at what the company at the time of the arbitration could have erected the work and purchased the property for, making due allowance on the one hand for wear and tear, and on the other, perhaps, for outlay incurred in work of a necessary but experimental character. It does not appear in this case that anything more than physical valuation of the plant was taken into consideration; neither does it appear that the attention of the court was directed to this point. Compare with *Monongahela Water Co.'s Case*, 223 Pa. 323, 72 Atl. 625, *infra*, II. d, (g) (1),

trenches in which to lay 252 service pipes; and, sixth, that the going value determined by the commission and included in the amount fixed by it was based upon improper considerations, and was inadequate in amount.

In the first five of these propositions the circuit court held with the plaintiff, and on the sixth with the defendant, and rendered judgment that the railroad commission alter and amend its previous order in accordance with the conclusions so reached. Both parties appeal.

Messrs. Lines, Spooner, Ellis, & Quarles, for plaintiff:

The Constitution and the statute have declared that just compensation shall be

where the term "property" was held to include the franchise of the company.

The valuation of a waterworks plant should not be confined to the actual cost of construction less the depreciation by use and decay, under an ordinance granting the franchise, which provides that the city may purchase at the fair and equitable value of the property, which shall be placed at the actual value of the work, land, buildings, machinery, and equipments including the franchise granted. *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735.

Neither is it confined to cost of reproduction.

Neither the reproduction cost of the plant, nor the cost at present of a new one differently constructed, but equal or even superior in efficiency to the plant, is the sole test of the compensation to be awarded, but this must be considered in connection with other elements, such as the fact that it is a completed structure connected with buildings prepared for use, and that the company is a going concern. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The mere cost of reproduction of the plant is not a proper criterion for the determination of the compensation. *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

The court in *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555, does not go into any critical examination of the elements making up the award of the arbitrators in that case, but relies largely upon the award. The commission here considered the cost of the reconstruction of a new plant not identical, but equally as efficient for the required purposes, and the objection was made by the water company that the arbitrators excluded from the matters considered many things which the water company had, which had cost a considerable sum, and which were elements of value in its plant. The court merely states that the answer to this contention is that, while these were

paid, and the ascertainment of that is a judicial inquiry.

3 Dill. Mun. Corp. 5th ed. § 1036; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; *Bauman v. Ross*, 167 U. S. 548, 583, 42 L. ed. 270, 286, 17 Sup. Ct. Rep. 966; *Isom v. Mississippi C. R. Co.* 36 Miss. 300; 2 *Lewis, Em. Dom.* § 887.

The compensation must be a full and perfect equivalent for the property taken.

Monongahela Nav. Co. v. United States, 143 U. S. 326, 343, 37 L. ed. 468, 474, 13 Sup. Ct. Rep. 622; *Lewis, Em. Dom.* § 462; *Milwaukee & M. R. Co. v. Eble*, 3 Pinney (Wis.) 358; *Welch v. Milwaukee & St. P.*

elements of value in the existing plant, if it was to be sold, they might yet be such structures as no reasonable man would duplicate in erecting a new plant, and that many of them had been constructed for purposes which had been found futile and had been abandoned for the object for which they were originally constructed, although some of them had been made to serve other purposes which could just as well have been accomplished at less expense. It is finally stated that there is no showing that these matters "affected the award in fact made."

Under a power of purchase reserved in an ordinance granting a franchise to a gas company, which provides that the city shall have the privilege of purchasing "all the pipes, buildings, privileges, and apparatus constituting the gas works, . . . the price or value . . . to be ascertained . . . by five disinterested persons," the value is not limited to a valuation of the pipes, buildings, and apparatus of the gas company. *Covington Gaslight Co. v. Covington*, 22 Ky. L. Rep. 796, 58 S. W. 805. The court states that "it certainly was never contemplated that [a gas company] . . . should expend its time, money, and energies in building up and developing a business, and then be compelled to sell it at the mere cost of reproduction of its physical features, receiving no consideration for the greater value which comes from the successful development and operation of the plant."

To measure adequately the structure value of a water system, there must be considered, among other things, the present efficiency of the system, length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop such new system to the level of the present one in respect to business income, and the added net income and profit, if any, which, by its acquirement as a going concern, would accrue to a purchaser during the time required for such new construction and for such development of business and income. *Ken-*

R. Co. 27 Wis. 108; Jeffery v. Chicago & M. Electric R. Co. 138 Wis. 1, 119 N. W. 879; 15 Cyc. 687, 695, 757; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Allentown & C. Turnp. Co. v. Lehigh Valley Traction Co. 174 Pa. 273, 34 Atl. 565; Clarion Turnp. & Bridge Co. v. Clarion County, 172 Pa. 243, 33 Atl. 580; Montgomery County v. Schuylkill Bridge Co. 110 Pa. 54, 20 Atl. 407; Consolidated Gas Co. v. New York, 157 Fed. 849.

The value of property like a waterworks plant does not depend alone upon the cost of construction or reproduction, but also upon the franchises conferring the right to operate and charge for services, and upon the extent of the acquired business.

nebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

(b) Method of determining material value.

In arriving at the value of the physical plant, in so far as this is material, the original cost of the construction is not conclusive of the value.

The original cost of construction cannot control, for it is the present value that is to be determined, and "original cost" and "present value" are not equivalent terms. National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

Under a statute authorizing the taking of a water company's plant at a "valuation of said plant, property, and franchise at what they are fairly and equitably worth," the actual cost of a water plant and property, together with proper allowances for depreciation, is local and competent evidence upon the question of the present value of the same, upon a taking under eminent domain proceedings, but is not conclusive of such value. It is subject to inquiry as to whether the works were built prudently, and whether they were built when prevailing prices were high, so that actual cost in such respect may be present value. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

Prior cost is a proper, but not the only, criterion of present value, since the present value may be affected by the rise or fall of prices of material, and if in such a way the present value of the structure is greater than the cost, the company is entitled to the benefit of it; if less than the cost, the company must lose it. Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537.

The construction account of the water company is not conclusive upon arbitrators, especially where in the alleged expenditure there are contained many things which have proved useless or nearly so, and of little or no actual value to a pro- 47 L.R.A.(N.S.)

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537.

Structural value is cost of reproduction less a proper allowance for depreciation.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup.

posed purchaser of the waterworks plant, and also where there have been included items which were in whole or in part only replacements of worn-out and outgrown appliances. Eau Claire v. Eau Claire Water Co. 137 Wis. 517, 119 N. W. 555.

See also Cornwall v. Cornwall Waterworks Co. 29 Ont. Rep. 350.

But a water company which, in good faith, made a contract for the construction of a plant to be paid for substantially on the basis of the cash market value of it at completion, and made a settlement with the contractor fixing the amount due him in accordance with the contract, and owes this amount either to the contractor or to a creditor who has lent it the money to be paid to the contractor, or in part to one and in part to the other, is entitled to have such amount considered as the actual cost of the property, where the plant is taken by the city after it has been operated by the company for only four months, under a statute authorizing the city to take the plant of the company on payment to said company of "the actual cost of its franchise, works, and property of all kinds held under the provisions of this act." Falmouth v. Falmouth Water Co. 180 Mass. 325, 62 N. E. 255.

The reproduction cost less depreciation has been held to be a proper method of arriving at the value of the material part of the plant.

The court in Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 975, holds that the correct method of determining the value of the material plant is by the cost of reproduction less depreciation. In this case the court separates the elements which make up the total valuation of the plant. See, "Franchise," II. d, 2 (g), *infra*.

Although it is not so directly stated, the court in Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615, apparently assumed that the cost of duplication less depreciation is the value of the physical property.

This seems to have been the method of

Ct. Rep. 148; Consolidated Gas Co. v. New York, 157 Fed. 849; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A. (N.S.) 1209, 118 Pac. 354; Re Cashton L. & T. Co. 3 W. R. C. R. 67; Hill v. Antigo W. Co. 3 W. R. C. R. 623; Paine v. Wisconsin Teleph. Co. 4 W. R. C. R. 1; Ashland v. Ashland W. W. Co. 4 W. R. C. R. 273; State Journal Co. v. Madison G. & E. Co. 4 W. R. C. R. 501; Ripon v. Ripon, W. & L. Co. 5 W. R. C. R. 1; Appelton v. Appelton W. W. Co. 5 W. R. C. R. 276; Re Fond du Lac W. Co. 5 W. R. C. R. 482; Re Manitowoc W. W. Co. 6 W. R. C. R. 76; Marinette v. City Water Co. 7 W. R. C. R. 374.

The going value should include the value of the earning capacity.

National Waterworks Co. v. Kansas City,

27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Norwich Gas & Electric Co. v. Norwich, 76 Conn. 565, 57 Atl. 746; Galena Water Co. v. Galena, 74 Kan. 644, 87 Pac. 735; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A. (N.S.) 1209, 118 Pac. 354; Spring Valley Waterworks v. San Francisco, 124 Fed. 574; C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348; Des Moines Water Co. v. Des Moines, 192 Fed. 193; Omaha

determining the value of the material plant in Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977, but so far as is shown by the report, there was no dispute on this point.

In determining the value of the mains, pipes, and fittings regarded as a plant *in situ* capable of earning a profit, the local board which was placing the plant arrived at this value "by taking the cost of the mains, pipes, and fittings, of laying them down, and making good the ground, and deducting a sum for depreciation." The court suggests that this might not be the proper way for finding the value of the plant as a going concern in every instance, but that the basis itself, that is, the plant as a concern *in situ* capable of earning a profit, is correct. Stockton & M. Water Bd. v. Kirkleatham Local Bd. [1893] A. C. 444, 63 L. J. Q. B. N. S. 56, 1 Reports, 288, 69 L. T. N. S. 661, 57 J. P. 72.

No question was raised over the action of the commissioners in Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 133, in considering the cost of reproduction of all that part of the physical plant used in pumping and delivering water, less any depreciation.

See subdivision II. d, 7, where cases in which the statute makes the cost and interest the compensation, are discussed.

(c) Condition of plant.

The quality of the water furnished by the company and of the service rendered, and the fitness of the plant to meet the reasonable requirements of consumers in the present and the future, are material questions in fixing the valuation of the plant. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The fact that insurance rates have been raised in the municipality on account of defects in the water system was shown in Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533, and it is stated that it is questionable whether such evidence would be admissible before a jury 47 L.R.A. (N.S.)

upon the question of value, but that in this particular case it could do no harm beyond tending to prove that the waterworks were not as good as the average,—a fact which, if proved, could not affect a valuation arrived at as the commissioners in this case arrived at it.

The water right of the company, taking into account not only the land, reservoirs, dams, and everything else that created the water right, but also the quantity and quality of water that gathered at this point and its adaptability to the purpose for which it was in use when sold, was valued by the commissioners in Newburyport Water Co. v. Newburyport, *supra*, at what they deemed it was worth for the purposes of its use by the city, taking into account its capacity, adaptability, usefulness, and connection with and relation to the plant. The commissioners also took into consideration the fact that there was only one other practicable source of supply that could be availed of to supply the city with the same quantity of water that had been supplied by the company, and heard evidence offered as to the probable cost of creating and maintaining a water right at this source to take the place of the water right used by the company. No specific objection was made to the action of the commission on this point.

(d) Water and water rights.

The water rights in a reservoir and the water which gathers there from springs or by percolation must be compensated upon a taking of the plant of the water company. Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977.

The water company is not entitled to full compensation for water and water rights which it has no right to use for domestic purposes, but only for mill purposes, but compensation must be made for the use to which the water company is entitled, although it may not be authorized to own and conduct a mill. *Ibid*.

A municipality has a right to object to the title of the water company to water

v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615.

The appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop such new system to the level of the present one, in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction and for such development of business and income.

Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Hill v. Antigo Water Co. 3 W. R. C. R. 623; State

rights which it claims by user for a part of a year, and test the title of the water company by the question whether the rights of an owner of the water in question, who has not elected to treat this use as a taking of it, have been extinguished. *Ibid*.

Although a water company may not own the fee to the bottom of a pond, having only a mill privilege in the waters therein, and although the waters of the pond cannot be made fit for the purposes of a domestic water supply without acquiring this fee, the water company is entitled to compensation for the mill privilege, since this is of value as a step toward the ownership of the waters. *Ibid*.

The fact that the waters of a pond in which the water company had mill privileges were not in actual use when the property was transferred to the city, does not prevent the water company obtaining compensation for its mill privileges. *Ibid*.

The appraisers in Gloucester Water Supply Co. v. Gloucester, *supra*, considered an available water supply of the company as not enhancing the value of its supply on account of the presence of such supplementary sources, but the fact that they could be so employed as preventing any impairment under any claim that the company's sources would be shortly exhausted and therefore likely to be abandoned.

In Gardner Water Co. v. Gardner, 185 Mass. 190, 69 N. E. 1051, the commissioners considered the right of the water company to use and sell the water of a lake in which they had acquired rights subject to the right of the state to regulate the rate, to authorize competition, to revoke the company's right to use the public ways of the municipality for its pipes and hydrants,—thus leaving it with the right only to sell its waters wholesale to a distributing company or to the town, or to distribute them through pipes laid exclusively on private land,—to revoke the company's charter, to dispose of any part of the waters of the lake not required for the supply of the inhabitants of Gardner, to 47 L.R.A.(N.S.)

Journal Co. v. Madison G. & E. Co. 4 W. R. C. R. 501; Ripon v. Ripon L. & W. Co. 5 W. R. C. R. 1; Re Fond du Lac W. Co. 5 W. R. C. R. 482; Re Manitowoc W. Co. 6 W. R. C. R. 76; Marinette v. City Water Co. 8 W. R. C. R. 334.

Just compensation requires that the property owner receive interest from the time he is deprived of the use of his property until compensation is paid.

Jeffery v. Chicago & M. Electric R. Co. 138 Wis. 1, 119 N. W. 879; Lewis, Em. Dom. § 499; Mills, Em. Dom. § 175; 15 Cyc. 929; West v. Milwaukee, L. S. & W. R. Co. 56 Wis. 318, 14 N. W. 292; Kluender v. Milwaukee, 57 Wis. 636, 15 N. W. 805; Uniacke v. Chicago, M. & St. P. R. Co. 67 Wis. 108, 29 N. W. 899; Neilson v.

control, lease, or sell the use of the lake for fishing, boating, ice cutting, and other purposes not interfering with its use for the water supply in the municipality, to control the operations of the company, and its use of the water of the lake to the extent reasonably necessary to protect the purity of the water, and otherwise to exercise over the company the police power of the state within the limits set by the state and Federal Constitutions. The only exception discussed by the court to this method of appraisal was as to the rights in the waters of the great pond.

No exception was taken to the action of the commissioners in Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533, in including in the compensation the value of water collected in the reservoir and wells upon the date of the transfer. See this case under II. d, 2, c, *supra*, also.

See also Kennebec Water Dist. v. Waterville, *supra*, II. d, 2, c, as to quality of water.

(e) Fact that utility company is a going concern or has an established business.

The fact that the plant is a going concern may be considered by the appraisers in arriving at the compensation. Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977.

The commissioners allowed for the fact that the water plant was a going concern, in Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533, and this allowance is approved by the court.

The value of the plant as an established and going concern should be considered in determining the fair and equitable value of a waterworks system, under the provision of an ordinance granting the franchise, that the city should have the right to purchase the plant and appurtenances thereto "at their fair and equitable value, which shall be placed at the actual value of the work, land, buildings, machinery, and equipments, including the franchise hereby

Chicago & N. W. R. Co. 91 Wis. 557, 64 N. W. 849; *Stolze v. Milwaukee & L. W. R. Co.* 113 Wis. 44, 90 Am. St. Rep. 833, 88 N. W. 919; *Re Cashton L. & P. Co.* 3 W. R. C. R. 67; *Re Fond du Lac Water Co.* 5 W. R. C. R. 482.

Any law which casts upon the property owner the burden of either ascertaining or enforcing payment of just compensation at his own cost is unconstitutional.

Stolze v. Milwaukee & L. W. R. Co. 113 Wis. 44, 90 Am. St. Rep. 833, 88 N. W. 919; 2 Lewis, Em. Dom. 2d ed. § 559; *Re New York, W. S. & B. R. Co.* 94 N. Y. 287; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

An indeterminate permit is a franchise which continues in force until the municipi-

palty exercises its option to purchase, or it is otherwise terminated by law.

Public Utility Act, § 1, Subdiv. 5; *La Crosse v. La Crosse Gas & Electric Co.* 145 Wis. 408, 120 N. W. 530; *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

It is a property franchise as distinguished from a corporate franchise, and is not within the power of repeal reserved to the legislature in the Constitution.

Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; *State ex rel. Atty. Gen. v. Portage City Water Co.* 107 Wis. 441, 83 N. W. 697; *Linden Land Co. v. Milwaukee Electric R. & Light Co.* 107 Wis. 493, 83 N. W. 851; *Re Southern Wisconsin Power Co.* 140 Wis. 245, 122 N. W. 801; *Water Power Cases*, 148 Wis. 124, 38 L.R.A.(N.S.) 526,

granted." *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735.

In *Covington Gaslight Co. v. Covington*, 22 Ky. L. Rep. 796, 58 S. W. 805, the city assigned its option to purchase, and in an action by the assignee to take over the property, the contract of the gas company with the city, by which it was granted the exclusive privilege of laying gas pipes under the streets of the city of Covington for a period of fifty years, and also the exclusive right of lighting the streets and furnishing the inhabitants of the city with gas, subject to the right of the municipality to purchase the plant, was held to be a proper element to be taken into consideration in estimating the value of the plant. It is stated that the company is entitled to have every element which contributes to the pecuniary value of the plant taken into consideration, and this includes not only the cost of reproducing the physical features of the plant, but the additional value created by their connection with the buildings, and the fact that the plant is in actual operation, and all the privileges, rights, and franchises enjoyed by it, which tend to enhance its pecuniary value.

See *Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615, supra, II. d, 2 (a), where it was held proper to consider the fact that the plant of the water company was a going concern.

A joint water board created by a special act for the purpose of supplying a number of districts with water, which by the terms of the act is, when required by the sanitary authority of a certain district, bound to sell to such sanitary authority "all mains, pipes, and fittings belonging to the joint board within that district, other than and except any mains, pipes, or fittings used for service beyond the limits of that district, at a price to be fixed, in default of agreement, by an arbitrator" is entitled only to the value of the mains, pipes, and fittings regarded as a plant *in situ* capable of earning a profit, and not to a value based on the revenue which the joint board

was enabled to earn by means of such equipment. *Stockton & M. Water Bd. v. Kirkleatham Local Bd.* [1893] A. C. 444.

That the company had a right in the streets, a right to supply the public, that it had its customers, an income, and that its plant had a certain productiveness, are matters to be considered in fixing the compensation of the company. *Monongahela Water Co.'s Case*, 223 Pa. 323, 72 Atl. 625.

That the company has an established business built up after experiments and changes during a long period, and at the risk of private capital, so that the result is a good working plant, is properly considered as entering to some extent into the value of the plant. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746. See statutory provisions in this case under II. d, 2 (a), supra, and II. d, 3, infra.

A water company is entitled to compensation for its plant over and above the cost of reproduction, from the fact that it has a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city; that it has not only the capacity to earn, but is actually earning, an income. *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853. The statute and ordinance in this case require the municipality to estimate the value of the waterworks as its fair and equitable value.

The fact that the water company does not own the connections between the pipes in the streets and the buildings, such connections being the property of the individual property owners, does not prevent the compensation including something for the fact that it has a going business. *Ibid.*

The fact that the plant is a running plant and the probable retention of the customer, which is what is meant by good will, are elements which are included in the valuation of the franchise (an element which was held a proper subject of valuation). *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 975.

134 N. W. 330; Calumet Service v. Chilton, 148 Wis. 334, 135 N. W. 131.

Such a franchise is a thing of value.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 342, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622; Willcox v. Consolidated Gas Co. 212 U. S. 19, 44, 53 L. ed. 382, 396, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Re Monongahela Water Co.'s Case, 223 Pa. 323, 72 Atl. 625; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Montgomery County v. Schuylkill Bridge Co. 110 Pa. 54, 20 Atl. 407; Whitten, Valuation of Pub. Serv. Corp. chap. 26, pp. 572, 591.

A water company is entitled to a return for skill and good management. Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537. But see Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533, II. d. 4, *infra*.

See Kennebec Water Dist. v. Waterville and Brunswick & T. Water Dist. v. Maine Water Co. II. d. 2 (a), *supra*.

(f) *Good will.*

The element of good will cannot be considered in so far as the system sought to be taken is practically exclusive. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The court in Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 975, after stating that the element of good will is included in the franchise, states that a monopoly has no good will, for its customers are retained by compulsion, not by their voluntary choice.

That good will is of little or no commercial value when the business is a natural monopoly is the opinion of the court in Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615.

Good will was required by statute to be included in Water Comrs. v. Westchester County Waterworks Co. 176 N. Y. 239, 68 N. E. 348, *infra*, II. d. 2 (g).

It was excluded by statute in Gloucester Water Supply Co. v. Gloucester and Newburyport Water Co. v. Newburyport, *infra*, II. e. 1.

Good will was not considered in Norwich Gas & Electric Co. v. Norwich, 76 Conn. 565, 57 Atl. 746. See the case under II. d. 2 (g), *infra*.

(g) *Franchise.*

(1) *In general.*

The valuation of the franchise has been governed largely by statute or ordinance in the cases that have passed upon the question thus far, and, as will be noticed in a majority of them, compensation has 47 L.R.A.(N.S.)

Messrs. George G. Greene and Jerome R. North, with Messrs. W. C. Owen, Attorney General, and Walter Drew, for defendant:

The indeterminate permit was not unlawfully excluded in valuation.

Plaintiff's franchise to operate expired by its terms when the city exercised its option to buy.

Re Appleton W. W. Co. 6 W. R. C. R. 118; Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 36, 50 L. ed. 353, 360, 26 Sup. Ct. Rep. 224; Helena Waterworks Co. v. Helena, 195 U. S. 383, 392, 49 L. ed. 245, 250, 25 Sup. Ct. Rep. 40; Appleton Waterworks Co. v. Appleton, 132

been allowed therefor. Where the state or municipality has the power to revoke the franchise, on principle, the obiter statement of the court in Brunswick & T. Water Dist. v. Maine Water Co. *infra*, that the franchise may be taken without valuation, seems correct. The indeterminate permit in APPLETON WATERWORKS CO. v. RAILROAD COMMISSION was similar in character, and was held not to require compensation. This question however, is likely to remain, as it has been, one of statutory construction rather than one to be settled by principles of general law.

In actual practice where the plant is in operation and has an established business, there is no well-defined line between value attributable to an established business or to the fact that the plant is a going concern, and value attributable to a franchise, however it may be theoretically. These elements are distinct, and may exist independently of each other, as in the case of a company whose franchise has expired or a company which has obtained a franchise and erected its plant, but has not yet put it in operation. But as stated above, where the plant is in operation and has an established business, the values attributable to these various elements are separated by no well-defined line. This leads to some difficulty in valuing these elements. It is frequently the case, especially where franchises are included, that elements more properly attributable to the fact that the company has an established business are attributed to the franchise.

Thus, the court in Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537, states that, even in cases where, by statute, franchises were not to be included in the valuation, it must have been implied that the property was to be valued as rightfully where it was, and rightfully to be used, and these rights are the franchises, at any rate, the most important ones.

A franchise which did not necessarily expire at the time the city was given the option was held a proper subject of valuation, in Monongahela Water Co.'s Case,

Wis. 563, 113 N. W. 44, 136 Wis. 395, 117 N. W. 816.

If it did not expire on purchase by the city, compensation for any unexpired term of it would not be just.

Northern C. R. Co. v. Maryland, 187 U. S. 258, 268, et seq. 47 L. ed. 167, 172, 23 Sup. Ct. Rep. 62; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 211, 48 L. ed. 406, 412, 24 Sup. Ct. Rep. 241; *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 257; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 274, 54 L. ed. 472, 477, 30 Sup. Ct. Rep. 330.

223 Pa. 323, 72 Atl. 625, where the contract required the "property" of the company to be paid for.

Under a contract with the water company entered into at the time of the granting of the franchise, giving to the town the option to purchase the "waterworks and all pipes, reservoirs, pumps, and other property, rights, and appurtenances connected with said works, . . . for a fair and reasonable price to be agreed upon," the franchise must be considered. "The res to be bought," says the court, "under this option, is exactly what would be the subject of purchase by a third party who should offer to buy of the defendant, the Bristol waterworks. It comprises the material plant, and the rights possessed by the defendant and exercised in the use of the material plant. . . . The town has the option to buy, not to extinguish, the rights they have given, which, together with other property and rights, make up what the defendant owns. Everything which the defendant can sell to another, he can sell to the town. A fair and reasonable price to the town is what would be a fair and reasonable price to anyone else." *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 975. See form of ordinance granting franchise, II. d, 2 (h), *infra*. Compare with *Toronto v. Toronto Street R. Co.* *infra*, III. f, 1.

A franchise for fifty years, granted subject to the right of the city to purchase "all the pipes, buildings, privileges, and apparatus constituting the gas works," must be considered in determining the valuation. *Covington Gaslight Co. v. Covington*, 22 Ky. L. Rep. 796, 58 S. W. 805. See this case II. d, 2, e, *supra*.

But under a contract by which a light, heat, and power company gave the municipality power to acquire its works and property before the expiration of its franchise, the company was held entitled to no compensation for the value of the earning power or franchise. In *Re Kingston*, 5 Ont. L. Rep. 348, appeal dismissed by privy council, 20 Times L. R. 448. The wording of the contract is not set out in 47 L.R.A. (N.S.)

Plaintiff should not be paid for any right to do increased business in the future.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 216, 48 L. ed. 406, 414, 24 Sup. Ct. Rep. 241; *Des Moines Water Co. v. Des Moines*, 192 Fed. 199; 2 Wyman, Pub. Serv. Corp. § 1133; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966, affirmed in 223 U. S. 655, 659, 56 L. ed. 594, 596, 32 Sup. Ct. Rep. 389; *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137; *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, 113 Pac. 676; *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204; *Whitten, Valuation of Pub. Serv. Corp.* §§ 630, 631; *Brunswick*

this case, but the substance is given in the opinion of the lower court in 3 Ont. L. Rep. 637, to be that the municipality shall have the option of purchasing and acquiring all the works, plants, appliances, and property of the company used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitrators. It was contended by the company that the franchise was included in the term "property." This contention, however, was denied, as above stated.

See *Stockton & M. Water Bd. v. Kirkleatham Local Bd.* [1893] A. C. 444, 63 L. J. Q. B. N. S. 56, 69 L. T. N. S. 661, 57 J. P. 772, *supra*, II. d, 2, e, where the compensation was confined to the material plant.

Although nothing is said of franchises in *Cornwall v. Cornwall Waterworks Co.* 29 Ont. Rep. 350, where the company was to be paid the value of its works and property, the elements included in that case did not include franchises.

Where the ordinance or statute provides that the franchise shall be considered, it must be valued.

The franchise of a waterworks plant must be included in an estimate of the value of the plant, under an ordinance granting the franchise, which provides that the city may purchase at the fair and equitable value of the property, "including the franchise hereby granted." *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735. The ordinance granted an indeterminate franchise, reserving the right in the city to purchase at stated periods.

A statute authorizing the taking of the plant of a water company, by a water district, under eminent domain proceedings, expressly required compensation for the franchise, in *Kennebec Water Dist. v. Waterville*, *supra*, II. a.

Where the state may revoke the franchise, the power of the state to permit the franchise to be taken without valuation seems to exist. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

But the state also has power to say that

t. T. Water Dist. v. Maine Water Co. 99 Me. 378, 59 Atl. 537.

It requires a special statute to subject the state to costs.

Noyes v. State, 46 Wis. 250, 32 Am. Rep. 710, 1 N. W. 1; *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504; *People ex rel. Cook v. Board of Police*, 39 N. Y. 506; *Scrafford v. Gladwin*, 42 Mich. 464, 4 N. W. 167; *Manor v. Jay County*, 137 Ind. 367, 34 N. E. 959, 38 N. E. 1101; *Trustees of Schools v. Shepherd*, 139 Ill. 114, 28 N. E. 1073; *Ward v. Alton*, 23 Ill. App. 475; *Greene County v. Hale County*, 61 Ala. 72.

Cost of reproduction is only evidence of value.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Stanislaus Coun-*

ty v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 215, 216, 48 L. ed. 413, 414, 24 Sup. Ct. Rep. 241; *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555; *Gleason v. Wan Keshah Conuty*, 103 Wis. 235, 79 N. W. 249; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966, affirmed in 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204; *Maheew v. Lighting Co.* 2 Pub. Serv. Com. (1st Dist. N. Y.) —; *Whitten Valuation of Pub. Serv. Corp.* § 168; *Re Fond du Lac Water Co.* 5 W. R. C. R. 482; *Re Manitowoc Water Co.* 7 W. R. C. R. 71; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *San Joaquin &*

compensation shall be made to the corporation for the taking of such franchise, and where it requires compensation of the corporation taking the property, such compensation must be made.

Under a statute authorizing the town to purchase "the franchise" of a water company and its corporate property, the franchise should be considered, although it is subject to termination at any time upon a vote of the town, the value to be ascertained with due regard to the fact that it is thus subject to termination. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063.

The statute authorizing the purchase by the municipality, in *Gardner Water Co. v. Gardner*, 185 Mass. 190, 69 N. E. 1051, refers to it as a purchase of "said franchise and property," and the water company was held entitled to compensation for its rights in a great pond given by the legislature.

Under a statute requiring the appraisal to be of the value of the company's property, including its good will and franchise, at its full value, but without enhancement from any of the provisions of the act, these elements must be included. *Water Comrs. v. Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348.

On the contrary in *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977, the statute authorized the municipality to furnish water, and required it to purchase the plant of a waterworks company, if it desired to sell, "without enhancement . . . on account of the franchise of said company."

The franchise was not valued in *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746, the report stating: "Neither the franchise nor the good will of the plaintiff has been valued, and they should not be sold." No objection was made to this so far as the report shows.

See *Tisbury v. Vineyard Haven Water* 47 L.R.A.(N.S.)

Co. 193 Mass. 196, 79 N. E. 256, *infra*, II. d, 7, where franchises were included by virtue of a statute.

(2) *How franchise value is determined.*

aa. In general.

It does not follow because a franchise is to be included in the valuation that it is to be given any great value. This must always depend upon its character. There are certain facts to be taken into consideration in determining this value. As to whether or not it is exclusive is such a fact.

The fact that a franchise is a limited one, not perpetual, and may be recalled by the state, is to be considered in determining the value thereof, as is also the fact that it is not exclusive, but other and competing franchises may be granted, and also that the right may be limited or qualified by express enactments, and that, by virtue of the franchise, the water company can charge only reasonable rates in any event. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

Whether or not the franchises of the company are exclusive, so that no other company can operate, or whether there is merely a lack of competition, is proper to be considered, as is also the fact that the charters under which the company is operating are subject to repeal by the legislature. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The fact that a franchise is not exclusive was taken into consideration in estimating its value, in *Re Brooklyn*, 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983, affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718. Apparently, however, the only disputed point in this case was whether or not the water company had a franchise which was exclusive and which could not be taken by the city.

So, the franchises of a going concern must be considered subject to all proper

K. River Canal & Irrig. Co. v. Stanislaus County, 191 Fed. 875; Washburn v. W. W. Co. 6 W. R. C. R. 74; Beloit v. Gas & El. Co. 7 W. R. C. R. 187.

No interest should be added to or included in the award.

16 Am. & Eng. Enc. Law, 1019, note 4; Cutter v. New York, 92 N. Y. 166; Grote v. New York, 190 N. Y. 235, 82 N. E. 1088; Stewart v. Barnes, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; Jones v. Orton, 65 Wis. 9, 26 N. W. 172; Davis v. Harrington, 160 Mass. 278, 35 N. E. 771.

Plaintiff, by accepting the \$255,000 reward, waived right to challenge the lawfulness of the award by appeal.

Grand Rapids v. Bogoger, 141 Wis. 530, 124 N. W. 659; Fiedler v. Howard, 99 Wis.

388, 67 Am. St. Rep. 865, 75 N. W. 163; Laird v. Giffin, 84 Wis. 286, 54 N. W. 584; Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 319, 36 N. W. 864; Alexander v. Alexander, 104 N. Y. 643, 10 N. E. 37, 2 Lewis, Em. Dom. § 808.

The going concern value of a utility plant is "that value which arises from its having an established business."

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 262, 91 N. W. 1081; Omaha v. Omaha Water Co. 218 U. S. 180, 202, 54 L. ed. 991, 1000, 30 Sup. Ct. Rep. 615; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977.

But it is only a characteristic of the

legal duties governing public service companies. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537.

And the fact that the charge for water was limited by a contract, and that the franchise was not a perpetual monopoly, is a proper subject of consideration in determining the compensation. Monongahela Water Co.'s Case, 223 Pa. 323, 72 Atl. 625.

See West Springfield v. West Springfield Aqueduct Co. supra, II. d. 2 (g) (1).

See also Bristol v. Bristol & W. Waterworks Co. infra, II. d. 2 (h).

See Gardner Water Co. v. Gardner, 185 Mass. 190, 69 N. E. 1051, supra, II. d. 2 (d).

bb. Effect of nonuser.

In taking the property of a water company, all the several franchises, rights, and privileges of the company whether presently used or capable of being used, so far as they relate in any manner to the territory included within the district covered by the municipality taking including specifically all the rights of the company to supply water to the municipality and all the inhabitants within the entire territory, all rights incidental thereto or connected therewith, and the right to receive and appropriate the net incomes and revenues from its business enterprise or undertaking, were considered as a whole in Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

The existence of the franchise is the criterion, not whether or not it is being exercised.

cc. Good faith in use of franchise.

The faithfulness or unfaithfulness of the company in the exercise of its franchise does not bear any such relation to the present value of the franchise as to make it a proper matter for consideration, although the company may have rendered

itself liable to a forfeiture by such unfaithfulness. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

dd. Earning power.

The value of the franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking, subject to the limitation that reasonable rates must be charged to the consumer. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6. The value thus shown should not be understood to be in addition to that mentioned in the discussion of this case under II. d. 3 (a), infra. The court here treats the franchise and property together.

ee. Taking under eminent domain.

That the taking of the franchises, rights, and privileges of a water company is authorized by an act of the legislature, in no respect destroys or impairs their value to the water company, and cannot diminish or affect the amount to be awarded as just compensation therefor. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

(h) Right to lay pipes in streets.

Under a statute fixing the compensation of a water company at "the fair value of said property for the purposes of its use by said city," but requiring the value to be estimated without taking into account the franchise of the company, the right to lay and maintain pipes in the streets, and its right to collect water rates, cannot be considered as elements of compensation to the water company, where water pipes are not an additional burden to the highway, since the authorization by the legislature of the city to furnish water impliedly authorized it to lay pipes and charge water rates; therefore the city acquired these rights directly from the

physical structure, not an item of separate valuation by the commission.

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746; *Cedar Rapids Gas-light Co. v. Cedar Rapids*, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966; *Eau Claire v. Eau Claire Water Co.* 137 Wis. 526, 119 N. W. 555; *State ex rel. N. C. Foster Lumber Co. v. Williams*, 123 Wis. 69, 100 N. W. 1048; *Spring Valley Waterworks v. San Francisco*, 192 Fed. 167.

Going value is not to be added to the cost of reproducing the structure new.

Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 519, 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*,

legislature, and not merely or at all, as successor to the water company. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533.

But where the town gave to the water company the use of its streets for laying pipes for a period of fifty years, and in the same ordinance the use of pipes owned by the town for the term of fifty years, or until the town should avail itself of the privilege reserved by the waterworks, compensation must be made for the right to use the streets for the laying of pipes, notwithstanding the entire franchise was granted subject to an option in the town to purchase. *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 40 Atl. 975.

See generally "Franchise," *supra*.

See *Gardner Water Co. v. Gardner*, 185 Mass. 190, 69 N. E. 1051, *supra*, II. d, 2, d.

(4) Right to take additional land.

It cannot be said, as a matter of law, that the right to take additional land, water, and water rights, if found necessary, which the town has acquired by its purchase, is not of some value, and that the commissioners could not properly consider it. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063.

(5) Policy of state in dealing with public service corporations.

The power of the state and its policy in dealing with public service corporations, as shown by the terms of a statute on that question, may be considered as an element in the value. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746.

3. Value as dependent upon earning power.

(a) In general.

As stated above, the compensation which must be made to a public utility company 47 L.R.A. (N.S.)

174 U. S. 755-757, 43 L. ed. 1160, 1161, 19 Sup. Ct. Rep. 804; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 215, 216, 48 L. ed. 413, 414, 24 Sup. Ct. Rep. 241; *Reagan v. Farmers' Loan & T. Co.* 164 U. S. 412, 38 L. ed. 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555.

On the question of value, the opinion of the original trier, be it an administrative or judicial body, is conclusive, on appeal or any kind of review.

1 *Sutherland, Damages*, 803; 2 *Lewis, Em. Dom.* § 654; *Peoria, B. & C. Traction Co. v. Vance*, 234 Ill. 36, 84 N. E. 607; *Brewer v. Tyrringham*, 12 Pick. 547; *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *Oster-*

is not ordinarily confined to a valuation of its physical plant. Not being so confined, various methods have been suggested of determining the value for which compensation must be made. It is apparent that when an estimation is to be placed upon such an intangible thing as value due to the fact that the business is a going concern, or value due to the franchise, some method other than that employed in valuing the material plant must be used. One such method is that of making it depend upon the earning power. The earning power as affecting the value of the franchise has been discussed under "Franchise," *supra*.

In the absence of statute changing the rule, in so far as the valuation is dependent upon the earnings of the company, such earnings must be estimated upon what would be derived from reasonable rates.

The actual rate charged by the company and its earnings are admissible in evidence and material upon the question of compensation; the value of the evidence, however, depends upon whether the appraisers shall find that the rates charged have been reasonable or not. If reasonable, these facts furnish one important test in determining the compensation, but if the charges have been excessive, past receipts should not be regarded by the appraisers as a proper test of value. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

Neither do rates which exceed in the aggregate a fair return on the company's property and franchises furnish any criterion of either franchise values or going concern values. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

And this is true whether the rates or profits are obviously extortionate, or merely shown by a preponderance of testimony to be unreasonable or excessive. *Ibid*.

And the net earnings of a water plant are not conclusive upon arbitrators as to its value, especially where the amount is derived from the earnings of the plant of

houdt v. Rigney, 98 N. Y. 222; *Lownsberry v. Rakestraw*, 14 Kan. 151; *State ex rel. Twin Lakes v. Hynes*, 82 Minn. 34, 84 N. W. 636; *Ex parte Lee Kow*, 61 Fed. 592.

The cost of reproducing the structure, as evidence of value, should be estimated at present prices of labor and materials.

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; *Driver v. Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726; *Sweaney v. United States*, 62 Wis. 396, 22 N. W. 609; *Port Huron & S. W. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882; *Detroit Western Transp. & Junction R. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73; *Eau Claire v. Eau Claire Water Co.* 137 Wis. 525, 119 N. W. 555.

Mr. B. H. Stebbins, Assistant Attorney General, also for defendant.

Winslow, Ch. J., delivered the opinion of the court:

A preliminary objection is urged by the defendant which, if sustained, would require a reversal of the entire judgment below, without regard to the merits. This objection is, in brief, that the plaintiff and its receiver, by accepting the \$255,000 award pending this action, have waived the right to challenge the lawfulness of the award, or further prosecute the action.

The contention must be sustained if the matter is opened up for a new trial on the merits by this action, and if the result may be a reduction of the award. *Grand Rapids v. Bogoger*, 141 Wis. 530, 124 N. W. 659. This simply involves consideration of the sections which authorize and define this action and determination of the legislative

the water company and of the water power which belongs to the city, for which no compensation need be made, and where it further appears that certain legitimate items of expense have not been deducted from the amount. *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555.

The earning power is required by statute in some instances to be taken into consideration in arriving at the value.

A statute requiring the price of such a plant to be "its fair market value, including, as an element of value, the earning capacity of such plant, based upon the actual earnings" at a certain date, does not require the earnings to be the sole basis of the appraisal, but it is obviously necessary to take other considerations into account, since the plant may have been strained to its utmost limit of productive power in order to increase the apparent earnings at a particular time; there may be defects in the plant fatal to the maintenance of earnings at the same rate, unless the defects are remedied, and therefore needed changes for the reasonable improvement of the plant may be considered in this connection. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746. It will be noticed that the "actual" earnings are here required to be taken into consideration. The court, after discussing the element of earnings above, concludes: "The net earnings of a producing plant are a more significant test of its value than the gross earnings."

In other instances earning power is excluded by statute.

A water company which does not have an exclusive franchise, and which, when the city is authorized by the legislature to supply its inhabitants with water, is given the option of selling its plant to the city at its fair value, without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company, is not entitled to have its past earnings considered in arriving at the fair value. *Gloucester Wa-*

ter Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977.

Under a statute similar to that involved in *Gloucester Water Supply Co. v. Gloucester*, supra, it is stated by the court in *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533, that past net earnings, even if admissible, ought not to have affected the result, since the different conditions under which the property would be used by a municipal corporation seeking only reimbursement, and not profit, diminish the instructiveness of the figures offered as to past net earnings.

Under a statute which was accepted by the water company, providing that the value of its plant should be ascertained without enhancement on account of future earning capacity or good will, or on account of the franchise of said company, the commissioners excluded from consideration these elements in *Newburyport Water Co. v. Newburyport*, supra, and no exception was taken to their action in this regard. Likewise, the earning capacity, past, present, and future, and also any income which the company had or might have derived from its plant, were excluded from the consideration of the commission.

Where a statute, in creating a joint water board and authorizing the construction of a water system, provided that the joint board, when so required by the local sanitary authority of any district, should sell to such sanitary authority "all mains, pipes, and fittings belonging to the joint board within that district . . . at a price to be fixed . . . by an arbitrator." the joint board is not entitled to a valuation fixed upon the income producing powers of the water plant, since this would constitute compensation for a revenue earning rate which was made possible by means of the mains, pipes, and fittings, and not merely for the mains, pipes, and fittings themselves. *Stockton & M. Water Bd. v. Kirkleatham Local Bd.* [1893] A. C. 444.

intent. Section 1797m—83 provides that either the municipality, the utility, or any creditor of the utility, may prosecute the action "to alter or amend" the order of the commission. Section 1797m—84 provides that if such plaintiff shall not establish to the full satisfaction of the court that the compensation fixed is unlawful, or some of the terms or conditions unreasonable, the compensation, terms, and conditions fixed by the commission shall be paid, followed, and observed in the purchase. Section 1797m—85 provides that if the plaintiff shall establish to the full satisfaction of the court, and the court shall adjudge, that the compensation is unlawful, or some of the terms and conditions unreasonable, the court shall remand the same to the commission, with findings of fact and conclusions

of law, setting forth in detail the reasons for the judgment and the specific particulars in which the order is adjudged to be unreasonable or unlawful. Section 1797m—86 provides that in such event the commission shall at once set a rehearing for the re-determination of the compensation as in the first instance, and shall forthwith otherwise alter the previous order with or without rehearing, as they deem necessary, so that it shall be lawful and reasonable in every particular.

It must be admitted that the language here is not as clear as might be wished, but we think the most reasonable construction of the various sections leads to the conclusion that the subject is not in any event to be opened up for a trial *de novo*, but only that the court is to examine into the specific

(b) Rates.

As to what are reasonable rates within the rules laid down in *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6, and *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537, it is held that reasonable rates are such as will produce a fair income to the company, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance and depreciation, and current operating expenses, allowing for the risks of the original enterprise, which were justly contemplated by those who made the original investment, and on the other hand will not exact of the public more than the services in themselves are worth.

The court in *Brunswick & T. Water Dist. v. Maine Water Co.* supra, after stating that reasonable rates are to be considered in determining the present value of the plant of a water company, and thereby the compensation to be paid the water company, concludes by saying that what is reasonable in a given case must be for the most part left to the good judgment of the tribunal which passes upon each particular case.

In considering the effect of rates upon the valuation, such rates must be no higher than the services are worth to the customers, not in the aggregate, but as individuals, even if the charges so limited would fail to produce a fair return to the company upon the value of its property or investments. *Kennebec Water Dist. v. Waterville* and *Brunswick & T. Water Dist. v. Maine Water Co.* supra.

4. Capitalization of income.

The capitalization of the income of a water company, even at reasonable rates, cannot be adopted as a sufficient or satisfactory test of present value, especially where the franchises are not exclusive nor perpetual, and it cannot be known that what are reasonable rates now would con-

tinue to be reasonable. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

Where a franchise granted to a waterworks company for a term of twenty years, or longer if renewed, was not renewed, a capitalization of the net earnings of the company will not show the "fair and equitable value," as required by the ordinance, since that implies a continuance of earnings and a continuance of earnings rests upon a franchise to operate the waterworks. *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

The court in *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533, states that if capitalizing profits would give a much greater excess over the value of the land, water, easements, and plant of the company than the commissioners allowed, the reasons are to be found in the franchise and monopoly of the company in its right to lay pipes in the streets, and partly, perhaps, in the personal skill of the management, none of which are things for which the city is to pay.

That a water board whose plant has been taken by a local sanitary authority is not entitled to a valuation based upon the revenue which the board was enabled to earn, see *Stockton & M. Water Bd. v. Kirkleatham Local Bd.* [1893] A. C. 444, supra, II. d, 3, a.

5. Selling price of capital stock.

That the selling price of the capital stock of a company owning a water plant is not to be considered as affecting the valuation of the property was admitted by both parties in *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6,—by the water district on general principles, and by the water company because of special circumstances of the case which showed that the property sought to be taken was included with other property not in question.

That the general estimate made by the

claims of error or unreasonableness made by the plaintiff in the action, and decide whether such specific claims, or any of them, are satisfactorily established, and, if so, is to make findings to that effect, setting forth in detail the reasons therefor and the "specific particulars" in which the order is held to be unreasonable or unlawful, and remand the matter to the commission for correction of the order in these particulars. If this be the correct conclusion, then it is manifest that the court could not, in this action brought by the utility corporation, reduce the amount of the award, and from this it follows that the acceptance of the amount of the award was not a waiver of the right to prosecute this action.

We shall take up the questions presented

public, as shown by prices at which stock is bought and sold, is some evidence of value of more or less weight according to the circumstances, was the opinion of the court in *Monongahela Water Co.'s Case*, 223 Pa. 323, 72 Atl. 625.

The market value of some of the company's stock was introduced in evidence in *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533, but this was not adopted as a standard of value, and is therefore not discussed by the court.

As to compensation being limited by amount of capital stock, see *West Springfield v. West Springfield Aqueduct Co.* *infra*, II. h.

6. Prior arbitration.

The amount fixed by another arbitration with no evidence as to the manner in which the arbitration was conducted, which was never accepted or carried into effect by the parties, is stated in *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555, to be hardly evidentiary; at best, to be merely the opinion of certain men, which could at the utmost have only advisory effect on the minds of the arbitrators.

7. Statute providing for payment of cost and interest.

By statute, in some cases, the amount invested is made the basis of compensation.

The statute in *Tisbury v. Vineyard Haven Water Co.* 193 Mass. 196, 79 N. E. 256, authorizing the taking by the town, prescribed in detail the method of determining the compensation for the property. Such taking was to be "on payment to said corporation of the total cost of its franchise, works, and property of any kind held under the provisions of this act, including in such cost interest on each expenditure from its date to the date of taking, as hereinafter provided, at the rate of 7 per centum per annum. If the cost of maintaining and operating the works of said corporation shall exceed in any year the income derived from said 47 L.R.A. (N.S.)

in the order in which they are stated in the statement of facts.

1. As to the matter of interest on the award. The law requires (§ 1797m—82) the award of "just compensation." In the present case the commission awarded \$255,000, to be paid July 1, 1911, and further provided that if an action should be brought to alter or amend the order, the time for payment should be extended for a period of six months after the final determination of the action.

We have been entirely unable to see how this latter provision of the order can be justified. It, in effect, penalizes the plaintiff for exercising a statutory right. Just compensation must mean fair and reasonable value at the time the property is taken;

works by said corporation for that year, then such excess shall be added to the total cost; and if the income derived from said works by said corporation exceeds in any year the cost of maintaining and operating said works for that year, then such excess shall be deducted from the total cost." The effect of this provision was held to be a guaranty to the corporation of the return of all the money invested in the enterprise with 7 per cent interest upon it for the time that it remained invested.

The interest provided by this statute is simple interest only. *Ibid.*

The statute involved in *Williamsport v. Citizens' Water & Gas Co.* 232 Pa. 232, 81 Atl. 316, provided that the municipality, upon taking the plant of the defendant, should pay therefor "the net cost of erecting and maintaining the same, with interest thereon at the rate of 10 per cent per annum, deducting from said interest all dividends theretofore declared." The questions in that case were confined to questions of practice concerning the methods of determining this cost.

e. Severance of plants.

The relative increase in the general expense of supervision and management of a water company owning a number of plants in different places cannot be taken into consideration in determining the compensation to be paid to such company upon the taking of one such plant, where the several plants are separate and distinct. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

But where two systems belonging to a company are connected, one of which is taken, and the act authorizing the taking provides for damages for the severance, and is accepted by the municipality, damages for the severance must be paid. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

The statutory rule for determining the compensation in *Brunswick & T. Water Dist. v. Maine Water Co.* *supra*, was, first, to find the value of the entire system

just compensation for property presently taken must necessarily mean its present value presently paid; it cannot mean its present value to be paid two years in the future, without interest. If payment is not to accompany the taking, but is to be postponed to a later period, it must certainly be upon the payment of interest for the deferred period. The statute evidently contemplates that the commission shall fix the time when the property shall be delivered to the municipal authorities, as well as the time when, and the manner in which, payment shall be made; all this is evidently included within the words "terms and conditions of sale and purchase." It is evident that the intention was to give the commission ample power to fit the terms and condi-

tions to the circumstances in each particular case; deferred payment for a reasonable period may doubtless be provided for if the financial condition of the municipality seems to call for such a provision, but in such case interest from the time of the taking of the property must be also provided for, if "just compensation" is to be attained.

In the present case, therefore, the provisions of the order of the commission, which provide that if the present action should be commenced, the time of payment should be postponed until six months after the final determination of the action, cannot be approved. If the time when the property was to be turned over and the compensation was to be paid was not to be definitely fixed by

before severance, then the value of what is not taken after severance; and the valuation of the property and franchises taken, and the additional damages for severance, if any, taken together, shall be so fixed as to equal the difference.

f. Plant more expensive than necessary.

If water can properly be secured from a nearer source of supply at a certain rate, the water company cannot have a valuation based on a higher rate, based upon the expense of bringing the water from a farther and more expensive source. *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537.

That the city cannot be called upon to pay for expensive machinery to do work which might be accomplished at less expense is the opinion of the court in *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555. See *supra*, II. d, 2 (a).

g. Property not directly connected with plant.

Real estate or other outside property not directly connected with the water system should be appraised at its fair market value, not at forced sale, but at a prudent and beneficial sale thereof. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

h. Limitation upon compensation.

In *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063, the water company was authorized to hold real and personal estate to the amount of \$60,000, and it was provided in the statute that the whole capital stock should not exceed \$75,000, and by the section which authorized the taking by the municipality, the municipality was authorized to issue notes, bonds, or certificates of indebtedness for the purpose of defraying the costs of such purchase to an amount not exceeding \$75,000. It was urged by the town that the

award to the water company could not exceed \$75,000. The water company, on the other hand, urged that, by a subsequent statute, it was authorized to issue bonds to an amount not exceeding its capital stock actually paid in, and that this should be regarded as an extension of the amount of real and personal property which the company was authorized to hold. It was held that the compensation to be paid the water company could not be limited to \$75,000, if the company actually owned real or personal estate adapted to the purposes of its incorporation beyond the amount prescribed by the legislature, but the town must pay the value of the property the corporation owned, if it was property which pertained to the purposes for which the company was incorporated, even though the amount of property exceeded that which the corporation was authorized to hold. This case is somewhat confusing. It is not clear whether the limitation of \$75,000 was urged because this was the capital stock of the water company, or because this was the amount of bonds the municipality was authorized to issue in payment. This confusion is increased by the statement of the court given above, that the town must pay the value of the property, even though this amount exceeded that which the corporation was authorized to hold. It nowhere appears in the opinion, other than the statement above indicated, that any claim was made that the compensation was limited to the value of the property the corporation was authorized to hold, unless it is assumed that the corporation had power to hold property to the amount of its capital stock, irrespective of any other provisions in the incorporating act.

i. Deduction on account of unreasonable rates previously received.

The fact that the company may have received more than reasonable rates for its services is not material, and the amount of such excess cannot be deducted from the amount to which the company would other-

the order, it should at least have been provided that, for such time as payment should be delayed after possession of the property was taken by the city, interest at the legal rate should be paid, and this regardless of the question whether any action should be brought or not.

As matter of fact, in the present case the receiver retained possession of the property until December 1, 1911, when he surrendered possession to the city under the provisions of the order made by the Federal court, directing him to surrender possession at that time, and requiring the city to pay the award by February 1, 1912 (afterwards enlarged to February 7th). For this period of two months the circuit court held that interest must be allowed, and as we think

correctly on the principles which have just been laid down. It is argued by the defendant that, because the receiver and the plaintiff consented to the entry of this order on the plaintiff's petition, there resulted a waiver of all claims for interest.

It is said that when the principal of a debt is paid and accepted as payment of the debt in full, the right to interest is thereby waived. Whether this be a correct principle or not, it does not apply to the circumstances here present. It is entirely clear in this case that there was no intention on either side, when the payment of the \$255,000 was agreed upon, that there should result thereby any change in the rights of the parties, or any difference in the result of this action, but rather the contrary.

wise be entitled. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

j. As of what time rights are determined.

The contract of purchase is fixed when the city notifies the company that it elects to take the plant, and offers to close the transaction at once, notwithstanding the proceedings to ascertain the value of the property are afterward had, when the compensation therefor is determined. The value determined upon should bear interest from the date of the election by the city, and the net profits arising from the operation of the plant since that date should be regarded as a credit to that extent on the purchase price of the property. *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735.

A waterworks company was held entitled to the possession of the plant and to the rentals, earnings, and revenues, until payment by the city of the amount found due as compensation; but during such period it was required to keep the plant in good repair, and pay, as and when the same shall mature, the several interest installments that may accrue on the mortgage bond. *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

That the city must pay for the plant as it exists at the time it is turned over to it is the opinion of the court in *Janes v. Racine*, — Wis. —, 143 N. W. 707.

k. Adjustment of mortgage indebtedness.

The municipality is not entitled to have the plant turned over to it free and clear of valid mortgage encumbrances, notwithstanding it could borrow money with which to pay off the mortgage bonds at a rate of interest less than that which they bore. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746.

The ordinance in *Galena Water Co. v. Galena*, 74 Kan. 644, 87 Pac. 735, provided 47 L.R.A. (N.S.)

that any encumbrance on the work at the time purchased should be assumed or paid by the city, provided the encumbrance did not exceed the purchase price, and an encumbrance less than the purchase price was assumed by the city in this case.

By the order of the appraisers in *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977, the amount of any outstanding bonds was allowed to be retained by the city to indemnify it for the payment of these bonds as they matured.

The city was given the right to enter into any agreement which it thought proper for assumption and the continuation of the lien, and payment or cancellation of any of the outstanding mortgage bonds in *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

l. Interest.

On award.

Interest was allowed from the date of the transfer to the city to the date of the payment of the award, in *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

But where the city has made a tender of the amount of an award, and has kept the tender good, it is not liable for interest thereon, notwithstanding the water company has been required to account for the net revenues earned by the works since the tender. *Eau Claire v. Eau Claire Water Co.* 137 Wis. 517, 119 N. W. 555.

As an element of damages.

Interest on the outlay during the construction of the work was allowed by the appraisers in *Cornwall v. Cornwall Waterworks Co.* 29 Ont. Rep. 350, and the court states that this is as far as the appraisers could properly go,—interest upon the cost of the works for the period after their completion, during which the annual expenses exceeded the annual revenue, not being allowable.

In the petition of the city upon which the consent order was made, the city states, as one of the reasons why the order should be made, "that said city has at all times been ready and willing, and is now ready and willing, to pay the valuation fixed by said railroad commission, as aforesaid, or any other valuation that may be fixed by said order as amended in said suit in said state court, if the same is amended, and that, by the vote of its electors at said election of August, 1910, set out in said ancillary bill, said city has pledged itself to pay whatever the final award may be."

The intention to preserve the status of the questions involved in this litigation in exactly the same condition as before, notwithstanding the payment and receipt of the

award, could hardly be more plainly stated. It was this sort of a payment, namely, a payment which left its rights intact in the litigation, to which consent was given, and none other. The circuit court was therefore right in its holding that interest from the time of the surrender of possession of the works, until payment should actually be made, should have been provided for in the order of the commission.

2. The circuit court held that the commission should have included in its order a provision that the city of Appleton should pay plaintiff's costs and disbursements, in case judgment should be rendered in its favor in an action brought by it to alter or amend the order. The evident result of this part of the judgment is that the city of Ap-

m. Costs.

It was held within the power of the commissioners to award costs, in *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. In that case the costs of reference were awarded against the city.

In *Monongahela Water Co's Case*, 223 Pa. 323, 72 Atl. 625, although there was no express provision in the statute concerning the question of costs, the court took the view that the statute provided that the company should be obliged to take such sum of money as shall be allowed on a fair appraisement, and could not therefore be compelled to take any less sum; that to require it to pay all or part of the costs would reduce the amount to be so paid, and therefore the city should pay the costs, and it was so ordered.

In the absence of express legislation authorizing the costs of litigation incurred by a water company to be taxed against the city, such costs cannot be thus taxed. *Falmouth v. Falmouth Water Co.* 180 Mass. 325, 62 N. E. 255. It is not clear whether the "costs of litigation" referred to are what are technically known as costs, or whether they include expenses which could not properly be called costs and taxed as such.

n. Penalty.

A company which has agreed to sell its plant to the city is not entitled to the 10 per cent additional compensation required by statute to be paid in the case of a compulsory purchase. *Re Kingston*, 5 Ont. L. Rep. 348, appeal dismissed by privy council in 20 Times L. R. 448. See III. h. infra.

III. Street railways.

a. Statutes.

A majority of the English cases dealing with the taking of street railways were decided under the English tramway act of 1870. Chapter 78, § 43, of this act, provided that the local authorities may, with-

in six months after the expiration of a period of twenty-one years from the time when promoters are empowered to construct a tramway, and within six months after the expiration of every subsequent period of seven years, require such promoters to sell the tramway, and thereupon such promoters "shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway and all the lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." It is further provided that when such sale has been made, all the rights, power, and authority of such promoters in respect to the undertaking sold shall be transferred to, and be exercised by, the authorities to whom the same has been sold.

b. What property is included.

The local authority must make compensation for a depot that is used with and suitable to the undertaking, although such depot is located outside the boundaries of its district. *Manchester Carriage & Tramways Co. v. Swinton & P. Urban Dist. Council*, 75 L. J. K. B. N. S. 839 [1906] A. C. 277, 93 L. T. N. S. 821, 70 J. P. 81, 22 Times L. R. 154, 4 L. G. R. 214.

Upon taking a tramway system, the local authority is not bound to take, and make compensation for, an extensive car factory which is not suitable for the purposes of the tramway company's undertaking within the district. *North Metropolitan Tramways Co. v. Leyton Urban Dist. Council*, 98 L. T. N. S. 136, 71 J. P. 536, 6 L. G. R. 1, affirmed in 98 L. T. N. S. 792, 72 J. P. 241, 6 L. G. R. 627. The car factory had been constructed in connection with a large system all of which had previously been taken by local authorities, except the part which was being taken in this case.

pleton is compelled to pay the costs of an action to which it is not a party. This seems a singular proposition at first blush, but the argument in its favor is not without force, and is in substance as follows: The proceeding before the commission is, in substance and effect, a condemnation proceeding. In case the award of the commission is too small, the action brought to alter and amend that award is the only means by which the plaintiff can secure that full and just compensation for his property taken which the Constitution and the law guarantee to him. This court has held in *Stolze v. Milwaukee & L. W. R. Co.* 113 Wis. 44, 90 Am. St. Rep. 833, 88 N. W. 919, that just compensation, within the meaning of the Constitution, must include the reason-

able costs and disbursements of such legal proceedings as the landowner is compelled to take to secure the ascertainment and payment of such compensation. Inasmuch as no costs can be taxed against the railroad commission, and the city is not a party to this action, the only way in which the law can be made constitutional is to incorporate in the original order a provision that the city pay the costs of a successful action of this nature.

The *Stolze Case* was a case where property had been taken by adversary condemnation proceedings by a railroad company which became bankrupt and went into the hands of a receiver before payment of the amount finally adjudged. The property was taken possession of by another company and

The local authority is not bound to purchase and pay for the private land of a tramway company included in the limits of its car factory, over which it has run its line, simply because the company originally included in its description of the tramway about a chain of that land. *North Metropolitan Tramways Co. v. Leyton Urban Dist. Council*, 98 L. T. 792, 72 J. P. 241, 6 L. G. R. 627.

In determining the compensation which must be made to a tramway company which, in conjunction with its own line, operates lines which it has leased from the city, upon a taking by the city under the tramway act of 1870, the value of all the depots, horses, cars, and plants belonging to such tramway company, should be included, and not merely that proportion of such property which the miles of line owned by the tramway company bear to the miles of line which it leased from the city. *Re Manchester Carriage & Tramways Co.* 87 L. T. N. S. 504, 18 Times L. R. 779, 67 J. P. 14.

Permanent pavements constructed by the city under a compromise agreement, in place of pavements to be built by the railway company, by the terms of which agreement, in lieu of the company's liability for the construction of such pavements, it agreed to pay a certain sum annually during the existence of the franchise, are not included in the property for which the city must make compensation. *Toronto v. Toronto Street R. Co.* 20 Ont. App. Rep. 125, affirmed in [1893] A. C. 511, 63 L. J. P. C. N. S. 10, 1 Reports, 418.

c. Physical property as a basis.

Under the tramway act of 1870, the valuation of a tramway is confined to what it would cost to construct the same, less depreciation, but, in determining this cost of construction, the fact that the tramways are in working condition or are established is taken into consideration.

The appraiser in the case of the *London Street Tramways Co. v. London City Council* included in the valuation "the consider-

ation of the value to the tramways company, or to the county council, measured by what it would cost either the tramways company or the county council to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation." In delivering the opinion of the court of appeal, *Lindley, L. J.* [1894] 2 Q. B. 189, states that "the tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." In the case of the *Edinburgh Street Tramways Co. v. Edinburgh*, the appraiser fixed the valuation at such sum "as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation to their present condition," and in estimating such cost took into account the fact that the tramways were "successfully constructed and in complete working condition."

In the latter case [1894] A. C. 456, 63 L. J. Q. B. N. S. 769, 6 Reports, 317, 71 L. T. N. S. 301, 25 Eng. Rul. Cas. 267, Lord Watson states that the right of property in a tramway line may be of three different degrees: First, it may be no higher than bare ownership of the materials of which the line is composed, without anyone having the right to retain or use them, *in situ*. Second, it may be that the property of the line does not carry with it the privilege of future user, but that others than the owner selling may either possess, or be in a position to acquire, such privilege. Or it may be, third, that the right to use the line for tramway purposes, in perpetuity or for a time limited, is inherent in the right of property. Continuing, Lord Watson states that the appraisers have dealt with the tramway as a subject belonging to the second of these classes, and have accordingly put upon it what may conveniently be termed a "construction value." The opinion of the court of appeal in the case of the *London Street Tramways Co. v. London County Council*, referred to above, was affirmed by the

used for railroad purposes. The landowner commenced proceedings under the statute to sequester the assets of the first-named corporation, and incurred large costs in such proceedings, but was unable to obtain satisfaction. He then brought action against the second railroad company to restrain it from using the property until full compensation had been made to him therefor. The latter company paid into court the amount of the award, and contended that no more could be required of it; but this court held that the landowner was entitled to have paid to him the costs in the sequestration proceedings, as well as interest on the award and the costs of the equitable action, and to an injunction restraining the second company from using the land for

railway purposes until such payment was made. This was on the ground that a law which throws upon the property owner the burden of paying the costs necessarily incurred by him in ascertaining and securing payment of just compensation for his property when condemned would be unconstitutional.

We are entirely satisfied with that decision, but do not consider it applicable to the present case. That was purely an adversary proceeding. The landowner consented to nothing, but was compelled to bring action after action to obtain his compensation, and if it were held that he must subtract from that compensation the costs of the litigation which he was forced to bring in order to secure its payment, it

House of Lords in [1894] A. C. 459, 25 Eng. Rul. Cas. 267, upon the opinion in the case of *Edinburgh Street Tramways Co. v. Edinburgh*.

So, under a special agreement between a tramway company and the city, by the terms of which the city was to buy the "railway" at a price to be settled, in case of difference, by the board of trade, and, upon the sale, the power of working the tramway, together with all other powers in respect to it, was to be transferred to the city, the tramway company was entitled to have the valuation fixed as for a "railway *in situ* capable of earning a profit," but not as for "the railway as an income earning concern." *Dudley v. Dudley, S. & Dist. Electric Traction Co.* 97 L. T. N. S. 556, 71 J. P. 481, 5 L. G. R. 1077. In this case the lord chancellor states that "the structure alone was to be valued." Lord Atkinson, in delivering his opinion, states that the "railway" must mean the physical structure.

The Canadian courts do not confine the valuation strictly to the physical structure. Thus, under a statute prohibiting a municipal council from granting to a street railway company any privilege for a longer period than twenty years, and providing that, at the expiration of this period, the municipal corporation may, after giving a certain notice, assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration, a street railway company is not entitled, upon a taking by the municipality, to compensation based upon a capitalization of its net earnings, but is entitled to a valuation based upon a railway in use, and capable of being used and operated as a street railway. *Berlin v. Berlin & W. Street R. Co.* 42 Can. S. C. 581.

d. Freedom from burdens imposed subsequent to organization of company.

Where the city is taking the property of a tramway company which was organ-

ized before it was the custom of requiring a contribution from the tramway company toward the widening of the streets, the value of the tramway is not enhanced by its being freed from liability to contribute to the widening of the streets in which it is laid, because of its previous organization, where in fact such widening has not been made, and no contribution has been made by the tramway company. *London, D. & G. Tramways Co. v. London County Council* [1905] 1 K. B. 316, 74 L. J. K. B. N. S. 143, 92 L. T. N. S. 124, 21 Times L. R. 172, 53 Week. Rep. 411, 69 J. P. 98, 3 L. G. R. 103.

e. Sums expended in obtaining franchise.

The appraiser in *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 456, 63 L. J. Q. B. N. S. 769, 6 Reports, 317, 71 L. T. N. S. 301, 25 Eng. Rul. Cas. 267, made allowance for the sums expended by the tramway company in obtaining parliamentary authority, in so far as such expenditure was necessary and proper; and no exception seems to have been taken to his action in this regard.

f. Franchise.

1. In general.

Under the tramway act of 1870 a tramway company which possessed a nontransferable, exclusive right to use the street for tramway purposes was held to have no right to compensation based upon the capitalization of the rental value of the tramway property. *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 456, 25 Eng. Rul. Cas. 267; *London Street Tramways Co. v. London City Council* [1894] A. C. 489, 25 Eng. Rul. Cas. 267.

The amount of capitalization of this rental value over and above the value of the physical property was treated here as compensation for the "undertaking" of the tramway company, or what is equivalent to a franchise. Lord Herschell, L. C., in delivering his opinion, refers to the fact that

would be very apparent that he would be deprived of a substantial part of the just compensation which the Constitution guarantees to him. When, however, a public utility company elects to surrender its franchise and receive an indeterminate permit under the utilities law, it consents to sell its plant to the city at any time when the city desires to take it, and consents also that it will abide by the provisions of the utilities law as to the method of securing its compensation. In effect it embodies all the provisions of the utilities law bearing on the subject into its consent, and agrees to be bound by them. Whether the proceedings by which the compensation is ascertained under the utilities law be called condemnation proceedings or not is a matter

of little moment. The property owner has voluntarily consented to be bound by them, and is in no position to complain of them.

Nowhere in the law do we find any provision, express or implied, authorizing the commission to include such costs in its order. As we have before said, the words "just compensation," as used in this law, plainly mean fair and reasonable value at the time of the taking; and it seems that it would be taking an unwarranted liberty with plain language to hold that the words include also the costs of an action which presumably will never be brought, and will never be necessary if the commission does its full duty. Costs are a creature of the statute, and are withheld unless the statute affirmatively grants them. The statute

the power given to the tramway company, although exclusive, was not transferable, and continued: "It is by virtue of this enactment (tramway act of 1870), and of this alone, that the local authority become entitled to the exclusive use of the tramway which was previously vested in the promoters. It is the statute, and not the company which originally constructed the tramways, which confers upon the local authority this right."

A franchise granted a street railway company to extend over a period of thirty years, at the expiration of which the municipality should have the right to purchase, and, if it failed to exercise the right, the right to purchase at the expiration of every five years thereafter, should not be valued where the municipality has exercised the right at the expiration of the thirty-year period. The agreement in this case authorized the municipality to "assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value." The possibility that the franchise might be exercised beyond this period, in the event of the failure of the city to purchase, was held not to be such a property right as required compensation. It will be noticed that the duration of the franchise was thirty years with a possibility of a further extension. MacLennan, J. A., suggests a difference between this case and that of a franchise for fifty years with a power in the municipality to purchase at the end of thirty years [compare, as to this point, with *Bristol v. Bristol & W. Waterworks*, supra, II. d, 2 (g) (1), and II. d, 2 (h)]. In the appeal of this case to the privy council, stress was placed upon the argument that this was a perpetual franchise, subject to termination as above stated. The privy council, however, agreed with the court of appeal, and affirmed the judgment. *Toronto v. Toronto Street R. Co.* 20 Ont. App. Rep. 125, affirmed in [1893] A. C. 511, 63 L. J. P. C. N. S. 10, 1 Reports, 418.

Under a statute prohibiting a municipality from granting a franchise to a street

railway company for a longer period than twenty years, and giving the municipality the right to purchase at the end of twenty years, a street railway company is not entitled to any compensation for its franchise where the property is taken at the end of that time. Whether the privilege of operation held by the company ceases to exist, or whether it continues in existence, but is by the statute transferred to the municipality, is stated by the court to be an academic, rather than a practical or material, question. If transferred to the municipality, it is so by the operation of the statute. It ceases to belong to, or to be exercisable by, the company, and is no longer available to it for its benefit or profit after the statutory notice; upon the expiration of the twenty years, it is in no sense the property of the company. *Berlin v. Berlin & W. Street R. Co.* 42 Can. S. C. 581.

Continuing further, the court states that the company's privilege of operating being no longer available to it, or exercisable by it, it cannot be regarded as still existing, and as something for which the company is to be paid as part of its railway and property assumed by the municipality. The company's right of property in the railway upon the expiration of the twenty years of enjoyment of the privilege of operation is property which does not carry with it the privilege of future user, but is such that others than the owners selling may either possess or be in a position to acquire. *Ibid.*

Upon such a purchase, a company which is operating lines in two municipalities is not entitled to compensation, upon a taking by one municipality of the lines within its limits, for its franchise in the other, since its right to the enjoyment thereof has expired. *Ibid.*

Although the municipality did not take the road immediately at the expiration of the twenty year period, no further franchise became vested in the company for which compensation was required, where it agreed to an extension of time, and the legislature ratified the agreement and ex-

withholds them. Grant that such a statute would be unconstitutional under the principles of the Stolze Case in adversary proceedings for condemnation, it is entirely within the power of the property owner to waive his constitutional right, and this he can easily do by voluntarily consenting to sell his property to the city at its option, and rely for his compensation upon the remedy which the statute gives, which in this case is an action in which, if successful, he recovers no costs. We conclude that the circuit court was wrong upon this proposition.

3. Should there be an allowance made for the value of the indeterminate permit? The commission held that it had no value, but the circuit court held that it necessarily

had some value, if nothing more than a nominal value, and that the commission must ascertain that value and consider it in fixing the just compensation.

Upon this question we quite agree with the commission. The privilege or right called an "indeterminate permit," which was first brought into our jurisprudence by the public utilities law, is simply an authority granted by the state to a given public utility to do business in a certain community, subject to all proper legislative action, either as a monopoly or in competition with other utilities, as the case may be, or as the commission may deem for the public welfare, until such time as the municipality chooses to exercise its right of purchase. When this right of purchase has been exercised by

tension, and authorized the municipality to take possession upon payment of the award, subject to any variation by the court. *Ibid.*

2. *Fact that franchise is not perpetual.*

The undertaking of a tramway company which was authorized to sell to a corporation by a special act must be valued and treated as an undertaking which the company only enjoys subject to the contingency of being compelled to part therewith under the terms of § 43 of the tramways act of 1870, and cannot be regarded as an undertaking which the company enjoys free from all obligations to part therewith, other than the obligation created by the special act itself. *Re Southampton Tramways Co.* 80 L. T. N. S. 236, 15 Times L. R. 217, affirmed in 81 L. T. N. S. 652, 16 Times L. R. 38, 63 J. P. 788.

g. Capitalization of rental value.

The capitalization of the rental value was treated as a method of arriving at the value of the franchise in *Edinburgh Street Tramways Co. v. Edinburgh and London Street Tramways Co. v. London City Council*, and is discussed under "Franchise," below.

That a capitalization of the net permanent revenue of a railway company is not a proper method of determining the valuation, see *Berlin v. Berlin & W. Street R. Co.* 42 Can. S. C. 581.

h. Penalty.

Under a statute defining the rights of a street railway company, and not providing for a 10 per cent additional compensation, the street railway company is not entitled to such additional compensation, as provided by general statute upon a compulsory taking. *Berlin v. Berlin & W. Street R. Co.* 42 Can. S. C. 581.

See II. n, *supra*.
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IV. Toll roads, bridges, and water ways.

a. In general.

A toll bridge erected under a franchise granted to enable the builders to maintain the bridge as a public highway becomes public property at the expiration of the franchise, and the owners are not entitled to any compensation therefor (*dictum*). *Sears v. Tuolumne County*, 132 Cal. 167, 64 Pac. 270.

A statute in this case provided that the bridge should become a free public highway upon the expiration of the franchise. It was urged that the statute imposing this condition was enacted after the franchise had been granted, and therefore after the right of the owners of the bridge had attached, and that it could not be given a retroactive effect. The court does not make its position clear, but apparently the decision is rendered independent of the statute.

So, upon a quo warranto proceeding, a bridge constructed by a company as a part of a highway over and across a river, and used for fifteen years as a part of the highway by the public upon the payment of toll, was held to have been dedicated to the public as fully and completely as it could have been by a deed of dedication, acknowledged and recorded, and, when the license to take toll expired, the public was held to take the bridge disburdened of the toll. *State ex rel. Green v. Lawrence Bridge Co.* 22 Kan. 438.

The same holds true in case of abandonment, and the failure of the proprietors of a toll bridge erected under a franchise granted to enable the builders to maintain the bridge at a public highway, to take any steps to rebuild the same after its destruction by fire for more than six years, and until within two years of the expiration of the franchise, constitutes such abandonment of the bridge to the public as will prevent the owners thereof from obtaining compensation upon the use of the piers by the public for the construction of another bridge. *Sears v. Tuolumne County*, *supra*.

giving the statutory notice, the authority to transact business is gone by its very terms. The element of value which remains in such a thing as this after its existence has been forever terminated is difficult to perceive. It is much like a franchise for a term of years after the term of years has expired. The railroad commission considered this question in 1908, in *Re Cash-ton*, 3 Wis. R. Com. Rep. 67, and treated it as follows: "Obviously the term of the indeterminate permit is indefinite, and limited only by the happening of the event specified in the statute. The moment the municipality exercises its option to purchase the plant of a public utility operating under an indeterminate permit, the life of such permit is terminated, and henceforth the same pos-

sesses no more value than a franchise for a definite term of years upon the expiration of the term. It is manifestly the purpose of the law to relieve a municipality of any and all obligation to make compensation for the privilege of doing business, granted to a public utility, when the municipality determines to acquire the property of such public utility. As the company's privilege of continuing in business has expired, no compensation can be awarded for a right that no longer exists."

It is said by the plaintiff in criticism of the foregoing, that this court has in two cases held that the aim of this legislation was to secure uniformity in public utility franchises (*La Crosse v. La Crosse Gas & Electric Co.* 145 Wis. 408, 130 N. W. 530:

See, further, as to the right and duties of toll bridge proprietors, note to *Clarks-ville & R. Turnp. Co. v. Montgomery County*, 58 L.R.A. 155 (particularly sub. div. IX), and supplementary note to *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30 L.R.A. (N.S.) 360.

b. For what compensation must be made.

Where, before the expiration of the franchise, the bridge or road is taken, compensation is not limited to the value of the bridge structure alone, but must include the franchises.

Compensation to a bridge company is not confined to the value of the bridge structure. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407.

But where the franchise is indeterminate, compensation must be made therefor, the amount necessarily depending upon the productiveness. *Ibid.*

The compensation to be paid a bridge company upon a taking of its bridge by a county under the right of eminent domain is not confined to the cost of the structure, but franchises, earning power, and market value of capital stock are elements to be considered also. *Mifflin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431, 22 Atl. 896.

That compensation must include compensation for the physical structure of the bridge, together with the franchise or right to take toll, is held also in *Clarion Turnp. & Bridge Co. v. Clarion County*, 172 Pa. 243, 33 Atl. 580.

That not only the bridge structure and appurtenances must be considered, but also the franchise or right to maintain the same and collect toll, is assumed in *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. 379, 27 Atl. 728.

Since a toll bridge, together with all fixtures necessarily incident to its use as a way, passes to those who succeed and become entitled to it by the expiration of the term of the franchise originally grant-

ed, or by a redemption by payment of a certain sum pursuant to a right reserved by the act of incorporation, or, when it is legally taken, by the right of eminent domain, the bridge company's right of property in the bridge as a bridge or structure belonging to them cannot be considered independently of the franchise in determining the compensation. *Central Bridge Corp. v. Lowell*, 15 Gray, 106.

The question is stated in the *Sunderland Bridge Case*, 122 Mass. 459, to be, What damages are to be paid to the proprietors for taking from them the right to maintain the bridge and way, and to take toll to the end of their term of their franchise? It is obvious that the value of the bridge as a structure cannot be fairly computed as damages, but such damages must include the franchises.

Nor in the case of a turnpike road is the compensation measured by the value of the physical structures, but it must include the franchises as well. *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

It was urged in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, where the Federal government was taking a lock and dam in a river owned by a company chartered by the state, that the Federal government did not take the franchise; that it did not need any authority from the state for the exaction of tolls if it desired to exact them; that it appropriated only the tangible property, and then either made use of it free to all, or exacted such tolls as it saw fit, or transferred the property to a new corporation of its own creation with such a franchise to take tolls as it chose to give. In answer to this, it was said that the franchise goes with the property, and the navigation company which owned it is deprived of it; that the government takes it away from the company whatever use it may make of it, and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken.

Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131), and that it must follow that there was no purpose to avoid the making of compensation for the value of an unexpired franchise. This conclusion does not by any means follow. There was doubtless desire to obtain uniformity of rates and service and privilege, to establish order in the place of infinite confusion, to eliminate the peculiarities and inequalities existing in the various municipalities of the state, and reach a point where the public should obtain like service on terms of substantial equality in all municipalities, so far as such a result could be obtained; but it does not by any means follow that this was the only object in the mind of the legislature. The elaborate provisions made for the acquiring

of title to such utilities by the municipalities themselves leave no doubt that ultimate public ownership was an idea very much in mind, and that the advantages resulting to the public from the possession of an option to purchase at any time must have been in view. One of those advantages plainly is that there can be no unexpired franchise to be considered or allowed for in case of purchase. To speak of a nonexistent right having value seems a solecism. An indeterminate permit doubtless has value so long as it is in force, depending on the extent of the business, the prospects of growth in the municipality, and the likelihood of its termination in the future by the exercise of the city's option, and other considerations which will occur to any mind.

c. Physical plant.

1. Cost of construction.

(a) In general.

The amount paid by the bridge company to the contractor who constructed the bridge is immaterial, since the county is entitled to take the bridge at its actual value at the time of taking, and the contract price may have been either below or above this value. *Mifflin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431, 22 Atl. 898.

Nor is the cost of repairs on the bridge material on the question of its value. *Ibid.*

Nor the cost of the masonry per perch. *Ibid.*

In a prosecution of county commissioners for allowing too large a sum upon the purchase of a bridge, it was held in *State v. Pierce*, 52 Kan. 521, 35 Pac. 19, that, under a statute authorizing the county commissioners to purchase bridges at their "true value," the board had no authority to buy bridges at the original cost of their construction,—an amount more than six times their true value.

In the absence of evidence of the actual cost of the property, this element cannot be considered in determining the compensation. *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

(b) Statutory rule.

A statute governing the rights of the bridge company in *Central Bridge Corp. v. Lowell*, 15 Gray, 106, provided that the franchise should expire in a certain time or sooner if the tolls from the bridge amounted to the amount invested, together with interest thereon at the rate of 9 per cent per annum, and also provided that the bridge might be redeemed and made a free bridge by remunerating the proprietors for the amount expended, together with interest thereon at 9 per cent, deducting the tolls which have been received, upon a tak-

ing by a city under eminent domain proceedings. The court adhered to this statutory rule, and held that the computation should be so made as to give the stockholders 9 per cent in the years when the net receipt of tolls fell short of 9 per cent on the capital for that year, if there were any such, from the income of succeeding years when it exceeded 9 per cent, so as to give the stockholders 9 per cent on the capital each and every year, such capital being reduced each year by surplus of income, if any, from the preceding year.

The statute involved in *Little Nestucca Toll Road Co. v. Tillamook County*, 31 Or. 1, 65 Am. St. Rep. 802, 48 Pac. 465, provided that, at any time after the expiration of ten years from the establishment of a toll road, it should be lawful for the county court of any county through which the road passed to pay such corporation the amount of money so expended and interest thereon, after deducting the amount of tolls and other profits received by it, and thereupon the said toll road should become the property of such county.

Where the amounts received as tolls are thus to be credited to the public on the amount subsequently due the proprietors of the bridge, and the management of the bridge is left entirely by the legislature to the bridge corporation, the act of the bridge corporation in making certain lands and the persons occupying them free of toll, and permitting the inhabitants of a municipality at one end of the bridge to pass at half toll, cannot be shown with a view of fixing a charge of fraud on the corporation. *Central Bridge Corp. v. Lowell*, *supra*.

Nor can evidence of custom in other corporations not pay salaries or other compensation to directors for services be received. *Ibid.*

2. Cost of reproduction.

What a county which is seeking to take might have erected a new bridge for is immaterial after it has shown its preference to take the bridge of the bridge com-

But when the guillotine has fallen on the right, and it becomes but a memory, can it be logically said to have even a nominal value? We have been unable to answer this question in the affirmative.

4, 5. The question whether, in estimating the present value of the plant and business, the commission should have taken into consideration the value of the existing permanent pavements over service pipes, and the cost of excavating and filling trenches in which to lay service pipes, is next to be determined. In order that this question may be clearly understood, a brief statement of facts is necessary. At the time of the taking over of the plant, there were 1,827 service pipes attached to the mains; the company had dug and refilled 1,575 of these

trenches at its own expense, and patrons had dug and refilled 252 of them under a rule of the company in force during the latter part of its business life, requiring the prospective consumer to pay for such cost. The service pipe here spoken of is that section of pipe between the main and the corporation cock at the curb line. The company has always furnished the curb box, corporation cock, lead connections, curb cocks, and fittings, and performed all the work of making the connections, and formerly furnished the pipe and did the excavating, but since the establishment of the new rule above mentioned, the consumer has been required to supply the pipe and do the excavating and filling.

The question comes into the case in this

pany. *Miffin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431, 22 Atl. 896. The court is apparently of the same opinion in *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407, although it is not apparent that this point was directly raised in that case.

3. Condition of structure.

In determining the value of the physical structure, its condition of repair and the method of construction may be considered. *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

Evidence of the quality and value of masonry in a certain bridge along the line of a condemned road is admissible, although it is not shown that the bridge is the property of the plaintiff, and although it is marked with the date, indicating its erection prior to the chartering of the plaintiff, where there is also evidence to show that the bridge was rebuilt after the chartering of the plaintiff, and the presumption exists, after a long lapse of time, in this case nearly a century, that such property along the line of the road belongs to the turnpike company. *Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County*, 228 Pa. 1, 76 Atl. 726.

The condition of the roadbed, value of tollhouses and tollgates, amount of tolls, market value of the stock, and the possible use of the road by an electric railway, are all elements to be considered by the jury in ascertaining the value of a toll road part of which is taken by the county. *Harrisburg, C. & C. Turnp. Road Co. v. Cumberland County*, 225 Pa. 467, 74 Atl. 340. The purpose of the taking in this case is not made clear from the opinion.

The fact that the stone in the abutment of piers is inferior in quality, and is badly laid up, and that there are cracks in the same at the time of the taking of the bridge, must be considered by the jury in fixing the value. *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. 379, 27 Atl. 726.

It cannot be said that there was any 47 L.R.A. (N.S.)

reversible error in permitting the ancient books of a turnpike company to be used as some evidence for the purpose of showing that in its original construction the road was an excavated and graded highway, where this was followed by the testimony of experts who had examined the road, and who had testified to the physical evidence that work of this character had been done. *Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County*, *supra*. In this case the turnpike company was chartered about a hundred years before the action was begun, and the court states that the proof offered was best obtainable upon this subject.

4. Changes after award.

The fact that the superstructure of the bridge above the piers and abutments was totally destroyed by a storm does not prevent the entering of judgment upon the award. *Sunderland Bridge Case*, 122 Mass. 459.

5. Liability to destruction.

The fact that an abutment is exposed to an extraordinary current which washed the foundations of the pier, and that the bridge is exposed to liability of destruction or damage from floods, tides, floating logs, and violent winds, which at times actually damaged it, must be considered in estimating the value of the structure. *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. 379, 27 Atl. 726.

An instruction to the jury that they "may" consider the liability of the bridge to destruction from flood or ice as affecting its value is not erroneous in that the judge refused to instruct the jury that they "must" consider such matters. *Miffin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431, 22 Atl. 896.

6. Tollhouses.

A canal bridge which is an approach to the main bridge and the tollhouse may be included in the property for which com-

way: The commission procured from their engineers a careful estimate of the cost of reproducing the plaintiff's plant at the prevailing prices at the time of the decision, and of the present value of the physical property based on such estimated cost of reproduction, and used these estimates as important, but not controlling, factors in reaching their final decision as to the 'just compensation which should be paid. The estimate so made of the actual cost of reproduction amounted to \$282,091, and the estimate of present physical value, based on the cost, amounted to \$242,127. In these estimates the cost of cutting through and relaying permanent pavement over the mains of the company in all streets where such pavements existed, amounting to over

\$17,000, was inserted and included in the totals, but the cost of relaying pavements over the service pipes aforesaid (estimated to amount to \$7,000) was not inserted or considered.

The plaintiff's contention is that if cost of reproduction is to be considered, it must rightfully include the expenses of opening and relaying the pavement over service pipes as well as over mains, and also the expense of excavating and filling the trenches for service pipes. The circuit court agreed with this contention, and held that the commission should consider these items in arriving at its result. It is argued in support of this view that the service pipe from the main to the corporation cock is unquestionably a part of the company's plant; that

compensation must be made, if they are a necessary part and parcel of the main bridge as a convenient and necessary approach to it. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407.

Where expenditures for a tollhouse were allowed the bridge proprietors, upon a statutory adjustment of the amount due them, and subsequently a city took the bridge under eminent domain proceedings, omitting the tollhouse, the court held that the statutory adjustment, having been accepted by both parties, was conclusive, but that the tollhouse should be sold and the amount received deducted from the damages given the proprietors, or its actual cash value should be estimated and such value as estimated be deducted. *Central Bridge Corp. v. Lowell*, 15 Gray, 106. Upon a second trial the amount due for the tollhouse was adjusted between the parties.

d. Franchise.

That the franchise must be included in the valuation, see IV. b. *supra*.

The fact that the franchise was subject to forfeiture unless the road was completed by a certain date should be considered in determining its value. *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

See *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407, IV. f, *infra*, where the income is treated as a method of valuing the franchise.

The rights which the state may have with reference to a company owning and operating a lock and dam, to purchase the property, cannot be considered upon a taking of the property by the Federal government under eminent domain proceedings. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

e. Value of capital stock.

In *Mifflin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431, 22 Atl. 896, 47 L.R.A. (N.S.)

the market value of the capital stock was held to be an element to be considered in ascertaining the value of the bridge and its corporate franchises, and a certified copy of the return made by the bridge company of the value of its capital stock to the auditor general under oath was held to be competent evidence as to this market value, and, while it did not conclude the bridge company upon the question of value, it was important evidence to that effect.

So, in *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905, the returns of a turnpike company to the state for purpose of taxation, setting forth the value of its stock, were held to be competent evidence upon the question of the value of such stock.

The admission of evidence of the price paid at a private sale for a large block of stock in the turnpike company about six years before the condemnation proceedings, is not erroneous where all the circumstances surrounding the purchase and the subsequent fluctuations in the price of the stock, are shown and the trial judge states to the jury that the testimony is not to be regarded as conclusive or binding evidence of market value, but only as some evidence which they had the right to consider in determining the question. *Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County*, 228 Pa. 1, 76 Atl. 728.

The county, in *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407, was held to have no reason to object to the fact that the market value of the stock was not taken as a criterion of the value of the property of the bridge company, since, if this had been taken, the probabilities were that the valuation would have been higher than it was.

f. Earning power.

As bearing upon the value of the franchises, it is competent to show the income of the bridge company for a few years back. In this case a showing for the five years previous was allowed. *Mont-*

in reproducing that plant it would be necessary to excavate and fill new trenches, and to cut through and relay the pavements; and hence, if cost of reproduction is to be used as a basis, or even as a material factor, in determining present value, it should include the cost of reproducing the whole plant. We think it is true that the part of the service pipe above mentioned is part of the plant, whether paid for by the company or by the consumer. In the absence of legislative provision to the contrary, it would not seem reasonable or feasible to make the division between the company's property and the consumer's property at any point short of the corporation cock at the curb. This, however, does not seem to us decisive upon this question.

Cost of reproduction must mean the cost which will be necessarily incurred by a reasonably prudent and careful man, using ordinarily careful business methods, in reproducing a plant of equal efficiency. Anything which, under such a conduct of the business, would cost nothing to reproduce, cannot logically be included. It is not denied that if the city or a new water company were to establish a new plant, the consumers could be required, as a condition of receiving water service, to do the work in question, and even furnish the pipe. Such a requirement is quite generally enforced at the present time in cities of this class. Conditions of life at the present time in such cities practically compel residents to

accept water service. Even in small cities the old-fashioned well is either tabooed by public opinion, or its use prohibited by health regulations. So it seems that there could be no question but that it would be entirely practicable, and in fact the only reasonably prudent policy, for a new company to require consumers to lay their own service pipes.

This is not the case where land or other property of value has been voluntarily donated to the old company. With regard to such property it has been held, in cases involving the fixing of rates, that it is rightfully to be considered in arriving at the cost of reproduction. This result is reached on the idea that a new company could not count on receiving such gifts. Whether the logic of these cases be correct or not, we do not decide; but in any event the principle does not apply to expenses which may legally be assessed, and in the exercise of good business judgment ought to be assessed, against the consumer. For purchase purposes at least, the only expenses which should be considered in the estimate of the cost of reproduction are those which are reasonably necessary in a prudently conducted reproduction. *Whitten, Valuation of Pub. Serv. Corp.* §§ 180-192; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

6. As to the question of the going value: The circuit judge held that the commission fixed the going value of the plaintiff's plant

gomery County v. Schuylkill Bridge Co. 110 Pa. 54, 20 Atl. 407.

The fact that a bridge company declared larger dividends than were authorized by law is immaterial on a taking of its property by the county, especially where the county, was the holder of a considerable amount of the stock and participated in the dividends. *Ibid.*

Past profits are a proper subject of inquiry in determining the amount of compensation to be awarded a bridge company, since the property is of a peculiar character and can hardly be said to have a market value. *Ibid.*

That the net profits of a bridge were appropriated to keep up a turnpike road of which the bridge was a part, so that no net income was produced from the corporate property as a whole, does not depreciate the value of the bridge. *Clarion Turnp. & Bridge Co. v. Clarion County*, 172 Pa. 243, 33 Atl. 580.

The earning capacity is to be considered by the jury, the weight to be given it to be determined by them. *Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County*, 228 Pa. 1, 76 Atl. 726.

In speaking of the compensation that must be paid to the owners of a lock and dam which were being taken by the Federal government, the court in *Monongahela Nav.* 47 L.R.A. (N.S.)

Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, says that, before the property can be taken away from its owners, the whole value must be paid, and that value depends largely upon the productiveness of the property,—the franchise to take tolls.

g. Competition.

The fact that a bridge free for all to travel has been erected from 1 to 2 miles below the bridge in dispute must be considered in ascertaining the compensation to be paid to the bridge company. *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. 379, 27 Atl. 726.

h. True measure is value to owner.

The value of the bridge to the county is not the criterion for determining the compensation, but its value to the company that is deprived of its property. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Westchester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905. This was the view of the court in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, where the Federal government took a lock and dam.

W. A. E.

and business at \$13,000, and that he was not fully satisfied that, in making this determination, the commission proceeded on a false theory, or applied an unsound rule, or that its conclusion was unlawful; hence, upon this subject, the court declined to make any alteration or amendment in the order of the commission. This finding is attacked by the plaintiff as unsupported by the evidence, and the claim is that the evidence in the case does not justify a finding that the commission allowed more than \$5,000 for the going value. It is also claimed that the commission should have allowed a much larger sum than either of the sums named as the going value of the concern.

At the threshold of these contentions a question of evidence is presented, which will be first considered. The report of the commission contains the tables made by the engineers showing the estimated cost of a reproduction of the plant at present prices, and enumerating the items of property and expense which were included in the total estimate. In these tables the actual cost of such reproduction was placed at \$282,000, and the estimated present value, after making the proper allowance for depreciation, at \$242,217. The item of excavating for service pipes and relaying pavements over such pipes does not appear in the tables, and clearly was not considered by the engineers. The report of the commission, however, contains no explicit statement showing that the commission approved or adopted the estimate of the engineers in its entirety; nor does it expressly enumerate the items which were included by the commission in estimating the cost of reproduction or present value, although it appears that the cost of reproduction was considered by the commission as having a very important bearing on the final result.

In view of the absence of findings showing just what part of the \$255,000 compensation was allowed for the physical property and what part for going value, the plaintiff called the commissioners as witnesses, and examined them fully as to their education and experience in matters of this kind; whether they based their conclusions upon the evidence presented, or relied in part on their own judgment; whether there were any reports of engineers or other agents of the commission, other than those embodied in their report, which the commission considered in reaching their conclusion; whether they reached the same by applying the same rules of law as would be applicable in a condemnation proceeding; what the difference was between the methods and principles observed by the commission in fixing valuations for rate-making purposes and in fixing

the same for the purpose of purchase of the property by a municipality; whether the cost of reproduction of the physical property was considered by the commission as one of the most important evidentiary facts in fixing the compensation in a purchase case; whether the commission had before it and considered evidence of the original cost of the works, and, if so, whether they considered that cost of little or much weight, and why all reference to it was omitted from the decision; whether the commission included in the estimated cost of reproduction any allowance for cutting through and relaying pavements, except where such expense had been actually incurred by the company; whether they included anything in the compensation for going value, and, if so, how much; what the principles were upon which the commission determined going value in cases of this kind; whether the commission regarded 6 per cent as a reasonable return upon the investment in property of this kind; whether the commission modified the report of the engineers as to the cost of reproduction, and, if so, in what items; whether anything was allowed for the value of the franchise; whether the commission understood the law to be that the full money value of the property must be paid; whether the fact that the public had a hostile feeling towards the company, because of defective service which it had rendered, was taken into consideration in determining going value; and whether the alleged inefficiency in the fire service and alleged impurity in the water supply was considered in arriving at the going value.

All of this evidence was seasonably objected to, and thus the question of the propriety of its admission is fairly presented, and becomes an important one, especially in view of the fact that the ruling will doubtless serve as a precedent for future action in cases of this nature.

The rule that testimony of arbitrators as to what transpired at the hearing and during their deliberations will not be received to impeach their award is quite well settled, and was stated and approved by this court in the *Eau Claire Case*, 137 Wis. 517, 119 N. W. 555, where the question arose concerning the award of a board of arbitration appointed to assess the value of a similar plant which the city of Eau Claire was taking over under the terms of a contract which provided for the fixing of the compensation by a board of arbitrators. No reason appears why that rule should not apply in full force to the railroad commission. It is a rule founded on good sense and public expediency, and is simply an application of the same principle which has been universally applied to the verdicts of juries. The idea

is that there should be no possibility of the overturning of a judgment or final determination of a controversy which has been reached after fair trial and hearing, by reason of the fact that one of the body which rendered the judgment at some later period, either honestly or dishonestly, or from mere failure of memory, impeaches the result by testifying to some defect in the mental operations of himself or his fellows, or to a mistaken view of the legal principles applicable to the case. Important decisions of this kind cannot be upset or discredited in this manner, if they are to be of any value. They are not subject to any such hazard. But it is equally well settled that where the record is silent on the subject, an arbitrator may be sworn to show what issues he considered, and what matters of fact were actually submitted and passed upon by the arbitrators, and sometimes to show that he acted under a mistake of fact as to the scope of the issues submitted to him. 4 Wigmore, Ev. § 2358.

In the present case it appears clearly from the report of the commission that the cost of reproduction was considered one of the prime factors in reaching the ultimate result, and it does not certainly appear (although the inference is persuasive) that the commission adopted the report of the engineers as to the cost of present reproduction, and thus excluded from their consideration the question of the cost of paving over service pipes and trenching for the same.

We think it was competent to establish this fact by the evidence of the arbitrators, because it did not appear from the report, and was not a question as to their mental processes, but simply whether a given fact was before them. Had the commission stated the fact in their report, there would have been neither occasion nor excuse for the resort to parol evidence. Under the principles just stated, we are unable to see the propriety of the examination of the commissioners upon any other question in this case. The report shows affirmatively that nothing was allowed for the value of the indeterminate permit or franchise, that the cost of paving over mains was included in the estimate of the cost of reproduction, and that the going value was considered as an essential element to be allowed for in reaching the final result, and so it became unnecessary and improper to inquire as to either of these facts. The compensation plainly could not properly be reached by adding together items of cost or values of specific items of property, physical or incorporeal, nor was it so reached by the commission, but rather by a comprehensive view of all the proper elements of value taken as a whole, and determining as accurately as possible

the revenue producing power of the entirety upon the basis of reasonable charges for service to the consumers. The mental processes by which this final result is reached by a commissioner, and the relative importance given by the mind to each element, as well as the legal or economic principles deemed by him to have a bearing on the result, are not subjects upon which the commissioners can properly be examined. Had the report of the commission stated all of the items of property and expense which they considered as entering into the cost of reproducing the plant, we think it clear that none of the parol evidence given by the commissioners would have been admissible. So far as the present case is concerned, we think the only evidence of this character properly received was the evidence showing that the cost of paving and trenching for service pipes was excluded from the estimated cost of reproduction; substantially all of the other evidence obtained from the commissioners related either to facts fully covered by the report, or to the methods of procedure adopted by the commissioners, the legal or business principles upon which they acted, or the operations of their minds in reaching their conclusions. We have discussed this question of evidence at some length rather because of the importance of having a definite and correct rule upon the subject in future cases, than because of its intrinsic importance in this case. As matter of fact, the testimony of the commissioners threw very little additional light on the case. The conclusion reached by the circuit judge, to the effect that the commission determined the going value of the concern to be \$13,000, seems to be based almost wholly on the fact that in the engineers' estimate of the physical value of the plant embodied in the report, the present value was fixed at about \$242,000, while the commission fixed the amount of the just compensation as \$255,000. The commissioners who were placed on the stand were unable themselves to name any definite sum which they were willing to say they considered in their minds as the "going value," although both testified in corroboration of the report that "going value" was considered and allowed for in arriving at the final result. The fact that the testimony of the commissioners was taken a year and a quarter after the order was made may serve to explain why the commissioners could not testify with certainty as to their mental processes, and may also serve as an additional reason why the reception of such vague recollections as testimony ought not to be allowed.

The term "going value" is somewhat vague, and is a comparatively recent addition to the terminology of the subject. It is

not the value of the franchise, and it is not the good will of the business; certainly it cannot be the latter in the case of a monopoly like the present. It has been variously spoken of as the "difference between a dead plant and a live one" (*Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615; or "the element of value which comes from the fact that the property is sold as a going concern" (*Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977); "the added value because of the company's being a going concern" (Commissioner Roemer in his testimony in the present case).

The existence of the term as designating a substantial element of value seems to be largely due to the fact that, in appraisal cases like the present, as well as in rate-making cases, there has been a very general adoption, both by courts and commissioners, of the plan of ascertaining by expert evidence the cost of reproduction of the existing plant, and then making a deduction for depreciation, and thus arriving at what is called the present physical valuation. This has been universally recognized, not as fixing the present physical value of the property or the business, but only as an important and helpful consideration which may throw much light on the question. It has the advantage of comparative ease and certainty of ascertainment. It is said by Whitten (*Valuation of Pub. Serv. Corp.* § 639) to be at present the most generally accepted basis of valuation for purchase or rate making. Construing the word "basis" to mean simply a fundamental fact or starting point, not in any sense exclusive or controlling, the statement seems to be substantially correct. Important as it may be, however, this physical valuation so obtained is but one of numerous facts to be considered in reaching the final result. The commercial value of the business in full operation and entitled to charge reasonable rates for its service must, however, be considered as approximating the compensation which should be allowed for the property; in other words, the sum which the business should be capitalized for in order that the owner should receive a reasonable return on the investment, when the business is conducted with reasonable business skill, and charges such reasonable rates for service as the law permits. If this value exceeds the physical value of the tangible property, then it might be said that the difference ought to be the measure of the indefinite and intangible thing called "going value," and such has been sometimes considered the best way to arrive at the going value. Again, it has been thought that going value might be measured by ascertaining as nearly as possible the cost of reproducing

the existing business, sometimes called the "unrequited outlay," i. e., the amount of the deficits which would be incurred added to the promotion expenses necessary to be incurred up to the time the new plant would have a business equal to that of the present plant; or, again, by ascertaining the actual unrequited outlay in building up the present business; or, again, by ascertaining the average time and proportional outlay actually incurred in building up the business of a number of concerns of like character, and thus establishing what may be called a "curve," which can be used in determining the time and outlay which would be reasonably necessary in the instant case. It is quite apparent that the result reached by either of the suggested methods could hardly be considered as anything more than suggestive, and that its persuasiveness would necessarily depend upon many other facts which must enter into the general problem of value. The actual original cost of establishing the business of the existing plant is very clearly unsatisfactory to the last degree as a test of going value, because it may have been wasteful and extravagant, and because, also, it is well known that the building up of the business of a water plant thirty years ago, before sewerage systems had become common and the private water supply had been discredited, was a much slower process than at the present time, when in such a city as Appleton the population has been educated to use the public supply of water. Estimates of cost of working up a business under present conditions approach nearer to the requirements of a test, but they must always remain estimates, however carefully they be conducted; they cannot be called facts.

However, the fundamental difficulty with the attempt to set a definite sum as the measure of going value is that it is an attempt to divide a thing which is, in its nature, practically indivisible. The value of the plant and business is an indivisible gross amount; it is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, but as inseparable parts of one harmonious entity, and exercising the judgment as to the value of that entity. In this way the going value goes into the final result, but it would be difficult for even an expert to say how many dollars of the result represent it.

In the case before us it is quite apparent from the report of the commission that the commissioners fully appreciated this cardinal principle of valuation.

They had before them much evidence bear-

ing on the general question of value and just compensation from different angles; they had the very careful and elaborate estimates of their engineers, not only as to the cost of the reproduction of the plant and its present value, based on present prices, but also based on the average of prices for five years; they had all the testimony given in the rate case, showing inadequacy in the present plant to meet the reasonable demands of the public service, and the necessity of the immediate expenditure of at least \$50,000 to make the plant reasonably efficient; they had tabulated statements furnished by the company itself in the rate case, which tended strongly to show that the revenues of the plant had not been sufficient at any time to give anything more than an insignificant return upon the investment, if indeed they had given that; they had very complete information as to the condition of the physical property, the attitude of the public toward the concern, the probable growth of the city, and in fact of all the surroundings; they had also expert evidence as to the actual unrequited cost of building up the business of the plant, and expert evidence on both sides as to the probable unrequited cost in building up the same business with a new plant under present conditions, which estimates differed by many thousands of dollars. All of this testimony was considered by the commission in passing upon the ultimate question of value; it seems very clear to us from the report of the commission that all the facts in evidence bearing on the question of value were carefully weighed by the commission; we discover nothing to indicate that the commission acted on any mistaken basis in reaching the conclusion that \$255,000 was the fair and just compensation which should be paid for the plant.

Those parts of the judgment adjudging that the order of the railroad commission should be altered by providing therein for the payment by the city to the plaintiff of (1) the costs and disbursements of this action, (2) the value of the indeterminate permit, (3) the cost of cutting through and relaying pavement over service pipes, (4) the cost of excavating and filling trenches for service pipes, (5) interest on the three last-named sums from December 1, 1911, to the date of payment, and directing the said commission to alter and amend its order on December 7, 1910, in the particulars named, must be reversed, and that part of the judgment providing that said report be altered and amended by requiring the city to pay to the plaintiff interest on \$255,000 from December 1, 1911, to February 7, 1912, amounting to the sum of \$2,805, with interest on said latter sum to the date of payment, must be affirmed.

47 L.R.A. (N.S.)

Judgment affirmed in part and reversed in part, as indicated in the last paragraph of the opinion, and action remanded to the Circuit Court, with directions to remand the order in question to the commission for such alteration as shall make it conform to this opinion. No costs are to be taxed, except the fees of the clerk of this court, which shall be taxed and paid by the plaintiff.

Marshall, J., *dubitante* (filed June 10, 1913):

I have misgivings as to some features of this case, and will state briefly the reasons thereof. I assume that in an appraisal of public property, whether for taxation, rate making, or public purchase, the value should be fixed at what the utility is fairly worth as an entirety,—the physicals is characterized by the intangibles.

At first, largely because of the assumed knowledge of so-called experts, the idea of physical value was developed, as if there were no value to be considered except that of tangible things. It was the result, in my judgment, of inclination to lay hold of such characterizing features as good will, using the term in a broad sense, and the public privilege, without rendering therefor the constitutional equivalent. Public functionaries, including judges, drifted largely with the current, though generally making a record of such shadowy character as to render uncertain whether the unconstitutional scheme had been adopted or not. That led to much litigation and dissatisfaction.

In the Railroad Case, *Chicago & N. W. R. Co. v. State*, 128 Wis. 622, 108 N. W. 574, the physical valuation idea met that of valuing the utility as an entirety,—the physicals vitalized by the franchise and condition of maturity,—and the latter prevailed. The court remarked respecting the procedure of the appraisal: "They knew the law and their duty. They had a wide discretion in respect to the mere elements to be considered in making the valuation. If they thought the so-called valuation of physical property would aid them, they were permitted to procure evidence of that sort. We find, however, no satisfactory indication that they arrived at the value of the railroad property by adding together a valuation of visible things" and the value of the franchise, or that they did anything "other than just what they were required to do by the statute, determine the value of the railway property. . . . That included the visible things and the franchise, not as separate things, any more than the horse's blood, frame, internal machinery, and other elements are separate things; all taken together constitute the horse; remove any one of the things essential to life and action,

and all conception of the animated thing, the horse, disappears."

As I read the result here it does not contain any very satisfactory indication that the rule thus plainly announced was followed below. I am pretty strongly persuaded that the privilege and the established business condition were not considered to any appreciable degree. That creates serious doubt as to whether injustice has not been done. True, it is our duty to resolve all fair doubts in favor of the commission appraisal. But it is only by going to the limit in appreciation of that duty that I can concur in the affirmance of the judgment appealed from. I trust that in future appraisals it will be made plain that the constitutional rights of property owners have not been unduly infringed upon. Courage on the part of appraisers to do what duty requires, and do it so as to leave no doubt about the matter in the minds of parties or others, is the best.

The suggestions here made as regards the proper manner of viewing a public utility in appraising it have the support of many courts, as the following citations will indicate: *Re Brooklyn*, 73 Hun, 499, 26 N. Y. Supp. 198, affirmed in 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983, affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974; *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; *Cotting v. Kansas City Stock Yards Co. (C. C.)* 82 Fed. 850; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Clarion Turnp. & Bridge Co. v. Clarion County*, 172 Pa. 243, 33 Atl. 580; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

Why should the public privilege, without which the investment in a public utility property would not be made, be left out of consideration in fixing a value upon the entirety in operation. Such a privilege in general costs money legitimately expended, besides it is a right owned by the grantee, and none the less so because it was conferred without other consideration than the agreement to use it for the purposes of the grant. Such a franchise, in general, comes into existence and later reaches the corporation by purchase. In this case, long after acquisition in that way, the franchise was exchanged for the indeterminate permit by a bargain with the state. There was, in contemplation of law, a meeting of minds resulting in such exchange upon the basis of agreed equivalents. The property thereafter

was characterized by the indeterminate permit as it was before by the old privilege. The new franchise, the same as the old one, is not a thing of value, strictly speaking, that is, regarded as a separate and distinct thing, but to the extent that it gives character to the tangible things, and affords opportunity to carry on a public utility business, it is of much value. No one could value the visible things uncharacterized by the privilege without doing great injustice to the proprietor. Why not confess it, and, while shaping administration in recognition of it, be so open and frank and plain in respect to the matter as to leave no uncertainty about it to vex parties or courts?

In the Railroad Case it was held that mere cost of construction less depreciation is of consequence in valuing a public utility only as evidence bearing on the ultimate question to be solved. It was there conceded by the commissioners that, in arriving at the value of the utility, the privilege feature was considered; but only as a characterizing condition of the visible thing. The claim was made that, in valuing other corporate property by local assessors, the public privilege and going value were not considered, and so the commissioners violated the rule of equality. Though assessors testified that they commonly valued corporate property only contemplating the visible things, the court said: "The value of the physical elements of corporations or business property is made up largely of those which are invisible. . . . In valuing such property, looking only at the visible elements, one would unconsciously include the invisible. No one would think, in valuing a factory of any sort with an established business, of its value as a disorganized piece of property. In appraising it in the former condition at what it would be thought to be worth in money, and without specially taking into consideration the elements giving thereto, perhaps, its chief value, such elements would be in fact included. . . . To our minds, when the witnesses on the trial of this case said they valued the property . . . observing only the things visible, fixing the value upon those things as they found them, whether they specially thought of the other elements, and considered the same or not, they were, in effect, included." In assessing the property of a corporation, no attempt should be made to separate tangible from intangible elements. The assessment of the one should be included in that of the other, by assessing the whole at what it is worth under the circumstances.

Thus, it will be seen that, in valuing a public utility property, all the intangible elements are to be, indirectly at least, con-

sidered. The privilege feature and the circumstance of activity promoted by years of building up are the very breath of life of the utility. Without them there is a lifeless, useless body. With them, there is a living thing, so to speak.

After the early decision, the old term and idea of "physical value" was largely displaced by that of "cost of reproduction," such cost having close resemblance to mere physical valuation, and resort was had, as before, largely to so-called experts for evidence. Why treat the question of value of such property as scientific and technical? What was said by Lord Campbell in *Tracy Peerage*, 10 Clark & F. 191, and adopted by this court in *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 331, 80 N. W. 644, 653, 6 Am. Neg. Rep. 746, is appropriate: "Skilled witnesses come with such a bias on their minds that hardly any weight should be given to their evidence."

Triers of fact, in applying the cost of reproduction theory, easily realize that it could not be confined to mere physical valuation, either of the elements of a utility or the visibles considered as a unit,—that it had to be extended to the characterizing circumstances,—the privilege and the advantages of maturity. Good will, by name, putting a narrow construction on the term, was rejected; but as an equivalent the going value feature was adopted. The experts had their innings in working out the matter by the rule of theory. The turning of a simple mathematical business problem into a scientific question could but naturally result, as it did here, in the going value feature being put at anywhere from 5 to around 30 per cent of the valuation of the physical thing,—the result being mere guess work and within a very wide range.

From a business standpoint it seems that the going value of a public utility property is not so technical as to be a proper subject for opinion evidence, and that resorting to it and making diagrams with theoretical lines for the purposes of creating proof, tends to misinform and confuse instead of enlighten. Under normal conditions, the question of the going value of a concern is susceptible of pretty close mathematical solution. To illustrate: Assume that plaintiff, city of Appleton, afforded an average opportunity for a waterworks enterprise, that the business of developing the property there was handled with ordinary care, and started with an investment which ought to be ascertainable with reasonable accuracy, and apply common experience thereto, that it takes five to ten years before the gross income in such circumstances will balance a

fair rate of interest upon the investment, operating expenses, repairs, and depreciation. The deficit for the first year would, necessarily, with reasonable interest, be required to be carried over to the next year. The deficit at the end of that period would, necessarily, be required to be added to the previous one, and with interest thereon, carried to the next year, and so on from year to year; the deficiency, under normal conditions, decreasing each year until, finally, the current income would be sufficient to balance the current liabilities. In the now state of equilibrium, the deficiency account would measure the value of the mature going business feature. In case of there being anything abnormal by way of bad management, that would need to be taken into consideration as an evidentiary matter.

The difficulty created by trying to distinguish between going value and good will might well be avoided. Why indulge in a technical difference, which, from a broad standpoint, is a mere play on words? In a broad sense, good will is, after all, the value which attends and characterizes a business as a going industry, and has developed and become attached thereto in the course of time. Why discard an element of property under one name, which must be taken back into another, as matter of justice and of constitutional right? There is, in my judgment, no logical distinction between going value in connection with a public utility, and good will of a bank as it was considered in *Lindemann v. Ruak*, 125 Wis. 210, 104 N. W. 119, and there held to be worth around 25 per cent as much as the original money investment in the bank. Why not call things by their right names from an original standpoint, instead of trying to invent new ones to meet illogical objections,—objections which, if acted upon, would lead to unconstitutional results?

If what I have said shall tend to move appraisers of public utility property to work along a practical business line the same as one would in appraising any other thing, as suggested in the *Railroad Company Case*, and the making of the record in each case accordingly, much litigation will be prevented growing out of conviction or uncertainty as regards whether constitutional rights to just compensation in case of property being taken as in this case have not been violated. I am fearful that the right of the water company here has not been fairly considered in respect to the elements of indeterminate permit and good will, or going value, whichever one may choose to call it.

KANSAS SUPREME COURT.

RE JOHN A. FLACK.

(88 Kan. 616, 129 Pac. 541.)

Extradition — interstate rendition — trial for crime not charged.

A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, and who, on demand of the executive authority of the state from which he fled, shall be delivered up and removed to the state having jurisdiction of the crime, may there be prosecuted for crimes other than the one specified in the demand for his delivery, without first giving him a reasonable opportunity to return to the state which surrendered him.

(January 11, 1913.)

Headnote by BURCH, J.

Note. — Right to try returned fugitive for crime other than that for which he was extradited.

International extradition.

Earlier cases covering the question where a person was extradited from foreign countries will be found in note attached to *Re Foss*, 25 L.R.A. 593.

As was stated in the earlier note, it is settled in the United States by the decision in *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222, that one extradited from a foreign country can be charged only for the particular offense with which he is charged in the extradition proceedings, until he has had reasonable time and opportunity to return to the country from which he was extradited.

And in *Re Collins*, 151 Cal. 340, 129 Am. St. Rep. 122, 90 Pac. 827, the court, in commenting upon the decision in the *Rauscher* Case, said the reasoning of that case is substantially this: "That in the absence of treaty, there is no obligation upon any country to surrender to another persons who are charged with crime in the latter country. That, as a matter of comity, such surrender might be made, but that if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender, that such surrender is asked and received for the purpose of putting the accused on trial for that crime, and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the provision generally found in treaties of extradition that before any surrender shall be made there must be some proof of the commission of the offense. To permit a country to seek the extradition of 47 L.R.A. (N.S.)

APPPLICATION for a writ of habeas corpus to secure the discharge of petitioner from the custody of the sheriff of Dickinson County, to which he had been committed for crimes other than the one for which he was extradited. Writ denied.

The facts are stated in the opinion.

Mr. C. S. Crawford, for petitioner:

A person who has been extradited from another state cannot be held to answer to, or be tried upon, any other crime, until such time as the action upon which he was extradited has been finally determined.

State v. Hall, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918; *Ex parte McKnight*, 48 Ohio St. 588, 14 L.R.A. 128, 28 N. E. 1034; *State v. McNaspy*, 58 Kan. 691, 38 L.R.A. 756, 50 Pac. 895; *Re Cannon*, 47 Mich. 481, 11 N. W. 280; *Com. v. Haws*, 13 Bush, 697, 26 Am. Rep. 242, 2 Am. Crim. Rep. 201.

a person found in another country, upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty, and then, when his surrender has been granted upon that ground, to try him for some other offense, would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offense which might or might not be in itself extraditable. . . . The doctrine, then, seems to rest ultimately upon the view that the treaty of extradition is intended to provide for the surrender of persons who may have fled from one country to another after committing one of a number of designated crimes, and that it would be a breach of international faith to use the provisions of this treaty for any other purpose than the one which is stated in the demand for the surrender,—namely, that the prisoner may be put upon his trial for the specific offense designated in the proceedings. In the absence of this limitation, it would be possible to make up a fictitious case coming nominally within the terms of the treaty, and, having secured possession of the prisoner, to then disregard the charge upon which he was extradited, and proceed to try him upon some other offense which could not have been made the basis of extradition, because not covered by the treaty, or a charge on which extradition, even if the crime charged was named in the treaty, might have been refused."

Subsequently to the decision in the *Rauscher* Case, a treaty was entered into between Great Britain and the United States known as the treaty of July 12, 1889, though sometimes designated as the treaty of 1890. The third article of this treaty provides that no person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime

Messrs. John S. Dawson, Attorney General, S. N. Hawkes and S. M. Brewster, opposed.

Burch, J., delivered the opinion of the court:

The petitioner, John A. Flack, was cashier of the Abilene State Bank. On or about September 1, 1910, he absconded. Soon afterwards a complaint was filed before a justice of the peace of Dickinson county, charging him with forging the name of James A. Strachan to a note for \$2,000 with intent to defraud Strachan and the Abilene State Bank. A warrant of arrest was issued and placed in the hands of the sheriff for service. In August, 1912, Flack was discovered in the state of New York,

and was arrested there upon a fugitive warrant and held pending further rendition proceedings. Such proceedings followed, resulting in his return to Dickinson county for trial upon the forgery charge. A preliminary examination was waived, and he gave bond for his appearance at the ensuing term of the district court. While awaiting trial, eleven other prosecutions were instituted against him for false and fraudulent alterations of entries upon the books of the bank. Motions to quash the informations in these cases, and to stay proceedings in them until after the original case should be disposed of, were overruled, and in default of bail he was committed to the county jail. This proceeding is brought to discharge him from custody in

or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. Therefore, it is evident that, so long as such treaty or one similar in terms is in effect between the two countries, the question that arose in *United States v. Rauscher* cannot arise again in case of persons extradited from Great Britain.

People ex rel. Young v. Hannan, 9 Misc. 600, 30 N. Y. Supp. 370, cited in note in 25 L.R.A. 593, which held that one extradited for an assault with intent to kill could not be convicted of an assault in the second degree, was affirmed in *People ex rel. Young v. Stout*, 81 Hun, 336, 30 N. Y. Supp. 898, which decision was affirmed without opinion in 144 N. Y. 699, 39 N. E. 858. The opinion in 81 Hun, in answer to the contention that, as the court had jurisdiction to try the relator upon the indictment as for assault in the first degree, therefore it was within the power of the court to punish the relator for any lesser degree of the crime of assault for which he should by the jury be convicted on such trial, said that while it is true that under the Penal Code and the Code of Criminal Procedure, upon an indictment charging only the higher degree of the crime, a person may be convicted of any lesser degree of it, upon the theory that the lesser is included in the higher degree of the offense, nevertheless the minor is not the major offense, and unless the conviction of an assault less in degree than that with intent to commit murder was within the contemplation of the extradition treaty, it could not be seen that the relation of it to such extraditable charge could bring the lower degree within the purpose or effect of the surrender made pursuant to the treaty. That the purpose of the international compact evidently was to confine its execution to those charged with the graver crimes, and it is entitled to no construction which will justify the trial, conviction, or punishment of a person surrendered pursuant to it, of any degree of assault other than that there mentioned. If

anything further in that respect had been intended, it may be assumed that such purpose would have been in some manner expressed in the treaty.

And it was further urged that the surrender of the relator should be treated as having been so made as not to confine the right to trial to the extraditable offense of the treaty, for the reason that the indictment was present at the hearing had preliminarily to the surrender, and it should be assumed that he was delivered up for trial on the charge of assault in any of the degrees alleged in the indictment. But the court said that nothing appeared to justify such inference or conclusion. That the proceedings for extradition, as they appear by the documentary evidence, were had pursuant to the treaty, and this appeared by the warrant there issued, wherein the alleged offense upon which he was surrendered is distinctly stated to be that of assault with intent to commit murder.

In *Ex parte Browne*, 148 Fed. 68, a new question was presented to the court, i. e., whether one extradited for a particular offense can be seized and imprisoned by virtue of a prior conviction under an indictment for a different charge. Counsel for government, while admitting that the judgment in the *Rauscher* Case had for twenty years rendered it unlawful to try a person surrendered in extradition for any offense committed prior to surrender, other than that specified in the demand for extradition, contended that upon the true construction of the *Rauscher* Case, it is lawful to apprehend an escaped convict, even though, at the time of apprehension, he has been brought within the country solely by virtue of a demand in extradition wholly unconnected with the crime for which he became a convict. But the court, in denying this contention, and holding that such person could not be detained, said that "as long as the present Federal statutes on the subject remain in force, unrepealed either by Congress or the express language of a treaty, there is no authority of or within these United States having any right or power to seize, arrest, confine, or detain any

the eleven cases instituted against him for crimes not embraced in the rendition proceedings.

The question involved is not new, and has provoked great argument about and about. It has been decided favorably to the petitioner by this court in the case of *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918. The syllabus of that case reads as follows: "An alleged fugitive from justice, extradited from one state to another, can be prosecuted in the state to which he has been extradited, only for the offense for which he was extradited, until after he has had a reasonable time and opportunity afforded him to return to the place from which he was extradited." Similar views have been expressed by the

supreme court of Ohio. *Ex parte McKnight*, 48 Ohio St. 588, 14 L.R.A. 128, 28 N. E. 1034. The courts of other states which have considered the question, and the Supreme Court of the United States, hold to the contrary. *Carr v. State*, 104 Ala. 43, 16 So. 155; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21; *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945; *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539; *State v. Kealy*, 89 Iowa, 94, 56 N. W. 283; *Taylor v. Com.* 29 Ky. L. Rep. 714, 96 S. W. 440; *Com. v. Wright*, 158 Mass. 149, 19 L.R.A. 206, 35 Am. St. Rep. 475, 33 N. E. 82; *Re Little*, 129 Mich. 454, 57 L.R.A. 295, 89 N. W. 38; *State v. Patterson*, 116 Mo. 605, 22 S. W. 696; *State ex rel. Petry*

person extradited in pursuance of treaty provisions and for a specific offense, for any other offense, crime, or cause whatsoever (committed or existing before his extradition), except for that specific offense, crime, or cause by reason of which the extradition has been granted; and, further, that this doctrine rests, not only nor principally upon the civil rights or personal privileges of a fugitive criminal who has been returned in accordance with an increasingly civilized international law, but upon the highest grounds of national honor, imposing upon this government and upon all persons subject to its rule the obligation to deal with the human being intrusted to them by a friendly foreign power, only in respect of the matter by reason of which he was so intrusted." It was also urged that the omission of the words "or to be punished" from the provision of article 3 of the extradition treaty of 1889, that no person extradited "shall be triable or tried," permitted a requisition to be obtained for one crime under that article, and when possession of the person is thus obtained, he may be punished for another and totally different crime of which he had been convicted before extradition. This contention was also denied, and in commenting thereon in *Johnson v. Browne*, 205 U. S. 309, 51 L. ed. 816, 27 Sup. Ct. Rep. 539, 10 Ann. Cas. 636, which affirms 148 Fed. 68, the court said that the mere failure to use these words in article 3 does not so far change and alter the manifest scope and object of the treaties as to render this imprisonment legal. The general scope of the treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose. Why the words were left out in the 3d article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the 47 L.R.A.(N.S.)

two treaties as to give them a totally different construction.

In answer to the contention that this construction is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, the court said that, "while the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense, and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense, on the ground that such offense was not one covered by the treaty."

In *Cosgrove v. Winney*, 174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598, 11 Am. Crim. Rep. 403, where one who had been extradited into Michigan from Canada, and while on bail pending final disposition of the charge for which extradited, had returned to Canada, but voluntarily returned before the final disposition of his case, it was contended that, inasmuch as during his absence in Canada his sureties could not have followed him there and compelled his return, if his appearance happened to be required according to the exigency of the bond, when he actually did come back to Michigan he had lost his exemption. But the court, in holding that his exemption from arrest was not lost or waived by going to his own country and voluntarily returning while at liberty on bail before the final discharge of the case for which he was extradited, said that the treaty and statutes secured to Cosgrove a reasonable time to return to the country from which he was surrendered after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited, and, at the time of his arrest, he had not been so discharged by reason of acquittal, or conviction and compliance with sentence, or the termina-

v. Leidigh, 47 Neb. 126, 66 N. W. 308; Rutledge v. Krauss, 73 N. J. L. 397, 63 Atl. 988; People ex rel. Post v. Cross, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 246; State v. Glover, 112 N. C. 896, 17 S. E. 525; State v. Wine, 7 N. D. 18, 30, 72 N. W. 905; Dows's Case, 18 Pa. 37; Ham v. State, 4 Tex. App. 645; State ex rel. Brown v. Stewart, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687. Text writers are divided in opinion. Spear, Extradition, 2d ed. chap. 12, favors the rule stated in the syllabus of Hall's Case. The following authorities take the opposite view: 2 Moore, Extradition, chap. 8; Hawley, Interstate Rendition, 78 et seq.; Rorer, Interstate Law, 307; 2 Wharton, Confl. L. 3d ed. 1696; 1 Bishop, Crim. Proc. § 224b.

The written law on the subject is contained in the Constitution of the United States and an act of Congress passed pursuant thereto. The Constitution reads as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Article 4, § 2. In the constitutional convention this provision first appeared in the report of the committee of detail as follows: "Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be

found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offense." 3 Documentary History of the Constitution, 456. Afterwards the words "high misdemeanor" were stricken out, and the words "other crime" were inserted in order to comprehend all proper cases; it being considered doubtful whether the term "high misdemeanor" did not have a technical meaning too limited. Ib. 634. The section was given its final form by the committee of "style and arrangement."

The act of Congress referred to reads as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent

tion of the state prosecution in any way. That the mere fact that he went to Canada did not in itself put an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he re-entered Michigan, he was as much subject to the compulsion of his sureties as if he had not been absent.

On the other hand, neither the treaty with Great Britain nor the United States Revised Statutes under which an extradited prisoner is entitled to a reasonable time to return to the country from which he was extradited, before he may be tried for a prior offense, grants such extradited person immunity from trial for an offense committed after his extradition, until he has been afforded opportunity to return to the country from which he had been extradited. Collins v. O'Neil, 214 U. S. 113, 53 L. ed. 933, 29 Sup. Ct. Rep. 573, which affirms 151 Cal. 340, 129 Am. St. Rep. 122, 90 Pac. 827, 91 Pac. 397. As was stated in the opinion rendered in 151 Cal. 340: "But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of 47 L.R.A.(N.S.)

extradition, such country, after it has once extradited him, cannot be concerned in securing him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country, but we cannot see that there would be any breach of international faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited."

In each of the following cases, it was contended that one extradited was being tried for an offense other than that for which he had been extradited, and therefore unlawfully: Re Rowe, 23 C. C. A. 103, 40 U. S. App. 516, 77 Fed. 161; Cohn v. Jones, 100 Fed. 639; United States v. Greene, 146 Fed. 766; Greene v. United States, 85 C. C. A. 251, 154 Fed. 401. These cases, while conceding that since the Rau-

when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory. . . . Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year." Rev. Stat. U. S. §§ 5278, 5279, U. S. Comp. Stat. 1901, p. 3597.

The primary question for consideration is, of course, the meaning of the Constitution of the United States of which the Supreme Court of the United States is the final interpreter. When this court approached the subject in *Hall's Case*, the Supreme Court of the United States had not spoken upon the precise question under consideration. Among other eminent authorities, Judge Cooley (*Princeton Review*, January, 1879, p. 76) and Doctor Spear (*Extradition*, 2d ed. chap. 12) had expressed opinions to the effect that, in cases of interstate rendition, it would be a violation of the Constitution to put the fugitive on trial for any other offense than the one specified in the rendition proceedings, without first giving him an opportunity to de-

part from the jurisdiction to which he had been returned. These opinions coincided with the right of asylum as understood in international law, with the practice of independent sovereignties in extradition cases under treaties, and with the rules of the common law exempting suitors and witnesses from abuse of judicial process. Reasoning by analogy, the court reached the conclusion that the principles governing extradition between independent sovereignties under treaties, and rendition between separate states under the Constitution of the United States, were the same. This conclusion accorded with that of some other courts, and was believed to be fortified by the then very recent decision of the Supreme Court of the United States in the case of *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222.

The *Rauscher Case* arose under the Webster-Ashburton treaty with Great Britain, the preamble of which, so far as pertinent, reads as follows: "And whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties, respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up. The United States of America and her Britannic Majesty, having resolved to treat on these several subjects, have for that purpose appointed their respective

scher Case one may not be tried for an offense other than that for which he has been extradited, are mere *dicta* on that question, as the actual decision in each case was that the offense for which the one extradited was being tried was not one different from that for which he had been extradited.

Interstate extradition.

Earlier cases covering the question of the right of one extradited to be tried for another offense in the case of interstate extradition will be found in notes to *Ex parte McKnight*, 14 L.R.A. 128, and *Com. v. Wright*, 19 L.R.A. 206. As was pointed out in the note to 19 L.R.A., the long existing conflict between the different courts, as to the right to try a prisoner for other crime than that for which he was surrendered in cases of interstate extradition, was finally settled by the United States Supreme Court in *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687. At least that case settled the point that a decision of the state court in the affirmative will not be disturbed by the United States Supreme Court on error, while state courts are doubtless free to 47 L.R.A. (N.S.)

apply a different rule, if they see fit. As a matter of fact in cases which have arisen since the *Lascelles Case*, it has been held, following that case, that one may be tried for an offense other than that for which he was extradited. *Carr v. State*, 104 Ala. 4, 16 So. 150, 10 Am. Crim. Rep. 75; *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539; *State v. Kealy*, 89 Iowa, 94, 56 N. W. 283; *State v. Walker*, 119 Mo. 467, 24 S. W. 1011; *State v. McNaspy*, 58 Kan. 691, 38 L.R.A. 756, 50 Pac. 895; *State v. Dunn*, 66 Kan. 483, 71 Pac. 811; *Taylor v. Com.* 29 Ky. L. Rep. 714, 96 S. W. 440; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *State ex rel. Petry v. Leidigh*, 47 Neb. 126, 66 N. W. 308; *Re Walker*, 61 Neb. 803, 86 N. W. 510, 12 Am. Crim. Rep. 343; *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 588; *People ex rel. Post v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 246; *Re Brophy*, 2 Ohio N. P. 230, 4 Ohio S. & C. P. Dec. 391.

And one extradited from another state may be lawfully convicted of a lesser grade of the crime embraced in the grave charge for which he was extradited. *Com. v. Johnston*, 2 Pa. Dist. R. 673; *State v. Dunn*, 66 Kan. 483, 71 Pac. 711. J. H. B.

plenipotentiaries to negotiate and conclude a treaty." Compilation of Treaties of 1899, under Act of 1898, p. 226. Article 10 specified seven extraditable offenses, and reads as follows: "It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy or arson or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed. And that the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." Compilation of Treaties of 1899 under Act of 1898, p. 230.

Rauscher was extradited for murder. He was not tried for murder, however, but for a minor offense not embraced in the treaty. On a motion in arrest of judgment, the judges of the circuit court in which the action was pending divided in opinion, and the matter was presented to the Supreme Court of the United States on their certificate. The principal question was the true import of the treaty. The recognized public law on the subject prevailing in the absence of treaties was examined and stated. The provisions of the treaty itself were analyzed and considered according to the approved canons of interpretation, and the interpretation placed upon all treaties of this character by Congress in the extradition act was adverted to. The conclusion was that, although the treaty contained no express limitations upon the right of the country in which the crime was committed,

to try the fugitive for that crime alone for which he was extradited, nevertheless sound construction rendered an implication of such a limitation unavoidable; that, under the treaty and the act of Congress, Rauscher could not lawfully be tried for any crime but murder; that he was clothed with the right to exemption from trial for any other offense until he had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender; and that the national honor required that good faith should be kept with the country which surrendered him. This decision is manifestly sound. Every independent nation has the right to grant an asylum to a person residing peacefully within its borders, even though he be an offender against the law of some foreign state, and this right supersedes the right of the foreign state to demand that he be given up for trial. However desirable it may be that fugitives from justice should be surrendered to answer for their misdeeds, no obligation to do so rests upon the asylum state, which has the right to make the peace and security of any person residing upon its territory its own cause. It may relinquish this right either by comity or by agreement, but any concession it may make does not waive the right generally. If the relinquishment be made by treaty, the asylum is abridged only with respect to the crimes specified in the treaty, and then only subject to the limited forms of procedure agreed upon. These considerations are fundamental in the interpretation of any extradition treaty, and their importance is emphasized when attention is drawn to political offenses. Such crimes, being directed against the political system of the state or its administrators, do not of necessity render those who commit them undesirable citizens of another state. What would be called treason in the parent country might be regarded as a legitimate struggle for liberty by another country, which, on the highest principles of justice and humanity, would be authorized to afford refuge to exiled participants in such a struggle. Consequently, political crimes are not considered extraditable, and it would offend against the law of nations if a fugitive were extradited for a crime specified in a treaty and then were put on trial for a political offense. Turning to the treaty in question, it waives the right to afford asylum to fugitive offenders with respect to seven designated crimes only; and the sovereignty upon which the demand for surrender is made expressly reserves the right to examine the case presented by the requisition, hear the evidence of criminality, and

determine whether or not the offense charged justifies the government in depriving the accused of his asylum. These facts in themselves are quite conclusive that, as to all other offenses, the fugitive, if surrendered, is to be regarded as still in the asylum state. The extradition act (U. S. Rev. Stat. title 66, U. S. Comp. Stat. 1901, p. 3591) provides for a hearing, upon complaint made under oath, to determine whether the evidence is sufficient to sustain the charge of criminality, before a warrant may issue for the surrender of a fugitive whose return is desired by a foreign nation. § 5270. It further provides that the Secretary of State is authorized to order a person demanded of the United States to be committed to be delivered up "to be tried for the crime of which such person shall be so accused" (§ 5272); and that a person delivered up to the United States for trial shall have protection and safe-keeping "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter" (§ 5275). Under these circumstances, it would have violated the convention between the two governments, and would have compromised the national honor, if the United States had suffered Rauscher to be tried not only for an offense not named in the requisition, but for an offense not specified in the treaty itself.

In *Hall's Case* the court applied the arguments whereby the interpretation of the Webster-Ashburton treaty was sustained, to an interpretation of the Constitution of the United States. The states of the Union were treated like independent sovereignties having the right to grant asylum to fugitives from justice, who could not be surrendered without the consent of the asylum state. The Constitution was regarded in the light of an extradition treaty between such sovereignties, and it was declared that the *Rauscher Case*, among others of like import, which were cited, was perfectly applicable to the one under decision.

On the same day that the opinion in the *Rauscher Case* was filed, a decision was rendered by the Supreme Court of the United States in the case of *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, which greatly impaired the basis upon which the constitutional argument in *Hall's Case* was founded. *Ker* was kidnapped from Peru, with which country the United States had an extradition treaty, and brought to the state of Illinois for trial for embezzlement and larceny. He was convicted, and the case was taken by writ of error to the

Supreme Court of the United States, where he claimed that the full faith and credit of the treaty with Peru had not been kept and enforced. He contended that under the treaty he had acquired, by his residence in Peru, a right of asylum,—a right to be free from molestation for the crime committed in Illinois, a right that he should be forcibly removed from Peru to the state of Illinois only in accordance with the provisions of the treaty,—and that this right was one which he could assert in the courts of this country. The court said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says, in terms, that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered *Ker* out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum? Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered *Ker* to an agent of the state of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in *Ker's* condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum." p. 442. Consequently, it was held that *Ker* was clothed with no rights which a proceeding under a treaty would have protected, and the judgment of conviction was not disturbed.

In 1887 the rule stated in *Ker's Case* was applied to a case of kidnapping from one state to another. *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 287, 288, 8 Sup. Ct. Rep. 1204. *Mahon* was indicted for murder committed in Kentucky. He fled to West Virginia. He was then forcibly abducted to Kentucky, where he was committed for trial upon the indictment. It was held that he was not entitled to be discharged under a writ of habeas corpus. The court said: "There is indeed an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case

is asked, namely, that his forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. It would indeed be a strange conclusion if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state. . . . It is contended that, because under the Constitution and laws of the United States a fugitive from justice from one state to another can be surrendered to the state where the crime was committed, upon proper proceedings taken, he has the right of asylum in the state to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is that the laws of the United States do not recognize any such right of asylum, as is here claimed, on the part of a fugitive from justice in any state to which he has fled." pp. 712, 714.

The principle that a fugitive from justice does not bear in his own person the sovereignty of the state to which he has fled, and that, if anyone is within the jurisdiction of a court and there properly charged with crime, the court may hold him and proceed to try him without reference to the circumstances under which he was brought within its jurisdiction, was clearly and forcibly stated by Chief Justice Gibson in *Dows's Case*, 18 Pa. 37, decided in 1851. After having been indicted for forgery in Pennsylvania, Dows escaped to the state of Michigan. Without legal authority he was returned to Pennsylvania. Pursuant to a requisition made upon him, the executive of Michigan issued a warrant to arrest and surrender Dows, but it was not utilized. The opinion reads: "The governor of Michigan, so far from resenting the prisoner's arrest, had put a warrant for his extradition into the hands of the proper officer. The sovereignty of the state, therefore, was not outraged, unless it resided in the prisoner's person. A sovereign state is doubtless bound to fight the battle of its citizen, when he has his quarrel just; but it is not bound to maintain him against demands of foreign justice from which he has fled. It may, or it may not, interpose its shield at discretion; but the exercise of

this discretion will be directed, not by any claim he may be supposed to have on it, but by a consideration of the consequences to the general weal. The Federal Constitution takes away this discretion in the case of an executive demand, and makes that a matter of duty which else had been a matter of grace; but it does not prevent a state from dispensing with a demand. The constitutional provision was not devised for the benefit of the fugitive. It was intended to obviate the principle that one government may not execute the criminal law of another." p. 39.

In the case of *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204, the governor of West Virginia demanded the restoration of the prisoner to the jurisdiction of that state, but that fact afforded him no immunity from trial upon the indictment found in the state of Kentucky. The effect of these decisions is that the so-called right of asylum is not a right possessed by a fugitive from justice in any case; that it is merely the right of an independent sovereignty to grant asylum if it so desires; and that a state of the United States possesses no such right respecting fugitives from the justice of another state.

In 1892 the precise question involved in the present proceeding was decided by the supreme court of Georgia in the case of *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945. *Lascelles* was extradited from New York for one crime and placed on trial in Georgia for another. By a motion to quash the indictment and a plea in abatement, he contended that it was unlawful to try him without first allowing him to return to the state which surrendered him. The court held that his objections were properly overruled. A very able opinion was delivered by Mr. Justice Lumpkin, who, after discussing the *Rauscher Case*, and the treaty and act of Congress which it involved, said: "When we go back of the express law on the subject, and consider the matter independently of the statute referred to, or of the obligations assumed by treaty, it will be found that the right of the person extradited to return to the country from which he was surrendered is based upon the right of that country to afford asylum to the fugitive, and to refuse to give him over to another except upon such terms as it may see fit to impose. It is well settled that the criminal himself never acquires a personal right of asylum or refuge anywhere. Such right as he may have in this respect grows entirely out of the rights of the government to whose territory he has fled. It matters not, so far as the right to try him is concerned, that he may have been abducted while in another

state, and brought back illegally and against his will to the state whose criminal laws he has violated, nor, in such case, that the executive of the state from which he was taken has demanded his return. *Mahon v. Justice*, supra. See also *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, decided on the same day as the *Rauscher Case*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222. That the right to protect the fugitive who has taken refuge in its territory exists on the part of every independent nation, except in so far as it may have agreed to forego the right, is recognized by the Supreme Court of the United States in the *Rauscher Case* as an established principle of international law. But to our minds it is clear that, under the organic law of the Union, no such right exists on the part of the several states with reference to each other. The Constitution declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' Article 4, § 2, subsec. 2. And it is settled that this provision extends without exception to all offenses punishable by the laws of the state where the act was done. It is immaterial that the thing complained of is not a crime in the state in which the accused is found; nor can the authorities of that state inquire into the question of his guilt or innocence. The sole question is whether he is a fugitive charged with crime under the laws of the demanding state. If he is, the duty to deliver him up is imperative. The framers of the organic law clearly intended that there should be no reserved right to convert any state into a place of refuge for fugitives from the justice of another, and that state lines should constitute no insuperable obstacle to the enforcement of the criminal laws of any part of the Union as to offenses committed within the field of their operation. By the act of 1793, Congress has constituted the executive authority of the state to which the accused has fled the agency for carrying into effect the provisions of the Federal Constitution and laws as to arrest and delivery. His sole function is to ascertain whether the authorities of the demanding state have on their part complied with the constitutional and statutory requirements, and, if so, to cause the arrest and delivery of the fugitive. If these requirements are complied with, he has no further interest in the matter, and cannot set up any right of his state to protect the fugitive. The sole

right which his state can set up as against the right of the demanding state is that its own justice shall be satisfied, if, at the time of the demand, the accused stands charged with a violation of its laws. In such cases the right of the demanding state is not denied, but is merely suspended until a prior claim shall have been discharged. . . . It may be true that there is no power on the part of the Federal government or of the demanding state to compel performance of this duty, but it is not on that account in any less degree a duty. If, therefore, the demand cannot, as a matter of right, be refused when made in compliance with the Federal requirements, it would be idle for the authorities of the state, to whom the accused was surrendered, to set him at large so that another demand might be made before trying him for an offense other than that charged in the requisition upon which he was surrendered. Certainly they are under no obligation, before trying him for other violations of law, to place the executive of the surrendering state in a position to do or refuse to do that which, under the supreme law of the land, it is his imperative duty to do. If what we have said is true, considerations of comity and good faith on the part of the state to which the surrender was made are not involved in the matter." pp. 363-367.

Lascelles removed the controversy to the Supreme Court of the United States, which approved the opinion of Justice Lumpkin and affirmed the judgment of the supreme court of Georgia. The opinion, written by Mr. Justice Jackson, contained the greatly desired interpretation of the Constitution of the United States and of the extradition act, so far as it relates to interstate rendition. The material portions follow:

"Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one state to demand, and the obligation of the other state upon which the demand is made to surrender, a fugitive from justice. Now the proposition advanced on behalf of the plaintiff in error in support of the Federal right claimed to have been denied him is that, inasmuch as interstate rendition can only be effected when the person demanded as a fugitive from justice is duly charged with some particular offense or offenses, his surrender upon such demand carries with it the implied condition that he is to be tried alone for the designated crime, and that, in respect to all offenses other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the states of the

Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do, in fact, afford, to all persons within their boundaries an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, et seq., 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222, is invoked as a controlling authority on the question under consideration. If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations in the same sense in which the general government stands towards independent sovereignties on that subject, and in the further assumption that a fugitive from justice acquires in the state to which he may flee some state or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another state, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement, in another form, of the question presented for our determination. The sole object of the provision of the Constitution and the act of Congress to carry it into effect is to secure the surrender of persons accused of crime, who have fled from the justice of a state whose laws they are charged with violating. Neither the Constitution nor the act of Congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done. *Kentucky v. Dennison*, 24 How. 66, 101, 102, 16 L. ed. 717, 727; *Ex parte Reggel*, 114 U. S. 642, 47 L.R.A. (N.S.)

29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218.

"The case of *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of Congress, in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offenses that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for his surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice, which can be regarded as establishing any compact between the states of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description punishable by the laws of the state where the forbidden acts are committed. It is questionable whether the states could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process.

"If a fugitive may be kidnapped or unlawfully abducted from the state or country of refuge, and be thereafter tried in the state to which he is forcibly carried, without violating any right or immunity secured to him by the Constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a state's authority or jurisdiction to try him for another or different offense than that for which he was surrendered. If the fugitive be regarded as not lawfully within the limits of the state in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction

of its courts to try him for other offenses any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever.

"We are not called upon in the present case to consider what, if any, authority the surrendering state has over the subject of the fugitive's rendition, beyond ascertaining that he is charged with crime in the state from which he has fled, nor whether the states have any jurisdiction to legislate upon the subject, and we express no opinion on these questions. To apply the rule of international or foreign extradition, as announced in *United States v. Rauscher*, supra, to interstate rendition, involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned. . . .

"The highest courts of the two states immediately or more directly interested in the case under consideration hold the same rule on this subject. The plaintiff in error does not bear in his person the alleged sovereignty of the state of New York, from which he was remanded (*Dows's Case*, 18 Pa. 37), but, if he did, that state properly recognizes the jurisdiction of the state of Georgia to try and punish him for any and all crimes committed within its territory. But, aside from this, it would be a useless and idle procedure to require the state having custody of the alleged criminal to return him to the state by which he was rendered up, in order to go through the formality of again demanding his extradition for the new or additional offenses on which it desired to prosecute him. The Constitution and laws of the United States impose no such condition or requirement upon the state." *Lascelles v. Georgia*, 148 U. S. 541-543, 545-547, 37 L. ed. 550-552, 13 Sup. Ct. Rep. 688.

This opinion is necessarily conclusive upon the question decided, and deprives the decision in *Hall's Case* of support on constitutional grounds. The subject of the 47 L.R.A.(N.S.)

return of a fugitive from justice found in one state, to the state from which he had fled, for prosecution and punishment, was lifted bodily out of the law governing extradition in international cases, in which it had so long been submerged, and was given a standing and character of its own. The right of independent sovereignties to grant asylum, which is the nidus from which all the doctrines of international extradition took their rise, does not exist in any state of the American Union. In respect to the return of fugitives from justice, the various states are not to be regarded from the standpoint of international law as separate and independent sovereignties with selfish and jealous purposes to serve, but as governmental organizations having mutual interests, duties, and relations, and pledged to mutual support; each one acting as an instrumentality for the suppression of crime and the advancement of justice in the other. Such being the true attitude of the states toward each other, the Constitution loses all semblance of a treaty between sovereigns, and becomes a supreme law of the land for the promotion of the general welfare. The specification in the Constitution of treason, felony, and other crimes, leaves no ground for distinction between political and other offenses, and no ground for the application of the rules and principles which govern in the case of limited treaty concessions hedged about by conditions and restrictions, express and implied. Disencumbered of the legal impediments attending the subject of international extradition, the article of the Constitution relating to interstate rendition is left to operate with all the force of its chaste simplicity, and to fulfil the purpose expressed in the preamble: "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

A charge of crime, flight, discovery, and a formal demand for return, are all that are necessary to raise the obligation to deliver up the fugitive, and that obligation is imperative. The act of Congress passed to execute the provisions of the Constitution is in full harmony with the spirit of that instrument. The duty to cause the fugitive to be arrested and delivered is imposed upon the executive authority of the state to which he has fled, without any of the reservations and restrictions imposed by other provisions of the act upon international extradition, to the end that state boundaries

shall no longer act as barriers to the administration of justice. Besides the constitutional ground, the decision in Hall's Case was rested in part upon considerations of good faith and fair dealing. It was said that a state should not be allowed to obtain jurisdiction over a fugitive from justice for one purpose, and then to take advantage of the jurisdiction thus obtained and use it for another and different purpose. No such question as this can arise between the state of Kansas and the state of New York in the present case, because the state of New York recognizes the right of any state to which it has delivered a fugitive from justice to try him for crimes other than the one specified in the requisition proceedings. With the asylum doctrine excluded from consideration, however, no such question can arise in any case in which rendition is regularly sought in good faith under the Constitution and the extradition act. To all intents and purposes the state upon which the demand is made is constituted an agency to supplement the judicial process of the demanding state, which otherwise could not be extended beyond its own boundaries, and the only right which the surrendering state has in the matter is to see that the prescribed conditions are present, and that the prescribed formalities are observed. To hold a returned fugitive to answer for a crime different from that specified in the requisition is not to hold him for a purpose foreign to the original demand. The end to be accomplished is the punishment of crime. That end is constant and identical in both instances. The state to which the fugitive has fled has no right to detain him in opposition to the accomplishment of that end. It cannot grant an asylum. It cannot impose conditions upon surrender. Its duty to deliver up the fugitive on demand is immediate and imperative, and it would have no more discretion over a second demand than it had over the first. Consequently, it can suffer no deprivation of right or affront to its sovereignty if, after surrender, the returned fugitive be dealt with in the same manner as if he had not fled.

So far as the fugitive himself is concerned, it is impossible that he should be prejudiced or defrauded by detaining him for trial upon other charges. He cannot build up rights against the state whose laws he has broken, by fleeing from its justice. He has no lawful right of asylum in any other state. By taking refuge in another state, he acquires no right to demand conditions upon his return, and no conditions upon his return can be lawfully imposed by the surrendering state itself for his benefit. Consequently, there is no implication that 47 L.R.A. (N.S.)

he is surrendered for the purpose of one proceeding only, and no implication of any limitation upon the jurisdiction and authority of the state to which he is returned. By resorting to compulsory proceedings to secure the return of a fugitive, the state holds out no inducements whatever to him. It gives him no assurances that he will be afforded an opportunity to depart from its jurisdiction as soon as the charge specified in the requisition is disposed of. It obtains custody of him outside of the state, irrespective of his will or consent, precisely as it might do within its own borders if he had not fled, and it cannot be guilty of bad faith when it is impossible for the fugitive to be overreached or misled, and when no duty toward him, which the law governing the subject of rendition imposes, is violated.

In Hall's Case the analogy was invoked of the exemption of suitors and witnesses attending court outside the jurisdiction of their home tribunals, from service of judicial process. The analogy, however, fails. In such cases the party or witness has a personal right to all the benefits and advantages flowing from a lawfully established domicile, and ought not to be held to waive them by answering a call to assist in the administration of justice elsewhere, while an offender against the criminal laws of a state acquires no right by flight which the court administering those laws is bound to regard when he is again found within its jurisdiction. *Lascelles v. State*, 90 Ga. 347, 368, 35 Am. St. Rep. 216, 16 S. E. 945. Besides this, the privilege is accorded to litigants and witnesses on grounds of public policy. The purpose is to subserve great public interests by promoting the administration of justice. *Moleitor v. Sinnen*, 76 Wis. 308, 312, 7 L.R.A. 817, 20 Am. St. Rep. 71, 44 N. W. 1099. That policy encourages the voluntary personal appearance in the trial of causes, of persons whose presence is necessary for a better solution of controversies, and whose attendance cannot be compelled. *Reid v. Ham*, 54 Minn. 305, 307, 21 L.R.A. 232, 40 Am. St. Rep. 333, 56 N. W. 35. No such considerations as these arise in favor of one who has fled from the scene of his crime to defeat justice, and who has been brought back by compulsory process. *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988.

Speaking upon this subject the supreme court of Nebraska said: "The immunity from service of process extended to suitors and witnesses attending court is founded on considerations of wisdom, and is well calculated to assist in the due administration of justice. It needs no argument to sustain the proposition that whatever encourages the attendance of witnesses at the

trial of any case in controversy in the courts will conduce more certainly to a rightful determination, and assure to a party litigant the protection of all his rights guaranteed by law. This desired result can best be accomplished by steadily adhering to a policy which will save to all whose attendance is desirable in the furtherance of the ends of justice, and who come voluntarily, annoyance, inconvenience, and oftentimes oppression by the service of process upon them while present in any stated jurisdiction for the purposes mentioned. This privilege has constantly been safeguarded by the courts, and the rule can doubtless be safely and confidently invoked by all who come within its scope and purview. The petitioner in the case at bar does not, however, come within the reason of the rule. His presence is involuntary and against his will. He was brought into the state forcibly, and for the purpose of answering a charge of violating its laws. The reason for extending the rule of immunity is wanting in his case." *Re Walker*, 61 Neb. 803, 816, 86 N. W. 510, 515, 12 Am. Crim. Rep. 343.

In the case of *State v. McNaspy*, 58 Kan. 691, 38 L.R.A. 756, 50 Pac. 895, a fugitive from justice was found in another state by a pursuing deputy sheriff who held a warrant of arrest issued by a justice of the peace. Although informed of the officer's lack of authority to make an arrest, the fugitive voluntarily accompanied the officer to Kansas, where he was prosecuted for a crime other than the one specified in the warrant. It was held that the prosecution might lawfully be maintained. In a dissenting opinion it was said that there is no conflict between *Hall's Case* and *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, but that in any event the argument based upon principles of good faith toward the surrendering sovereignty and the fugitive himself were sufficient to sustain the *Hall* decision. Manifestly, there is a direct conflict between the two decisions upon the constitutional question, and, as already shown, the good-faith argument is unsound.

The case of *Re Cannon*, 47 Mich. 481, 11 N. W. 280, was cited in *Hall's Case* as one of substantial authority. Courts and text writers have experienced considerable difficulty in classifying that case, but its scope has been made clear by the supreme court of Michigan itself in the case of *Re Little*, 120 Mich. 454, 57 L.R.A. 295, 89 N. W. 38, wherein the doctrine of *Lascelles v. Georgia* is accepted and conclusions antagonistic to the decision in *Hall's Case* are announced.

The case of *Ex parte McKnight*, 48 Ohio St. 588, 14 L.R.A. 128, 28 N. E. 1034, was 47 L.R.A. (N.S.)

decided after the decision in the *Rauscher Case* and before the decision in the *Lascelles's Case*. The position was taken that the Constitution is to be interpreted according to the rules, principles, and usages governing international extradition under treaties. *Rauscher's Case* was accepted as of controlling authority. Nothing but the constitutional question was considered, and consequently the grounds of the decision were invalidated by *Lascelles v. Georgia*.

Some fear has been expressed that, unless a returned fugitive be allowed to depart in peace after the immediate purpose of the requisition proceeding has been accomplished, interstate rendition may be abused for illegitimate private ends. It is always open to the courts, however, to relieve against perversions of rendition process, the same as they are in the habit of doing against perversions of ordinary judicial process. The case of *State v. Simmons*, 30 Kan. 262, 18 Pac. 177, furnishes an example of the latter kind. A sheriff of this state, holding merely an order to attach the person of a witness who was not a fugitive from justice, executed it in the state of Nebraska, in the nighttime, by force and violence. When the prisoner was brought within the jurisdiction of the court issuing the attachment, a criminal complaint was lodged against him, upon which he was tried and convicted. In quashing the conviction, the court said: "It would not be proper for the courts of this state to favor, or even tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace. Indeed, it would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself,—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together." p. 264. On the same principle relief may be granted whenever rendition proceedings are in fact prostituted to fraudulent purposes.

In the course of this opinion the term "interstate rendition" has been used when speaking of the return of fugitives from one state to another, following a suggestion contained in the preface to Moore's admi-

table treatise on Extradition and Interstate Rendition: "In the judgment of the writer, such rendition is not properly described as extradition, for, as confirmed by the Constitution and regulated by the legislation of Congress, it proceeds upon a principle precisely antipodal to that from which are derived the leading doctrines of extradition in its true and international sense. This is the necessary consequence, not only of the form and character of the specific provision in the Constitution, but also of the mutual relations, duties, and limitations of sovereignty of the states under the Federal government. Whatever may be our theories as to the duties of nations, the leading rules on the subject of extradition presuppose, and are deduced from, the right, in strict law, of every sovereign power to grant asylum to fugitives from justice. Such a right has no place among states united under a common government, and, as between the states of the United States, it is excluded by the explicit requirements of the Constitution. Since the accurate employment of terms is of the utmost importance, and the use of the word 'extradition' invites the application of the principles of international law to the interstate proceeding, the second part of the present work has been called 'interstate rendition.'" 1 Moore, Extradition, p. 7.

The decision in the case of *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918, is overruled, and the petitioner is remanded to the custody of the sheriff of Dickinson County.

KANSAS SUPREME COURT.

MOLLIE J. DENTON, Appt.,

v.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY.

(90 Kan. 51, 133 Pac. 558.)

Negligence — violation of criminal statute — effect.

1. In order for the violation of a criminal statute to constitute actionable neg-

Headnotes by MASON, J.

Note. — Violation of statute or ordinance in relation to blocking railroad crossing as affecting liability for injury.

As to damages recoverable for delaying person by blocking railroad crossing, see note in 44 L.R.A.(N.S.) 1069.

As to right to recover for the destruction or injury of a building by fire on account of delaying the movement of fire apparatus by blocking a crossing, see notes 47 L.R.A.(N.S.)

ligence the injury complained of must be of the sort the legislation was intended to prevent.

Railroad — highway crossing — obstruction — statutory prohibition — effect.

2. The statute making it a misdemeanor for a railway company to allow cars to stand upon a street for more than ten minutes at a time, in such a way as to reduce the opening in the traveled part thereof to less than 30 feet, is intended to prevent obstructions to travel, and acts in violation thereof do not necessarily constitute negligence for the purposes of an action in which the plaintiff relies upon the fact that the position of the cars, by obscuring his view of the track, prevented his seeing an approaching engine in time to avoid a collision.

Municipal corporation — ordinance — when operative.

3. An ordinance requiring a railway company to provide a flagman at a street crossing, which purports to take effect upon publication, is in force from that time, irrespective of whether the company had actual notice, or in the exercise of reasonable diligence ought to have learned of it. **Negligence — passenger in vehicle — imputed.**

4. Where a woman is injured through the negligence of a railway company, she is not precluded from recovery by the fact that a contributing cause of her injury was the failure of her husband to exercise due care in the management of the automobile in which they were riding.

New trial — issues concluded.

5. A special finding that the defendant is not guilty of one of several acts of negligence charged against him, which is not affected by any erroneous ruling, may be treated as a final determination of that question, notwithstanding a new trial is granted upon other issues.

(June 7, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Labette County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been received through defendant's negligence by a collision with its train at a street crossing. Reversed.

The facts are stated in the opinion.

in 12 L.R.A.(N.S.) 382; 20 L.R.A.(N.S.) 1110; and 39 L.R.A.(N.S.) 20.

Upon the general question as to requisites of averments in complaint as to causal connection between violation of law or ordinance by a railroad company and injury, see note to *Wilson v. Louisville & N. R. Co.* 8 L.R.A.(N.S.) 987.

In the absence of statute, the mere fact that a railroad company obstructs a street or highway at a public crossing, by letting a train or cars remain thereon for a reason-

Mr. C. E. Pile, for appellant:

The cars had stood in the street for more than ten minutes before the accident. The jury found the crossing blocked to a space of 16 feet.

If possible the findings of a jury should be so interpreted as to support the general verdict, rather than give an interpretation which will destroy it.

Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730; Simpson v. Greeley, 8 Kan. 586; St. Louis & S. F. R. Co. v. Ritz, 33 Kan. 404, 6 Pac. 533.

Messrs. John Madden and W. W. Brown, for appellee:

The proximate cause of the accident was the negligence of plaintiff in driving on to a crossing under the circumstances.

able length of time, and for proper purposes, is not negligence, and the company is not responsible for injuries caused thereby. But a railroad company is liable for injuries caused by reason of such obstruction, when it amounts to negligence, as where it allows its trains or cars to remain on the crossing unnecessarily, or for an unreasonable length of time, by reason of which injuries are received by one who attempts, with due care, to cross or go around the obstruction. 33 Cyc. 831.

Statutes and municipal ordinances have been enacted which prohibit the stopping of trains or cars upon highway and street crossings, or prohibit the obstruction of such crossings longer than designated periods of time.

Private right of action for violation of of statute or ordinance.

Upon the general question as to violation of police ordinance as ground of private action, see note in 5 L.R.A.(N.S.) 186.

As to private action for violation of statute not expressly conferring it, see note in 9 L.R.A.(N.S.) 338.

It is generally held, as shown in those notes, that the violation of a valid municipal ordinance or statute enacted to protect persons and property from injury is such a breach of duty as will sustain a private action for negligence if the other elements of actionable negligence concur.

In *Patterson v. Detroit, L. & N. R. Co.* 56 Mich. 172, 22 N. W. 280, it was held that while the duty to avoid obstructing a public highway contrary to the statute is one which the defendant owes to the public, an individual who suffers an injury or damage of a special nature, different in kind from that suffered by the public generally, by reason of the nonobservance of such public duty, has a right of action to recover such damage.

Violation of statute or ordinance as negligence *per se*.

It has been held that a violation of a statute or ordinance prohibiting the ob-

Chicago, R. I. & P. R. Co. v. Wheeler, 80 Kan. 187, 101 Pac. 1001; Chicago, R. I. & P. R. Co. v. Williams, 56 Kan. 333, 43 Pac. 246, 11 Am. Neg. Cas. 545; Hinchman v. Pere Marquette R. Co. 136 Mich. 341, 65 L.R.A. 553, 99 N. W. 277; Union P. R. Co. v. Adams, 33 Kan. 427, 6 Pac. 520.

It was incumbent on plaintiff to look again when she passed any obstruction and reached a point where she could have obtained a clearer view of the track.

Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; Chicago, R. I. & P. R. Co. v. Williams, 56 Kan. 333, 43 Pac. 246, 11 Am. Neg. Cas. 545, 59 Kan. 700, 54 Pac. 1047; Atchison, T. & S. F. R.

structing of street or highway crossings is negligence *per se*. *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, 434; *Central R. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757; *Houren v. Chicago, M. & St. P. R. Co.* 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, affirming 139 Ill. App. 116; *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758; *Lindler v. Southern R. Co.* 84 S. C. 536, 66 S. E. 995; *Mueller v. Milwaukee Street R. Co.* 86 Wis. 340, 21 L.R.A. 721, 56 N. W. 914.

In *Todd v. Philadelphia & R. R. Co.* 201 Pa. 558, 51 Atl. 332, 11 Am. Neg. Rep. 348, where it appeared that the crossing was blocked for a considerable period of time, and it was shown that the statute declared the blocking of public crossings with locomotives or cars to be illegal and prohibits it under a penalty, it was held that the obstruction was *prima facie* evidence that the defendant was guilty of negligence, and to establish its innocence, the burden was upon it to satisfy a jury that the obstruction had not continued for an unreasonable time, and could not have been avoided by the exercise of proper care and diligence.

Mere passive acquiescence by a municipality in repeated violations of its ordinance forbidding any railroad company to obstruct a public street longer than five minutes with an engine, car, or train, furnishes no excuse for further violations; neither does it relieve the violator from the importation of negligence. *Central R. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757.

—as evidence of negligence.

It has been said that a violation of such a statute or ordinance is not necessarily negligence, but only evidence of negligence.

Thus in *Connor v. Electric Traction Co.* 173 Pa. 602, 34 Atl. 238, it was held that the disobedience of a municipal ordinance regulating the movements of vehicles, giving a right of way to those moving in certain directions at street intersections, is not necessarily negligence *per se*, but only evidence of negligence.

Co. v. Holland, 60 Kan. 209, 56 Pac. 6; Chicago, R. I. & P. R. Co. v. Wheeler, 80 Kan. 187, 101 Pac. 1001; Beech v. Missouri, K. & T. R. Co. 85 Kan. 90, 116 Pac. 213; Missouri, K. & T. R. Co. v. Jenkins, 74 Kan. 487, 87 Pac. 702; Chicago, R. I. & P. R. Co. v. Palmer, 61 Kan. 860, 60 Pac. 736.

The special findings are inconsistent with the general verdict.

The court could not do otherwise than render judgment on the findings in favor of the railroad company.

Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Nichols v. Weaver,

7 Kan. 373; Tobie v. Brown County, 0 Kan. 14; Gripton v. Thompson, 32 Kan. 367, 4 Pac. 698; Clark v. Missouri P. R. Co. 35 Kan. 350, 11 Pac. 134; Atchison, T. & S. F. R. Co. v. Morgan, 43 Kan. 1, 22 Pac. 995, 11 Am. Neg. Cas. 538; Leavenworth, N. & S. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. 16; Phelps & B. Windmill Co. v. Buchanan, 46 Kan. 314, 26 Pac. 708; School Dist. v. Lund, 51 Kan. 731, 33 Pac. 595; Beech v. Missouri, K. & T. R. Co. 85 Kan. 90, 116 Pac. 213; Missouri, K. & T. R. Co. v. Jenkins, 74 Kan. 487, 87 Pac. 702; Chicago, R. I. & P. R. Co. v. Wheeler, 80 Kan. 187, 101 Pac. 1001.

In *Burns v. Delaware & H. Co.* 110 App. Div. 592, 96 N. Y. Supp. 509, the court said: "The provision of the Penal Code does not purport to charge a duty upon the company, but it punishes the train officials for a willful violation of the section. If an engine remains in a public street in violation of this statute, that fact, with other circumstances, may tend to show that the defendant is negligently occupying the public street."

In a few cases it is merely held that evidence of the violation of the statute is competent as tending to establish negligence without discussion as to the effect of such violation if proven.

Thus in *Cumming v. Brooklyn City R. Co.* 104 N. Y. 669, 10 N. E. 853, affirming 38 Hun. 362, it was held in an action for personal injury caused by a collision with a train running noiselessly on the other side of a train obstructing the crossing, that a municipal ordinance prohibiting the stopping of cars on the crossing so as not to interfere with travel on the cross streets, and evidence of its violation, which prevented plaintiff from seeing the approaching train, are competent upon the question of negligence and contributory negligence.

And in *Harrison v. Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019, 1 Am. Neg. Rep. 403, where it appeared that a street car was stopped suddenly in its progress near the middle of a street crossing, and a wagon coming down a grade on the cross street collided with it, it was held that evidence that the car was stopped in violation of a municipal ordinance forbidding the stopping of street cars upon any crossing so as to obstruct travel in any manner is admissible on the question of negligence of the street railway company.

In the above case the evidence was offered by the owner of the wagon, who was also a defendant in the action brought by a passenger for injuries sustained by the collision while he was riding in the car. The court said: "Evidence that the party was acting in violation or neglect of a statute or ordinance regulating the mode of conducting vehicles is always admissible in such a case, as tending to show negligence in the one guilty of the omission. In this instance the evidence bore directly upon the one material question

arising as between the defendants, as to which one caused the collision; and its exclusion was, therefore, prejudicial error."

Necessity that violation of statute or ordinance be proximate cause of injury.

It must appear that the violation of the statute prohibiting the obstructing of a highway crossing was the proximate cause of the injury. *Southern R. Co. v. Prather*, 119 Ala. 588, 72 Am. St. Rep. 949, 24 So. 836; *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, 434; *Houren v. Chicago, M. & St. P. R. Co.* 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611, affirming 139 Ill. App. 116; *Cleveland, C. C. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 170 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430, 23 N. W. 67; *Anderson v. Alabama & V. R. Co.* 81 Miss. 587, 33 So. 840.

In *Wilson v. Louisville & N. R. Co.* 146 Ala. 285, 8 L.R.A.(N.S.) 987, 40 So. 941, it was held that, in order to give a right of action to an individual for the violation of a penal ordinance forbidding the blocking of a street crossing by railroad trains, a causal connection between the offense and the injury must be shown, and therefore a complaint which merely alleges the violation of the ordinance and the running away of the plaintiff's team as a proximate consequence thereof, without anything to show how the fright of the team resulted therefrom, is insufficient.

But in *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 170 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758, it was held that a complaint, to hold a railroad company liable for injury to private property by fire because of its unlawful obstruction of a highway crossing to the delay of the fire apparatus, is not demurrable for failure to show that the wrong was the proximate cause of the loss, if the facts alleged do not show as a necessary inference that such was not the fact.

A complaint is sufficient as against demurrer which averred that plaintiff was injured while lawfully traveling along the public highway, by her horse becoming

Mason, J., delivered the opinion of the court:

Mollie J. Denton was riding in an automobile, driven by her husband, across a street in Parsons crossed by twenty-four tracks of the Missouri, Kansas, & Texas Railroad. As it was crossing one of the tracks the automobile was struck by a switch engine, and Mrs. Denton received injuries on account of which she sued the railway company. A general verdict was returned in her favor. The jury were asked to state upon what acts of negligence the verdict was based, and answered by the word, "obstructions." The trial court ren-

dered judgment for the defendant upon the special findings, first setting this one aside. The plaintiff appeals.

The petition charged the defendant with negligence in three respects: (1) In failing to give any signal of the approach of the engine; (2) in allowing two of its freight cars to stand upon the street for more than ten minutes at a time in such a way as to reduce the opening in the traveled portion to less than 30 feet, in violation of the statute making such conduct a misdemeanor; and (3) in failing to provide a flagman, as an ordinance required. The case was tried by the plaintiff largely upon the theory

frightened at a car negligently left standing in the highway by defendant in violation of the statute, without alleging that there was anything peculiar or unusual about the car likely to frighten a horse. *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 118 Ind. 152, 20 N. E. 727. The court said: "We do not hold that there is anything about a car that, if, while in lawful use by a railroad company, a horse would become frightened at it and run away and injure a person, the company would be liable, but in this case there was an unlawful use made of it. It was being used as an obstruction of the highway, and while occupying such unlawful position the horse became frightened at it. Had the company been using the car for a lawful purpose, it would have been removed from the highway two days before the injury, as appears from the allegations of the complaint, and the horse of the appellee would not have been frightened by such unlawful obstruction."

Necessity that the injury be such as statute aimed to prevent, or that person complaining be within the class designed to be protected.

And to afford a right of action for injury, it must appear that the person complaining of the violation was within the class designated to be protected, and the injury he sustained was such as the statute or ordinance aimed to prevent.

Thus, in *Southern R. Co. v. Prather*, 119 Ala. 588, 72 Am. St. Rep. 949, 24 So. 836, it was said that a railroad company "is liable for all damage resulting proximately from a violation of valid city ordinances, made for the protection of the public, but is not liable for damages which do not result proximately from such causes; nor can it be said that a violation of a statute or ordinance made for the benefit or protection of certain persons or classes gives a right of action under all circumstances to persons or classes not within its purposes."

Accordingly it was held in the above case that under a city ordinance prohibiting persons from obstructing "any street in any manner calculated to delay any company in carrying their apparatus to or from

any fire," etc., and which declared it to be unlawful, in placing cars or trains near any street crossing, "to fail to leave space free from obstruction, less than the full width of the roadway of the street, at such crossing," a cause of action is not stated in a complaint which averred that plaintiff, who was the chief of police of that city and also a member of the fire company, started immediately after the fire alarm was sounded toward the burning house, and, as it was his duty to do, went ahead of the hose carriages to keep the way clear, and found that defendant, a railroad company, negligently obstructed a street crossing in violation of the ordinance by permitting cars to stand thereon, extending into the street from both sides on different tracks for an unlawful period of time after becoming aware of the fire, and that plaintiff, in attempting to cross the tracks in their obstructed condition, drove around the end of the train, and was injured in making a short turn between the cars, when his buggy collided with the rails of the railroad track so violently as to throw him upon the ground,—for failure to allege that the fire company was obstructed in carrying its apparatus to or from the fire, or that the damage resulted because such company was thereby obstructed.

DENTON v. MISSOURI, K. & T. R. Co., above reported, holds that the statute forbidding the obstruction of a crossing longer than a designated time was intended to prevent obstructions to travel and delay occasioned thereby, and that therefore the fact that defendant permitted its cars to extend into the highway in violation of the statute, but in such position as not to prevent plaintiff from passing with his machine, did not necessarily constitute negligence for the purpose of an action in which he relied upon the fact that the position of the cars by obstructing his view of the track prevented his seeing an approaching engine in time to avoid a collision.

In *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556, it was held that the obstruction of a railroad crossing by a freight train for a time longer than the statute allows may be a concurrent cause with smoke, steam, and noise of another train, in frightening a team

that the violation of the statute referred to was the proximate cause of the injury, because one of the cars prevented the employees of the company on the engine from seeing the automobile, and prevented the driver of the automobile from seeing the engine, until the collision was imminent. An instruction was given that a finding to this effect would authorize a verdict for the plaintiff. We do not think a recovery could be sustained on that theory.

In order for the violation of a statute to constitute actionable negligence, the injury complained of must be of the sort the legislation was intended to guard against.

which is waiting to cross, and render the railroad company liable for the damages thus occasioned, where the team would not have been frightened by the other train if it had not been concealed from view by the freight train which obstructed the crossing. The court said: "The obstruction of the highway was a continuous breach of duty. It was a cause operating at the time of the injury. The smoke and steam were concurrent, rather than intervening, causes. They were contemporaneous."

In an action to recover damages for ill health alleged to have been caused by detention at a railroad crossing which obstructed the highway in violation of a statute making it the duty of a railroad company, upon stopping a train upon a highway crossing, to uncouple its cars so as not to obstruct travel on the highway for a longer period than five minutes, the plaintiff himself must have been detained by the obstruction for a longer period than five minutes. *Anderson v. Alabama & V. R. Co.* 81 Miss. 587, 33 So. 840.

In *Burns v. Delaware & H. Co.* 110 App. Div. 592, 96 N. Y. Supp. 509, the court said: "The violation of a statute may be shown as a fact tending to establish negligence, but its mere violation by the engine crew does not make the railroad company liable for everything that happens at the time of the violation; to charge it with liability, the facts making the violation must cause the injury, and here, when a horse is being rapidly driven across a railroad track, and becomes frightened by an engine standing there, and runs against the plaintiff, it is difficult to see how the injury is caused or contributed to by the fact that the engine had remained in that position for over five minutes before the horse came in sight. In this case, if the engine had arrived at the street just as the horse was crossing, the accident would have happened in the same way, but no liability could then be claimed, and it must be quite immaterial how long the engine had been standing there before the horse came up."

In an action for damages for injuries sustained on account of plaintiff's horse becoming frightened at a freight car which was permitted to extend into the highway in violation of the statute, in *Cleveland, C.* 47 L.R.A. (N.S.)

"It is believed that as a general rule evidence of the violation of a statute or ordinance can tend to show actionable negligence only where the consequences particularly or generally contemplated by the provision in question have ensued from its violation." 21 Am. & Eng. Enc. Law, 2d ed. 481, 482. "In order to render the violation of a statute or ordinance actionable negligence, the consequences which resulted from such negligence must have been those contemplated by the provision." 29 Cyc. 438. "When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason

C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118, the court said: "The mere fact that an object is in the highway in violation of a statute does not necessarily make the owner liable for damages resulting from fright which the object may have occasioned to horses. There must have been some natural, causative connection between the violation of the statute and the frightening of the horses. The object in the situation in which it was left must have had a necessary or natural tendency to that end, according to common experience. A cow or a sheep may be upon a public highway in violation of a statute, and a horse of ordinary gentleness may take fright at such an animal. The frightening of horses was not, however, the mischief which the statute requiring certain animals to be restrained from running at large was intended to prevent. The injury must, in each case, be proximately such as was within the purpose and the protection of the statute. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391."

When violation of statute or ordinance deemed proximate cause of injury.

It is not essential to a recovery against the wrongdoer that he should have foreseen the identical injury to the particular person. *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556; *Terry v. New Orleans G. N. R. Co.* — Miss. —, 44 L.R.A. (N.S.) 1069, 60 So. 729.

The sudden stopping of a street car across a street, thus obstructing it in violation of a penal municipal ordinance, is negligence; and when such stoppage halts a funeral procession so suddenly that the pole of a following coach crashes into the rear of a coach in front, such stopping and violation are the proximate cause of the injury and will render the street railway company liable for the damages. *Mueller v. Milwaukee Street R. Co.* 86 Wis. 340, 21 L.R.A. 721, 56 N. W. 914.

The unlawful blocking of a highway crossing by a train is the proximate cause of in-

of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss." Headnote to *Gorris v. Scott*, L. R. 9 Exch. 125. "'Negligence' is a breach of a duty. Those only to whom that duty is due and who have sustained injuries of the character its discharge was designed to prevent can maintain actions upon it." *Chicago G. W. R. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 100 C. C. A. 41, 45, 176 Fed. 237, 241, 20 Ann. Cas. 1200.

The rule referred to results from a special application of the broader principle that the object of the statute must be looked to

in order to determine who may invoke its benefit. The test whether an individual injured by the violation of a penal statute may recover damages from the wrongdoer is whether the legislature intended to give such right. 1 Cyc. 679; *Harrod v. Latham Mercantile & Commercial Co.* 77 Kan. 466, 471, 95 Pac. 11. A matter necessarily to be considered in applying that test is whether the lawmakers had similar injuries in mind and designed to prevent them. The cases holding that the violation of a statute constitutes actionable negligence only in favor of a person belonging to the class intended to be benefited are fully col-

jury to a patient by the delay of her physician in reaching her in consequence of the blockade, although those in charge of the train may not have anticipated that such injury would result from their act. *Terry v. New Orleans G. N. R. Co.* supra. The court said: "Appellant, as a member of the general public, had the right to have this highway remain unobstructed so that it could be used by her for any legitimate purpose; and having a physician to travel over it to reach her bedside in order to relieve her pain and suffering was, of course, such a purpose. . . . It seems clear from the evidence that appellant's suffering was prolonged by the delay of the doctor in reaching her bedside, but whether she sustained any additional injury thereby is a question of fact for the jury."

The violation by a railroad company of a statute forbidding the obstruction of street crossings in cities is the proximate cause of damages to the owner of a house destroyed by fire because of failure of the fire department, whose progress was interfered with by the obstruction, to reach it in time to extinguish the fire or prevent its spread to his house. *Houren v. Chicago, M. & St. P. R. Co.* 236 Ill. 620, 20 L.R.A. (N.S.) 110, 127 Am. St. Rep. 309, 86 N. E. 611; *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758.

In *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, 434, it was held that the question of proximate cause was properly submitted to the jury where the plaintiff's child, a pedestrian, was killed by being run over by a team of horses that became frightened at two locomotives which occupied about three fourths of the street crossing in violation of a city ordinance.

And in *Lindler v. Southern R. Co.* 84 S. C. 536, 66 S. E. 995, it was held that the question of proximate cause was for the jury where plaintiff was injured while lawfully using the highway, by his horse becoming frightened at two of defendant's locomotives which occupied about three fourths of the street crossing in violation of the city ordinance.

In *Peterson v. Chicago & W. M. R. Co.* 64 47 L.R.A. (N.S.)

Mich. 621, 31 N. W. 548, it was held that the case was properly submitted to the jury where the evidence tended to show that plaintiff, who was lawfully using the highway, was injured by reason of his horses becoming frightened at a freight box car which was left standing in the highway in violation of the statute, and so near the traveled part of the roadway that teams could not cross upon the planking without the wheels or the whiffletrees coming in contact with the car; that the team was of ordinary gentleness, but when they got near the car they moved off to one side, causing the wagon to get off the planking between the open rails, and the jolting of the wheels upon the rails threw the plaintiff to the ground to his injury.

Whether a freight train obstructing the crossing did or did not give to the noise, steam, and smoke of another passing train a character which they would not possess in the absence of the obstructions, so as to make a concurrent cause of the frightening of a team, is a question for the jury where there is evidence that the team was accustomed to trains. *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L.R.A. 164, 53 N. W. 556.

Illinois C. R. Co. v. Engle, — Miss. —, 60 So. 1, affirms the right of one to recover damages for injuries to health because of exposure by being detained at the railroad crossing, which was blocked for a longer period than that provided by statute, the only question in the case being the amount of damages.

In *De la Pena v. International & G. N. R. Co.* 32 Tex. Civ. App. 241, 74 S. W. 58, it was held that the blocking of a street crossing in violation of a municipal ordinance was not the proximate cause of injuries sustained to one by falling into an open drain overgrown with grass and weeds, along a path on defendant's right of way, used by the public, with the knowledge and acquiescence of the railroad company, for the purpose of going around cars. It was said that "the obstruction of the crossing was not that which, in a natural and continuous sequence, unbroken by any new independent cause, produced the accident which resulted in plaintiff's injury; and hence not its proximate cause."

lected in notes in 9 Ann. Cas. 427; Ann. Cas. 1912 D, 1106; 9 L.R.A. (N.S.) 338, 343; and 36 Am. St. Rep. 817.

The statute here invoked was clearly intended to prevent the impeding of traffic by providing that, except for limited periods, a strip 30 feet wide should be kept open for travel. The title describes the act as one "to prohibit railroads from obstructing public highways and streets." The prohibition in full reads: "Each and every railroad company, or any corporation leasing or otherwise operating a railroad, in Kansas, is hereby prohibited from allowing its trains, engines, or cars to stand

upon any public road within $\frac{1}{4}$ mile of any incorporated or unincorporated city or town, station, or flag station, or upon any crossing or street, to exceed ten minutes at any one time without leaving an opening in the traveled portion of the public road, street, or crossing of at least 30 feet in width." Gen. Stat. 1909, § 7142.

Evidently the purpose of the statute was to prevent obstacles to travel, not to sight; the injury in the mind of the legislature was that resulting from delay in crossing, not from collisions with a moving train. In *Corley v. Atchison, T. & S. F. R. Co.* 90 Kan. 70, 133 Pac. 555, decided at this sit

A railroad company does not, by obstructing a highway with an engine contrary to the provisions of the statute, become liable for injuries to persons attempting to use the highway, which are caused by the emission of steam from the engine, if such emission does not result from negligence, or have any relation to its wrongful act. *Hinchman v. Pere Marquette R. Co.* 136 Mich. 341, 65 L.R.A. 555, 99 N. W. 277.

The question of proximate cause is for the jury where it appears the plaintiff was injured by the sudden movement of the train while attempting to climb over or between the cars which were obstructing the crossing in violation of the statute or ordinance. *Rauch v. Lloyd & Hill*, 31 Pa. 358, 72 Am. Dec. 747; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372; *Chicago, R. I. & G. R. Co. v. Johnson*, 101 Tex. 422, 108 S. W. 964.

Accordingly it was held that defendant is not entitled to an instruction in such a case, that the violation of the ordinance forbidding the blocking of the street could not have been the proximate cause of plaintiff's injuries. *Chicago, R. I. & G. Co. v. Johnson*, supra; *Texas & N. O. R. Co. v. Bean*, 55 Tex. Civ. App. 341, 119 S. W. 328.

It was urged in the cases cited above in the last two propositions that it was the movement of the cars, and not the unlawful obstruction, that was the proximate cause of the injury, but it was said that the two acts of negligence were not separable.

And so in the following cases it has been held that such two charges of negligence are not separable in the sense that only one would be the proximate cause of the injury; taken together they constitute a sufficient allegation of negligence as against a general demurrer. *Burger v. Missouri P. R. Co.* 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439; *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 641, 41 N. E. 980.

In *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372, in which a child undertook to pass under a train standing across a street, and was injured by the negligent starting of the cars before he had passed through, the court said: "Now adjust the acts of stopping and starting ever so nicely to the maxim *causa proxima*, and not a step of

advance is taken by the defense, for the company are equally liable for both causes. If you say it was the starting, and not the stopping, of the cars, that did the mischief, the question of plaintiff's negligence in suffering his son to be under them is still in the case, but you have made no progress in the defense, because if there was wrong in the start, the company are as responsible for it as for any wrong in the stop. The nature of the case, however, does not admit of this nice distinction. The conduct of that train of cars was one thing,—intrusted as a special duty to one man,—and if his mismanagement injured the plaintiff, without fault on the plaintiff's part, the company are liable for it. To split such a single, simple, individual cause into two causes, and to christen them *proxima* and *remota*, is to embarrass ourselves unnecessarily, and to obstruct the course of justice."

In *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 641, 41 N. E. 980, the court said in affirming this doctrine: "Nor are the two negligent acts independent of each other. Both concur in constituting an act of negligence. viz., the negligent starting of a train negligently, and unlawfully obstructing a street crossing."

In *Burger v. Missouri P. R. Co.* 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439, it was objected that the petition showed no causal connection between the act of obstructing the crossing and the injury to the plaintiff; that the moving of the train was the proximate cause of the injury, and no negligence in doing that was stated, but the court said: "The rule that the causal connection between the negligent act and the damage may be broken by the interposition of an independent, responsible human agency cannot be applied to relieve one of liability for one negligent act by interposing another, also committed by himself. Besides, we do not think the two negligent acts charged in this petition are independent of each other. . . . The negligent and unlawful obstruction of the street continued until the negligent starting of the cars commenced, and the two alleged causes of the injury were not separable, in the sense that one only would be the proximate cause of the damage."

ting, it is decided that a railway company may be liable for injuries due to the obstruction of vision by objects unnecessarily allowed near the track. The principle has been applied where cars have been so left upon a side track as to produce that effect. *Reed v. Chicago, St. P. M. & O. R. Co.* 74 Iowa, 188, 37 N. W. 149. See however *Bruggeman v. Illinois C. R. Co.* 154 Iowa 596, 134 N. W. 1079; *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633; *Chicago, B. & Q. R. Co. v. Roberts*, 3 Neb. (Unof.) 425, 91 N. W. 707; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556; *Nashville, C. &*

St. L. R. Co. v. Witherspoon, 112 Tenn. 128, 78 S. W. 1052. The violation of a law may be evidence of negligence, even in a situation where it could not actually constitute negligence. *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38 L. ed. 434; note in 9 Ann. Cas. 431. Thus, upon an issue whether or not cars so placed as to obstruct vision at a crossing were necessarily and properly there, the fact of the violation of the statute here involved might have evidential value. Here, however, no question was presented of negligence in the obstruction of the view, apart from the statute. The plaintiff relied upon

And in *Texas & N. O. R. Co. v. Bean*, 55 Tex. Civ. App. 341, 119 S. W. 328, it was held in an action against a railroad company for personal injuries alleged to have resulted from a defendant's negligence in the mismanagement of its train by blocking the street crossing in violation of the ordinance, and negligently starting the train without warning of any kind while plaintiff was attempting to cross between the cars, that the ordinance prohibiting the obstruction of the crossing under a penalty was properly received in evidence on the issue of negligence, over the objection that the blocking of the street crossing could not have been the proximate cause of the injuries, upon the ground that the blocking of the street and the negligent starting of the cars in motion were so interwoven as to constitute an inseparable act of negligence, that it would be improper to attempt to separate them and to inquire whether either alone was the proximate cause.

In *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, 434, and *Lindler v. Southern R. Co.* 84 S. C. 536, 66 S. E. 995, the court, without discussion, treated the occupation of three fourths of a street crossing by two locomotives facing each other as a violation of a municipal ordinance forbidding the stopping or standing of trains upon a street crossing, and to constitute negligence.

A railroad company which leaves its cars standing in the highway is guilty of a violation of the statute prohibiting obstructing of highway crossings, notwithstanding it leaves a portion of the traveled roadway open for the passage of teams. *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 118 Ind. 152, 20 N. E. 727.

In *Peterson v. Chicago & W. M. R. Co.* 64 Mich. 621, 31 N. W. 548, the court affirmed a charge to the jury to the effect that if they found that the car stood upon or so near the usual traveled part of the crossing that teams could not cross the track on the usual crossing without the wheels or the whiffletrees coming in contact with the car, and that the car had stood there at one time for more than five minutes, the period designated in the statute, it amounted to an obstruction of the highway.

It cannot be said, as a matter of law, that 47 L.R.A. (N.S.)

an opening between the cars of 16 feet or more in width of the traveled portion did not obstruct the highway, where the highway crossed the railroad at an angle less than 45 degrees, and in order to pass between the cars it was necessary to deviate from the traveled way and to cross the track at nearly right angles thereto. *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430, 23 N. W. 67.

In *Lawless v. Detroit, G. H. & M. R. Co.* 65 Mich. 292, 32 N. W. 790, it was held that the court could not as a matter of law say that it was negligent to leave cars standing within the limits of the highway on either side for a longer period than that provided by the statute for the obstructing of highway crossings, leaving a space between the cars of about 22 feet, there being evidence tending to show that a part of the one car extended over the planking slightly, which was 14 feet wide, it appearing that the planking was the only part of the highway used or practicable for crossing, and that the injury was caused when plaintiff's horse became frightened at the cars, and, shying to the side, brought the sleigh in which plaintiff was riding against the car standing nearest to the planking.

The court cannot, as a matter of law, say that because an engine was within the limits of the highway it obstructed the crossing within the meaning of the statute which provides that the railroad company shall not "obstruct any public highway or street by cars or trains for more than five minutes at any one time." *Hinchman v. Pere Marquette R. Co.* 136 Mich. 341, 65 L.R.A. 553, 99 N. W. 277.

Accordingly, it was held in the above case that the mere fact that an engine is within the limits of the highway more than five minutes does not make its presence wrongful, so as to charge its owner with responsibility for injuries caused by steam emitted from it, regardless of the question of negligence, if it does not obstruct the highway under a statute forbidding the obstruction of any street or highway by cars or trains for more than five minutes at any one time. *Ibid.*

The mere fact that a locomotive extended into the street for some distance for a longer period than five minutes in violation of a

the violation of the law as constituting negligence in and of itself.

The jury were instructed that the failure to maintain a flagman was negligence if the company had actual notice of the passage of the ordinance, or in the exercise of ordinary care should have known of it, prior to the accident. The injury occurred November 8, 1910. The ordinance was published November 2, 1910, and purported to take effect at that time. The jury found that the defendant first had actual notice of it on November 12, 1910. The statute imposes no restriction, and it rests with the body passing the ordinance to determine

the time of its taking effect. 21 Am. & Eng. Enc. Law, 997. There is some conflict in the authorities regarding the necessity for publishing an ordinance except when, as in this state, it is required by statute (28 Cyc. 359, 391, 392), but apparently none as to the power of the municipality to make it effective immediately upon publication. Such an ordinance as that here involved has the force of law, and, like a statute, imposes an obligation regardless of any question of actual notice, or of constructive notice based upon opportunity for information, notwithstanding the hardship that may sometimes result.

statute making it a misdemeanor for one in charge of a locomotive, train, or car wilfully to obstruct any farm or highway crossing for a longer period than five minutes, does not as a matter of law make a railroad company guilty of negligence *per se*, in an action to recover damages for personal injuries by one who, while working upon the track, was injured by a horse which became frightened at the locomotive, as the driver, without being delayed, attempted to drive in front of the locomotive on reaching the crossing. *Burns v. Delaware & H. R. Co.* 110 App. Div. 592, 96 N. Y. Supp. 509. The court said: "There was clearly enough room . . . for the passage of an ordinary vehicle in front of the engine. Viewing the matter in its most favorable light to the plaintiff, there is a question of fact to be submitted to the jury whether this engine obstructed the street, and whether it was a wilful obstruction, and whether such obstruction caused the injury."

In *Crowley v. Chicago, St. P. M. & O. R. Co.* 122 Wis. 287, 99 N. W. 1016, it was held that a nonsuit was properly granted in an action to recover for injuries alleged to have been caused by plaintiff's horse, which became frightened at defendant's locomotive alleged to have obstructed the street, rendering it unsafe for travel, in violation of the city ordinance prohibiting the stopping of any trains "across any street" for longer than a certain time, upon the ground that no violation of the ordinance was shown, where it appeared that the engine extended only slightly into the street.

Effect of contributory negligence.

It is generally held that the fact that the defendants' negligent act in permitting its train to stand across the public highway, so as to obstruct passage thereon, may have been a violation of a statute or ordinance, will not exclude as a feature of the case, the contributory negligence of plaintiff (*McCullum v. Cleveland, C. C. & St. L. R. Co.* 154 Ind. 97, 55 N. E. 1024; *Magoon v. Boston & M. R. Co.* 67 Vt. 177, 31 Atl. 156); and so in the following cases it was held that the negligence of the plaintiff in attempting 47 L.R.A.(N.S.)

to cross between cars was the proximate cause of the injury so as to preclude recovery, although the train had unlawfully blocked the crossing. *Curtis v. St. Louis & S. F. R. Co.* 96 Ark. 394, 34 L.R.A.(N.S.) 466, 131 S. W. 947, Ann. Cas. 1912 B, 685; *Wick v. Central of Georgia R. Co.* 11 Ga. App. 323, 75 S. E. 162.

In *Curtis v. St. Louis & S. F. R. Co.* 96 Ark. 394, 34 L.R.A.(N.S.) 466, 131 S. W. 947, Ann. Cas. 1912 B, 685, the court said: "It has been repeatedly held by this court that, though the defendant may be guilty of negligence and of a violation of law, still the plaintiff cannot recover if his own negligence contributed proximately to the happening of the accident which caused the injury."

In *McCullum v. Cleveland, C. C. & St. L. R. Co.* 154 Ind. 97, 55 N. E. 1024, it was held that one who was injured while attempting to cross over a freight train which was obstructing the street in violation of the statute could not successfully claim that, on account of its unlawful obstruction of the street, the injury was thereby wilfully or intentionally inflicted by the defendant upon the plaintiff, so as to render the defendant liable notwithstanding the contributory negligence of plaintiff.

And in *Russell v. Central of Georgia R. Co.* supra, it was held that if the only employee who knew of the perilous position in which the person attempting to cross had placed himself was a watchman at the crossing, no recovery can be had, unless it appears that the watchman was so situated, after he knew of the dangerous position in which the person was placed, that he could have signaled the engineer or other employees in control of the train's movements, and thus have prevented injury to the party attempting to cross, and that he failed to give such signal, or that he gave the signal and it was disregarded.

In *Andrews v. Central R. & Bkg. Co.* 86 Ga. 192, 10 L.R.A. 58, 12 S. E. 213, it was said: "Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured . . . cannot recover unless the engineer, conductor, or some other person having control of the

Finding were made to the effect that the position of one of the freight cars obscured the view of the track so that the front of the automobile was on the track before the driver was able to see the engine. In somewhat similar situations it has been held that the question whether the exercise of due diligence required the traveler to stop, as well as to look and listen, is a question for the jury. *Atchison, T. & S. F. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; *Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246, 11 Am. Neg. Cas. 545; *Chicago, R. I. & P. R. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993. In ex-

ceptional cases the court has declared the failure to stop to be negligence as a matter of law. *Atchison, T. & S. F. R. Co. v. Willey*, 60 Kan. 819, 58 Pac. 472, 6 Am. Neg. Rep. 515; *Chicago, R. I. & P. R. Co. v. Palmer*, 61 Kan. 860, 60 Pac. 736; *Missouri, K. & T. R. Co. v. Jenkins*, 74 Kan. 487, 87 Pac. 702; *Id.* 79 Kan. 17, 98 Pac. 208. Even if it should be held that the findings show that the driver was negligent as a matter of law, a judgment for the defendant would not necessarily result; no personal negligence on the part of the plaintiff is found, and she is not responsible for the manner in which her husband handled the car.

train's movements knew of his attempt to cross, or had notice of his exposure to danger." To the same effect *Russell v. Central of Georgia R. Co.* 119 Ga. 705, 46 S. E. 858.

In *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758, it was held that a complaint, to hold a railroad company liable for injury to property by fire because of its unlawful obstruction of a highway crossing so as to delay the fire apparatus, is insufficient if it does not show freedom from negligence on the part of complainant, bringing about the fire, contributing to its spread, or in removing goods, for which purpose a general allegation that the loss was the proximate result of defendants' acts is not sufficient.

In an action for injuries to plaintiff's health by reason of defendant blocking the highway crossing for a longer period than that provided by the statute, in which plaintiff testified that, after having waited about half an hour in the cold and rain, he was taken with a chill; that, notwithstanding this, he continued to wait in the rain for three quarters of an hour longer,—the court said that plaintiff "was justified in momentarily expecting that the servants of the company would remove the obstructing train from across the highway, so that he might pursue his journey home; and it does not lie with the company to say that he should have yielded to its unlawful and arrogant conduct, and sought shelter against the inclemency of the weather." The report of the case shows, however, that the trial court instructed for the defendant to the effect that if the jury believed from the evidence that plaintiff was in easy reach of public or other houses, wherein he could have protected himself from exposure during the time the track was obstructed, and neglected to avail himself thereof, then he was guilty of contributory negligence, and could not recover. *Louisville, N. O. & T. R. Co. v. Duffree*, 69 Miss. 439, 13 So. 697.

Miscellaneous.

In *Depow v. Chicago & N. W. R. Co.* 151 Wis. 109, 138 N. W. 42, it was held in an action to recover injuries sustained by the 47 L.R.A. (N.S.)

blocking of a street crossing, that a municipal ordinance forbidding the blocking of street crossings, without designating any time limit upon which cars may remain upon a crossing, must be construed to relate to an unnecessary stop upon a street crossing or a necessary stop prolonged for an unreasonable or unnecessary length of time, upon the ground that it cannot be presumed that the ordinance was intended to interfere with or prevent the ordinary, usual, and careful operation of railroad trains.

One who attempts to cross a railroad track by climbing over a car which had stood at the crossing longer than the law allowed is not a trespasser. *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 641, 41 N. E. 980.

One who goes upon a railroad track in an attempt to go around a train that is unlawfully obstructing the crossing is not a trespasser though he is compelled to go outside the street limits to do so. *Kurt v. Lake Shore & M. S. R. Co.* 127 App. Div. 838, 111 N. Y. Supp. 859, affirmed without opinion in 194 N. Y. 598, 88 N. E. 1122.

In *Littlejohn v. Richmond & D. R. Co.* 49 S. C. 12, 26 S. E. 967, 2 Am. Neg. Rep. 456, it was held that a railroad company that obstructs a highway for a longer time than that permitted by the statute becomes a trespasser, and is estopped from saying that one who attempts to climb over its cars for the purpose of crossing the track is a trespasser.

The rule in the above case is not affected by a statute making the railroad company liable to a penalty and for all damages arising to any person from an obstruction, where it permits its cars to remain upon or across a public highway for a longer period than five minutes after notice to remove the cars. *Walker v. Southern R. Co.* 77 S. C. 161, 57 S. E. 764, 12 Ann. Cas. 591.

Evidence tending to show that the railroad company knowingly violated a city ordinance by permitting its engines to stand upon the street crossing an unreasonable length of time, emitting steam, with no one in charge of them, will entitle one suffering injury resulting therefrom to recover punitive damages. *Lindler v. Southern R. Co.* 84 S. C. 536, 66 S. E. 995.

A. L. R.

Williams v. Withington, 88 Kan. 809, 129 Pac. 1148.

We conclude that the findings did not require a judgment for the defendant. It filed a motion for a new trial, which was not passed upon, because judgment was rendered in its favor, but which it is entitled to have allowed for reasons already stated. The plaintiff filed no motion for a new trial, but has argued questions regarding the rulings made against her; these have been passed upon because they will necessarily arise again in the further proceedings. Moreover in the unusual situation presented, one of the special findings having been set aside, it seems proper that a new trial should be ordered by this court. The finding of the jury that the bell was rung as the engine approached the crossing covers a distinct issue, and is not affected by any ruling held to be erroneous. It should therefore stand as an established fact of the case. Civ Code, § 307 (Gen. Stat. 1909, § 5901); McCullough v. S. J. Hayde Contracting Co. 82 Kan. 734, 738, 109 Pac. 176. The plaintiff complains of an instruction regarding the weight of testimony with reference to this matter, but as it stated a proposition of law which has been approved, and was applicable to a part of the evidence, and as no amplification was asked, we do not think it can be regarded as a ground for setting aside the finding.

The judgment is reversed and the cause remanded for further proceedings herewith.

All the Justices concur.

Petition for rehearing denied.

MAINE SUPREME JUDICIAL COURT.

BENJAMIN F. WARNER
v.

MAINE CENTRAL RAILROAD COMPANY.

GEORGE B. WARNER
v.
SAME.

(— Me. —, 88 Atl. 403.)

Evidence — report by agent — admission — admissibility.

A report by a station agent to the general manager of a railroad on the day after

a fire had occurred at his station, in which he states the cause of the fire to have been sparks from a locomotive, is not admissible against the railroad company in an action to hold it liable for the loss.

(October 8, 1913.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Androscoggin County made during the trial of consolidated actions brought to recover damages to property by fire alleged to have been caused by sparks from defendant's locomotive, which resulted in verdicts for plaintiffs. Sustained.

The facts are stated in the opinion.

Messrs. White & Carter, for defendant:

The letter written by Edward J. Hayes is inadmissible.

Bennett v. Talbot, 90 Me. 229, 38 Atl. 112; Fidelity & C. Co. v. Haines, 49 C. C. A. 379, 111 Fed. 337; Hazeltine v. Miller, 44 Me. 177; Boston & M. R. Co. v. Ordway, 140 Mass. 510, 5 N. E. 627; Fairlie v. Hastings, 10 Ves. Jr. 123; Louisville & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Wellington v. Boston & M. R. Co. 158 Mass. 185, 33 N. E. 393; McDonough v. Boston Elev. R. Co. 191 Mass. 509, 78 N. E. 141; Bachant v. Boston & M. R. Co. 187 Mass. 392, 105 Am. St. Rep. 408, 73 N. E. 642; Robinson v. Fitchburg & W. R. Co. 7 Gray, 92; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; Heath v. Jaquith, 68 Me. 433; Williams v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790; Chicago, St. P. M. & O. R. Co. v. Bryant, 13 C. C. A. 249, 27 U. S. App. 681, 65 Fed. 969; Merrow v. Goodrich, 92 Me. 393, 69 Am. St. Rep. 512, 42 Atl. 797; Robinson v. Old Colony Street R. Co. 189 Mass. 594, 76 N. E. 190; Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15; Franklin Bank v. Steward, 37 Me. 519; Partridge v. White, 59 Me. 564; Carroll v. East Tennessee R. Co. 82 Ga. 452, 6 L.R.A. 214, 10 S. E. 163; Carpenter v. Chicago, R. I. & P. R. Co. 126 Iowa, 94, 101 N. W. 758; Pratt v. Ogdensburg & L. C. R. Co. 102 Mass. 557; Grand Trunk R. Co. v. Nichol, 18 Mich. 170; Atchison, T. & S. F. R. Co. v. Parker, 5 C. C. A. 220, 12 U. S. App. 132, 55 Fed. 595; St. Louis & S. F. R. Co. v. Barger, 52 Ark. 78, 20 Am. St. Rep. 155, 12 S. W. 156; Cook v. Whitfield, 41 Miss. 541; Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86; Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282; Mortimer v. McCallan, 6

Note. — Admissibility of reports by agent or employee to employer to prove fact in issue.

This subject was covered by note to Atchison, T. & S. F. R. Co. v. Burks, 18 L.R.A. 47 L.R.A. (N.S.)

(N.S.) 231, supplemented by note to Conner v. Seattle, R. & S. R. Co. 25 L.R.A. (N.S.) 930, and only cases decided since the preparation of the supplementing note are here cited.

As to admissibility of insurance agent's

Mees. & W. 58, 9 L. J. Exch. N. S. 73, 4 Jur. 172; Craig v. Gilbreth, 47 Me. 416; Franklin Bank v. Cooper, 39 Me. 542; Richstain v. Washington Mills Co. 157 Mass. 538, 32 N. E. 908; Blight v. Ashley, Pet. C. C. 15, Fed. Cas. No. 1,541; North Hudson County R. Co. v. May, 48 N. J. L. 401, 5 Atl. 276, 9 Am. Neg. Cas. 559; Berry v. Reed, 53 Me. 487; Lime Rock Bank v. Hewett, 52 Me. 531; Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508; Mott v. Detroit, G. H. & M. R. Co. 120 Mich. 127, 79 N. W. 3; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1; United States v. Boyd, 5 How. 29, 12 L. ed. 36; Arnil v. Chicago, B. & Q. R. Co. 70 Iowa, 130, 30 N. W. 42; Bierce v. Stocking, 11 Gray, 174; Turner v. Phoenix Ins. Co. 55 Mich. 236, 21 N. W. 326; Blitch v. Central R. Co. 76 Ga. 333, 2 Am. Neg. Cas. 392; Whittemore v. Wentworth, 76 Me. 20; Gilmore v. Mittineague Paper Co. 169 Mass. 471, 48 N. E. 623; Atchison, T. & S. F. R. Co. v. Osborn, 58 Kan. 768, 51 Pac. 286; Houston & T. R. Co. v. Laforge, — Tex. Civ. App. —, 84 S. W. 1072;

Morse v. Connecticut River R. Co. 6 Gray, 450; Wormsdorf v. Detroit City R. Co. 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000; Maxson v. Michigan C. R. Co. 117 Mich. 218, 75 N. W. 459.

Mr. Ralph W. Crockett, for plaintiffs:

The letter by the station agent to the general manager was admissible.

Burnham v. Ellis, 39 Me. 319, 63 Am. Dec. 625; 16 Cyc. 1003, 1019; Whitney v. Wagener, 84 Minn. 211, 87 Am. St. Rep. 351, 87 N. W. 602; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Empire Mill Co. v. Lovell, 14 Am. St. Rep. 275, note; Lipacomb v. South Bound R. Co. 63 S. C. 148, 43 S. E. 388; Morse v. Connecticut River R. Co. 6 Gray, 450; Gott v. Dinsmore, 111 Mass. 45; Lane v. Boston & A. R. Co. 112 Mass. 455; Green v. Boston & L. R. Co. 128 Mass. 221, 35 Am. Rep. 370; McGenness v. Adriatic Mills, 116 Mass. 177; Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Weigley v. Kneeland, 18 App. Div. 47, 45

memoranda or letters as to policies and risks, see note to Cummings v. Pennsylvania F. Ins. Co. 37 L.R.A.(N.S.) 1169.

Some courts have admitted in evidence such reports for the purpose of affecting the principal with notice of, and to establish against him, relevant facts and existing conditions leading up to the cause of action, while others have limited the purpose to proving notice; in either case the report must have been required of the agent or employee, or made in the line of his duty. See notes to which reference is made, *supra*.

Conceding the relevancy of the purpose of the proffered evidence, its force and effect, as well as its admissibility, would yet depend upon the rule of evidence by which it must be tested, and this in turn would depend upon the substance of the report and the surrounding circumstances. Thus, in *WARNER v. MAINE C. R. Co.*, the court disposes of the contention that the report was binding upon the principal as an admission, by showing that it was merely a narrative of a past transaction with the agent's opinion added; of the contention that it was part of the *res gestæ*, by pointing out that the agent had no part in the transaction that formed the basis of the cause of action; and of the assertion that the agent was required to make the report, by showing that the assertion was not proved, and even if it had been proved, no question of notice was involved, since the report was made after the alleged accident; and for the same reason, the report could not be admitted to show the relevant facts and conditions existing and leading up to the cause of action.

In *Lemen v. Kansas City Southern R. Co.* 151 Mo. App. 511, 132 S. W. 13, an action 47 L.R.A.(N.S.).

against a railroad company for damages caused by the burning of plaintiff's barn, alleged to have been fired by sparks from defendant's engine, the report of the conductor to the nearest operator, "Better send your section gang up the road; I think we set something on fire there; better send them as far as the bridge for it may be that," was held admissible as in the nature of an admission that the locomotive had started the fire, the report having been made as soon as the conductor's train reached the station, and within fifteen minutes after it had passed the barn, pursuant to a custom of train men "to report mishaps and fires set out by their trains to the nearest operator or station agent."

In *Hilbert v. Spokane International R. Co.* 20 Idaho, 54, 116 Pac. 1116, it was held that a section foreman's report made shortly after the fire occurred, giving details and stating that the cause of the fire was unknown, he being required by the company to make such reports, was admissible on the part of the plaintiff in an action against the company for damages caused by the fire, which was alleged to have been caused by defendant's negligence.

In an action against a carrier for the value of one box of clothing, where it was alleged that plaintiff had delivered two boxes to defendant, but had found the shipment one box short at destination, a notation by the carrier's agent at destination upon the bill of lading, "one case short," made within the scope of the agent's duty, was admissible as an admission on the part of the defendant that it had failed to deliver the one box of goods. *Dunie v. Atlantic Coast Line R. Co.* 161 N. C. 520, 77 S. E. 756.

And in a suit against a carrier for loss

N. Y. Supp. 388; McGowan v. Supreme Ct. I. O. F. 104 Wis. 173, 80 N. W. 603; Chicago, B. & Q. R. Co. v. Beal, 4 Neb. (Unof.) 510, 94 N. W. 956, 14 Am. Neg. Rep. 133; Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co. 59 Kan. 111, 52 Pac. 71; Southern R. Co. v. Bailey Bros. 28 Ky. L. Rep. 53, 80 S. W. 786; Louisville & N. R. Co. v. Brown, 28 Ky. L. Rep. 772, 90 S. W. 567; Crawford v. Southern R. Co. 56 S. C. 136, 34 S. E. 80; Hopkins v. Boyd, 18 Ind. App. 63, 47 N. E. 480, 3 Am. Neg. Rep. 644; Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; Wabash R. Co. v. Kelley, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; Alquist v. Eagle Iron Works, 126 Iowa, 67, 101 N. W. 520; Houston, E. & W. T. R. Co. v. Campbell, 91 Tex. 551, 43 L.R.A. 225, 45 S. W. 2; San Antonio & A. P. R. Co. v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; Western U. Teleg. Co. v. Barefoot, 97 Tex. 159, 64 L.R.A. 491, 76 S. W. 914; Missouri, K. & T. R. Co. v. Russell, 40 Tex. Civ. App. 114, 88 S. W. 379.

King, J., delivered the opinion of the court:

These actions were tried together. They were brought under the provisions of § 73, chap. 52, Revised Statutes, to recover damages to property by fire alleged to have been communicated by a locomotive engine of the defendant. The first, that of Benjamin F. Warner, was for damage to the buildings burned, and the second, that of

George B. Warner, for damage to the contents of the buildings. The insurance on the buildings having been paid, the jury deducted the amount thereof from the damages to the buildings, and returned a verdict in that suit for \$600, and a verdict in the other suit for \$2,300. The cases come before the law court on defendant's exceptions and motion for a new trial. The chief issue at the trial was whether the fire was communicated by the defendant's locomotive engine. The buildings burned were situated at Leeds Junction station, so called, northerly of the defendant's railroad, and about 80 feet therefrom.

Ernest J. Hayes, the first witness for the plaintiff, whose house was situated about 60 feet northerly from the Warner buildings, testified that he was the defendant's station agent at Leeds Junction, and that on the day after the fire he made a report of it to the defendant by letter, as he supposed it was his duty to do. Thereupon, against objection, that letter was admitted, as follows:

Leeds Jct., Me. Oct. 7th. '12.

Morris McDonald,

Vice President & Gen'l Manager,

Dear Sir:—

For your information, I beg to report that about 6:05 P. M. last night, Mr. G. B. Warner ran over to my house, calling that his buildings were on fire.

Upon going out on my piazza I saw flames coming up from the east side of the

of certain cows and damage to others in transit, it was held in *Quannah, A. & P. R. Co. v. Galloway*, — Tex. Civ. App. —, 154 S. W. 653, that a notation, on the expense bill, "Eight cows more or less stove up, and stiff in walking. Some few skinned, apparently caused by rough handling," was admissible against the defendant, after it had been shown that the carrier's employee, in making the notation, acted within the scope of his duties.

In *Arizona Powder Co. v. Kellam*, 13 Ariz. 291, 114 Pac. 561, where defendant's manager had instructed their team superintendent to value a freighting outfit which the defendant was renting from plaintiff, and to make a memorandum thereof, the memorandum so made, showing that a chain which the plaintiff claimed was never returned was included in the outfit, was admissible in a suit to recover for the value of several items, among which was the chain, as against defendant's contention that the team superintendent had no authority to bind the employer by his memorandum.

Usually, such reports are treated as self-serving declarations when offered on the part of the employer, and are excluded on that ground.

In *Woods v. Toledo, St. L. & W. R. Co.* 47 L.R.A. (N.S.),

159 Ill. App. 209, where a carrier was sued for damages caused to horses by unreasonable delay in their transportation, it was held that telegrams sent by the local agent to the train despatcher, and by the latter to the former, relative to the movements of the car carrying the horses, were inadmissible on the part of the defendant, on the ground that they were hearsay and self-serving.

In an action against a railroad company for damages for injuries alleged to have been sustained by the plaintiff, caused by being pushed off a moving train by the conductor, the conductor having testified denying all the averments as to what happened, and his testimony being unimpeached, it was error to admit, for the purpose of corroborating him, his written statement filed with the claim department of his employer, since the statement was self-serving. *Quigley v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 142 S. W. 633.

An entry made by an employee of the defendant in its pay roll book is not admissible as evidence for the defendant in an action for breach of an employment contract since such entry would be a self-serving declaration. *Kaplan v. Lieberman*, 80 Misc. 226, 140 N. Y. Supp. 1010.

J. W. M.

barn roof, went over and opened barn door, saw that the fire was on top of hay, which I could see up through the pitching hole in scaffolding, and could also see that the east side of roof had a 10 or 12 foot hole burned through.

In an hour the entire building was flat, with a good part of the furniture and all store goods, as well as nearly all articles of clothing, burned, also.

The damage to my house was all on the end and side; paint being badly blistered. Also two apple trees and two elm trees killed.

From appearances and past circumstances of the same kind, when the station buildings were catching fire frequently, I am safe in saying that Ex. 505 set the roof of Mr. Warner's barn on fire.

Yours truly,

E. J. Hayes, Agent.

Copy to F. E. Sanborn, Supt.

We are of opinion that the letter was both incompetent and prejudicial to the defendant, and should not have been received in evidence.

The rule governing the admission of declarations of an agent as evidence against his principal has been frequently stated by courts and textwriters, though in somewhat varying language. It is founded upon the idea of the legal identity of the agent and the principal, which presupposes authority from the principal to the agent to make the declarations. That authority may be expressly given as to make some specific declaration, or it may be derived by implication from authority given to the agent to do a certain act for the principal, in the doing of which the declaration is made. While acting within the scope of his authority, and in the execution of it, the agent is the principal, and his declarations and representations in reference to and accompanying his act are therefore admissible in evidence against the principal in the same manner as if made by the principal himself.

The language of Sir Wm. Grant in the leading case of *Fairlie v. Hastings*, 10 Ves. Jr. 123, is often quoted as a correct statement of the principles upon which the declarations of any agent can be received as evidence against his principal. In that opinion he said: "What the agent has said may be what constitutes the agreement of the principal, or the representation or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, in regard to acts done, the words with 47 L.R.A.(N.S.)

which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal."

Prof. Greenleaf says: "It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and therefore they bind only so far as there is authority to make them. Where this authority is derived by implication from authority to do a certain act, the declarations of the agent, to be admissible, must be a part of the *res gestæ*." Greenl. Ev. 15th ed. § 114.

Mr. Mechem, in his work on Agency (§ 714), states: "And (3) the statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction. Or, to use the common expression, they must have been a part of the *res gestæ*. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such a case they amount to no more than the mere narrative of a past transaction, and do not bind the principal."

Our own court has said: "The declarations, representations, or admissions of an agent authorized to make a contract, made as inducements to or while making the contract, are admissible as evidence against his principal. They are also admissible as evidence against him, when made by his agent accompanying the performance of any act done for him. They are not admissible, and do not bind the principal, when not made as before stated, but at a subsequent time." *Franklin Bank v. Steward*, 37 Me. 519, 524.

In *Northwestern Union Packet Co. v. Clough*, 20 Wall. 528, 540, 22 L. ed. 406, 408, the Supreme Court, by Mr. Justice Strong, said: "It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated, by Mr. Justice Story that, 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*.' A close attention to this rule,

which is of universal acceptance, will solve almost every difficulty."

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was that the defendant's locomotive engine emitted sparks or cinders, by which the buildings burned were set on fire. That, and that alone, constituted the alleged cause of action. That was the *res gestæ*. The station agent, Hayes, had no part in that. In writing the letter the next day after the fire he was doing no act for the defendant which formed a part of the particular transaction from which its alleged liability arose. His statements contained in the letter amount to no more than his narrative and opinion of a past transaction, and for that reason could not affect his principal.

But it is contended that the letter was admissible because the agent, in writing it, was performing a duty required of him by the company to report such occurrences. Granted that he was, upon what principle could it be held that the defendant would be bound by his statements and admissions contained in the report, without proof that it adopted those statements and admissions as its own, except for the purpose of charging it with notice thereof? As stated in *Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 452, 6 L.R.A. 214, 10 S. E. 163; "It surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents, and employees or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions, should litigation subsequently arise touching the subject-matter."

In that case, which was an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, reports of the accident made to the general manager of the company, by the superintendent and by the conductor of the train, supported by his affidavit and that of several others embracing the engineer, fireman, flagman, and brakeman, were admitted in evidence on behalf of the plaintiff, over the defendant's objection. But it was held on exceptions that they were inadmissible.

Further, it needs no argument to sustain the proposition that Mr. Hayes had no authority by virtue of his office as station agent, to bind the railroad company by an admission of its liability as alleged in this case. If authority in him to make such an admission is claimed, it should be shown 47 L.R.A. (N.S.)

by competent proof, for it cannot be inferred as within the scope of his authority as station agent.

In the case of *Randal v. Northwestern Tele. Co.* 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419, which was a suit to recover damages for an injury occasioned, as alleged, by the negligence of the defendant in not keeping its line in proper repair, whereby the plaintiff, while traveling along the highway, became entangled in its wire, and was injured, the admission of the following telegram from the superintendent of the telegraph company was held reversible error:

To Gen. George C. Ginty:

Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you tomorrow, and see them; but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident; but the repairman neglected his duty, and we must pay the penalty.

The court there said: "In the absence of any proof showing that the superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power. He was a competent witness for the plaintiff, and, though holding a high position as an agent of the defendant, he was still only an agent, and for the purpose of admitting away the rights of the defendant he cannot be presumed to have all the powers of the corporation. . . . The authority to make the admission for the principal or corporation is not to be inferred from the position or rank of the party making the same. If such authority is alleged to exist, it must be shown by competent proofs."

In the case at bar the letter was introduced by the plaintiff as affirmative evidence against the defendant, as an admission of liability binding upon the defendant. But according to well established principles of law, it was incompetent for such purpose, and we are constrained to the opinion that its admission was prejudicial to the defendant. We must hold, therefore, that there was reversible error in admitting the letter in evidence. This conclusion makes it unnecessary to consider the other exceptions or motion.

In each case the entry will be exceptions sustained.

NEBRASKA SUPREME COURT.

WILLIAM E. WALLACE

v.

A. W. COX et al., Appts.

(— Neb. —, 142 N. W. 891.)

Replevin — delay in returning property — refusal.

1. Mere delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit held not to justify the owner's refusal to accept it when returned.

Same — refusal of property — justification.

2. Where a defendant in replevin, after a judgment has been rendered in his favor for a return of the replevied property, refuses to accept it on the sole ground that it was damaged while unlawfully detained, his refusal cannot afterward be justified because the return was delayed for three months.

Same — deterioration — effect.

3. Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond.

(Reese, Ch. J., and Letton and Hamer, JJ., dissent.)

(June 26, 1913.)

APPEAL by defendants from a judgment of the District Court for Webster County in plaintiff's favor in an action on a replevin bond. Reversed.

The facts are stated in the opinion.

Messrs. Bernard McNeny and E. U. Overman for appellants.

Mr. L. H. Blackledge, for appellee:

Plaintiffs in replevin were only required to return the property in the like condition in which they received it under the order of replevin.

Eickhoff v. Eikenbary, 52 Neb. 332, 72 N. W. 308; Reavis v. Horner, 11 Neb. 479, 9 N. W. 643; Richardson Drug Co. v. Teasdall, 59 Neb. 150, 80 N. W. 488; Ervin v. Montgomery, 84 Neb. 107, 120 N. W. 903; Rinker v. Lee, 29 Neb. 783, 46 N. W. 211; Fair v. Citizens' State Bank, 69 Kan. 356,

Headnotes by ROSE, J.

Note. — As to right to reject property because of depreciation, under alternative judgment in replevin for return of property or for its value, see note to Hallidie Mach. Co. v. Whidbey Island Sand & Gravel Co. 45 L.R.A. (N.S.) 40, which, among other cases, cites and discusses WALLACE v. COX. 47 L.R.A. (N.S.)

105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 794, 59 Pac. 454; Jones v. Messenger, 40 Colo. 37, 90 Pac. 64; Maguire v. Pan-American Amusement Co. 205 Mass. 64, 137 Am. St. Rep. 422, 91 N. E. 135, 18 Ann. Cas. 110.

Rose, J., delivered the opinion of the court:

This is an action on a replevin bond. Property, consisting of a threshing machine, a traction engine, and the appliances belonging to a threshing outfit, had been taken from the obligee under a writ of replevin. There was entered in his favor in the replevin suit a judgment for a return of the property, or for its value in the sum of \$2,000 in case a return could not be had, for damages in the sum of \$404.50 by reason of the wrongful taking and use of the property, and for costs in the sum of \$121.60. The replevin bond bound obligors as follows: "Plaintiff shall duly prosecute his action aforesaid, and pay all costs and damages which may be awarded against him, and return the property to the defendant in case judgment for a return of such property be awarded against him." Obligee, who is plaintiff herein, pleads the judgment in replevin, nonpayment of the damages, and failure to return the property to him "in the same, or substantially the same, condition in which it was taken," and prays judgment for \$2,526.10, the sum of the three items named. Obligors are defendants herein, and admit the judgment in replevin, but plead a subsequent return of the replevied property. From a judgment in favor of plaintiff on the replevin bond for the full amount of his claim, with interest, defendants have appealed.

Upon a consideration of the appeal at a former term, plaintiff was required to remit, as a condition of affirmance, \$404.50, the amount allowed by the jury in the replevin suit as damages for the wrongful taking and use of the replevied property. Wallace v. Cox, 92 Neb. 354, post, 138 N. W. 578. Later a rehearing was granted on motion of defendants and the case has been reargued. In the former opinion two reasons for the conclusion reached on appeal are given: (1) The threshing outfit was not returned within a reasonable time after the judgment in replevin directed its return. (2) The property was diminished in value while it was wrongfully detained, and for that reason the owner properly declined to accept it.

1. Further reflection makes it necessary to recede from the position that the property was not returned within a reasonable time. The judgment ordering a return of

the property was rendered December 1, 1909, and the property was returned February 25, 1910. It requires more than mere lapse of time for a short period to show that the delay was unreasonable. The right to appeal from the judgment in replevin did not expire for six months. To comply with the judgment by an immediate return of the property would terminate that right. After a return had been adjudged, the threshing outfit was not retained during a threshing season. An earlier return was prevented by the bad condition of the roads. Plaintiff in making his own case testified positively that he refused to accept the property because, "when offered back," it was not "in the same, or substantially as good, condition" as when taken. The delay in making the return had nothing to do with plaintiff's refusal to accept the returned property. For these reasons the first position assumed in the former opinion will be abandoned.

2. Was deterioration during the time the property was wrongfully detained a sufficient justification for the refusal to accept it in a damaged condition? While there was some controversy, not material to this inquiry, over the identity and condition of an appliance, the identical thresher and engine taken under the writ were in fact returned. Plaintiff's own testimony shows that they were then worth at least \$1,000, though the jury in the replevin suit had found the value when taken to be \$2,000. Witnesses for defendants said the property, when returned, was in as good condition as when received. In the former opinion cases were cited to show that the returned property, under the facts of this case, was properly rejected. Each of those cases has been re-examined, with the following result:

In *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583, the following language was approved: "It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition than the principal." This is a holding that the return of property which has been practically destroyed does not satisfy the bond, but it is not a holding that identical property taken, when of great value, may be rejected if promptly returned.

In *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960, it was held that one who

replevied a promissory note, and permitted it to outlaw while in his hands, could not satisfy a judgment for its return by subsequently tendering it back, the rule announced being: "Where, as a compliance with the alternative judgment in an action of replevin providing for a return of the specific property or the value thereof, the property returned has depreciated in value, an action may be maintained to recover such depreciation. The statute contemplates that the property be returned in substantially the same condition, and of the same value, as when taken." The return of an outlawed note was not in law a return of the collectable note received.

In *Parker v. Simonds*, 8 Met. 205, the replevied property was never returned, and in a suit on the replevin bond plaintiff was allowed to recover its value.

In *Berry v. Hoeffner*, 56 Me. 170, the replevied property was accepted when returned. The point discussed was: "The question presented is whether a return of the goods replevied not 'in like good order and condition as when taken,' is a sufficient compliance with and performance of the condition of the replevin bond." While the bondsmen were liable, according to their obligation, to return the property in as good condition as when taken, the question of the right to reject the property because it was not returned in that condition was not decided.

In *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454, the suit was brought to recover the value of replevied property never returned.

Childs v. Wilkinson, 15 Tex. Civ. App. 687, 40 S. W. 749, was determined under a statute providing: "If the property tendered back by the defendant has been injured or damaged while in his possession under such bond, the sheriff or constable to whom the same is tendered shall not receive the same, unless the defendant at the same time tenders a reasonable amount for such injury or damage, to be judged of by such sheriff or constable."

In *Douglass v. Douglass*, 21 Wall. 98, 22 L. ed. 479, the report shows: As authorized by a statute of Maryland, defendant, who lost possession of chattels under a writ of replevin, retook them by giving a bond. After a judgment had been rendered against him the goods were delivered to the sheriff under a writ de retorno habendo. This was held to satisfy the bond for a return of the chattels, though they were not in as good condition as when the bond was given. It was further held that redress for injury to the property in the meantime should be sought in a separate action.

In harmony with those cases it was said

in *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308, that "in order to satisfy a judgment for the return of property the identical property must be tendered in substantially the condition in which it was received."

While the cases cited are precedents for holding that the return of damaged property does not satisfy the replevin bond or the judgment in replevin, they do not contain an announcement of the doctrine that the identical property replevied, when of great value, may be rejected on the sole ground of deterioration. The contrary doctrine is supported by both reason and authority. The principal questions litigated in replevin are the ownership and the right of possession of specific chattels. The adjudication of those questions is not a matter which either party may lightly disregard. It is not optional with a successful defendant in replevin to accept in money the value fixed by the jury in lieu of the property. The judgment is in the alternative. The purpose of fixing the value is to afford a measure of relief where the property is not, or cannot be, returned. Injury to replevied property while wrongfully detained, and failure of the defendant to comply with a judgment in replevin, are protected by the replevin bond. Under the Code of this state the law is: "The successful party to an action of replevin should recover therein all damage which he has actually sustained by reason of the unlawful detention of the property in controversy. A defendant who has, in an action of replevin, recovered judgment for the return of the property and his damage for the wrongful detention thereof, cannot thereafter maintain an action against the plaintiff for damage on account of depreciation in the value of such property while in possession of the latter." *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296.

Damages to property after the rendition of a judgment for its return are recoverable in an action on the replevin bond. A text-writer on replevin says: "If the property has in fact been injured while in the plaintiff's possession, that fact will not absolve the defendant from the duty of receiving it in its damaged condition. The judgment for a return does not leave it at the option of the defendant to accept or refuse and demand the value. The depreciation is, however, to be made good, and the party may receive full indemnity by suit on the bond." *Wells*, *Replevin*, 2d ed. § 422. Another author states the law as follows: "Whichever party recovers a judgment for a delivery or return of the property in replevin, when the same is in the possession of the adversary, is bound to accept

the return of it, or the return of a substantial part of it. In case of the tender of a part of it, such tender of return should be accompanied by a tender of the money value of the remainder in satisfaction of the judgment for a return, or for a payment of the value in case a return cannot be had. The party has a right to deliver or return what he can, and pay for that which he cannot deliver. This is true if the part offered to be returned is separable from the others and in no way dependent upon it for use or value, and the part tendered is in the same condition as when taken." *Shinn*, *Replevin*, § 679, citing *Reavis v. Horner*, 11 Neb. 479, 9 N. W. 643. The views thus expressed seem to be justified by both reason and authority. *Leeper G. & Co. v. First Nat. Bank*, 26 Okla. 707, 29 L.R.A.(N.S.) 747, 110 Pac. 656, Ann. Cas. 1912 B, 302; *Paulson v. Nichols & S. Co.* 8 N. D. 608, 80 N. W. 765; *Pabst's Brewing Co. v. Rapid Safety Filter Co.* 54 Misc. 305, 105 N. Y. Supp. 962; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Pickett v. Bridges*, 10 Humph. 171; *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

In the present case the conclusion is that plaintiff's refusal to accept the property when returned was not justified by the evidence nor sanctioned by the law. The opinion to the contrary is therefore overruled. It necessarily follows that the former conditional affirmance is vacated, the judgment of the District Court reversed, and the cause remanded for further proceedings.

Reese, Ch. J., and *Letton* and *Hamer*, JJ., dissent upon the ground and reasoning contained in the former opinion.

That opinion was delivered by *Reese*, Ch. J., as follows (92 Neb. 354, 138 N. W. 578):

This action was instituted in the district court for Webster county. It is alleged in the petition that on the 17th day of July, 1909, the *Clark Implement Company*, a corporation, commenced an action in that court against the plaintiff to recover the possession of certain specific personal property, which is shown to be a threshing machine and traction engine; that an order of delivery was issued, the property of the value of \$2,000 taken, when a replevin bond in the sum of \$4,000 was duly executed by the plaintiff in the action; that upon the trial of said cause such proceedings were had as resulted in a finding in favor of the plaintiff in this action, assessing his damages at the sum of \$404.50; that the right of property and of possession were in this plaintiff, which was of the value of \$2,000; that judgment was rendered in

favor of this plaintiff for the said sum of \$404.50, with costs taxed at \$121.60, and for a return of the property or in lieu of such return the value thereof, to wit, \$2,000; that "defendant has not returned, nor offered to return, said property in the same or substantially the same condition in which it was taken, and no part of said judgment has been paid;" that "an execution was issued . . . on said judgment in favor of this plaintiff, which was returned wholly unsatisfied." The action is founded on the replevin bond to recover the sum of \$2,526.10, being the value of the property, damages, interest, and the costs of the former suit.

The defendants Cox and Boyd answered, admitting the averments of the petition as to the prior suit and the judgment rendered therein, but allege that, after the termination of said action, the property involved in the suit was all returned to plaintiff, and in better condition than when taken under the writ of replevin. All unadmitted allegations are denied. Defendant, the Clark Implement Company, filed its separate answer, but which is substantially the same as that filed by Cox and Boyd. The replies are general denials. The cause was tried to a jury; the result being a verdict and judgment in favor of plaintiff for the sum of \$2,686.33. A motion for a new trial having been made, overruled, and judgment entered, defendant appeals.

Some objection is made to the above-quoted part of the petition, and it is contended that the use of the word "substantially" so militates against the other averments as to render them ineffectual as an allegation that the property had not been returned. As we view the case, the objection is not of much importance, as there is no contention that the property was not returned. While it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ, and that he refused to accept it. The theory upon which the case was tried by plaintiff was that the property was not returned within a reasonable time, and, when it was returned, it was in so badly damaged condition as to relieve plaintiff from the duty of accepting it, and gave him the option of rejecting it and suing upon the bond for the value as found and adjudged on the trial of the replevin suit. It is contended by defendants that plaintiff has no option, but must receive the property, and could then sue for the difference in its value between what it was when taken and at the time of the return. To the extent of submitting to the jury the question of the condition of the property

when returned, the court adopted plaintiff's view of the law. If the court was right in this, the language of the petition to which objection is made becomes unimportant.

The trial of the replevin case was had in November, 1909, the final judgment being rendered on the 1st day of December of that year. The action was commenced in July, 1909, the replevin bond bearing date of the 19th, at which time the property was delivered to defendant. Defendant returned the property to plaintiff on or about the 25th of February, 1910, and, when examined by plaintiff and others called by him for that purpose, he gave to defendants a notice in writing that he would not accept it. This notice is dated the 26th of February, 1910, and refers to the tender of return having been made the day before. While there is a sharp conflict in the evidence as to the condition of both the separator and engine at the time the return was tendered to plaintiff, as compared with their condition when taken under the order of replevin, there is sufficient to sustain the finding of the jury that both were very materially injured by wear and breakage, and that their value was reduced probably one half by reason of their impaired condition. So far as is shown by the record, they had been in the possession of defendants from the 19th day of July, 1909, until the 25th day of February, 1910, and there seems to be no doubt that they had been put to use during the threshing season while in defendants' possession.

It is fundamental that, where a judgment in an action of replevin is against the plaintiff, it is his duty to return the property to the defendant within a reasonable time in substantially as good condition as when taken, and this would satisfy the judgment in so far as the return had been ordered if the property was accepted by the defendant, but it would not cancel the money judgment for damages, nor would it deprive the defendant of his action for depreciation of the value of the property while out of his possession. While this is all true, yet the duty of returning the property within a reasonable time and in substantially an unimpaired condition should be performed, and it does not lie with the plaintiff in the action after long delay to return property badly damaged by use or otherwise, compel the defendant to accept it, and then litigate the question of damages in another action. Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities sustaining these

views we here cite, but without quoting from any. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Met. 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454; *Childs v. Wilkinson*, 15 Tex. Civ. App. 687, 40 S. W. 749; *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; *Douglass v. Douglass*, 21 Wall. 98, 22 L. ed. 479; *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583; 34 Cyc. 1551, 1552; *Cobbey, Replevin*, 2d ed. § 1182; *Wells, Replevin*, 2d ed. § 422; *Shinn, Replevin*, § 679. In some of the cases cited, and in the citations from *Wells* and *Shinn*, it is said that the party returning may do so, even if the property is depreciated in value, and leave the one to whom the return is made to his action on the bond for the deficiency, but we apprehend that in order to secure this right, if it may be so secured, the return must be had within a reasonable time, which would be soon after the judgment. In this case the offered return could scarcely be said to be within a reasonable time.

Where the property is not returned, the plaintiff's measure of damages is its value when taken under the writ, with legal interest thereon from the date of the wrongful taking by the plaintiff in replevin, but, in that event, the successful defendant must be content with a recovery of the value at the time it was taken from him, with legal interest to the time of the trial, and he can have nothing further in the way of damages.

In *Romberg v. Hughes*, 18 Neb. 579, 28 N. W. 351, it is said, the late Judge Maxwell writing the opinion of the court: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case, when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." See also *Aultman, M. & Co. v. Stichler*, 21 Neb. 72, 31 N. W. 241.

Since the jury in the replevin suit found the value of the property in dispute to be \$2,000, and upon which the judgment was 47 L.R.A. (N.S.)

rendered, and the same was not appealed from, that must be the limit of plaintiff's recovery, with legal interest from the time the property was taken under the writ.

The judgment of the district court will therefore be reversed, and the cause remanded, unless the plaintiff within sixty days from the rendition of the order hereby made remits from the judgment the sum of \$404.50 as of the date of the judgment in this case. If such remittitur is filed, the judgment of the district court for the sum of \$2,121.60, with interest at 7 per cent on \$2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee. The effect of the affirmance of the judgment in this case as modified, will be a satisfaction of the judgment of December 2, 1909.

NEW YORK COURT OF APPEALS.

REGINALD G. BARCLAY, Appt.,

v.

ALEXANDER BARRIE, Respnt.

(209 N. Y. 40, 102 N. E. 602.)

Partnership — dissolution — ill health.

1. Incapacity, by reason of a stroke of paralysis, of a partner, for a period of three years and eleven months out of a partnership period of four years and eleven months, to attend to the duties of the partnership, is ground for dissolution at the suit of the other partner, although there has been a progressive recovery, and it is found that he will be practically restored to health by the expiration of the contract period of the partnership.

Same — unimportance of duty — effect.

2. That a partner who became incapacitated by ill health from performing the duties of the partnership had undertaken for a small extra percentage of the profit to perform the other partner's share of such duties does not show that the work of the partnership was of such slight importance that the partnership should not be dissolved because of his incapacity.

Note. — Physical or mental incapacity of partner as dissolution, or a ground for dissolution, of a partnership.

- I. Introductory, 840.
- II. As a dissolution of the partnership.
 - a. In general, 840.
 - b. Adjudication of insanity,
- III. As a ground for dissolution of the partnership.
 - a. Insanity.
 1. In general, 841.
 2. Temporary insanity, 842.
 3. Effect of adjudication of insanity, 843.
 - b. Illness, 843.

Same — exclusion from business as defense.

3. An attempt by one partner to exclude the other from participation in the affairs of the partnership is no defense to a dissolution of the concern because of the incapacity, through ill health, of the latter to perform his duties to the partnership.

Same — date of dissolution — time of entering decree.

4. A decree dissolving a partnership for disability of one of the members need not take effect from its date, but may be made effective from the commencement of the action if the incapacity was complete, the action of the complaining partner not precipitate, and a dissolution from date of decree

will deprive him of all relief because the partnership contract has expired by its own limitation.

(Cullen, Ch. J., and Chase, J., dissent.)

(June 10, 1913.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County, Part V., dismissing the complaint in an action for the dissolution of a partnership between plaintiff and defendant. Reversed.

I. Introductory.

This note is confined to incapacity arising from physical or mental ailments. Incapacity to perform the duties of a partner arising from some inconsistent position voluntarily assumed, such as arose in *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459, where one of a firm of attorneys accepted a judicial position, is not discussed. Likewise other cases of inconsistent positions which incapacitate a partner from performing his duties to the partnership are excluded.

It is assumed that the partnership is one which requires some ground for its dissolution, and partnerships in which no duration of time is specified and which are usually regarded as dissoluble upon notice have in general been excluded.

Belonging to this class of cases is *Mellersh v. Keen*, 27 Beav. 236, where, upon the infirmity of one of the parties, the remaining partner served a notice upon him that the partnership would be dissolved at a certain date. Sir John Romilly, in delivering the opinion in this case, states that "when persons enter into a partnership at will it must be considered as incidental to that partnership that it is dissoluble on either partner receiving from the other notice of dissolution."

II. As a dissolution of the partnership.

a. In general.

Incapacity arising from insanity has been urged as effecting the dissolution of partnership. With the exception of *Isler v. Baker*, *infra*, it is uniformly held that neither insanity, nor an adjudication of such insanity, of itself effects a dissolution.

Insanity does not of itself terminate a partnership at will, so as to relieve the insane partner of liability for debts, especially where the creditor had no notice of such insanity. *Jurgens v. Ittmann*, 47 La. Ann. 367, 16 So. 952.

Nor does it dissolve a partnership so that a partner who carries on the business is relieved from accounting to the insane partner for his share of the property. *Jones v. Nov*, 3 L. J. Ch. N. S. 14, 2 Myl. & K. 125.

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The insanity of a partner not declared by inquisition does not dissolve a partnership so that the remaining partner can make an assignment without the assent of the insane partner. *Friedburgher v. Ja-berg*, 20 Abb. N. C. 279. The disability in this case was an acute mania of short duration, and the disabled partner was discharged from the asylum within four weeks from the first day of his confinement therein.

Lunacy of one of the partners does not dissolve the partnership. *Wrexham v. Hudleston*, 1 Swanst. 514, note.

The court in an Anonymous Case, 2 Kay & J. 441, regards it as settled that insanity of a partner is not of itself a dissolution of the partnership.

It is urged in *Sadler v. Lee*, 6 Beav. 324, 7 Jur. 476, 12 L. J. Ch. N. S. 407, that one of the partners having become imbecile, he was not liable for the acts of another partner; but there was no satisfactory evidence to this effect and the defense was overruled.

See *Bagshaw v. Parker*, 10 Beav. 532, *infra*, under "insanity as a ground for dissolution."

b. Adjudication of insanity.

The adjudication of the insanity of one of the partners does not of itself effect a dissolution of the partnership. *Raymond v. Vaughn*, 128 Ill. 256, 4 L.R.A. 440, 15 Am. St. Rep. 112, 21 N. E. 566. The remaining partner continued the business of the partnership without taking any steps to dissolve, and the court states that the presumption exists in such cases that he wanted to determine whether the incapacity of his partner would prove temporary merely so that it would thereafter prove practicable for him to resume business, and not that he desired to terminate the partnership.

On the contrary in adjudication of insanity of itself was held to dissolve the partnership, so that a creditor who accepted a note of the partnership from the remaining partner in payment of a bill of goods sold before the adjudication could not recover against the insane partner, either upon the note or for the goods sold, since the acceptance of the note extinguished

Statement by Hiscock, J.:

This action was brought to procure a dissolution of partnership between the plaintiff and defendant, because, as alleged by the former, the latter had become incapacitated by reason of sickness from discharging his duties as such copartner.

The parties had been copartners in the business of manufacturing and selling under a succession of partnerships from the year 1873 until on or about January 1, 1904. On said last date articles were again entered into which were from time to time, extended, and on or about February 7, 1908, an agreement was made extending the part-

nership to January 1, 1913. The partnership agreement, thus extended and involved in this action, provided for the use of certain trademarks belonging to the plaintiff and to the estate of a deceased brother, for a compensation somewhat in excess of 50 per cent of the net profits, for a division of the balance of such profits between the parties hereto on a somewhat larger percentage to defendant than to plaintiff, and for a contribution of capital of which, as a matter of fact, the defendant contributed about \$130,000 and the plaintiff about \$110,000. Said agreement also contained the following provision: "At all times dur-

the partnership debt. *Isler v. Baker*, 6 Humph. 85.

III. As a ground for dissolution of the partnership.

a. Insanity.

1. In general.

Lunacy continued for a period of eighteen months, recovery from which, as shown by the evidence, is hopeless or at least very improbable during the remainder of the time for which the partnership contract was to endure, furnishes ground for a dissolution. *Leaf v. Coles*, 1 DeG. M. & G. 171.

A mining partnership for sixty years was dissolved in *Rowlands v. Evans*, 30 Beav. 302, 8 Jur. N. S. 88, 31 L. J. Ch. N. S. 265, 5 L. T. N. S. 638, 10 Week. Rep. 186, after one of the partners became hopelessly insane. It is stated that the court cannot compel persons to carry on business with the committee of a lunatic, subject to the inconvenience of having all transactions passed upon by the court sitting in lunacy; that this would be ruinous, and no one would bid for a share in a mine to be carried on in such a way, nor could the value of the share of the lunatic be properly ascertained under such circumstances.

It was assumed in *Kirby v. Carr*, 2 Jur. 741, 8 L. J. Exch. in Eq. N. S. 31, 3 Younge & C. Exch. 184, that some ground was necessary for the dissolution of a partnership without any stipulated time for its duration. In that case the partnership was dissolved upon a showing that one of the partners in a conveyancing partnership had been insane for about three years, so that he had been unable to attend the office for this time, and there was a showing that the lunacy was incurable. It seems to have been admitted, however, in this case, that upon a showing of incurable lunacy the partnership might be dissolved, the only dispute being as to whether there had been such a showing made.

The Lord Chancellor in *Besch v. Frolich*, 7 Jur. 73, 1 Phill. Ch. 172, 12 L. J. Ch. N. S. 118, states that a partner may have

the partnership dissolved at any time after his partner becomes incompetent to assist in the business by reason of insanity. The chief dispute in this case, however, was as to the time at which the dissolution should take effect.

The court was of the opinion in *Raymond v. Vaughn*, 128 Ill. 256, 4 L.R.A. 440, 15 Am. St. Rep. 112, 21 N. E. 566, that insanity may constitute a ground for the dissolution of a partnership, but not if the malady be temporary only, with a fair prospect of recovery within a reasonable time. With reference to an adjudication of insanity, the court was of the opinion that this might be for temporary purposes only, and that the only effect such as adjudication could have upon a bill filed to dissolve the partnership would be to establish the insanity, and that the court, in determining the partnership, will be governed by the effect the insanity has upon the capacity of the insane partner to discharge the duties imposed by his contract relation. The partnership here was one at will, which the court states might have been dissolved of the partner's own volition.

In an action against the estate of a deceased partner for the misconduct of another of the partners, in which the defense was that the partner sued had become imbecile and was therefore relieved from liability, *Lord Langdale*, in delivering the opinion, says that affirmed and incurable insanity is a ground for dissolving a partnership, but that before a decree can be made that the partnership shall be dissolved on this ground it must be shown not merely that the party alleged to be insane is not for the time so capable as he may previously have been of attending to or conducting the business, but that he is really insane. *Sadler v. Lee*, 6 Beav. 324, 7 Jur. 476, 12 L. J. Ch. N. S. 407.

The court in *Sayer v. Bennet*, 1 Cox, Ch. Cas. 107, was of the opinion that continued insanity is a ground for the dissolution of a partnership, but if the partner has recovered so that he is in such a state of mind as to be able to conduct the business according to the articles of partnership there is no ground for dissolution.

Following *Sayer v. Bennet*, supra, a reference was directed in *Patey v. Patey*, 5

ing the continuance of said partnership, each partner shall give reasonable time, attention, and attendance to, and use reasonable endeavors in the business of said co-partnership, and shall, with reasonable skill and power, exert himself for the joint interest, profit, and advantage of said copartnership, and shall truly and energetically, with the joint stock and increase of said business, sell, deal, and merchandise. The alleged breach of any of the provisions of this section vii. of these articles by either party hereto shall not give to the other party hereto any right to damages or to any relief whatsoever, until thirty days after written notice by such party, specifying in detail the acts or omissions deemed by such other party to constitute such breach, and stating that for any such breach accruing after such thirty days damages will be demanded." It was provided, in substance, by supplementary agreement that plaintiff at his option should not be

required to devote himself actively to the conduct of the business, in which event the defendant should receive a small additional percentage of the profits; also, that "in the event of the termination of said copartnership by limitation, agreement, death, or otherwise, the share of the said partners shall be paid to them or to their respective representatives within five (5) years of said termination, but in instalments of not less than twenty-five thousand (\$25,000) dollars in each and every year succeeding such termination, with interest at and after the rate of six (6) per centum."

May 10, 1908, defendant was afflicted with a stroke of paralysis caused by a hemorrhage in the left side of his brain, and on the second and last trial of this action, occurring in March, 1912, the court found: That as the result of such ailment the defendant had "temporary paralysis of the right side of his body and a certain difficulty of speech, and thereby became incapaci-

L. J. Ch. N. S. 198, to determine the condition of partner at time of suit.

Past insanity is not a ground for dissolution, if, at the time when the release is sought, the party is in such a state of mind as to be able to conduct the business of the partnership with the other members according to the articles of partnership. *Anonymous*, 2 Kay & J. 441.

And this is true notwithstanding the other partners may be satisfied that the business can never be carried on in a satisfactory manner, and although the act of the insane partner may have shaken the confidence of the customers of the firm. *Ibid*.

In *Huddleston's Case*, cited in *Pearce v. Chamberlain*, 2 Ves. Sr. 33, there was held to be no ground for dissolution after the partner had recovered from a temporary disorder.

The right to dissolve the partnership on account of insanity exists in favor of the insane partner, so that he may maintain a suit for that purpose by his next friend, although he has not been adjudged insane. *Jones v. Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785.

The only dispute in *Bagshaw v. Parker*, 10 Beav. 533, was as to when the partnership was to be considered dissolved; it being admitted apparently that under articles of partnership by which one of the partners was to go to India and personally superintend and manage a factory there, and in the event of his death or such severe illness as required him to quit India for more than one year, the books for the partnership were to be made up at the end of the partnership year, the fact that the partner on his passage to India became a lunatic, and after remaining there some months was returned to England, was sufficient for the dissolution of the partnership. 47 L.R.A. (N.S.)

In 2 Colly. Ch. Cas. 276, there is merely the statement with reference to the case of *Sander v. Sander*, that on a bill filed by one partner against his copartner for a dissolution of partnership on the ground of the insanity of the defendant, the vice chancellor decreed a dissolution as from the date of the decree.

2. Temporary insanity.

That mere temporary insanity is not sufficient ground for dissolution, see *Raymond v. Vaughn*, 128 Ill. 256, 4 L.R.A. 440, 15 Am. St. Rep. 112, 21 N. E. 566; *Sadler v. Lee*, 6 Beav. 324, 7 Jur. 476, 12 L. J. Ch. N. S. 407; *Sayer v. Bennet*, 1 Cox, Ch. Cas. 107. And *Patey v. Patey*, 5 L. J. Ch. N. S. 198, *supra*.

That there can be no dissolution after a recovery from the insanity, see *Anonymous*, 2 Kay & J. 441, and *Huddleston's Case*, cited in 2 Ves. Sr. 35, *supra*.

The court in *J. v. S.* [1894] 3 Ch. 72, 63 L. J. Ch. N. S. 615, 70 L. T. N. S. 757, 758, 8 Reports, 436, 42 Week. Rep. 617, not being satisfied that the partner was permanently insane, directed the action to stand over until after the long vacation, in order to ascertain whether his mental condition would improve. The real question decided in this case was as to whether an injunction would issue pending the action for the dissolution, to restrain the insane partner from interfering in the conduct of the partnership affairs.

Upon a suit by the executor of an insane deceased partner for an accounting, the court in *Jones v. Noy*, 3 L. J. Ch. N. S. 14, 2 Myl. & K. 125, states that it is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract.

tated from devoting any time, attention, or attendance to the business of the copartnership, or using reasonable endeavors in the business of the copartnership, or exerting himself for the joint interest, profit, and advantage of the copartnership with reasonable skill or power, and from in any way selling, dealing, or merchandising with the joint stock and increase of said business. That the defendant has not recovered from the effects of said stroke of paralysis and the aforesaid incapacity resulting therefrom, but his condition will so improve that prior to the time limited for the existence of the copartnership he will make a practical recovery of his health. There has been a steady, decided, progressive improvement in all the difficulties in which the defendant's affliction manifested itself. . . . The defendant's mentality has never been involved, and he has not shown any signs of any mental deterioration. Defendant was mentally perfectly

normal and competent. At the time of the trial the defendant could walk without any assistance whatsoever, and write with his right hand, and express his thoughts on any topic intelligently, and could carry on any conversation without difficulty." Also, that since the date of his stroke of paralysis defendant has not attended to the business of the partnership, or given any time, attention, or attendance thereto, and said business has been wholly conducted and managed by the plaintiff.

On or about March 1, 1909, plaintiff sent to the defendant a letter in which, in substance, he called to the attention of the latter his failure to perform his obligations and duties under the articles of copartnership, and notified him that such omissions were breaches of said contract, and that "at the expiration of thirty days after the receipt by you of this notice I shall consider the said firm to be terminated, and shall proceed to liquidate the business of the same

The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity, but it may not in the result prove to be a ground for dissolution, for the partner may recover from his malady; that when a partner is affected with insanity the continuing partner may make it a ground for dissolution. But if he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait and see whether the incapacity of his partner may not prove merely temporary. This *dictum* of the court conflicts with the decisions in so far as it states that a dissolution may be had before the insanity is shown to be permanent. It is apparent on an examination of this case that the court is not discussing the character of insanity as a ground of dissolution, but whether or not insanity of itself works a dissolution.

3. Effect of adjudication of insanity.

It is not necessary to refer the question of lunacy to a master where the partner has been adjudged a lunatic by a commission. *Milne v. Bartlet*, 3 Jur. 358, 8 L. J. Ch. N. S. 254.

Upon a suit by the insane partner by his next friend for the dissolution of a partnership, the court in *Jones v. Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785, where there had been no adjudication of insanity, states that a committee may be necessary to decide on the insanity of the partner, but leaves this matter undecided.

See *Raymond v. Vaughn*, *supra*.

b. Illness.

The court in *Whitwell v. Arthur*, 35 Beav. 140, refused to dissolve a partnership 47 L.R.A. (N.S.).

of druggists where one of the partners was seized with a paralytic attack and remained incapable of performing the duties which he had covenanted to perform by the articles of partnership for about ten months, but where he had improved in health since that time so that he was competent to perform his duties, though possibly not as competent as he had been previous to his illness. The bill, however, was not dismissed, but proceedings were stayed with liberty to apply in case the partner's health should again fail.

In an abstract case, *Casky v. Casky*, 5 Ky. L. Rep. 775, the fact that a partner has lost his health or strength, or does not possess the skill necessary for the proper execution of the work he undertook to do, is held to be a sufficient cause for the dissolution of the partnership.

From a subsequent paragraph of the abstract it appears that this was a partnership agreement by which it was provided that, from the date of the death of either of the partners, the survivor or survivors should continue the partnership for the term of seven years or until the death of all of them; and the widow of one of the deceased partners had brought the action for the dissolution against the sole surviving partner, whose incompetency, as above stated, was urged as a ground for the dissolution.

Article 3888 of the Louisiana statute provides that there is just cause for a partner to dissolve partnership before the appointed time when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of the partnership which require his presence or personal attendance. *Jurgens v. Ittmann*, 47 La. Ann. 367, 16 So. 952. And see *BARCLAY v. BARRIE*. W. A. E.

in accordance with article xvi. of the articles of copartnership." In addition, on or about April 1, 1909, plaintiff so changed the partnership bank accounts that the funds therein could not be drawn on any checks signed by the defendant, and then commenced this action.

Messrs. Charles F. Brown, John L. Wilkie, and Chester A. Jayne, for appellant:

The partnership in suit should have been decreed at an end because of the "permanent incapacity" of the defendant.

Parsons, Partn. 3d ed. pp. 503, 504; Story, Partn. 6th ed. §§ 291, 294; 4 Lindley, Partn. 7th ed. chap. 1, § 2 (b) p. 614; Burdick, Partn. 2d ed. chap. 7, § 3 (b); English Partnership Act, 1890, § 35 (b); Whitwell v. Arthur, 35 Beav. 140; Sadler v. Lee, 6 Beav. 324, 12 L. J. Ch. N. S. 407, 7 Jur. 476; Jones v. Noy, 2 Myl. & K. 125, 3 L. J. Ch. N. S. 14; Waters v. Taylor, 2 Ves. & B. 299, 13 Revised Rep. 91; Leaf v. Coles, 1 DeG. M. & G. 171; Friedburgher v. Jaberg, 20 Abb. N. C. 279; Casky v. Casky, 5 Ky. L. Rep. 775; Sayer v. Bennet, 1 Cox, Ch. Cas. 107; Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; Barclay v. Barrie, 64 Misc. 403, 119 N. Y. Supp. 463; Barclay v. Barrie, 142 App. Div. 670, 127 N. Y. Supp. 403.

Where a person has absolutely contracted to do a particular thing not impossible or unlawful at the time, he will not be excused from the obligations of his contract unless either (1) performance is made unlawful, or (2) is prevented by the other party.

Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

A court of equity will decree a dissolution of a partnership on account of a substantial breach by one of the partners of the express provisions of the partnership contract, and, assuming that in this case the defendant was guilty of such a breach, then a decree should enter as prayed for in the complaint.

Durbin v. Barber, 14 Ohio, 311; Dumont v. Ruepprecht, 38 Ala. 175; Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; Von Tagen v. Roberts, 2 Pearson (Pa.) 137; Essell v. Hayward, 30 Beav. 158, 29 L. J. Ch. N. S. 806, 6 Jur. N. S. 690, 8 Week. Rep. 593; Lyon v. Tweddell, L. R. 17 Ch. Div. 529, 50 L. J. Ch. N. S. 571, 44 L. T. N. S. 785, 29 Week. Rep. 689, 45 J. P. 680; Henn v. Walsh, 2 Edw. Ch. 129; Mechem, Partn. § 255; Parsons, Partn. 3d ed. p. 497.

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exist the aggrieved partner must come into a court of equity to obtain the desired relief.

Ferrero v. Buhlmeier, 34 How. Pr. 33; Gansevoort v. Kennedy, 30 Barb. 279; Mechem, Partn. ed. 1899, p. 155, § 239; Parsons, Partn. 2d ed. p. 424; Story, Partn. 6th ed. § 275; 1 Collyer, Partn. 6th ed. p. 421.

Dissolution of the partnership in suit should be decreed as of the date of the commencement of the action.

Durbin v. Barber, 14 Ohio, 311; Dumont v. Ruepprecht, 38 Ala. 175; Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; Von Tagen v. Roberts, 2 Pearson (Pa.) 137; Essell v. Hayward, 30 Beav. 158, 29 L. J. Ch. N. S. 806, 6 Jur. N. S. 690, 8 Week. Rep. 593; Lyon v. Tweddell, L. R. 17 Ch. Div. 529, 50 L. J. Ch. N. S. 571, 44 L. T. N. S. 785, 29 Week. Rep. 689, 45 J. P. 680; Lindley, Partn. 2d Am. ed. 583; George, Partn. 405; 30 Cyc. 658; Besch v. Frolich, 1 Phill. Ch. 172; Hartman v. Woehr, 18 N. J. Eq. 383; Akin v. Luce, 45 N. Y. S. R. 692, 18 N. Y. Supp. 392; Crawshaw v. Collins, 15 Ves. Jr. 218, 10 Revised Rep. 61, 19 Eng. Rul. Cas. 682; King v. Leighton, 100 N. Y. 386, 3 N. E. 594; White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Blum v. Mayer, 189 N. Y. 153, 81 N. E. 780; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135.

Messrs. Edward Bruce Hill and Edward H. Green, with Messrs. Sullivan & Cromwell, for respondent:

This appeal is not maintainable.

People ex rel. Gray v. Phillips, 67 N. Y. 582; People ex rel. Kingsland v. Clark, 70 N. Y. 518; People ex rel. Geer v. Troy, 82 N. Y. 575; People ex rel. 23d Street R. Co. v. Squire, 110 N. Y. 666, 18 N. E. 362; Re Manning, 139 N. Y. 446, 34 N. E. 931; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 514, 55 L. ed. 310, 315, 31 Sup. Ct. Rep. 279; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Gamewell Fire-Alarm Teleg. Co. v. Municipal Signal Co. 9 C. C. A. 450, 21 U. S. App. 1, 116, 61 Fed. 208.

A partnership will not be dissolved in consequence of the physical incapacity of a partner which is temporary in its nature, although prolonged, but will be dissolved for total and permanent incapacity.

Whitwell v. Arthur, 35 Beav. 140.

Even insanity furnishes only a ground

for applying to the court for a dissolution, and that the court will refuse to dissolve, even on that ground, unless satisfied that the insanity is permanent and incurable.

Friedburgher v. Jaberg, 20 Abb. N. C. 279; *Raymond v. Vaughn*, 128 Ill. 256, 4 L.R.A. 440, 15 Am. St. Rep. 112, 21 N. E. 566; *Jurgens v. Ittmann*, 47 La. 367, 16 So. 952; *J. V. S.* [1894] 3 Ch. 72, 63 L. J. Ch. N. S. 615, 8 Reports, 436, 70 L. T. N. S. 757, 758, 42 Week. Rep. 617; *Jones v. Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785; *Anonymous*, 2 Kay & J. 441; *Sadler v. Lee*, 6 Beav. 324, 12 L. J. Ch. N. S. 407, 7 Jur. 476; *Patey v. Patey*, 5 L. J. Ch. N. S. 198; 2 *Lindley*, Partn. 2d Am. ed. 557; *Parsons*, Partn. 4th ed. 459; *Burdick*, Partn. 350.

Even had respondent been disabled, that fact would not justify a dissolution in this case.

Skolny v. Richter, 139 App. Div. 534, 124 N. Y. Supp. 152.

No judgment which would give appellant the whole profits of the business since April 1, 1909, would be justified in any case.

Besch v. Frolich, 1 Phill. Ch. 172, 12 L. J. Ch. N. S. 118, 7 Jur. 73.

Hiscock, J., delivered the opinion of the court:

After being copartners for many years in the manufacture and sale of various articles under a succession of agreements, in February, 1908, the parties to this action entered into a new agreement of copartnership, which was to extend from said date to January 1, 1913. In addition to contributing substantial sums of money as capital, each partner, as an original agreement, expressly undertook reasonably to devote his time and attention to the partnership affairs, but by further provision plaintiff had the right at his option to withhold his time and attention, and in which event defendant was to receive a small additional percentage of the profits. In May, 1908, the defendant was stricken with paralysis, and thereby was concededly disabled from discharging his duties as copartner for a considerable period of time, the full extent thereof being a subject of dispute. In March, 1909, plaintiff, claiming to act in accordance with the provisions of the partnership agreement already quoted, served a notice, which, after charging defendant with failure to fulfil his partnership obligations, notified him that at the expiration of thirty days the former would regard the partnership terminated in accordance with the provisions of the copartnership agreement, and about April 2, 1909, he commenced this action for a dissolution 47 L.R.A. (N.S.)

of such copartnership. He based and prosecuted his action on the twofold theory: First, that he was entitled to a dissolution under general principles of equity because of the incapacity of his partner; and, second, that he was entitled to such dissolution under the provisions of the partnership agreement, because of the breach by defendant of his express obligations as set forth in said agreement.

I agree with the counsel for the defendant that the express agreement of the latter reasonably to apply his time and attention to the management of the affairs of the copartnership does not materially strengthen the plaintiff's case; for undoubtedly, in the absence of express agreement to the contrary, a partner is impliedly bound thus reasonably to devote himself to the advancement of the copartnership of which he has become a member. And, further, I shall not consider plaintiff's right, if any, to relief under the express provisions of the partnership agreement, on the theory of a breach of defendant's obligations therein set forth, simply stating, as all that is necessary, that in my opinion those provisions are limited in their application, and do not exclude the plaintiff from a right to relief on general principles of equity. Thus the discussion will be limited to the question whether he was entitled to relief under those principles.

Inasmuch as defendant's physical condition is the basic fact in the discussion, it becomes necessary to consider at some length the findings on that subject. The trial court found, amongst other things, that as the result of the stroke of paralysis May 10, 1908, he "became incapacitated from devoting any time, attention, or attendance to the business of the copartnership, or using reasonable endeavors in the business of the copartnership, or exerting himself for the joint interest, profit, and advantage of the copartnership; . . . that the defendant has not recovered (speaking as of the time of the trial in March, 1912) from the effects of said stroke of paralysis, and the aforesaid incapacity resulting therefrom;" that there had been a steady, progressive improvement in all defendant's difficulties; that his mentality had not been involved; and that at the time of the trial he "walked without any assistance whatever, and wrote with his right hand, and expressed his thoughts on any topic intelligently, and could carry on any conversation without difficulty;" that his condition would "continue to improve, ending in practical recovery within the time limited for the existence of the copartnership."

In my opinion the fair construction of these findings as a whole is that defend-

ant became and continued wholly incapacitated for the discharge of his duties as copartner from May 10, 1908, until March, 1912, and that the most which could be expected in the future was that he would make "a practical recovery within the time limited for the existence of the copartnership;" namely, at some time before January 1, 1913.

I do not regard the explicit finding that the defendant at the time of the trial was still suffering from complete incapacity caused by his stroke of paralysis as at all overcome by the very general and indefinite findings that he had so far recovered that he could perform certain acts. It cannot be fairly inferred that a person has recovered from a total incapacity to transact business because of the statement that he may do the various things mentioned, when there is no further information as to the distance he could walk, the amount of writing he could do, and the length of time he could converse. An established incapacity to endure the general strain and constant activity incidental to the conduct of a large business is not shown to be cured or avoided by such findings as those, and that the latter do not fairly bear the construction sought to be imposed upon them by the learned counsel for the respondent of a recovery already attained is evidenced by the finding that the defendant would make a "practical recovery" sometime during the following nine months.

It also seems to me that the construction of these findings is very materially illuminated by the facts that the defendant did not appear on either of the two trials, that some time before the last one he traveled to another state, whither his physicians were called for the purpose of examining him, and that an attempt on the part of the plaintiff to procure a physical examination of him was opposed and defeated by his counsel. It would seem that if the defendant had sufficiently recovered to withstand the strain of active business, there would have been no better way of establishing such fact than by his appearance on the trial.

The principles of law which are applicable to such a situation, as a basis for dissolution of the partnership, through not of frequent application, are, as it seems to me, extremely simple and plain.

As has already been stated, independent of express provision, a partner impliedly undertakes to advance the success of the copartnership by devoting to it, within reasonable limits, his time, efforts, and ability. His copartners are entitled to this contribution, and if for any reason he fails to fulfil his duties, they are thereby de-

prived, in greater or less degree, according to the extent of his failure, of the benefits of the contract which they have made, and of the fruits thereof to which they are legitimately entitled. With entire justice, therefore, the principle has been well established that courts of equity have power to decree dissolution of a copartnership because of permanent incapacity of a partner which materially affects his ability to discharge the duties imposed by his partnership relation and contract. *Parsons, Partn.* 3d ed. pp. 503, 504; *Story, Partn.* 6th ed. §§ 291-294; 1 *Lindley, Partn.* 3d ed. pp. 235, etc.; *Gow, Partn.* 3d ed. chap. 5, § 1, pp. 221, 222; *Whitwell v. Arthur*, 35 *Beav.* 140; *Friedburgher v. Jaberg*, 20 *Abb. N. C.* 279, 281; *Raymond v. Vaughn*, 128 *Ill.* 256, 4 *L.R.A.* 440, 15 *Am. St. Rep.* 112, 21 *N. E.* 566; *Jones v. Lloyd*, *L. R.* 18 *Eq.* 265, 43 *L. J. Ch. N. S.* 826, 30 *L. T. N. S.* 487, 22 *Week. Rep.* 785; *Jones v. Noy*, 2 *Myl. & K.* 125, 3 *L. J. Ch. N. S.* 14.

And in elucidation of the general principle thus stated the cases and text writers, as well as common sense, make it apparent that "permanent" incapacity as a ground for dissolution does not, and should not, mean incurable and perpetual disability during the life of the partner. It means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote, which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership.

Story on Partnership says (§ 297): "It is not the mere fact of the existence of such insanity, infirmity, or other disability supervening that will justify them in the application of such an extraordinary remedy (dissolution). But it must be of such a character as amounts to a permanent or confirmed disqualification to perform the duties of the partnership. If the insanity or infirmity or other disability be of a temporary or fugitive nature; if it be merely an occasional malady or accidental illness; . . . if there be a fair prospect of a recovery within a reasonable time—then and in such cases there is no fit ground for a court of equity to decree a dissolution, for every partnership must be presumed to be entered into subject to the common incidents of life, such as temporary illness, infirmity, or insanity."

In *Raymond v. Vaughn*, 128 *Ill.* 256, 4 *L.R.A.* 440, 15 *Am. St. Rep.* 112, 21 *N. E.* 566, it is said: "While curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity. . . . it will not authorize a court of

chancery to decree a dissolution of a partnership if the malady be temporary, only, with a fair prospect of recovery within a reasonable time. Story, Partn. § 297.

. . . Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to determine the partnership and apply its assets unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation."

In *Jones v. Lloyd*, L. R. 18 Eq. 265, it was said by Sir George Jessel: "I quite agree with what was said on the part of the defendant, that you must have an allegation of permanent insanity [as a ground for dissolution]—that is, you must have an allegation of insanity, not merely of a temporary character, for that is the meaning of the rule, and not merely insanity from which it is likely or reasonably possible that a man may recover."

Within these principles I think that the plaintiff, on the facts as now found, established his right as matter of law to a dissolution of the partnership. Many times the meaning and effect of such descriptive terms as "substantial" and "reasonable," as found in a rule of action, are to be determined by a jury, but, on the other hand, it sometimes happens that a given set of facts is so decisive that their significance is not subject to diverse inferences, and does not present a question of fact, and that I think is the present case. It would seem that there ought to be no doubt or difference of opinion concerning the proposition that when a partner has been totally incapacitated from attending to his duties for three years and eleven months out of a partnership period of four years and eleven months, with no assurances that he will recover before the expiration of the unexpired balance of eleven months, the incapacity has been of a permanent, and not a temporary or fleeting character, and of a substantial, and not inconsequential nature, and that the purpose of his partners in joining him with them has been materially and essentially defeated.

Two special reasons are urged why the rule of dissolution should not be applied to the facts of this case. In the first place, it is said that inasmuch as defendant undertook largely to discharge the ordinary duties of plaintiff as copartner for a small extra percentage of profits, the exactions of the partnership business could not have been great or material enough to warrant a dissolution. The fact that the plaintiff's agreement with defendant entitled the former to have the latter do his work is an added argument concerning the disadvantage

which flowed to him from defendant's incapacity, and it can hardly be assumed that the utter inability of a partner to discharge his duties to the copartnership is not a matter of substantial importance.

In the second place, it is said, and the court, in substance, has so found, that after April, 1909, plaintiff maintained the position that he would not permit the defendant to resume his place as a partner, although the latter desired so to do. The only evidence on this subject relates to the plaintiff's insistence that the partnership should be dissolved because of defendant's sickness, and his arrangement of the firm bank accounts so that the latter could not draw therefrom. There is nothing in these facts which constitutes a defense to this action. Defendant is not required to establish as a matter of defense that plaintiff excluded him from participation in the partnership affairs. The burden rests upon the plaintiff to show that the defendant had become incapacitated by reason of sickness from attending to these affairs. If he establishes this proposition, it was defendant's incapacity, and not plaintiff's conduct, which kept the former from attending to his duties. If plaintiff does not establish this proposition, his action fails independent of any other consideration.

Having thus reached the conclusion that plaintiff on the facts as found was entitled to a dissolution of the copartnership, the question still remains as of what date such dissolution should be adjudged. In fact this at present is the only question of practical importance; for, the partnership agreement having now expired by its own limitations, a judgment of dissolution is of no importance unless it relates to a date prior to such expiration. It may be conceded, as argued by respondent, that under ordinary circumstances dissolution will be adjudged as of the date when the judgment was granted, but beyond question the court may for sufficient reason adjudge such relief as of an earlier date. *Durbin v. Barber*, 14 Ohio, 311; *Dumont v. Ruepprecht*, 38 Ala. 175; *Fogg v. Johnston*, 27 Ala. 432, 62 Am. Dec. 771; *Von Tagen v. Roberts*, 2 Pearson (Pa.) 137; *Essell v. Hayward*, 30 Beav. 158, 29 L. J. Ch. N. S. 806, 6 Jur. N. S. 690, 8 Week. Rep. 593. I have no doubt that if on a new trial the court should find that plaintiff was entitled to a dissolution within the principles approved by us, it will have the power to adjudge such dissolution as of an earlier date when he became entitled to such relief, if to it the equities seem to warrant so doing. Plaintiff waited nearly eleven months after the commencement of the defendant's sickness before beginning this action, and thereby insisting

that the incapacity was permanent, and that he was entitled to a dissolution. On the facts as at present found it could be fairly said that such conduct was not precipitate or unreasonable, and that the claim then asserted by his action that defendant's incapacity was permanent and warranted a dissolution was justified. If without fault on plaintiff's part the processes of litigation have been delayed until a judgment of dissolution, taking effect when rendered, will be of no benefit whatever, the cases which have been cited and principles of equity undoubtedly would entitle the court, by relation of its judgment, to secure him in the rights which he asserted, and as now found possessed, without impairment by delays and obstacles for which he was not responsible.

It is urged with much vigor that the plaintiff's insistence upon a dissolution of the copartnership as of an earlier date, such as that of the commencement of the action, is so inequitable that it should be denied as a matter of law, but this is not so. There is no reason why the plaintiff rather than the defendant should bear the disadvantages resulting from the latter's unfortunate affliction. Plaintiff by reason of this action is not to be held responsible because if an earlier dissolution of the partnership shall be adjudged, the result will be that during the subsequent period defendant will have been subjected to the liabilities of the copartnership without participating in the profits. Defendant by assenting to a dissolution when demanded by plaintiff could have avoided any such consequences as the result merely of his sickness. There still would have remained, however, the provisions of the articles of copartnership expressly providing for a period of five years within which his capital should be repaid to a partner after the termination of the copartnership for any reason.

The judgment should be reversed, and a new trial granted, with costs to abide event.

Werner, Collin, and Hogan, JJ., concur.

Cullen, Ch. J., and Chase, J., dissent.

Willard Bartlett, J., absent.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

D. E. EVERETT, Appt.

(— N. C. —, 79 S. E. 274.)

Criminal law — suspension of sentence — conditions — payment of costs.

1. A suspension of sentence upon payment 47 L.R.A. (N.S.)

of costs does not render such payment a satisfaction of the judgment, so that the court cannot afterward proceed with the sentence.

Same — uncertainty.

2. A judgment suspending sentence upon condition of payment of costs and giving bonds to appear from term to term and show that accused has demeaned himself as a good and law-abiding citizen is not void for uncertainty.

Same — punishment for subsequent act.

3. Imposing a sentence which was suspended during good behavior, upon violation of law by the accused, is not void as a punishment for something occurring after the original conviction.

Same — power to suspend sentence.

4. The power of suspending sentence belongs of common right to every tribunal invested with authority to award execution in a criminal case.

Jury — suspension of sentence — violation of conditions — right to trial.

5. One at liberty under a suspended sentence is not entitled to a jury trial of the question whether or not he has violated the conditions of the suspension so as to be subject to punishment under the verdict against him.

(September 10, 1913.)

A PPEAL by defendant from a judgment of the Superior Court for Edgecombe County sentencing him to imprisonment for unlawfully selling liquor in violation of a condition upon which a judgment against him had been suspended. Affirmed.

Statement by Walker, J.:

The defendant was indicted in three cases for unlawfully selling liquor, and pleaded guilty to each indictment at September term, 1911. Judgment was prayed by the solicitor, and the court adjudged that defendant pay a fine of \$150 and the costs in the first case, suspended judgment on payment of the costs in the second, and entered the following order in the third: "It is ordered that judgment be suspended on the payment of costs, and further that the defendant enter into a bond in the sum of \$200 for his appearance at each criminal term of this court for the next two years and show that he has demeaned himself as a good and law-abiding citizen." The defendant appeared from term to term of the court, and at March term, 1913, on the suggestion of the solicitor that the defend-

Note. — For power of court to suspend or stay execution of sentence, see notes to State v. Abbott, 33 L.R.A. (N.S.) 112, and Fuller v. State, 39 L.R.A. (N.S.) 242. See also later cases, Snodgrass v. State, 41 L.R.A. (N.S.) 1144, and State ex rel. Dawson v. Sapp, 42 L.R.A. (N.S.) 249.

ant had violated the terms imposed by the court for the suspension of judgment at September, 1911, by unlawfully selling liquor, the court, in the presence of defendant, heard testimony from both sides upon the accusation, and, on due consideration thereof, found as a fact that the defendant had engaged in the unlawful sale of liquor, in violation of the condition upon which the judgment of the court had been suspended. The court thereupon, and for the same cause, adjudged, in said case, that defendant be imprisoned in the county jail for the term of nine months, with directions that he be assigned by the county commissioners to work on the public roads, and from this judgment he appealed.

Mr. John L. Bridgers, for appellant:

The suspension of the judgment under consideration was not for a reason embraced in those stated.

State v. Hilton, 151 N. C. 692, 65 S. E. 1011.

Judgment may be suspended on payment of costs, and if costs are paid, then it becomes a finality.

State v. Whitt, 117 N. C. 807, 23 S. E. 452.

If it be the law that the court could sentence defendant in the case in which judgment was suspended, no sentence could be imposed for an offense committed since the time judgment was suspended.

State v. Sanders, 153 N. C. 627, 69 S. E. 272.

Messrs. T. W. Bickett, Attorney General, and T. H. Calvert, Assistant Attorney General, for the State:

The court had power to suspend the sentence.

People ex rel. Forsyth v. Court of Sessions, 141 N. Y. 292, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 679; State v. Hilton, 151 N. C. 692, 65 S. E. 1011; State v. Crook, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513; State v. Whitt, 117 N. C. 804, 23 S. E. 452; State v. Sanders, 153 N. C. 624, 69 S. E. 272.

Walker, J., delivered the opinion of the court:

The practice of suspending judgment upon convictions in criminal cases and upon reasonable terms has so long prevailed in our courts that we would be loath to disturb it, except for the most convincing reason, supported by the clearest authority showing its illegality. We are satisfied, after the most careful examination of the question, that no such reason can be presented, and that no such precedent can be found. Recent decisions of this court are strongly in favor of the power as existing in the court 47 L.R.A.(N.S.)

when it is fairly and not unreasonably or oppressively exercised. In this case the learned and enlightened judge who presided and imposed the sentence proceeded with great caution after a final hearing of both sides, and we concur in his finding of fact and his conclusion that this was a proper case for the use of the power residing in him, in order to punish the defendant for a violation of the criminal law, which he had confessed in open court, and of which he had been adjudged guilty; he having shown himself no longer entitled to the clemency of the court.

Before discussing the general question as to the power of the court to suspend judgment upon terms and conditions imposed at the time, it will be well to notice the objections made by the learned counsel for the defendant in his brief and argument. As we understand, they are the following: (1) If the court can suspend the judgment, it may do so indefinitely. (2) The suspension was really, and in law, conditioned upon the payment of costs only, and, when the costs were paid, the power of the court to proceed further was terminated, for, the condition annexed was no part of the punishment. (3) The conditional terms imposed render the judgment uncertain, as in the case of alternative judgments. (4) The court has punished the defendant for what he has done since the suspension of the judgment, and not for the original offense, and for which he has not been tried upon indictment and convicted by a jury. We do not think any of these objections are tenable. It would be useless for us, in this case, upon a suspension for only two years, to inquire what would be the legal effect of an indefinite suspension, as there has been no such exercise of the conceded power.

It must not be overlooked that the suspension of judgment upon terms expressed therein, at September term, 1911, was entered with the defendant's implied assent at least; he being present, and not objecting thereto. This court said in State v. Crook, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513, that such an order is not prejudicial, but favorable to a defendant, in that punishment is put off, with the chance of escaping it altogether, and it is presumed that he was present and assented thereto, if he did not ask for it as a measure of relief from impending punishment. The court also expressed some surprise at the suggestion that the rights of a defendant are infringed or his interests impaired by allowing him to escape for the present the toils of the law, by suspending immediate action and affording him an opportunity for reformation as a basis for permanent clemency, instead of requiring him at once to undergo the pun-

ishment of the law, for the offense of which he had been convicted. And we repeat that it is strange he should complain of the merciful consideration which the law thus extends to him.

The practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time, and it seems to have been recognized in England, for in 4 Blackstone, 394, it is said that "a reprieve (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, *ex arbitrio judicis*, either before or after judgment, as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy, or sometimes, if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon." And to the same effect we find the law thus stated in 1 Chitty, Crim. Law, 757: "The more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution. And this power exists even in cases of high treason, though the judge should be very prudent in its exercise." "At common law every court invested with power to award execution in criminal cases has inherent power to suspend the sentence." Clark, Crim. Proc. 496. In *Com. v. Dowdican*, 115 Mass. 133, it was held to be proper and within the power of the court, after conviction in a criminal case, "when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file, and this practice has been recognized by statute. . . . Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order

or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged." Sometimes the judge reprieves, said Lord Hale, "as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy." Also, when favorable or extenuating circumstances appear, and when youths are convicted of their first offense. "And these arbitrary reprieves may be granted or taken off by the justices of jail delivery, although their sessions be adjourned or finished, and this by reason of common usage." 2 Hale, P. C. chap. 58, p. 412. Our courts, of course, can only act in such matters during their sessions, and not in vacation. The power of suspending or respiting the sentence belonged of common right to every tribunal invested with authority to award execution in a criminal case. *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 292, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675, citing 1 Chitty, Crim. Law, 1st ed. 617, 758; *Bishop, New Crim. Proc.* § 1299; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; 2 Hawk. P. C. p. 657, § 8. It was held in *Fulta v. State*, 2 Sneed, 232, that the courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The courts will be presumed to have exercised such discretion in a proper case.

We have already seen that there is a presumption that the order of suspension was made with the defendant's consent, if not at his request. The record here evidently implies that the order in question was made at defendant's solicitation, as an act of mercy to him, so that he might qualify himself by his good behavior to receive further clemency from the court, and thus avoid the rigor of the law. *Allen v. State*, Mart. & Y. 294; *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547. In the case last cited, the court said: "It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand." The case of *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011, does not controvert these views, but is in perfect harmony with them. The capital distinction between the two cases is that in *Hilton's Case* the court had previously in-

vestigated the conduct of the defendant, and, after finding as a fact that he had fully complied with the condition of the suspension, he was discharged, while here, unfortunately for the defendant, the court has found the other way, after hearing both sides, that is, it has declared, after hearing the evidence, that the defendant has sold liquor unlawfully, in clear violation of the terms of suspension, to which he agreed. In the Hilton Case, the court fully recognized the existence of a valid power in the court to suspend judgment on condition that the good behavior of the defendant, and his obedience to the law, be shown by him from term to term, for a reasonable period, citing many authorities to sustain the ruling by which it approved the long-standing practice of our tribunals in this respect. Justice Hoke, for the court, thus comments upon this method of procedure in our criminal courts: "In this state, as shown in *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513, the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or to make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law, and, while they are well established with us by usage, the practice should not be readily or hastily enlarged and extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law." He refers to the cases hereinbefore cited, and also to *State v. Bennett*, 20 N. C. (4 Dev. & B. L.) 170; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Gibson v. State*, 68 Miss. 241, 8 So. 329; *Ex parte Williams*, 26 Fla. 310, 8 So. 425; *Revisal of 1905*, §§ 1293, 1294. See also *State v. Whitt*, 117 N. C. 804, 23 S. E. 452; *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513; *State v. Sanders*, 153 N. C. 624, 69 S. E. 272.

There was no indefinite suspension of judgment in this case, but only for a definite time with the consent of the defendant, upon a condition which he impliedly promised to perform, but which he most flagrantly disregarded. We need not, therefore, decide upon the lawfulness of an 47 L.R.A.(N.S.)

indefinite suspension, for we have no such case. There was no abuse of the court's discretion, and this is a sufficient answer to the first contention.

Nor has the second any greater force. The payment of the costs was not a full compliance with the terms of the suspension, and did not take away the power of the court to proceed to judgment, if it found that the defendant had not complied with the condition, but on the contrary had become, since the date of the judgment, a common retailer of liquors, in open violation and defiance of the law.

The next contention, that the condition rendered the judgment uncertain, as in the case of alternative judgments, cannot be sustained. The judgment is certain and definite in its terms, and does not impose alternative duties or obligations.

Nor can it be well argued that the judge had, by the judgment, punished the defendant for his subsequent conduct. This is a misapprehension of its legal effect. He has simply punished him for the crime he had confessed, because he has violated the terms upon which clemency was impliedly promised. But this is merely the reason for awarding punishment in the original case, and is no part of the offense for which it was inflicted. This very point was urged in the similar case of *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954, where the defendant was indicted for the illegal sale of liquor, and the mittimus was ordered to be stayed "while he does not sell liquor," and it was held that "the enforcement of the judgment by mittimus was not a punishment for subsequent offenses, or for breach of the condition on which execution was stayed."

It must be clear that the defendant was not entitled to a jury trial to determine whether or not he had violated the conditions upon which the judgment had been suspended. He was not on trial for any new offense, nor for any offense whatever. When the judgment was suspended the defendant assumed the obligation of showing, to the satisfaction of the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency. Whether or not he had so demeaned himself was not an issue of fact to be submitted to a jury, but a question of law to be passed upon by the court. It was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here.

The case of *State v. Sanders*, 153 N. C. 627, 69 S. E. 272, cited by the defendant in support of the position that the defendant must have been convicted of the subsequent

offense, and that the record of conviction is the only competent evidence of the violation of the condition, is not in point. The court, in that case, was deciding as to the forfeiture of a recognizance given for a defendant's appearance, where the statute prescribes the method of proving a breach, that is, by the record of a conviction. It was not a proceeding to enforce a former suspended judgment by punishing the defendant.

The power to suspend judgment exists, but should be exercised fairly and reasonably, so as not to deprive the defendant of the right to assign errors and review the proceedings in the court below, if he desires to do so, and with due regard to his other rights. He must not be oppressed or unduly burdened by the suspension. There was no abuse of discretion in this case, nor did the court exceed its authority. The suspension was made with the consent of the defendant, and for his benefit, and he has now no reason to complain, having violated his own voluntary promise to demean himself as a good citizen should do.

No error.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

JAMES RUFFIN, Appt.

(— N. C. —, 79 S. E. 417.)

Larceny — abstracting money from letter.

Abstracting and appropriating to his own use, money from a sealed letter in-

Note. — Larceny by abstracting money or other property from letter given one to mail.

The question stated is one upon which, oddly enough, there seems to be but little authority.

In *Rex v. Jones*, 7 Car. & P. 151, where it appeared that prosecutrix asked the prisoner to put a letter in the post for her, telling her at the same time that it contained money, and the prisoner abstracted the money by breaking the seal of the letter before she put it in the post, the common serjeant, after consulting Mr. Justice Gaselee, said that in his opinion, and in that of the learned judge, it was larceny; but added that if any serious doubt were entertained on the point, he would reserve it.

A case which involved a somewhat similar state of fact, but which presents a different aspect of the question, is *State* 47 L.R.A. (N.S.)

trusted to him to mail, renders one guilty of larceny.

(September 24, 1913.)

A PPEAL by defendant from a judgment of the Superior Court for Vance County convicting him of larceny. Affirmed.

Statement by Hoke, J.:

The facts in evidence tended to show that on a certain Sunday night, 1913, Robert Royster had several letters written, and same were put in envelopes sealed and addressed to the respective parties; that one of these letters so inclosed and sealed was addressed to his father, Spot Royster, Vergilina, Virginia, and in that one said Robert had put \$10 in bills. Next morning Robert gave these letters to Eugene Sandiford to mail, and Sandiford handed them to defendant for like purpose. There was further evidence tending to show that defendant, having opened the envelop and taken the money, resealed and mailed the letter at the postoffice in Henderson. The court charged the jury that if they should find beyond a reasonable doubt that defendant secured the letter from Sandiford for mailing and undertook to mail same at his request, that the money was then in it, and he broke open the letter and took it out and appropriated it to his own use, they would render a verdict of guilty; that the breaking of the letter was a sufficient taking within the proper definition of the crime. There was verdict of guilty, and from sentence to jail for eight months defendant excepted, assigning for error that on the facts in evidence defendant could not be convicted of larceny, having acquired possession by consent of owner or his bailee.

v. Walker, 65 Kan. 92, 68 Pac. 1095. It there appeared that a person handed another a gold piece to be changed into bills, which were to be put by the latter in a letter and mailed; and the one to whom it was given took the money and made the change and put it in the letter, but did not make the deposit in the postoffice, and, with intent to keep it himself, refused to return it to the giver. Everything to be done was to be done in the presence of the two together and under the direction of the giver of the money; and everything that was done or refused was done or refused in the presence of both of them. It was held that the one who refused to complete the direction given, and refused to return the money, but kept it with the intent stated, had only the bare physical custody of it, the legal possession being that of the owner; and therefore that he was guilty of larceny of the money in its changed form.

E. S. O.

Mr. Thomas M. Pittman for appellant.

Messrs. T. W. Bickett, Attorney General, and T. H. Calvert, Assistant Attorney General, for the State:

Defendant was guilty of larceny.

18 Am. & Eng. Enc. Law, 476, 479; Walker v. State, 9 Ga. App. 863, 72 S. E. 446; 25 Cyc. 24, 25; Rex v. Jones, 7 Car. & P. 151; State v. England, 53 N. C. (8 Jones L.) 399, 80 Am. Dec. 334.

Hoke, J., delivered the opinion of the court:

At common law it was regarded as an essential feature of the crime of larceny that the party charged should have acquired possession of the property against the will of the owner and ordinarily with intent to steal at the time. The taking considered necessary to make out the offense involved the idea of a trespass on the possession of the owner, either actual or constructive. The principle was held to include cases where possession was acquired from the owner *animo furandi*, by trick or fraudulent contrivance. State v. McRae, 111 N. C. 665, 16 S. E. 173; People v. Miller, 169 N. Y. 339, 62 N. E. 418, reported with instructive editorial note in 88 Am. St. Rep. 546. And convictions were upheld when the party charged had only the custody of the property; the constructive possession remaining with the owner. Instances of this occurring when a servant or employee intrusted by the master with goods or money for a specific purpose, in breach of this purpose, appropriates same to his own use with felonious intent. State v. Jarvis, 63 N. C. 556.

There is high authority for the position that the conviction in the present case could very well be sustained on the ground that defendant had only the care or custody of the property, and not the possession. Murphy v. People, 104 Ill. 528, 4 Am. Crim. Rep. 323; Walker v. State, 9 Ga. App. 863, 72 S. E. 446. We are not called on to determine whether this view is in accord with our decisions more directly relevant to the question presented, the defendant not being the servant or employee of the prosecutor (State v. Copeland, 86 N. C. 692-695; State v. England, 53 N. C. [8 Jones, L.] 399, 80 Am. Dec. 334; State v. Martin, 34 N. C. [12 Ired. L.] 157), being of opinion that on the record the defendant has been properly convicted, whether considered originally as bailee or only as custodian. It is the well-established principle that "a bailee who breaks bulk and appropriates the goods or a part of them to his own use with felonious intent is guilty of larceny." 18 Am. & Eng. Enc. 47 L.R.A. (N.S.)

Law, 479; Robinson v. State, 1 Coldw. 122, 78 Am. Dec. 487; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Rex v. Jones, 7 Car. & P. 151; Reg. v. Jenkins, 9 Car. & P. 38. In Fairclough's Case, supra, citation is made from my Lord Coke as follows: "If a bale or pack of merchandise be delivered to carry to one at a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take anything out *animo furandi*, this is larceny." 3 Co. Inst. p. 417. In the Robinson Case, supra, the principle was applied where the prosecutor left his room and trunk unlocked in charge of defendant, who, in prosecutor's absence, opened the trunk and took money out of it with felonious intent. And again in Rex v. Jones, supra, to a case where defendant broke open a letter intrusted to him to mail and abstracted money from same, the very case we have here, and is recognized as the correct position in State v. England, supra, an authority to which we were referred by counsel.

There is no error, and the judgment is affirmed.

NORTH DAKOTA SUPREME COURT.

AUGUST NADERHOFF, Jr., Appt.,
v.

GEORGE BENZ & SONS, Respt.

(25 N. D. —, 141 N. W. 501.)

Judgment — default — motion to secure costs.

1. Service of summons and verified complaint was made by service upon the secre-

Headnotes by Goss, J.

Note. — Pendency of motion as extending time to plead.

It may be said generally that the pendency of a motion that is frivolous on its face, or a motion the determination of which either way could not affect the right of the plaintiff to proceed with the cause, will not prevent the entry of a default.

Thus, if a motion to dismiss filed in an action at law within the time allowed by the statute for filing a plea or demurrer is of such a character that the plaintiff will be justified in treating it as a nullity, he may disregard it and cause the clerk to enter a default for failure to plead or demur; but if the motion is not of that character, no default can be entered until the motion is disposed of. Dudley v. White, 44 Fla. 264, 31 So. 830.

And in Rice v. Simmons, 89 Ark. 359, 116 S. W. 673, while conceding that it is generally irregular to enter a judgment by de-

tary of state. Defendant appears by a motion to require of plaintiff security for costs, with hearing thereon noticed to be had three days after the expiration of the thirty-day period for answer, and defendant neglects to serve or file answer. On the thirty-first day after service of summons, plaintiff files affidavit that defendant has defaulted and failed to answer or demur, but informs the court of the pending motion for security for costs. Judgment is ordered as of default without taking of testimony or the assessment of damages. The complaint claimed to recover \$1,527, alleged to have been paid defendant by plaintiff as the purchase price of intoxicating liquors delivered plaintiff at various times by de-

fendant upon contract made and executed within this state. Plaintiff claims to recover as for money had and received under § 9390, Rev. Codes 1905. Soon after entry of the judgment by default, defendant applied to the court to vacate the judgment and permit answer, which motion was granted and from which plaintiff appeals. Held, that the pendency of the motion to require of plaintiff security for costs did not operate to extend the time within which defendant must answer or demur, and that the judgment, if otherwise properly entered, is not irregularly entered because of the pendency of said motion.

Costs — motion to secure — effect.

2. The right of defendant to exact secur-

fault while a motion remains pending and undisposed of, the court stated that where the motion upon its face appears to be frivolous, and it clearly appears that the motion could not have been granted, or where the determination of the motion either way could not affect the right of the plaintiff to proceed with the cause, it would not be reversible error to enter a judgment by default.

With the exceptions above indicated, the question as to the effect of the pendency of a motion to prevent a judgment by default depends to a large extent upon the purpose or character of the motion, and to some extent upon the terms of the local statutes in relation to defaults.

Thus, the California and Nevada decisions that pendency of a motion does not extend the time to answer are under a Code provision that default may be entered upon failure to answer or demur, the court construing such provision as showing conclusively that a motion will not prevent entry of default in the absence of an order of court or agreement of the parties staying proceedings.

On the other hand, the Colorado Code provides that default may be entered in case no answer, demurrer, or motion is filed, and so pendency of a motion prevents default being taken in that jurisdiction.

Motion for security for costs.

NADERHOFF v. GEORGE BENZ & SONS, in holding that a motion for cost bond does not prevent the entering of a default, has the support of the authorities, for, although in *The Osprey v. Jenkins*, 9 Mo. 643, it was held error to enter judgment for want of plea pending a motion for security for costs required by statute before a nonresident could commence an action, the court stating that the legitimate office of this motion was to suspend all further proceedings until it was disposed of by the court, and that there could be no propriety in requiring the defendant to incur any additional trouble and cost until it was ascertained whether the plaintiff would secure him in the costs that had or might accrue in the event of his becoming liable for them, and that, besides, the officers of the court and others

who were bound by law to render services in the cause had a right to be secured in their fees for such services, yet later Missouri cases hold that only a motion going to the merits dispenses with the necessity for answering. *Hill v. Meyer*, 47 Mo. 585 (see *infra*, under d); *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836.

And so in the *Fears Case* it was held that the taking of judgment while a motion for security for costs was pending was not fraud upon the court, for the reason that the court takes judicial notice of the state of the case as shown by its own records.

It will be noted that in **NADERHOFF v. GEORGE BENZ & SONS** it is stated that *The Osprey Case* was evidently decided under a rule of practice, and the *Fears* and *Hill Cases* are cited as showing that a different rule now prevails in that jurisdiction.

And so, also, it has been held that judgment by default may be rendered without first acting upon a motion for security for costs filed at the same time as the answer, where the answer has been stricken out as "sham and unverified," and defendant elects not to amend, but to stand on the answer. *Pilant v. S. Hirsch & Co.* 14 N. M. 11, 88 Pac. 1129; *Pilant v. S. Grabfelder & Co.* 14 N. M. 30, 88 Pac. 1130.

And in *Creelman v. Ronnan*, 28 N. S. 50, it was held that the summons, on application for costs and stay of proceedings, does not act as a stay until its return to prevent the entry of default.

But in *McDermott v. Rosenbaum*, 13 Colo. App. 444, 88 Pac. 880, it was held that the force and effect of § 168 of the Colorado Code, which provides that if no answer, demurrer, or motion has been filed within the time specified in the summons, or such further time as may have been granted, the clerk or judge shall enter the default of the defendant, were to prevent the entering of a default pending a motion for a cost bond.

Motion in relation to pleadings.

It has been held that a judgment upon the pleading against the defendant cannot be taken where a motion, not frivolous, to make the petition more definite and certain, has been filed within the time to plead, and

ity for costs ceased at the expiration of the period for answer, when no issue had been taken by answer or demurrer to the cause of action charged in the complaint, the motion not going to the jurisdiction over person or subject-matter.

Judgment — vacating — affidavit — sufficiency.

3. The proposed affidavit of merit stated insufficient facts to invoke the discretion of the court in an application to vacate the judgment, made under § 6884, Rev. Codes 1905.

Assumpsit — price of liquor — judgment.

4. The cause of action sued upon, claim-

is pending undisposed of, and not waived. *St. Louis & S. F. R. Co. v. Young*, 35 Okla. 521, 130 Pac. 911.

But there is no error in rendering judgment without disposing of a motion to strike petition from the files, where it is evident that the motion, being without merit, could not have prevailed if acted upon. *Kellogg v. Churchill*, 2 Ohio Dec. Reprint, 4.

And in *Register v. Pringle Bros.* 58 Fla. 355, 50 So. 584, the reasoning in *Dudley v. White*, supra, was approved and held to apply with equal force to a motion for a more specific bill of particulars. And so, in the *Dudley Case*, a motion to dismiss upon grounds having no relevancy to such a motion under the facts of the case was held not to prevent entry of default. And in the *Register Case*, an action in assumpsit by a wholesale merchant against a retail merchant upon an open account, a motion for a more specific bill of particulars was held not to operate to prevent entry of default, where there was attached to the declaration an invoice or itemized bill in the form customarily used between wholesale and retail merchants, the court stating that the contention that such invoice was too indefinite, vague, and uncertain to enable defendants to plead was utterly without merit, and could not be seriously entertained. And especially the court thought that such a motion should not prevent the entry of default where, as in this case, the motion was not filed until the very day a plea or demurrer was due.

And so, also, a motion to set aside an amended complaint because it does not correspond to the summons as to the name of one of the defendants does not extend the time to answer. *Greenfield v. Wallace*, 1 Utah, 188.

Motion attacking jurisdiction—motion to quash summons or set aside service.

In *Smalley v. Lasell*, 26 S. D. 239, 128 N. W. 141, though, in affirming the order opening a default, the decision, as pointed out in *NADERHOFF v. GEORGE BENZ & SONS*, was based more on excusable neglect in failing to get an extension of time to answer 47 L.R.A.(N.S.)

ing, under § 9390, Rev. Codes 1905, a recovery for payments made for the purchase of intoxicating liquor sold and received in violation of our prohibition law, is an action upon an implied contract for the recovery of money had and received, and not to recover a statutory penalty. Judgment entered by default under the provisions of § 7001 was therefore entered in an action on contract within the meaning of the first subdivision of said section.

Judgment — default — failure to assess damages.

5. Section 7001, Rev. Codes 1905, authorizing the entry of judgment by default without the necessity for an assessment of damages, "in an action arising on contract for

after the motion was denied, the court said that, pending a motion to set aside the service of a summons, a default judgment could not be entered without overruling defendant's objections to the service of the summons.

And it was so held in regard to a meritorious motion to quash and vacate a summons in *Atchison, T. & S. F. R. Co. v. Lambert*, 31 Okla. 300, 121 Pac. 654. The court stated that if the motion had been disposed of and properly determined, plaintiff could not have proceeded to trial, and no judgment would have been rendered, for it properly challenges the jurisdiction of the court over the person of defendant. It would be a strange and inconsistent procedure to hold that the defendant, in order to challenge the attention of the court to the want of jurisdiction over his person, because of irregularities in the summons and service thereof, must do so by motion to quash, but, in order to prevent a default judgment from being entered against him, and avoid the subsequent proceedings necessary to set aside such judgment, must file an answer by which he would waive all irregularities in the service and in appearance. Where a motion is frivolous upon its face, or has not been filed with promptness, and its evident purpose is one of delay, a different question might be presented.

Though, as will be seen, the above decision is in conflict with the majority of the decisions, it would seem to be based upon the better reasoning.

In Colorado it seems that under the Code (for provision, see *McDermott v. Rosenbaum*, supra, under a) a court cannot have a default entered pending a motion filed by the defendant. *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231 (motion to quash summons); *Atchison, T. & S. F. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512 (motion to quash summons and return of sheriff); *Chivington v. Colorado Springs Co.* 9 Colo. 597, 14 Pac. 212 (motion to quash sheriff's return).

In *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185, where the parties were not served with a summons, it was held error to grant a default against them without first disposing of a motion on file to vacate appearance entered by attorney for them.

the recovery of money only," did not authorize entry of the judgment vacated without an assessment of damages. The portion of the statute "for the recovery of money only" does not apply to this judgment. Payments so made are not admitted by failure to answer.

Same — when proper.

6. Judgment by default without assessment of damages, under this provision of the statute, can only be ordered in actions for the recovery of a definite sum of money as such, and wherein the court is not called upon to ascertain or adjudge anything but the existence and terms of the contract by which it is due; and an action that requires the determination of amounts unliquidated is not to be deemed an action for the recovery of money only, as to relief sought. In such an action the amount of damages is not admitted by the defendant by a failure to answer, and an assessment of damages by the court is required.

Same — notice of assessment.

7. As the judgment was irregularly entered, in that damages were not assessed in a matter where assessment is required upon statutory notice to the opposite party after appearance, defendant was entitled to notice of time and place of such assessment of damages.

Same — vacating — affidavit of merit.

8. The judgment so being erroneously ordered and entered without assessment, and without notice to the opposite party of time and place of assessment, an affidavit of merit is not essential, and the court on

motion of defendant properly vacated said judgment thus irregularly entered.

Same — time to answer.

9. The court, being obliged to vacate the judgment, properly permitted an extension of time to answer.

(Bruce, J., dissents from propositions 1 and 2.)

(May 16, 1913.)

APPEAL by plaintiff from an order of the District Court for Stark County vacating a default judgment against defendant in an action brought to recover the purchase price of intoxicating liquors sold and delivered by defendant to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Heffron & Baird, for appellant:

The affidavit of the attorney for defendant, which is the sole basis of defendant's motion to vacate the judgment, is insufficient.

Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Sargent v. Kindred, 5 N. D. 9, 63 N. W. 151; 1 Enc. Pl. & Pr. 360.

The ground set up for vacating the judgment, while called "excusable negligence and mistake," is not negligence at all, but a wilful act on the part of the defendant, from which he is entitled to no relief.

Plano Mfg. Co. v. Murphy, 16 S. D. 380, 106 Am. St. Rep. 692, 92 N. W. 1072.

But it has been held that a motion to set aside the service of a summons does not operate to extend the time to answer. Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133; Garvie v. Greene, 9 S. D. 608, 70 N. W. 847.

Nor does a motion to quash the summons. Higley v. Pollock, 21 Nev. 198, 27 Pac. 895. The California and Nevada cases, at least, were decided under a Code provision that default may be entered upon failure to answer or demur.

And in Mantle v. Casey, 31 Mont. 408, 78 Pac. 591, it was held that, as the Code provides that default shall be entered if an answer has not been filed within the time specified in the summons, or any extension that may have been granted, a motion to quash the summons does not operate to extend the time to answer.

And the lower court was held properly to have refused to enter judgment by default pending the question whether suit should be retained in that court because of alleged nonresidence of the defendant in the county, as, that question having been raised, it was preliminary to all others. State use of Ockerme v. Gittings, 35 Md. 169.

In Phillips v. Kerr, 26 Ill. 213, it was said that, while it may be the better practice to dispose of a motion before a trial upon the merits, yet entry of default in an action of assumpsit, pending motion to

quash a *capias ad respondendum*, was not error, as the motion related only to the mode by which he was before the court, and would not go to the jurisdiction of the court over the person of defendant. The court stated that, had the motion prevailed, the effect of quashing the *capias* would have been to discharge the bail and let it stand for and answer the office of the summons. The determination of this motion, one way or the other, could not affect plaintiff's right to proceed to a trial of the case, as it was not in abatement or in bar of the action. Its determination could affect only the steps which might be taken for the collection of any recovery which might be had, and questions only a right to hold defendant in custody in satisfaction of judgment, or make his bail liable if his body should not be surrendered in execution; but it by no means questions the right of recovery.

Motion to quash attachment.

Where an attachment is issued at the same time as the suit is commenced by *præcipe* and summons, pendency of motion to dismiss the attachment will not prevent the entering of default for failure to plead. Loring v. Wittich, 16 Fla. 617.

Courts do not vacate judgments where the default is the result of a wilful act.

Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A. (N.S.) 244, 106 N. W. 129; *Hunt v. Swenson*, 15 N. D. 512, 108 N. W. 41.

Messrs. M. L. McBride and L. A. Simpson, for respondent:

The answer which was served upon the plaintiff's attorneys, along with application to vacate the default judgment, disclosed a good defense, and the affidavit of the attorney accompanying said application offers a reasonable excuse for default, if default exists.

Barrie v. Northern Assur. Co. 99 Minn. 272, 109 N. W. 248; *Potter v. Holmes*, 14 Minn. 508, 77 N. W. 416; *Nye v. Swan*, 42 Minn. 243, 44 N. W. 9.

Even assuming that doubt exists as to the propriety of the order made by the court in vacating and setting aside the judgment, it is proper that the doubt should be resolved in favor of the application to set it aside, and that the court's order in so doing should not be disturbed.

Citizens' Nat. Bank v. Branden, 10 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Goss, J., delivered the opinion of the court:

This is an appeal from an order of the district court of Stark county, vacating a default judgment taken by plaintiff against defendant corporation for \$1,527 and costs

and disbursements. Judgment was entered upon proof of service of summons and a verified complaint. The summons had been served upon defendant by service upon the secretary of state May 31, 1911. On June 23d following, defendant appeared by its attorney in the action and served a motion noticed to be heard July 3d, moving dismissal of the action upon the ground that plaintiff was a nonresident of the state, and had not filed security for costs as required by law, and stating that the motion would be based upon all the files and upon an affidavit served therewith, and made upon positive knowledge that plaintiff was then, and had been for some time past, a resident of Glendive, Montana, and there engaged in the saloon business, and not a resident of the state of North Dakota. This affidavit and notice of motion was served upon the attorneys for plaintiff nine days before the time to appear, answer, or demur had expired. Said affidavit is not controverted. The affidavits filed in support of the motion to vacate the judgment further disclose that defendant's attorney had prepared, and had ready for service, an answer stating a valid defense, together with a demand for a bill of particulars of the items constituting the cause of action sued upon, both of which are dated June 21st, the date of the service of the notice of motion for security for costs. It further appears that the motion would have been

Motion to change venue or for removal.

In *Pennie v. Visser*, 94 Cal. 323, 29 Pac. 711, the grounds upon which a motion to set aside a default was based were held insufficient, one of which grounds was that it was unlawful to enter default pending motion for change of venue.

And so, also, in *Risher v. Morgan*, 56 Ind. 172, judgment by default was held properly entered where defendant refused to answer pending motion for change of venue, the court having rightly declined to pass upon the motion until after defendant's answer was filed.

But in *Beasley v. Cooper*, 42 Iowa, 542, it was held that as, under the Code, where the objection is to the court, the place of trial may be changed before the issue is made up, judgment by default cannot be entered pending a motion for change of venue.

And it is error to permit judgment by default to be entered pending a motion to remove the cause to the Federal court. *Cooper v. Condon*, 15 Kan. 572; *Mattoon v. Hinkley*, 33 Ill. 209.

Miscellaneous.

Pendency of motion to dismiss action for want of prosecution does not extend the time to answer. *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133.
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In *Hill v. Meyer*, 47 Mo. 585, a mechanics' lien case, a motion for the production of a note was held frivolous, inasmuch as it was not the foundation of the suit, and it need not have been named in it, and so entry of judgment by default pending disposition of the motion was not error.

And in *Rice v. Simmons*, 89 Ark. 359, 116 S. W. 673, it was held not reversible error to enter judgment by default pending a motion, frivolous on its face, in an action on a promissory note, to require the plaintiff to file copies of the notes as exhibits to the complaint, where copies of the notes were attached to the complaint at the time it was filed; and further that, if it was the desire that plaintiff be required to file the original notes, that motion could not have been granted.

An entry of judgment by default pending motion for substitution or interpleader was improper, especially where, by stipulation of the attorneys for both sides, the motion was submitted to the judge for decision. *Woods v. Woods*, 16 Minn. 81, Gil. 69.

And so, also, under a rule "that judgment may be entered . . . in all actions . . . which are ripe for judgment," it was held error to enter judgment by default pending motion for continuance, after the filing of suggestions of insolvency. *Hoamer v. Hoitt*, 161 Mass. 173, 36 N. E. 835.

J. H. B.

noticed for hearing at an earlier date, had the district judge not been temporarily without his district hearing causes at Mandan, in an adjoining district; that his wishes were consulted as to the time when the motion should be noticed for hearing, which was set accordingly for July 3d; that by inadvertence the demand for bill of particulars and answer prepared was not served upon the attorneys for plaintiff; that on July 1st, without notice to defendant's attorney, and promptly at the expiration of the thirty-day period for service of answer or demurrer, plaintiff's attorneys presented the summons and complaint with proof of service, together with an affidavit of default, reciting that no answer or demurrer had been served upon them, to the district judge, who signed an order for judgment by default without the assessment of damages, and for the full amount for which judgment was asked in the complaint, upon which default judgment was entered by the clerk. On July 13th defendant, upon an affidavit of merit made by said attorney, accompanied by an answer verified by him upon information and belief, moved to vacate this default judgment, bringing the same on for hearing on July 21st, at which time the motion was granted with leave to answer upon the payment of \$25 terms, which terms were tendered, but refused. The grounds upon which the motion was made and presumably granted were, among others, that there was a motion, one to dismiss the above-entitled action, pending and duly noticed at the time that said judgment was entered, which motion, if it had been granted, would have prevented the entry of said judgment against defendant, and that the judgment as entered was taken without notice to defendant, though defendant had appeared in the action before the entry thereof; also leave to vacate was asked upon the grounds set forth in the affidavit of merit, of excusable neglect, inadvertence, and mistake of defendant in failing to serve answer previously prepared. From the order vacating the judgment this appeal is taken.

Defendant has in all things since default judgment was entered acted promptly. The motion to vacate the default judgment was seasonably made, noticed, heard, and decided. The motion challenged the power of the court to grant the judgment by default without assessment of damages under § 7001, Rev. Codes 1905; also questioned the regularity of the entry of judgment while there was pending a motion that plaintiff give defendant security for costs, which, if determined adversely to plaintiff, would have stayed proceedings, and might have resulted in the dismissal of the action de-

pending on the terms of the order for such security if granted. The motion to vacate covered additional grounds of excusable mistake and inadvertence on the part of the defendant in failure to answer, concerning which plaintiff challenges the sufficiency of the affidavit of merit to invoke the discretion and favor of the court, and on this appeal urges an abuse of discretion in vacating the judgment, if the same was vacated upon such grounds.

We will first decide the practice questions arising, the first of which concerns the regularity of the order for judgment on default, made while defendant's motion that plaintiff give security for costs was pending undisposed of, and noticed to be heard three days after the time for answer or demurrer had expired, and in the absence of service of an answer or demurrer. Strange to say this court has hitherto declared no rule upon this question for this jurisdiction.

Respondent urges that the vacating of the judgment upon these grounds was not a matter of the invoking of the favor of the court, but instead a matter going to the regularity of its proceedings; that it was improper to enter the judgment with the motion pending undisposed of. An examination of the statutes upon this question is here in order. Assuming the court had power to enter the judgment without proof, § 7001 provides that the plaintiff, on default of the defendant in answer, could procure the judgment to be entered; § 6853 also provides that "the only pleading on the part of a defendant is either a demurrer or an answer," and that it must be served within thirty days after the service of a copy of the complaint. Section 7336 declares that "when a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action need not be made upon him." The first subdivision of § 7001 provides that "the plaintiff may file with the clerk proof of the personal service of the summons and complaint, . . . and that no answer or demurrer has been received," and thereupon judgment shall be entered for the amount demanded in the complaint, where the complaint is verified, and the cause of action arises on contract for the recovery of money only. We will also take judicial notice that the usual practice in making the proof of default is by the affidavit of the attorney reciting such service, and that no answer or demurrer to the complaint has been served upon or received by him. Under these provisions the motion made for security for costs, not being an answer or demurrer, is not, strictly speaking, a pleading. Under § 7321 a motion is defined as "an application for an order,"

in this case in writing and noticed for hearing, the decision of which under the provisions of §§ 7196-7198, if granted, might have terminated this action as effectually as if a defense had been pleaded and proven. And the only way under our practice defendant could avail himself of this right to security for costs at any time before judgment was by motion, which when made with the assertion by him of the legal right in the manner prescribed by statute, and upon which he had a right to be heard at any time before judgment. But proper practice on defendant's part would have been to have answered or demurred or procured additional time within which to have pleaded after the ruling on the motion to dismiss for want of security for costs.

The period for answer and demurrer expiring before the time at which the motion for security for costs was noticed for hearing and argument, the right of defendant to require of plaintiff such security lapsed and expired immediately when he became in default in answer. The right to security for costs is that defendant may recover his costs and disbursements assessable at law, should his defense prevail or plaintiff's cause of action fail, and, to urge the right for such purposes, he must be in a position to interpose a defense or question the right of plaintiff to prevail on the merits, which he cannot do when he is in default in answer or demurrer. In fact, until relieved therefrom, defendant's default confesses the truth of the complaint, where that is sufficient under the statute to warrant the entry of judgment without proof, as was here the case, provided this is a cause of action based upon contract, for the recovery of money, within the provisions of § 7001, Rev. Codes, 1905, and assessment of damages before judgment was not necessary. The right of defendant to require security for costs, then, is dependent upon his being in position to exact the same, to do which he must not be in default in answer or demurrer, as the case may be; and the rights under the motion itself, unaccompanied by answer or demurrer, expire with the right of defendant to interpose a defense by answer or demurrer, the only two methods provided by statute. The motion alone, without an order of court extending the time within which to answer or demur, is insufficient to toll the statute requiring answer or demurrer within thirty days from the service of the summons and complaint in this case served. We are aware that many decisions, apparently to the contrary, may be found, and that it would be easy, without weighing the decisions and the statutes and the practice prevailing in different jurisdictions, and by ignoring the real reason 47 L.R.A. (N.S.)

for the statute requiring security for costs, to come to the opposite conclusion.

We may analyze a few of the many authorities touching the decision of this question. "Where a motion made by the defendant is pending undisposed of, a judgment by default against him cannot be taken unless the determination of the motion either way could not affect the right of the plaintiff to proceed with the cause." 6 Enc. Pl. & Pr. 93, and cases cited. The cases cited to support this text are: Dillon v. Rand, 15 Colo. 372, 25 Pac. 185; Atchison, T. & S. F. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512; Chivington v. Colorado Springs Co. 9 Colo. 597, 14 Pac. 212; Klemm v. Dewes, 28 Ill. 317; Kinyon v. Palmer, 20 Iowa, 138; and Phillips v. Kerr, 26 Ill. 213. To which we may add *The Osprey v. Jenkins*, 9 Mo. 644; *Beasley v. Cooper*, 42 Iowa, 542; *Mattoon v. Hinkley*, 33 Ill. 209; *Dudley v. White*, 44 Fla. 262, 31 So. 830; and *Register v. Pringle Bros.* 58 Fla. 355, 50 So. 584. The above cases and the text writer's conclusions therefrom are distinguishable from the issue here involved on this motion for security for costs.

The Colorado, Illinois, Florida, and Iowa statutes in terms recognize a motion pending as staying the right to a default judgment until such motion is disposed of. Section 149 of the Colorado Civil Code prior to 1885 expressly provided that notice of motion is equal to demurrer or answer in preventing a default. "This statute, prior to amendment in 1885, was imperative; upon motion to dismiss for want of cost bond, the court had no discretion in the matter, and must sustain the motion. *Edgar Gold & S. Min. Co. v. Taylor*, 10 Colo. 112, 14 Pac. 113; *Western U. Tele. Co. v. Graham*, 1 Colo. 183; *Talpey v. Doane*, 2 Colo. 299; *Filley v. Cody*, 3 Colo. 221." See note to § 675, *Mills's Anno. Stat. (Colo.)* 1891. The Illinois statute (*Starr & C. Anno. Stat.* 1896, vol. 3, p. 3027, § 39) provides for a default judgment for want of appearance at the term of court; that state continuing the old common-law practice of pleadings being filed at or during the term, and, there having been an appearance and motion, there was no default. The Iowa statutes (Code of 1897, §§ 3550-3557) are substantially the same as those of Illinois, and in terms make a motion a pleading, and as we infer operate to prevent judgment by default with a motion pending. Likewise, § 1422 of the Florida Code provides that "if the defendant shall fail to appear," "plead, or demur," "the plaintiff may cause a default to be entered."

The Missouri case, *The Osprey v. Jenkins*, was evidently announced under a rule of practice, as a different rule now prevails

in that state, as appears from *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836, where that court says: "Taking judgment while a motion for security for costs was pending was not a fraud upon the court, for the court takes judicial notice of the state of a case as shown by its own records. Only a motion going to the merits dispenses with the necessity of answering,"—citing *Hill v. Meyer*, 47 Mo. 585. We have also examined the following cases, none of which are applicable to a motion of this kind: *Cooper v. Condon*, 15 Kan. 572, involving the removal of a cause to the Federal courts, and thereby a question of jurisdiction in the state court to proceed; 34 Cyc. 1306, note 24; *Hosmer v. Hoitt*, 161 Mass. 173, N. E. 835, decided under a rule of court on suggestion of insolvency, and holding a case not "ripe for judgment" where such has been made; *Woods v. Woods*, 16 Minn. 81, Gil. 69, in which a stipulation of parties submitting a notice to substitute defendants caused delay in answer, which under the facts was held excusable neglect; and the decision in *Smalley v. Lasell*, 26 S. D. 239, 128 N. W. 141, was really based upon grounds of excusable neglect instead of the pendency of a motion, as one portion of the syllabus would indicate, the court considering the affidavit of merits. Nor do we consider *General Lithographing & Printing Co. v. American Trust Co.* 55 Wash. 401, 104 Pac. 608, applicable, as the facts are not similar.

The following authorities support our conclusions, apparently independent of statute and under Code provisions similar to ours: *Pilant v. S. Hirsch & Co.* 14 N. W. 11, 88 Pac. 1129; *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 324, following *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133, although the reasoning of the California case is brief and unsatisfactory. For a holding directly in point, see *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. See also *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591; *Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847; *Greenfield v. Wallace*, 1 Utah, 189; *Gipson v. Williams*, — Tex. Civ. App. —, 27 S. W. 824; *International & G. N. R. Co. v. Williams*, 82 Tex. 342, 18 S. W. 700.

For the foregoing reasons, and on an analysis of the authorities, we decide that the pendency of this motion for security for costs, undisposed of, would not of itself extend the time within which defendant was obliged to answer or demur, or stand in default thereof: and, when he is so in default because of his failure to present an issue on the merits, thereby conceding the merit of plaintiff's cause of action and his right of recovery, a defendant then has no right to ask or be heard to insist upon security

for costs, when, under every presumption, plaintiff is then entitled to judgment against him, and defendant would be asking for something which could avail him nothing, and for something concerning which he then could have no rights, having waived his defense by failure to plead or demur. When the reason for requirement of an order ceases, the right thereto, which otherwise might be available to a defendant, should cease with it. There was no error, then, in granting judgment with this pending motion undisposed of. Our holding is not authority concerning a pending motion invoking a question of jurisdiction, the motion for security for costs not raising jurisdictional questions.

We now take up the second practice question concerning the propriety of the order vacating the judgment on the grounds of excusable neglect, under the showing based upon the affidavit of merits, proposed answer, and the other files in the case. The affidavit of merit is made by defendant's attorney. It is accompanied by an answer subscribed by said attorney and verified by him on information and belief, with an accompanying demand for bill of particulars of plaintiff's cause of action. The part of the affidavit of merit material to the present inquiry reads: "That your affiant for and on behalf of said defendant most respectfully prays this court for an order vacating and annulling said judgment hereinbefore referred to, and that the defendant be allowed to answer in the above-entitled action, a copy of which answer is hereto annexed, together with a demand for a bill of particulars upon the following grounds: Upon the ground of excusable neglect by mistake, in that on the 11th day of June, 1911, your affiant received a copy of the pleadings served on the defendant, together with the information to make an answer. From such information affiant informed the defendants that they had a good and meritorious defense to said action to plaintiff's complaint herein, and affiant now states the same to this court, as is further shown by the answer of the defendant herein, which is especially referred to and made a part of this affidavit. That on the 21st day of June, 1911, your affiant prepared the demand for a bill of particulars, together with the answer, and also a motion to dismiss the action of plaintiff on the ground and for the reason that said plaintiff was a non-resident of the state of North Dakota. That no security for costs had been furnished, and therefore asked that said action be dismissed. That it was known to your affiant at that time that the judge of this court was in court at Mandan, North Dakota, busily engaged, and in conversation

with said judge in the fore part of June, 1911, said judge stated to this affiant that he would like to be consulted upon the dates for motions, especially during the summer months. That affiant expected to see and talk with said judge in time to make the motion for security for costs returnable before the time for answering expired," "and made the motion returnable on the 1st day of July, 1911, on which day the time for answering expired; but that affiant did not see the judge of the court as he was still at Mandan, and after two days your affiant was obliged to set the motion returnable on the 3d day of July, 1911, in order to give the attorneys for the plaintiff the eight days' notice to which they were entitled. That on the 3d day of July, 1911, your affiant was called into consultation on a criminal case in Dunn county, and was very busily engaged all of said day, and that your affiant completely forgot that he had a hearing on said motion set on the 3d day of July, 1911. That plaintiff's attorneys, ignoring the fact that defendant had made appearance in said action, made an application to this court for a default judgment and secured an order on July 1, 1911, for a judgment against this defendant as prayed for in plaintiff's complaint. That the attorney for the defendant was relying upon his motion, and if said motion were granted, said action would have been dismissed, and that unless said security for costs were furnished, the court herein would be without jurisdiction, as the plaintiff is not a resident of the state of North Dakota."

The answer in brief is a general denial, accompanied with a statement that "the goods [intoxicating liquors] sold and delivered and referred to in plaintiff's complaint, were sold and delivered in the state of Minnesota," with a demand for dismissal of the action, and verified on the information and belief of the attorney. The affidavit of merit fails to state that the attorney for the defense has been informed fully and fairly of all the facts in the case, and that therefrom he believes defendant has a meritorious defense; nor are any facts concerning said defense recited, except in the answer, and there on the information and belief of the attorney alone. The attorney subscribing the affidavit and answer could truthfully swear to everything contained in both affidavit and answer, and still there exists absolutely no defense to the cause of action herein recited. It does not appear that he has been told all the facts in the case; in fact, that he has been told any facts in the case does not affirmatively and plainly appear. All the information he received from his client, as appears from the 47 L.R.A.(N.S.)

affidavit of merit, is that to be inferred from the indefinite statement: "That your affiant received a copy of the pleadings served on the defendant, together with the information to make an answer; from such information affiant informed said defendants that they had a good and meritorious defense to said action, and now states the same to the court, as is further shown by the answer of the defendant herein, which is herein specifically referred to and made a part of this affidavit." Nor does the reason appear why someone familiar with the facts does not on positive knowledge under affidavit disclose the facts of the defense to the court, that it may therefrom, in the exercise of its discretion upon the facts disclosed, determine whether a meritorious defense exists, and determine whether the judgment should be vacated to allow trial of the issues so presented. We are not now dealing with a matter to which defendant is entitled as of right, but rather the question of whether the court in its discretion will favor him by vacating judgment against him, and allowing him a day in court after he has, by failure to answer or demur, waived the same. The first essential to invoke the court's discretion is a showing of merit in his defense, to do which is the office of the affidavit of merit with accompanying answer. The merit of the defense must affirmatively appear and be set forth by someone, either attorney or client, in such a manner and with such accompanying explanation as shall satisfy the court that the party so asserting the facts of the defense, from which their merit is to be determined, either knows the facts, or has sufficient knowledge of them to satisfy the court that there is real merit in the defense, and that the allowance thereof would not result merely in delay in the final judgment to be entered, and merely to delay plaintiff in the collection of his claim already in judgment. Weighed by all rules, the affidavit of merit with the answer considered is wholly insufficient as such to invoke the discretion of the court. Without the merit of the defense being shown, the court cannot consider the fact that this judgment was taken by default while a motion relied upon by attorney for defendant to extend the time for answer was pending undisposed of. We do not decide that this could not be considered as an element of the circumstances of the case, had the defendant established in this affidavit of merit a prima facie meritorious defense invoking the favor or discretion of the court for relief. Manifestly, then, the judgment cannot be vacated on the grounds of excusable neglect.

This takes us to the third ground of the

motion, that of the right of the court to order the entry of this judgment under § 7001, Rev. Codes 1905, without the assessment of damages. Two questions are here presented for decision: First, whether the general appearance by motion made by the attorney for the defendant made it necessary to notify him of the time and place of the assessment of damages, and not to assess the same until he was so noticed; and, second, whether the claim sued upon in this case, being a right of action given by § 9390, Rev. Codes 1905, to purchasers of intoxicating liquors within the state, to recover after demand therefor of the seller the purchase price for such liquors, gives rise to a demand arising upon contract, within the meaning of § 7001, authorizing judgment by default in actions upon demands arising on contract for the recovery of money only. Is this such a claim? If not, judgment by default should be set aside on motion, without the interposition of an affidavit of merit, and regardless of the merits of the case, as its entry would be irregular, and in disregard of the statute requiring the assessment of damages.

As to the first question, under § 7336 the appearance made did not necessitate notice before the taking of default judgment, the complaint being verified, unless the action be one not "arising on contract" or not "for the recovery of money only." As to whether the cause of action here sued upon, based upon the provisions of § 9390, Rev. Codes 1905, is a cause of action based upon contract, it becomes necessary to decide. Section 9390 provides: "All payments and compensation for intoxicating liquors sold in violation of this chapter, whether such payments or compensation is in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such goods and labor or other things." Several states have had similar statutes. Ours, wherever obtained, is nearly a literal copy of Iowa and Vermont statutes in force at the time of the adoption of this Code provision. See § 2423, Iowa Code of 1897, and General Statutes of Vermont of 1863, chap. 34, § 32.

We can answer this inquiry in the language of the decisions of those states construing practically our own statute. In *Foley v. Leisy Brewing Co.* 116 Iowa, 176, 179, 89 N. W. 230, we quote: "It is argued on plaintiff's behalf that Ill was a

participant in a scheme to enable plaintiff to violate the law. But this is not an action in tort. It arises out of a statutory contract,—that is, a contract which the statute says shall be implied from certain facts,—and is covered by the ordinary rules relating to actions on contracts. It is not the participation in making the sale, nor the handling of money, that could make Ill a joint principal, but only the receipt by him as his own of a part of the purchase price" of liquors sold in violation of law, for which recovery of the purchase price was sought.

The Vermont courts first held to the theory that this statute gave a right of action for penalty for an illegal sale, holding, in the language of *Thayer v. Partridge*, 47 Vt. 423, on page 428 of the opinion, that "the right of action is given by way of penalty for the illegal sale, and is analogous to the right of a borrower to sue for usury paid, and for the right to sue for money lost at play. It is a part of the machinery for enforcing the liquor law, and is essentially penal in its aim and in its nature. It is in no sense 'founded in contract,' but arises solely from the violation of law."

But a later decision, *Laport v. Bacon*, 48 Vt. 176, overrules *Thayer v. Partridge*, supra. We quote: "The statute for recovering back compensation paid for liquor sold in violation of law provides that all such compensation 'shall be held and considered to have been received in violation of law, without consideration and against law, equity, and good conscience, and may, in an appropriate action, be recovered back, it being alleged in the declaration that the money, labor, or personal property so held was received and is held to the use of the plaintiff.' This action is upon the common count in assumpsit, and it is urged that such compensation cannot be recovered back in that form of action. But the action of assumpsit has always been considered to be an equitable action, by which a plaintiff might recover money which a defendant held, and in equity and good conscience ought not to retain; and as the statute declares all such payments to have been received without consideration and against equity and good conscience, it would seem to be plain that the action of assumpsit would be a very appropriate action by which to recover back the payments, and when received in money that the common counts would likewise be appropriate. . . . Then again, this action is to recover what, by force of the statute, had always been the plaintiff's, and, although in form delivered in payment, had never become the defendant's, and is not penal, but is remedial."

And the later case, decided in 1892, of

Yeartau v. Bacon, 65 Vt. 516, 27 Atl. 198, expressly disapproves the portion of the holding quoted from Thayer v. Partridge, supra, and follows Laport v. Bacon, supra. The question involved in Yeartau v. Bacon was the identical question here considered, and under the statute above quoted practically identical with § 9330 under consideration. It arose in an action brought against an estate to recover money paid to the deceased in his lifetime for intoxicating liquors unlawfully sold, and it was urged that the statute giving a right of action for recovery of such payments was penal in nature, and not contractual, and hence there was no survival of action against the estate. From page 527 of 65 Vt. we quote: "The case is clearly within the test applied at common law to determine whether a demand survives. The rule is that the cause of action survives against the estate whenever the estate has received a benefit from the transaction for which a recovery may be had by an action in form *ex contractu*. . . . Money which the statute declares to belong to the plaintiff, and to be recoverable in an action for money had and received, is in the assets of this estate. If the money is the plaintiff's, the death of its possessor cannot have deprived him of the right to recover it. . . . The statute provides that one who makes a payment for liquor sold in violation of law may recover it back as money received and held to his use. . . . It was the purpose of the legislature to load the traffic in all its stages with danger and uncertainty, leave every seller at the mercy of the buyer, and deprive wealth thus obtained of that security which is the great incentive to legitimate trade." Then, again, concerning Thayer v. Partridge, supra, the court, on page 526, says: "In the opinion the statute authorizing the recovery of money so paid is spoken of as essentially penal in its nature and aim. But in Laport v. Bacon, 48 Vt. 176, a different view is expressed. There the plaintiff sought to recover money paid for liquor unlawfully sold in an action of general assumpsit, and the trial was by referee. It was contended that a claim of this nature could not be recovered under the common counts. The court held that the money was recoverable on the count for money had and received, but said further that the action was not penal, but remedial, and that the declaration could have been amended. And in the unreported case of Pecker v. Barney, held at the general term in 1879, a decision was rendered which could not have been arrived at without adopting the view expressed in Laport v. Bacon. The defendant in that case sought to recover under a plea in off-set money paid the

plaintiffs for liquor sold in violation of law. Nothing could be recovered in offset except an indebtedness on contract, express or implied. Plaintiffs' counsel insisted that the defendant's cause of action was not a demand resting in contract, but a right covered by the statute for a penal purpose, and cited Thayer v. Partridge in support of his claim; but the defendant had judgment in offset."

The foregoing, on all fours with the facts and under the contentions here made, are decisive of the contract feature of this case. The reasoning of the Vermont court is unanswerable. We must comply with the statute, § 9390, where in the most mandatory language it says that this money sued for "shall be held to have been received in violation of law, . . . and to have been received upon a valid promise and agreement of the receiver" to repay upon demand to this plaintiff. The statute makes the money so paid the defendant by plaintiff at all times the property of the plaintiff, to be repaid him upon his demand therefor. We might cite here the only two North Dakota holdings on this statute, Oswald v. Moran, 8 N. D. 111, 77 N. W. 281, holding demand prior to suit by way of counterclaim necessary, and Frankel v. Hillier, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265, concerning pleading and proof and place of sale involved in an action to recover the purchase price of liquors alleged to have been unlawfully sold. Consult also 23 Cyc. 343-344, wherein the author of Black on Intoxicating Liquors lays down the following rule, here applicable: "But in several states statutes have been enacted providing that all payments for liquors sold illegally shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement to repay the same upon demand. . . . An action on a statute of this character is an action of contract, and not in tort, and where the common-law system of pleading prevails, the proper form of action is assumpsit as for money had and received. The claim for money paid on such an illegal sale may also be pleaded as a set-off or counterclaim in cases where such a plea would otherwise be permissible,"—citing Schober v. Rosenfield, 75 Iowa, 455, 39 N. W. 706; Friend v. Dunks, 37 Mich. 25; Tolman v. Johnson, 43 Iowa, 127; Roethke v. Philip Best Brewing Co. 33 Mich. 340; Delahaye v. Heitkemper, 16 Neb. 475, 20 N. W. 385; Gorman v. Keough, 22 R. I. 47, 46 Atl. 37.

But is this an action, though, on contract, one "for the recovery of money only" within § 7001? With a cause of action

contractu existing by force of statute, upon admission or proof being made of the illegal sales, does it follow that after defendant has appeared by motion the court can, under the provisions of § 7001, Rev. Codes 1905, enter judgment without notice and without assessment of damages for the demand claimed in the complaint, as "in an action arising on contract for the recovery of money only?" The question of necessity of notice to the defendant, like the power of the court to enter the judgment without assessment of damages, depends upon the meaning of the statute prescribing that judgment may be so entered where the complaint is verified "in an action arising on contract for the recovery of money only."

Section 7001, Rev. Codes 1905, is identical with § 5025, Compiled Laws of 1887. Subdivision 1 of both statutes concerns the entry of judgment for money only; subdivision 2 of both for the entry of judgment for relief other than money. This distinction was carried into this statute from those prescribing the forms of the summons. See Compiled Laws, § 4894, the first subdivision of which required the insertion of a notice in the summons that a judgment would be taken for a sum specified therein if the action be one "arising on contract for the recovery of money only." And the second subdivision provided that the summons should contain a notice that in other actions the court would be applied to for the relief demanded in the complaint. The phraseology in the money demand form of summons and the statutory provision for entry of judgment thereon is identical, in each case being "in an action arising on contract for the recovery of money only." In the Revision of 1895 the distinction between the relief and money demand form of summons was abolished, as appears from § 5248, Rev. Codes 1895, our present § 6834, Rev. Codes 1905. But no change was made in the corresponding judgment statute. What constitutes "an action arising on contract for the recovery of money only" within the meaning of these statutes? That must now be held to have the same meaning as when used prior to 1895. Turning to the New York practice acts we find identical provisions as to both form of summons and entry of judgment thereunder; and the courts of that state in 1857 settled the very question before us in the determination of the form of the summons to be used "in actions arising on contract for the recovery of money only." See §§ 129 and 246 of the New York Code of Procedure, construed in the thoroughly considered case of *Tuttle v. Smith*, 6 Abb. Pr. 329, 14 How. Pr. 395, and followed in these cases; *People* 47 L.R.A. (N.S.)

v. Bennett, 6 Abb. Pr. 343; *Salters v. Ralph*, 15 Abb. Pr. 273; *Luling v. Stanton*, 8 Abb. Pr. 378; *Cobb v. Dunkin*, 19 How. Pr. 164; *Norton v. Cary*, 14 Abb. Pr. 364, 23 How. Pr. 469; *Garrison v. Carr*, 3 Abb. Pr. 266, 34 How. Pr. 187; *Travis v. Tobias*, 7 How. Pr. 90. And for a construction of § 4894 of the Compiled Laws on the form of summons, see *St. Paul Harvester Co. v. Forbreg*, 2 S. D. 357, 50 N. W. 628, citing and following *Brown v. Eaton*, 37 How. Pr. 325. See also *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34. As the subdivisions of our present § 7001 were framed to conform to the relief required to be demanded under the prescribed forms of summons, the holdings interpreting the form of the summons apply equally to the phraseology of the statute as to judgments, and are usually considered together.

Concerning this, we quote the following from *Tuttle v. Smith*, supra: "The phrase 'for the recovery of money only' ought not to be considered as marking a class of cases which are distinguished only from actions brought to compel performance of some specific act or thing, and terminating there. Such a classification evidently would be insufficient. There are many cases where specific relief is to be administered, and yet the ultimate object of the suit is the recovery of money. Such are foreclosure suits and suits for the administration of assets and the payment of legacies. These are suits for the recovery of money only, and not of any specific thing, and yet requiring specific relief, and an application to the court to obtain ultimately the money for which the suit is brought. These are confessedly included among the actions referred to in the second subdivision. [Concerning actions for relief only.] Yet they are actions founded on contract, and brought for the recovery of nothing but money, not of land, nor of chattels, nor any specific right or thing. The phrase in question must be construed to mean the recovery of a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due. Whenever the action requires the determination of amounts unliquidated, in their nature requiring other proof, and depending upon other considerations than such as appear in the contract itself, then the action is not for the recovery of money only, as money due and payable by the contract on which the action arises. It is rather an action to establish and ascertain the plaintiff's right to damages, which are to be paid and satisfied in money. It may be said that this is a refined construction of the statute. Undoubtedly it is, but it is

necessary to resort to it to prevent the most absurd as well as iniquitous results." The opinion then states that the judgment is to be entered by the clerk without an order, and comments upon the absurdity of the statute being intended to cover all cases in which a money judgment may be entered, as contended for. Continuing, it says: "Can it be said that the proof of facts is not necessary to enable the court to give judgment in a case like the present, brought to recover unliquidated damages for the breach or breaches of an agreement requiring many specific acts, in carrying on a business which was jointly undertaken by the parties? On the defendant's default, the contract and its breach, and that the plaintiff is entitled to damages, are indeed admitted; but it is impossible that their amount should be stated with precision, or admitted by a failure to answer, so that the court, acting through its clerk, can justly be said to have before it all the facts necessary to enable it to give judgment. The extent of the injury, or the amount of damages, is matter of judgment or legal discretion depending on extrinsic facts. It may be stated first in the complaint in round numbers, according to the claim and opinion of the plaintiff; but it must be determined upon evidence, or the proof of facts, which cannot be pleaded, but must be exhibited to the court, to enable it to make any clear, not to say just, disposition of the matter." Then again, we read the following from page 333 of the opinion: "Take the case of an action by a female for the breach of promise of marriage, where the excited feelings or fancy of the plaintiff would induce her not only to state, but to swear, to almost any amount of damages. This has been held, and if I am wrong in the construction I have adopted, it undoubtedly is, one of the class described in this section as 'actions on contract for the recovery of money only,' and the plaintiff may therefore give notice in the summons that if no answer is put in, she will take judgment for the amount claimed as damages in the complaint. Now, if the complaint be verified, and it be true there was a contract and a breach, and the defendant be too conscientious to deny it under oath, what is he to do? Is it not very doubtful whether a mere denial of the allegation that the plaintiff is damaged five or ten thousand dollars, as the case may be, would be good pleading, or would form any issue? And if such an answer were struck out, or if the defendant wished to be spared the expense and the exposure of a defense and a trial, and therefore made default, the plaintiff must have judgment for the whole amount of damages she claims, without the

defendant ever having been allowed any opportunity to try the question of damages in any way, a construction of the Code which would lead to such consequences, . . . if its design and effect be what its admirers claim." And the decision, as evidenced from the syllabus, holds that this language must be interpreted as applying only to "actions for the recovery of a definite sum of money as such, and without calling upon the court to ascertain or adjudicate anything but the existence and terms of the contract by which it is due; and an action that requires the determination of amounts unliquidated, in their nature requiring other proof and depending upon other considerations than such as appear in the contract itself, is not to be deemed an action for the recovery of money only, but rather an action to establish and ascertain the plaintiff's right to damages, which are to be paid in money," in which event "the amount of damages is not admitted by the defendant by a failure to answer," and assessment of damages by the court is required.

Proceedings and practice in the entry of judgment and assessment of damages, and necessity therefore, in practically all the states, are governed by statutory provisions. They may be found collected in a lengthy note to *State ex rel. Spratlin v. Thompson*, 20 L.R.A.(N.S.) 1-35. And the rule of each jurisdiction depends largely upon the construction of the particular statute. That our statute is taken from § 246 of the Code of Procedure of New York, prior to its amendment in 1877, has been decided by our sister state of South Dakota in *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34. See also, for 1877 amendment to former procedure, § 420 and annotations to *Stover's New York Code of Civil Procedure of 1893*, and § 420 of *Wait's New York Code of 1880*. And, again, the damages here claimed are not liquidated, but purport to consist of various payments on account for goods received, but which goods, because of their contraband nature, if the sale was made within this state, can constitute no valid consideration for the payments so made and sought to be recovered.

"Generally, a final judgment cannot be entered where the damages are unliquidated, or the amount of plaintiff's claim uncertain or indeterminate. . . . The final judgment is entered after the damages have been assessed on a writ of inquiry, or otherwise determined according to law." 23 Cyc. 765, ¶ 7.

"As a general rule a default admits the cause of action and the material and traversable allegations of the declaration, although not the amount of damages; and

hence the amount to be recovered is all plaintiff is required to prove or defendant permitted to controvert. There are, however, numerous decisions disapproving of the entry of such a judgment without proof of the facts essential to plaintiff's recovery, chiefly, however, in cases where the action is for unliquidated damages or based upon a condition or contingency." 23 Cyc. 761.

To the same effect, see 6 Enc. Pl. & Pr. 116: "Where the facts pleaded constitute a cause of action, the effect of the default is to establish it definitely." "All matters well pleaded and essential to the judgment are admitted." "But the defendant's default does not admit plaintiff's allegations of value or amount." These are to be proven before judgment can be taken. 6 Enc. Pl. & Pr. 128. "And the burden of proof as to the amount for which judgment by default shall be taken rests upon the plaintiff" [p. 129], except in cases provided by statute to the contrary, as where judgment is authorized to be ordered for the amount evidenced by a promissory note or other written instrument, by its production proving on its face the amount for which judgment may be taken.

This section is properly brought as upon a complaint for money had and received upon an implied contract created by special statute, § 9390. 27 Cyc. 870 et seq.; Logan v. Freerks, 14 N. D. 127, 103 N. W. 426, and cases found in 35 Century Dig., title "Money Received," § 49, and 13 Century Dig., title "Money Received," § 6. As we construe § 7001, Rev. Codes 1905, the amount for which judgment could be entered was not admitted by default in answer, granting that all other allegations of the complaint were so admitted. That statute contemplates that proof shall be made in all instances where the complaint is unverified, and where verified in all instances except where the contract by its terms makes proof of the amount of recovery, as, for instance, a promissory note or similar contract establishing, when considered with the matters admitted by the default, a liability and the specific amount thereof. This action for money had and received, based upon numerous payments at various times, is parallel in such respect to an action to recover for goods sold on account, in which case the assessment of damages is necessary before entering of judgment in default of answer. 6 Enc. Pl. & Pr. 134. And we are satisfied this holding is in conformity with the uniform practice heretofore followed in this state. We may remark that such proof may be made by

testimony, by deposition, or by affidavit showing the facts, inasmuch as where the defendant is in default the court may in its discretion consider an affidavit as proof. The affidavit of costs and disbursements is insufficient to constitute the proof of claim required on which to assess damages.

This judgment, entered by default without an assessment of damages, or without evidence to sustain it as to amount, was irregularly entered, and was properly set aside on motion based upon those grounds. And after the judgment was vacated it was then within the sound discretion of the court to grant relief to defendant from default in answer, to do which an affidavit of merit was unnecessary, as the rights of the parties were not yet adjudged, and the application to then answer would be considered, regardless of the merits of the suit, as an application to plead after time. Concerning this it appears that the reason why the answer was not served was solely because of the inadvertence and mistake of defendant's attorney. If authority on this question is needed, we cite *Salters v. Ralph*, 15 Abb. Pr. 273, directly in point on practice.

Defendant has argued that, even though the action be one arising upon contract for the recovery of money only, with a verified complaint, judgment could not be entered without notice of the assessment of damages, inasmuch as defendant had entered a general appearance. But in this defendant is in error. Had the action been one on contract as to basis of action, and for the recovery of money only as to relief, judgment could have been entered without notice regardless of his appearance, defendant standing in default of demurrer or answer, or of motion going to the jurisdiction of court or subject-matter.

We quote from the syllabus of *Dix v. Palmer*, 5 How. Pr. 233: "Where the defendant has appeared, but not answered, in an action for the recovery of money only, and the complaint is duly verified, he is not entitled to notice of assessment. In such case there is no assessment,—judgment is entered of course." And from *Southworth v. Curtis*, 6 How. Pr. 271: "A notice of assessment to the defendant in an action on contract for the recovery of money only, under § 246, is not necessary where the complaint is properly verified." And such must be the only conclusion to be arrived at from a careful reading of the first subdivision of § 7001.

After rehearing had in this action, we adhere to our decision that the trial court

properly vacated a default judgment entered, and its order is affirmed, with costs.

Fisk, and Burke, J., concur. Spalding, Ch. J., concurs in the result.

Bruce, J.

I concur in the result generally, but not in that part of the opinion covered by paragraphs 1 and 2 of the syllabus.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

**ELLEN CONNELLEY, Admr., etc., of
Thomas Connelley, Deceased,
v.**

**PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.**

(119 C. C. A. 392, 201 Fed. 54.)

Master and servant — trackwalker — assumption of risk.

One employed as trackwalker to watch the tracks of a railroad and make small repairs takes the risk of injury from trains operated in a proper and usual way, so that no recovery can be had for his death from collision with a train suddenly emerging from a cloud of steam and fog while he is engaged in tightening a bolt.

(December 2, 1912.)

ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Gray, Buffington, and McPherson, Circuit Judges.

Mr. John Hampton Barnes, for plaintiff in error:

Defendant was guilty of no negligence, and the death of the deceased was due to

one of the obvious and assumed risks of his employment.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Norfolk & W. R. Co. v. Gesswine, 75 C. C. A. 214, 144 Fed. 56; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; International & G. N. R. Co. v. Hester, 64 Tex. 401; Morris v. Boston & M. R. Co. 184 Mass. 366, 68 N. E. 680, 15 Am. Neg. Rep. 81; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Carlson v. Cincinnati, S. & M. R. Co. 120 Mich. 481, 79 N. W. 688; Tumatly v. New York, N. H. & H. R. Co. 170 Mass. 164, 49 N. E. 85; 2 Bailey, Personal Injuries, § 410, p. 1171; Bancroft v. Boston & M. R. Co. 67 N. H. 466, 30 Atl. 409.

Messrs. Guillaem Aertsen, Jr., and Francis Rawle, for defendant in error:

Plaintiff's intestate did not assume the risk of defendant's negligence.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

Buffington, Circuit Judge, delivered the opinion of the court:

In this case the plaintiff, Mrs. Ellen Connelley, administratrix of Thomas Connelley, brought suit against the Pennsylvania Railroad Company, charging it with negligence in operating one of its trains, by reason of which negligence her husband, Thomas Connelley, was killed. On trial she recovered a verdict, whereupon the railroad moved for judgment notwithstanding such verdict, on the ground, amongst others, that the proof showed no negligence on the part of the defendant. The trial court denied such motion, and entered judgment in plaintiff's favor. Thereupon the railroad sued out this writ, alleging the proofs failed to show its negligence, and that binding instructions

Note.—In the foregoing case, although the court discusses the defenses of assumption of risk and contributory negligence, this was unnecessary, for it was distinctly held that the master was not guilty of any negligence, and consequently was not prima facie liable, and did not have to rely upon the affirmative defenses to relieve itself from liability. The court used the term "assumption of risk" merely to connote the idea that a master is not liable for injuries caused by risks which are incident to the work,—a use which, as is pointed out in a note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215, is unfortunate, since the term "assumption of risk" is also used to denote the affirmative defense which the master has where he has been negligent, and consequently is prima facie liable for the injuries, but the servant, with full knowledge of such negligence, remains in the service.

The court in CONNELLEY v. PENNSYLVANIA R. Co. also states that there can be no recovery because the injured employee momentarily disregarded the perils of the situation.

Upon the question of contributory negligence in failing to remember dangerous conditions, see note to Ergo v. Merced Falls Gas & Electric Co. 41 L.R.A.(N.S.) 79.

W. M. G.

in its favor should therefore have been given.

The statement of claim avers deceased was employed as a trackwalker on the tracks of the main line of the defendant in the city of Philadelphia between Broad street and West Philadelphia stations, and that "while the said Thomas Connelley was so employed, and in the course of his said employment, he was, on the 4th day of November, 1910, run down and killed by a train belonging to and operated by the defendant company, by reason of the negligence of the defendant company's employees in operating the same, and by reason of the negligence of the defendant company's employees in failing to give the said Thomas Connelley, while so employed, due and proper warning of the approach of said train." The proofs showed that there are eight or nine tracks between these two stations, that there are numerous crossovers and frogs, and the system widens into sixteen tracks running into Broad Street station. Over these tracks there is the constant passage of several hundred trains incident to such a station. The employment of the deceased was to continuously walk over and watch these tracks, and repair any small job, such as tightening bolts, etc. The trackwalkers go in pairs, so that they can better lookout for each other's safety. At the time of the accident Connelley and Rowan, his companion, who were both experienced men, were walking their beat together. It was a dull, damp, and misty morning. When near Twenty-second street, they came opposite an engine which was standing still and blowing smoke and steam towards the track on which these two men were. This steam so enveloped them as to hide them from view. Here the men stopped, and Connelley began tightening a bolt. About a minute or two before the accident, Rowan called Connelley's attention to the steam enveloping them, and said they had better move to one side. Rowan's account is: "I says, 'There is a lot of steam here.' I says, 'We had better move to one side.' That was about a minute or two before this happened, and the last words he spoke. He said he had the bolt nearly tightened now. Just about a minute or so, I judge it was over a minute after that, this here draft came along. Of course, we could not see it very handy. Of course, there was steam blowing there, and I did not see it until about 5 or 6 feet away. So I hollered as soon as ever I seen it coming, you know, and I says to myself, if I jump, the wheels may happen to catch me, so I stood right in the middle of the track with my back to it, and let the train hit me. I went right down, and one of

the big cars and a half a car went right over me."

Connelley was struck just after Rowan went down, but, instead of falling in the middle of the track as Rowan did, he fell on the rail, was run over, and killed. The train that struck him was composed of empty passenger cars, and was being backed into the Broad Street station. On the end of the train which struck decedent, a brakeman was stationed to give warning to anyone he saw by shouting or whistling. His testimony was that he was on watch, and had control of the air brake, but, owing to the cloud of steam enveloping Connelley and Rowan, he did not see them until the car was hitting them; that he instantly applied the air, but, on account of the wet rails, the train slid. The testimony of the track foreman was: "You cannot warn the men of every train coming. They are supposed to watch for themselves. They have a steady job of trackwalkers, walking these tracks, and they walk the tracks all over in the morning, and continue, and if they see anything wrong, of course, it is their duty to repair it,—that is, small jobs, tightening bolts, etc.,—and one of these men is supposed to watch for the other while the other is working. That is the instructions they get."

The case was submitted to the jury under instructions: "The first thing, therefore, for you to determine, is whether or not there was negligence in the operation of the train that killed Mr. Connelley. If there was no negligence in the operation, then there can be no recovery in this case."

The above facts were all proved by the plaintiff, and are undisputed. We are clear they disclose no negligence on the part of the railroad in operating its train, and that the decedent's death, instead of being caused by any negligence or want of care on the part of the railroad, was caused by the risks incident to the employment he followed.

It is an obvious fact that many occupations, as for example a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employee in failing to protect him from dangers which cannot be escaped by anyone doing such work. *Narramore v. Cleveland*,

C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

It is obvious that even where a railroad operates its trains, and moves its switch drafts in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law. Thus, in *Norfolk & W. R. Co. v. Gesswine*, 75 C. C. A. 214, 144 Fed. 56, it was said: "This man was one of a number of men who were employed as sectionmen on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out cross-ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way; manifestly, a place of danger. A railroad does not suspend the operation of its trains until the track can be put in order, and the proposition to these sectionmen was, 'We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains,' and the sectionmen accept the employment upon those terms, and if an accident occurs, and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad. It is not the fault of the railway company."

So, also, in *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835, where an experienced trackman was injured by a moving train in a switching yard, it was said: "Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forwards and backwards would have simply tended to confusion. . . . It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what

was to be expected. We see in the facts as disclosed no negligence on the part of the defendants."

Indeed, in thus making self-protection the substantial safeguard of trackwalkers and sectionmen, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503: "These rules are founded upon the necessities of the business of operating railways;" and in *Rosney v. Erie R. Co.* 88 C. C. A. 155, 135 Fed. 311: "An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns, and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation."

This rule has the uniform support of courts in all sections of the country. *Morris v. Boston & M. R. Co.* 184 Mass. 368, 68 N. E. 680, 15 Am. Neg. Rep. 81; *Bancroft v. Boston & M. R. Co.* 67 N. H. 466, 30 Atl. 409; *International & G. N. R. Co. v. Hester*, 64 Tex. 401; *Carlson v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395.

In view of these decisions, it is clear, therefore, that, so long as the defendant railroad used its terminal tracks by running its trains properly thereon and in the usual way, the duty of guarding himself against such trains rested on Connelley, and a study of this testimony leads to the said conclusion that the death of this unfortunate man was due to his own momentary disregard of the peril of his situation. To aid these trackwalkers in taking care of themselves, the railroad required them to go in pairs, and, indeed, Connelley's companion called his attention to the enveloping steam, and advised their moving aside. Obviously self-preservation, the steam enveloped position he was in, together with the knowledge that trains were constantly moving, should have led the decedent to heed the warning, instead of making chance, and not care, the insurer of his safety. The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switching train. He was on watch and had the emergency brake ready, but the steam which enveloped Rowan and Connelley until they were struck made it just as impossible for the brakeman to see them as it was for them to see the approaching train.

Finding, as we do, no lack of care or omission of duty on the part of the rail-

road, we are constrained to reverse this case, and remand it to the court below with instructions to enter judgment for the defendant.

This conclusion renders it unnecessary to pass on the other questions raised in the briefs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

UNITED STATES COAL & OIL COMPANY
v.

LEM HARRISON et al., Appts.

(71 W. Va. 217, 76 S. E. 346.)

Deed — right to cut timber — license.

1. A clause in a deed which conveys land from parents to a child as an advancement, reserving to the father and mother "the

Headnotes by **POFFENBARGER, J.**

Note. — *Effect of contract with regard to standing timber to pass title to the same.*

The earlier cases upon this subject are discussed in a note to *Dennis Simmons Lumber Co. v. Corey*, 6 L.R.A.(N.S.) 468, and this note is supplementary thereto.

The question whether or not a contract for the sale of standing timber, or a deed to land by which the timber is reserved to the grantor, passes the title to the timber, is frequently not the ultimate question in cases construing such contracts or deeds, but in the great majority of the cases it is an essential question, which must be determined before the ultimate question can be reached. Where, for instance, the question involved is the plaintiff's right to maintain an action of replevin, or where a party to the contract is sought to be held liable for taxes upon the timber, it is necessary to first determine in whom the title to the timber lies. The same question must be determined very frequently in those contracts which prescribe a definite time within which the timber is to be removed, or in contracts not prescribing a definite time for the removal, where the case arises in jurisdictions which import the term of reasonable time into such contracts. Very frequently, however, the ultimate question in the case is decided without the court's expressly determining whether the title passed by the contract. It consequently would be impracticable, even if possible, to collect all of the cases in which this question has been expressly or by implication determined. It has therefore been thought sufficient to discuss the cases which have expressly passed thereon.

This note is not concerned with cases dealing with contracts for the sale of timber which expressly provide when the title is to pass, nor with cases dealing with the

privileges of selling and removing any timber from said land that they may desire to sell or to use, and also the right of way through said lands to remove the same," does not reserve title to the timber. It creates only an unassignable license.

License — attempted assignment — effect.

2. An attempt to assign such license revokes it, and the passage of the title to the land into the hands of a third party, by a sale, also terminates it.

(October 29, 1912.)

APPEAL by defendants from a decree of the Circuit Court for Cabell County granting partial relief in plaintiff's favor in a suit for the cancelation of certain deeds as clouds upon title and for an injunction prohibiting the cutting of timber. Affirmed.

The facts are stated in the opinion.

Messrs. J. S. Miller and C. H. Hudson for appellants.

question whether or not the title passes by an oral contract where the statute expressly provides that a contract for the sale of standing timber must be in writing.

A number of notes which may be consulted in connection with the question discussed herein will be found in the earlier volumes.

As to whether timber sold or reserved without specifying time must be removed within a reasonable time, see note to *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* 46 L.R.A.(N.S.) 672.

As to the effect of reservation of right to remove timber within a specified time, see note to *Adkins v. Huff*, 3 L.R.A.(N.S.) 649.

As to the rights and remedies of the landowner and owner of timber after the expiration of the time stipulated for removal of the same, see note to *Peirce v. Finerty*, 29 L.R.A.(N.S.) 547. In some jurisdictions the courts hold that, notwithstanding the time for the removal of the timber has expired, nevertheless since the title thereto passes to the grantee by the contract of sale, or the title thereto was reserved in the grantor in his deed of the land, the timber remained the property of the grantee or the reservoir, and this note deals with the rights and remedies of the parties in such a situation.

As to whether purchase of standing timber to be removed within a specified term is a purchase of realty or of personalty, see note to *Midyette v. Grubbs*, 13 L.R.A.(N.S.) 278.

As to effect of expiration of time for the removal of timber, see note to *Wimbrow v. Morris*, post, 882.

Upon the general question of conveyance of title to standing timber without conveying title to the land, see note to *McRae v. Stillwell*, 55 L.R.A. 513.

Messrs. Vinson & Thompson and E. T. England for appellee.

Poffenbarger, J., delivered the opinion of the court:

On the bill in this cause having for its purpose cancellation of certain deeds as clouds upon title, and inhibition of the cutting of timber by injunction, partial relief was granted by cancellation of the deeds.

The rights of the parties depend for the most part upon the interpretation of the following reservation in a deed dated June 11, 1887, by which Wm. B. Dempsey and Barbara, his wife, conveyed two tracts of land, containing 50 acres and 18 acres, respectively, to Rosa Jane Carter, their daughter, as an advancement: "And the said William B. Dempsey also reserves to himself and to his said wife the privileges of selling and removing any timber from said land that they may desire to sell or to use, and also

the right of way through said lands to remove the same."

More than twenty years later, September 23, 1907, Wm. B. Dempsey having died, the widow, Barbara, deeming herself the owner of the timber, executed a deed therefor to Lem Harrison and J. M. Meeks, and, on the next day, Meeks conveyed his interest to Harrison, who with his wife, Dolly, conveyed to John M. Harrison, October 26, 1908, who, on the next day, conveyed it back to Dolly Harrison. The plaintiff in this cause, having become the owner of the Rosa J. Carter land, filed said bill, in March, 1910, and obtained an injunction to prevent the Harrisons from cutting the timber. James A. Nighbert bought the land in 1890, and took immediate actual possession thereof, and the plaintiff derives its title through him. No claim to title to the timber, under the reservation, was ever asserted within the twenty-year period from 1887 to 1907.

Deeds absolute in terms.

Where the deed or contract is absolute in its terms, without conditions or limitations, it has been held that an absolute indefeasible title passes.

Thus in *Lodwick-Lumber Co. v. Taylor*, 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238, it was held that a conveyance in fee simple of the timber on certain land carries with it the absolute title thereto. To the same effect, *Jones v. Lodwick Lumber Co.* — Tex. Civ. App. —, 99 S. W. 736.

So a grant of timber, without limitations or conditions, passes the title thereto. *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* 80 S. C. 106, 128 Am. St. Rep. 865, 61 S. E. 217.

Where the contract for the sale of standing timber provides for the payment thereof, in any event, the legal effect of the instrument is to vest in *presenti* the legal title to the timber, in the absence of an intent clearly and unmistakably expressed to the contrary. *Mt. Vernon Lumber Co. v. Shepard*, — Ala. —, 60 So. 825.

Rule that indefeasible title passes—contracts of sale specifying time for removal.

In the great majority of cases relative to standing timber the contract or deed contains some conditions or limitations.

In some cases it has been held that the title to timber passes by a contract of sale which specifies that it is to be cut and removed within a specified time, and the mere failure to remove it does not forfeit the title.

Thus failure to remove the timber within the time limited does not result in a forfeiture of title under a clause in a grant of standing timber, that "the grantee is allowed two years" within which to cut and remove the timber. *C. W. Zimmerman Mfg.* 47 L.R.A. (N.S.)

Co. v. Daffin, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858.

So, in *Gibbs v. Peterson*, 163 Cal. 758, 127 Pac. 62, it was held that a contract by which the vendor granted, bargained, and sold to the vendee "all the timber now standing, lying, or being on" certain lands of the vendor to be removed within ten years, and which provided for a yearly rental by the vendee thereafter in case it was not removed within that period, and further provided that each party shall pay one half of the taxes upon the land, passes an absolute title to the timber. To the same effect, see *Ciapusci v. Clark*, 12 Cal. App. 44, 106 Pac. 436. See also *Omaha Lumber Co. v. Co-operative Invest. Co.* — Colo. —, 133 Pac. 1112.

And in *Advance Veneer & Lumber Co. v. Hornaday*, 40 Ind. App. 83, 96 N. E. 784, it was held that the title to timber passed, and failure to remove the same within the time limit did not forfeit the title thereto.

So, in *Ford Lumber & Mfg. Co. v. Asher*, 131 Ky. 796, 115 S. W. 790, it was held that a contract for the sale of standing timber passed the title thereto, which was not forfeited by the failure to remove the timber within the time limit. See also *Begley v. Consolidated Timber Co.* 152 Ky. 455, 153 S. W. 734.

A written contract whereby the grantor did "agree, covenant, and permit" the grantee "to cut" all the timber of certain varieties upon his lot "this winter if possible, and what remains shall be cut the following winter," was held in *Brown v. Bishop*, 105 Me. 272, 74 Atl. 724, to be a sale and purchase of the timber.

A sale and conveyance of timber evidenced by a writing which was signed, sealed, witnessed, and acknowledged, which instrument expressly stated that the right and title of the grantees was not in fee

No reservation of the timber itself in express terms is found in the clause. Only sale and removal privileges are reserved, and these reservations are made in terms indicative of intent not to subject all of the timber thereto, but only such as should be selected. Nor is there any limitation as to time of sale or removal. The deed also discloses the relationship of the parties and the purpose of the conveyance. It was from parents to a daughter, as an advancement, facts to be considered in seeking the intent of the reservation, indicative of a purpose other than reservation of title to the timber, and agreeable to the theory of a limited license, suggested by the terms used, which finds support in the conduct of

the parties also. *Wm. B. Dempsey* never claimed the title nor any right of sale of the timber as a whole, while he lived, nor did his widow until after the land went into the hands of strangers. Speaking of a parol agreement in *White v. White*, 64 V. Va. 30, 60 S. E. 885, we said: "The significance of language used in a parol agreement always depends upon the situation of the parties at the time, their prior and subsequent conduct, the nature of the subject-matter, the purposes they had in view, and all the surrounding circumstances. It sometimes means more, and sometimes less, than the words employed signify in their usual and ordinary acceptation." The

simple, but an estate in years to extend only for five years, worked in law a severance of the timber from the freehold, and vested the title thereto in the grantees, and they could consequently sell the timber as they could any other of their personal property. *Fairbanks v. Stowe*, 83 Vt. 155, 138 Am. St. Rep. 1074, 74 Atl. 1006.

Purchasers of an undivided interest in timber from tenants in common, with a fixed time for the removal of the same, although not entitled to a partition of the timber, may in equity enforce a partition of the land, setting off the parcel on which the timber will belong to them. *Mee v. Benedict*, 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175; *Harrell v. Mason*, 170 Ala. 282, 54 So. 105, Ann. Cas. 1912 D, 585.

Although a purchaser of standing timber does not lose his title by failure to remove the timber from the land within the time limited in the conveyance, the court cannot give him authority to enter to remove the timber after the expiration of such time. *Peirce v. Finerty*, 76 N. H. 38, 29 L.R.A. (N.S.) 547, 76 Atl. 194, 79 Atl. 23.

In *Tucker v. Ross-Attley Lumber Co.* 95 Ark. 623, 129 S. W. 1085, under a contract for the sale of standing timber made by a lessee who had agreed to put a certain number of acres of the land under cultivation each year, which contract provided that the vendee should remove the timber from a prescribed number of acres each year, designating the tract in writing, and which provided that upon failure of the vendee to so designate a tract the vendor had a right to select and designate a tract of equal size, whereupon the vendee's rights should cease except that he should have the right to cut and remove the timber in so far as it did not interfere with the work of clearing the land, the vendee does not lose his title to the timber by failing to designate a tract.

In *Davis v. Cox*, — Ga. App. —, 79 S. E. 383, it was held that immediately upon the conclusion of a contract for the sale of standing timber and a payment of the consideration agreed upon, the title to the timber passes, and is not affected by the 47 L.R.A. (N.S.)

fact that there was at the time a verbal agreement between the vendor and the vendee that the title should not pass until the timber was cut. It is not shown whether there was a time limit or not.

A vendor of timber, severed from his land by the vendee, under a written contract, may, in the absence of a stipulation to the contrary, retain possession thereof to secure payment of the purchase money, although the title has passed to the vendee; and such right of retention is not relinquished or destroyed by a clause in the contract, saying the timber shall "stand good for the purchase money." *Justice v. Moore*, 69 W. Va. 51, 71 S. E. 204, Ann. Cas. 1912 D, 17.

—deed reserving timber to be removed in fixed time.

The same rule has been applied where timber is reserved or excepted in a deed.

Thus, in *De Goosh v. Baldwin*, 85 Vt. 312, 82 Atl. 182, it was held that where the granting clause and the habendum of a deed of timber gave all the rights of the grantors to the grantee, a provision that the latter should have three years within which to remove the same will be construed as a covenant, and not as a condition, the failure to perform which would cause a forfeiture of the title.

So, in *Western Lime & Cement Co. v. Copper River Land Co.* 138 Wis. 404, 120 N. W. 277, it was held that where in a deed the terms "reserved" and "excepted" were used interchangeably in respect to the timber on the premises, the title to the timber would be construed as not having passed from the grantor of the deed.

The title to timber reserved in a deed is absolute in the grantor, although the deed also provided for the removal thereof before a fixed day. *Dyer v. Hartshorn*, 73 N. H. 509, 63 Atl. 231.

In *Bardon v. O'Brien*, 140 Wis. 191, 133 Am. St. Rep. 1066, 120 N. W. 827, it was held that a provision in a deed "reserving the pine and cedar now growing and being thereon, and the right to cut and remove the same," amounts to an exception, and the

same observation is applicable here. Apprehending possible necessity for timber for use, or occasional resort thereto for money for limited purposes, the grantors reserved the right to go upon the land and select and cut, or cause to be cut, certain kinds and quantities, but never to cut or sell all of it. Thus viewed, the reservation amounts to no more than a personal covenant, extending a privilege, personal to the grantors, and not assignable to third persons, who might, under the influence of motives not contemplated, proceed to take all the timber, or an undue amount thereof, and in a reckless and injurious manner. They reserved no interest in the land, except right of ingress or egress to remove such timber

as they should cut or cause to be cut,—a mere incident of the license.

Being, therefore, not coupled with an interest, the license was revocable, and was terminated by the attempted assignment thereof. *Blaisdell v. Portsmouth*, G. F. & C. R. Co. 51 N. H. 483; *Polk v. Carney*, 17 S. D. 436, 97 N. W. 360; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Bates v. Duncan*, 64 Ark. 339, 62 Am. St. Rep. 190, 42 S. W. 410. The sale of the land by the licensor also terminated the license. *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Hazelton v. Putnam*, 3 Pinney (Wis.) 107, 3 Chand. (Wis.) 117, 54 Am. Dec. 168.

Seeing no error in the decree, we affirm it.

title to the timber never passed to the grantee in the deed. In this case it does not appear that any time was fixed within which the timber should be removed.

But an exception in a deed conveying real estate, of "a certain lot of timber" growing on a portion of the land granted, for the benefit of a stranger to the instrument, is an exception of the timber rather than of the land itself, for the benefit of the person named personally, and terminates with his death, the fee then being in the grantee in the deed. *Stone v. Stone*, 141 Iowa, 438, 20 L.R.A.(N.S.) 221, 119 N. W. 712, 18 Ann. Cas. 797.

—contract of sale not specifying time for removal.

So, too the rule that the title passes, and is not forfeited by failure to remove, has been applied where the contract does not prescribe a definite time for removal, but the courts import the term of reasonable time into the contract,—such term being held applicable only to the right of removal.

Thus, in *Goodson v. Stewart*, 154 Ala. 660, 46 So. 239, it was held that under a contract for the sale of standing timber in which no time was mentioned for the removal of the same, the right to enter and remove timber might be lost by delay to do so within a reasonable time, but the title to the timber is not forfeited or lost by such failure to enter and remove. To the same effect, *Ward v. Moore*, — Ala. —, 61 So. 303; *Vizard v. Robinson*, — Ala. —, 61 So. 959.

A provision in a deed of real estate reserving certain described timber will be construed as an exception, so that the title will not pass to the grantee, and the grantor will not lose his title by failure to remove the timber within a reasonable time unless there is something to show that the parties intended that it should be severed from the land. *Hicks v. Phillips*, post, 878. To the same effect, *Hounshell v. Miller*, 153 Ky. 530, 155 S. W. 1148.

In *McCoy v. Fraley*, — Ky. —, 113 S. W. 444, it was held that a sale of standing timber evidenced by a written contract in

which no time was fixed for removal passed an equitable interest in the real estate notwithstanding that the trees of the designated size and kind had not been marked before the death of the vendor.

In case of a deed conveying legal title to timber, though the deed contemplates removal of timber, there being no limit of time for removal and no clause of forfeiture for failure to remove, title to the timber is not lost to the purchaser for such failure. *Keystone Lumber & Min. Co. v. Brooks*, 65 W. Va. 512, 64 S. E. 614.

A deed conveying to the grantee, "his heirs, and assigns forever" certain marked and described trees, with full right of ingress and egress to cut and remove the timber, and which further provides that in case any damage is done to the growing crop or land of the grantor, he shall be remunerated therefor, conveys an estate in fee to the grantee with an interest in the soil sufficient for their growth, and the estate in the trees is not lost by failure to remove the same within a reasonable time. *North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873.

A number of other cases holding that the grantee under a contract which specifies no time for the removal of the timber does not lose his title to the timber, but only the right to remove it by failure to remove it within a reasonable time, will be found in the note to *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* 46 L.R.A.(N.S.) 672. These cases necessarily presuppose that the title had passed, but in many of them the point is not discussed.

—rule in Louisiana.

The rule applied in Louisiana is that the title to the timber passes although the contract may be in a sense conditional.

Thus, in *Craighead v. Connelly*, 124 La. 943, 50 So. 804, it was held that the transfer of ownership of timber was not suspended by the inclusion in the contract that only a certain number of trees were to be deadened before a canal which the vendee had agreed to build was completed, and

that if more than a certain amount of timber per month was removed the maturity of the purchase-price notes would be hastened.

So, a provision in a contract for the sale of timber that the vendee might retire from the contract after he had paid a certain amount, upon the payment of a certain further amount, does not prevent the contract from having its full legal effect to pass the title to the timber. *Blanks v. Lephew*, 132 La. 545, 61 So. 615.

Contracts for the sale of standing timber with varying stipulations as to price and as to the time in which the timber should be removed are sales of the timber, and not mere licenses to cut. *Smith v. Huie-Hodge Lumber Co.* 123 La. 959, 49 So. 655; *Shepherd v. Davis Bros. Lumber Co.* 121 La. 1011, 46 So. 999.

Effect of cutting.

Under the rule that the title to timber not cut and removed within the time specified reverts to the original owner, it has been frequently held that cutting is a sufficient removal.

Thus, under a contract for the sale of growing timber whereby the grantee is authorized to cut and remove timber within a fixed time, the title to all of the timber cut before that time, but not removed, passes to the grantee. *Indiana & A. Lumber & Mfg. Co. v. Eldridge*, 80 Ark. 361, 116 E. S. 1173; *Griffin v. Anderson-Tully Co.* 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297.

So, also, in *Sanborn v. Franklin County Lumber Co.* 55 Fla. 389, 46 So. 85, it was held that a cutting was a sufficient removal to confirm the title of the grantee.

And in *Richmond Land Co. v. Watson*, 129 Mo. App. 554, 107 S. W. 1045, it was held that a reservation in a deed of timber to be removed within a fixed time reserved the title thereof, and the title to timber cut before the expiration of the time was not lost by failure to remove.

Where a sale of timber is one of chattels, the mere failure to remove from the land, within the time specified for ingress and egress, logs which have been cut under a reservation of title in a sale of the real estate, will not forfeit the title. *Wimbrow v. Morris*, post, 882.

Where, in a deed of conveyance of lands, the timber thereon is excepted and reserved by the grantors, with the privilege of removing the same within a stipulated time, and within that time a portion of the timber is cut and severed from the realty, but not removed from the premises until after the time limit has expired, the grantors' right to the timber severed from the realty is not lost, in the absence of a forfeiture clause in the deed, nor is their title thereto forfeited to the landowner. *Walcutt v. Treisch*, 82 Ohio St. 263, 29 L.R.A.(N.S.) 554, 92 N. E. 423.

But if the mere cutting of trees under a contract for the sale of timber which fixed

a time within which such timber was to be removed can be construed in any case as entitling the purchaser to remove it after the expiration of the time limit, such cutting must be seasonably done and with bona fide intention to remove the timber so cut within the time limit. *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742.

The rule that cutting is a sufficient removal was repudiated in *Anderson v. Miami Lumber Co.* 59 Or. 149, 116 Pac. 1056, where the court said: "It is claimed that the cutting of these trees and severing them from the soil constituted a technical 'removal from the premises,' and that the defendants had a reasonable time after the expiration of the grant to actually remove them. The very statement of the proposition involves a contradiction. If the timber was removed by the act of cutting, then it was removed, and no further act was required. To say that it was removed as a matter of law, and that defendants had a right to enter upon the premises, after the expiration of the time limit set in the deed, and thereafter to remove it, as a matter of fact involves a degree of legal metaphysics which we are unable to attain. If trees, which have been cut down and which lie undisturbed at the foot of the stumps, are timber, or if the same trees, which have been cut into saw logs and which are left lying where they fell, are timber, then it follows from a necessary, usual, and common-sense definition of the term, 'removal from the premises,' that they could not be, in a legal sense, removed, while they were, in fact, remaining physically on the premises." The court laid particular stress upon the fact that the contract contained a provision to the effect that if the timber was not removed the title thereto would revert to the original owner.

Effect of manufacturing timber into lumber.

It seems to be the rule in all jurisdictions that if the timber is manufactured into lumber or other products the title thereto is in the grantee.

Thus, in *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729, it was held that title to all of the timber cut and manufactured into saw logs, telephone poles, railroad ties, etc., passed to and remained in the grantee even though it is not removed, although the court said that the rule in that state was that if the timber has not been cut the purchaser loses all his interest therein.

So, the title to timber manufactured into railroad ties remains in the grantor in a deed of land in which the timber thereon was reserved, even after the expiration of the time for removal. *Butler v. McPherson*, 95 Miss. 635, 49 So. 257.

And in *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135, it was held that where the timber was cut into "cross-ties" the title was in the grantee, and the expiration of the time limit for the cutting and removal of the timber did not affect it; and this was

true although by the express terms of the contract the rights in the timber reverted to the grantor at the expiration of the period.

Title to boards manufactured from the timber and left on the premises is not forfeited, although the contract provided that title to all "lumber" should revert after three years, the court construing the word "lumber" as used in the contract to mean standing timber. *Tuttle v. D. W. Pingree* Co. 75 N. H. 288, 73 Atl. 407.

But trees that are simply felled and cut into lengths appropriate for manufacture are not manufactured articles within the rule that failure to remove within the time specified does not forfeit the title to timber that has been manufactured into lumber. *Rowan v. Carleton*, 100 Miss. 177, 56 So. 329.

Rule that defeasible title only passes—contracts specifying time for removal.

In a large number of cases, however, it has been held that a contract for the sale of standing timber, which provides that it shall be removed within a specified time, passes an absolute title to the timber, which is subject to defeasance as to the timber not removed within the time limited.

Southern Lumber Co. v. Long, 182 Fed. 82; *Ford Lumber & Mfg. Co. v. Cress*, 132 Ky. 317, 116 S. W. 710; *Bach v. Little*, 140 Ky. 396, 131 S. W. 172; *Ford Lumber Co. v. Cornett*, 146 Ky. 457, 142 S. W. 718; *Z. Harrell & Co. v. Danks*, 151 Ky. 71, 151 S. W. 13; *Oates v. Yeargin*, — Ky. —, 115 S. W. 794; *Hounshell v. Miller*, 153 Ky. 530, 155 S. W. 1148; *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1113; *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354; *Siler v. Louisville Property Co.* 32 Ky. L. Rep. 911, 107 S. W. 266; *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* 32 Ky. L. Rep. 1015, 107 S. W. 733; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742; *Noyes v. Goding*, 104 Me. 453, 72 Atl. 181; *Clark v. Ingram-Day Lumber Co.* 90 Miss. 479, 43 So. 813; *Hollensteiner v. Missoula Lumber Co.* 37 Mont. 278, 96 Pac. 420; *Ormand Min. Co. v. Bessemer City Cotton Mills*, 143 N. C. 307, 55 S. E. 700; *Midyette v. Grubbs*, 145 N. C. 85, 13 L.R.A.(N.S.) 278, 58 S. E. 795; *Davis v. Frazier*, 150 N. C. 447, 64 S. E. 200; *Hornthal v. Howcott*, 154 N. C. 228, 70 S. E. 171; *Bateman v. Kramer Lumber Co.* 154 N. C. 248, 34 L.R.A.(N.S.) 615, 70 S. E. 474; *Jenkins v. Montgomery Lumber Co.* 154 N. C. 355, 70 S. E. 633; *Powers v. Angola Lumber Co.* 154 N. C. 405, 70 S. E. 629; *Wiley v. Broadus & I. Lumber Co.* 156 N. C. 210, 72 S. E. 305; *Rountree v. Cohn-Bock Co.* 158 N. C. 153, 73 S. E. 796; *Kelly v. Enterprise Lumber Co.* 157 N. C. 175, 72 S. E. 957; *Frank Hitch Lumber Co. v. Brown*, 160 N. C. 281, 75 S. E. 714; *Anderson v. Miami Lumber Co.* 59 Or. 149, 116 Pac. 1056; *Hill v. E. P. Burton Lumber Co.* 90 S. C. 176, 72 S. E. 1085; *Matheson v. Marion County Lumber Co.* — 47 L.R.A.(N.S.)

S. C. —, 78 S. E. 970; *Lehtonen v. Marysville Water & P. Co.* 50 Wash. 359, 97 Pac. 292, second appeal, 58 Wash. 86, 107 Pac. 878; *Allen & N. Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622; *Belcher v. Kleeb*, 59 Wash. 166, 109 Pac. 798; *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Brown v. Gray*, 68 W. Va. 555, 70 S. E. 276; *Electro Metallurgical Co. v. Montgomery*, 70 W. Va. 754, 74 S. E. 994; *Kunst v. Mabie*, — W. Va. —, 77 S. E. 987; *Bretz v. R. Connor Co.* 140 Wis. 269, 122 N. W. 717.

In *United States v. W. T. Mason Lumber Co.* 172 Fed. 714, in which the contract for the sale of lumber contained a provision that all of the lumber not cut and removed within the specified time should revert to the grantor, the court seemed to adopt the view that ordinarily contracts of this character conveyed an absolute title in the timber embraced in the contract defeasible as to timber not removed within the time limited; but in view of the particular circumstances of the case—among others the fact that the grantee had been delayed for nearly five years from commencing to cut the timber by the action of the grantor—the court held that the grantee should have a reasonable time to remove all the timber that had been cut at the expiration of the time.

A deed of land reserving to the grantor the timber with the right of way to remove the same, which is to be removed within twelve months, constitutes an absolute grant of the land and the timber subject to the right of removal only. *Hand v. Fillin-game*, 92 Miss. 185, 45 So. 569.

In *Lehtonen v. Marysville Water & P. Co.* 50 Wash. 359, 97 Pac. 292, the court said: "Whether the reservation of the timber made it, in legal effect, personal property or otherwise, makes no difference. It is immaterial what the theoretical character becomes. The contract of reservation provides that it shall be removed within a given time. If it was the intention of the parties that the timber might be removed after that time, the limitation means nothing, and was misleading."

In Texas the rule is well established that where timber is conveyed as personally and in contemplation of removal, the title to the timber passes, but is lost on failure to remove within the time specified, or within a reasonable time if none is specified.

Beauchamp v. Williams, — Tex. Civ. App. —, 115 S. W. 130; *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* — Tex. Civ. App. —, 139 S. W. 1015; *Cartier v. Clark & B. Lumber Co.* — Tex. Civ. App. —, 149 S. W. 278; *Houston Oil Co. v. Boykin*, — Tex. Civ. App. —, 153 S. W. 1176; *Houston Oil Co. v. Hamilton*, — Tex. Civ. App. —, 153 S. W. 1194; *Lancaster v. Roth*, — Tex. Civ. App. —, 155 S. W. 597; *North Texas Lumber Co. v. McWhorter*, — Tex. Civ. App. —, 156 S. W. 1152.

However, if the contract provides that the grantee may erect such mills, sheds, etc., as he shall deem necessary, and shall have a reasonable time to remove such buildings,

he does not, upon the expiration of the time limit, lose the title to logs and lumber which he had brought to his mill and stored for the purpose of being sawed. *Lancaster v. Roth*, — Tex. Civ. App. —, 155 S. W. 597.

The title to timber which has been conveyed to a grantee with right to enter and cut and remove the same is in the grantee for the purposes of taxation. *Montgomery v. Peach River Lumber Co.* 54 Tex. Civ. App. 143, 117 S. W. 1061.

In Virginia it has been held that under a contract prescribing a certain time for the removal of the timber, title of so much timber only as is actually removed passes, although the contract provides for an extension of time by payment of interest. *Young v. Camp Mfg. Co.* 110 Va. 678, 66 S. E. 843; *Briggs v. Watkins*, 112 Va. 14, 70 S. E. 551; *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 76 S. E. 330.

Where the contract itself provides that the timber shall revert to the original owner if not removed, it has been held that the grantee loses his title to the timber by failure to remove, even in those jurisdictions following the rule that the absolute indefeasible title passes in the absence of such a reversion clause.

Thus in *Dye v. East Shore Woodenware Co.* 189 Mich. 78, 134 N. W. 986, it was held that if a deed conveying standing timber, with a provision that all logs cut or uncut which were not removed by a fixed date should revert to the grantor, passed the title to the timber, such title reverted to the grantor at the expiration of the time.

So, in *McNeil v. Hall*, 107 App. Div. 36, 94 N. Y. Supp. 920, affirmed in 187 N. Y. 549, 80 N. E. 1113, it was held that a contract for the sale of standing timber providing that all of the timber should be drawn off before a fixed date, after which the grantee should have no further right "on said premises or in any timber left thereon," the grantee had no right in any timber, bark, or logs left on the premises after such date.

Where a contract for the sale of timber expressly provides that in case it shall not be removed within a certain time it shall revert to and be vested in the grantor, the grantor's title to all timber not removed at that date is as complete as if no deed of the timber had been made. *Harris v. Free*, 6 Ala. App. 113, 60 So. 423.

A contract conveying "all the standing wood and timber which shall have been cut and removed" before a fixed date conveys title to only such timber as shall have been cut and also removed. *Nutting v. Stratton*, — N. H. —, 87 Atl. 251. The court in this case said that by the very terms of the contract no conveyance is made of the timber not removed.

—contracts not specifying time for removal.

There is also a number of cases which

hold that a contract for the sale of standing timber which specifies no time within which the removal shall be completed passes the title to the timber, which is subject to defeasance upon a failure of the grantee to remove the same within a reasonable time. *Liston v. Chapman & D. Land Co.* 77 Ark. 116, 91 S. W. 27; *Garden City Stave & Heading Co. v. Sims*, 84 Ark. 603, 106 S. W. 959; *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806.

And in *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672, it was held that a contract for the sale of standing timber which specified no time for the removal of the same conveyed a terminable estate to the grantee which would terminate at the expiration of a reasonable time. To the same effect, *Branch v. Johnson*, 9 Ga. App. 699, 71 S. E. 1123.

So, in *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.* 154 Ky. 523, 157 S. W. 1109, the court said that if the situation of the parties, and the circumstances surrounding them at the time the contract is executed, are such as to show that a severance of the timber from the soil was contemplated, the title thereto may be defeated by a failure to cut and remove the timber within a reasonable time.

A contract which clearly reflected the intention of the parties that the trees were to be cut and removed from the land within a reasonable time from the date of conveyance gives the purchaser a fee in the trees determinable upon a failure to cut and remove the timber within a reasonable time. *Warren v. Ash*, 129 Ga. 329, 58 S. E. 858.

In *Beatty v. Mathewson*, 40 Can. S. C. 557, 12 Ann. Cas. 913, it was held that where a contract for the sale of certain pine timber to be removed within ten years was, near the expiration of such time, replaced by another agreement to convey all of the timber on the land to the grantee and his heirs "forever," with the right to cut and remove it at all reasonable times "during ——— years," an estate in fee simple in the timber was not conveyed, but only a right to cut and remove it within a reasonable time.

A large number of cases holding that the grantee under a contract which specifies no time for the removal of timber loses all right in the timber if not removed within a reasonable time, will be found in the note to *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* 46 L.R.A. (N.S.) 672. In many cases of this character, the court disposes of the case without passing upon the point discussed in this note.

Where contract is uncertain.

If the contract is uncertain as to the timber to be removed, no title passes.

Thus an agreement to sell all of "my pine, oak, and poplar" timber that the grantee "may want for lumber" is too in-

definite to pass title. *Pitts v. Curtis*, 152 N. C. 615, 68 S. E. 189.

And the transfer of a deed giving the grantee the right to enter upon land, and to cut and remove any trees which he may select, with the right to construct the necessary roads, etc., does not pass the legal title to the trees to the transferee, but is sufficient to invest him with all the rights of the grantee under the deed. *Rush v. Hilton*, 83 S. C. 444, 65 S. E. 525.

In this connection, see *UNITED STATES COAL & OIL Co. v. HARRISON*.

If the payment to be made under the contract is uncertain or conditional, the title to the timber does not pass.

Thus, the title to timber which the vendee was to deliver f. o. b. cars before payment does not pass until the delivery is made. *Gow v. McFarren*, 156 Mich. 362, 120 N. W. 800; *Grand Rapids Bark & Lumber Co. v. Inland Twp.* 136 Mich. 121, 98 N. W. 980.

So, if the contract itself provides that it shall be void unless payment be made by a certain day, no title to the lumber passes. *Rowe v. Charles*, — Ky. —, 121 S. W. 697.

A contract for the sale of certain timber, which required a fixed amount due per month or week, and fixed a time when all the timber should be cut and ready for inspection, was held in *Wheeler v. Cleveland*, 170 Ala. 426, 54 So. 277, to be an executory contract of sale, notwithstanding the contract further provided that all timber remaining on the land at the time specified that it should be cut was to be removed within six months from that date, otherwise it should revert to the seller.

A contract by which the purchaser was required to deliver all of the lumber to the seller's agent, who was to receive all of the proceeds of the sale until the debt of the seller should be paid, is only a conditional sale. *Starnes v. Boyd*, 101 Ark. 469, 142 S. W. 1143.

A contract whereby the owners of timber agreed to bargain and sell the same in consideration of certain promises made by the purchaser is a mere executory contract, and passes no title. *Coles & Sons Co. v. Standard Lumber Co.* 150 N. C. 183, 63 S. E. 736.

Where the contract provides that no timber shall be cut until all is paid for, no title passes. *Wasey v. Mahoney*, 55 Mich. 194, 20 N. W. 901.

Inference from language of contract that parties did not intend title to pass.

So, also, in other ways the contract itself may show by its terms that it is not intended that the title to the timber should pass.

A written contract whereby the grantee was to cut timber on the grantor's lot and deliver a certain amount to him, which was 47 L.R.A.(N.S.)

not acknowledged, contained no apt words expressive of an intention to convey a present interest, contained none of the phrases usually found in real estate conveyances, and was evidently not intended for record, is only an executory contract or mere revocable license. *Polk v. Carney*, 21 S. D. 295, 130 Am. St. Rep. 719, 112 N. W. 147.

Where the contract for the sale of timber provides for payment upon the basis of "shingles cut from said timber," for monthly settlements for "all shingles cut," and for a time within which it shall be cut, if it shall be necessary to install additional machinery to finish the cutting within such time, "the necessary machinery shall be installed," the contract does not pass the title *in presenti* to all of the timber, but only to that cut into shingles. *Northern v. Tatum*, 164 Ala. 368, 51 So. 17.

License or oral contract to cut.

A mere license to cut timber passes no title at least before the timber is cut and removed.

Thus, in *Gibbs v. Wright*, 5 Ala. App. 486, 57 So. 258, it was held that a contract for the sale of standing timber which was not witnessed did not convey the title to the timber, but was only a license to cut and remove.

An oral contract for the sale of standing timber by which the purchaser could enter and cut logs, which were to be divided between the parties, is a mere license to cut, and gives the purchaser no title to any timber except that cut and converted into logs. *Colbey-Hinkley Co. v. Jordan*, 146 Ala. 634, 41 So. 962.

Under a mere permit to cut timber upon a certain lot, the permittee has no title in trees cut by a trespasser upon the lot. *Martin v. Johnson*, 105 Me. 156, 73 Atl. 963.

An oral agreement in respect to standing timber constitutes only a license to cut the same. *Fowler v. Ramsey*, — Fla. —, 61 So. 747..

Under a license to cut timber the title passes after the timber is cut and removed. *Scott v. Sullivan*, 159 Mich. 297, 124 N. W. 29.

The title to timber cut under a parol agreement passes, and the purchaser has a right to remove the same. *Johnson v. Bumpus*, 34 Pa. Super. Ct. 637.

In *Bowerman & Co. v. Taylor*, 127 Ky. 812, 106 S. W. 846, it was held that the sale of trees to be removed with ten years is a sale of real property where the deed of conveyance had been recorded, and a subsequent sale of the timber by the grantee evidenced only by memorandum written upon the deed, which was not subsequently recorded, passed no title to the timber as against a subsequent bona fide purchaser without notice from the original grantor.

W. M. G.

KENTUCKY COURT OF APPEALS.

JAMES D. HICKS et al., Appts.,

v.

HENRY L. PHILLIPS et al.

(146 Ky. 305, 142 S. W. 394.)

Deed — timber — reservation — passing of title.

1. A provision in a deed of real estate reserving certain described timber will be construed as an exception, so that the title will not pass to the grantee.

Timber — delay in removing — loss of title.

2. A grantor who, in conveying his real estate, reserves certain described timber growing upon the property, does not, unless there is something to show that the parties intended that it should be severed from the land, lose his title by failure to remove it within a reasonable time.

On Petition for Rehearing.**Same — reservation — scope.**

3. The reservation in a grant of real estate of the timber growing upon the property does not include saplings and undergrowth which, at the time of the grant, are not of a size suitable to make lumber.

Descent — reserved timber.

4. Timber reserved by a grantor of real estate, upon his death, passes to his heir at law.

(Hobson, Ch. J., and Nunn and Winn, JJ., dissent.)

(January 19, 1912.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Wayne County sustaining a demurrer to and dismissing the petition in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. John W. Tuttle and O'Rear & Williams for appellants.

Messrs. W. R. Cress & Son for appellees.

Clay, C., filed the following opinion:

Appellants, James D. Hicks, Cary L. Hicks, and Maggie Marshall, plaintiffs below, brought this action against Henry L. Phillips, Ephraim E. Phillips, and others, defendants below, to quiet their title to a certain tract of land situated in Wayne county, Kentucky. A demurrer was sustained to the petition, and the petition dismissed; hence this appeal.

It appears from the petition that appel-

Note. — As to effect of contract with respect to standing timber to pass title to the same, see note to *United States Coal & Oil Co. v. Harrison*, ante, 870. 47 L.R.A. (N.S.)

lants claim title through Peter Marshall, deceased, who derived his title from M. Phillips by deed dated March 31, 1873, and recorded in the Wayne county clerk's office, in Deed Book P, page 424. The deed in question contains the following clause: "Said Phillips reserves the timber on the left hand side of the road leading from Monticello, Kentucky, to the Francis line, at present owned by William Thornton, also all the rails made, and cut timber for rails or other purposes, lying on said land." Appellees are the heirs of M. Phillips, and claim title through him. The petition charges appellees with having entered upon the land and cut valuable timber therefrom. It also alleges that, no time being fixed in the reservation for removing the timber, it should in law, equity, and good conscience have been removed in a reasonable time; that more than thirty-seven years had elapsed since the timber was reserved, during which time appellees had suffered their claim to lie dormant and unasserted up until about four years before the filing of the petition; that such length of time was unreasonable; that, having failed to cut and remove the timber within a reasonable time, their claim was stale, and they should not now be permitted to do so. The petition concludes with a prayer for a perpetual injunction restraining the appellees from entering upon the land and cutting or removing the timber.

The question presented is, Did M. Phillips and those claiming through him forfeit their right to the timber in question by failing to cut and remove it within a reasonable time? It is the law that, where the contract itself fixes no time within which the timber sold or reserved is to be cut and removed, the intention of the parties may be ascertained from facts outside the agreement, such as the situation of the parties and the circumstances surrounding them at the time the contract is executed. *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247. In the petition in question, no facts nor circumstances are alleged which throw any light on the intention of the parties to the deed. Therefore resort must be had to the reserving clause, as that is the only provision of the deed bearing on the question. It will be observed that the word "reserves" is used. It is therefore insisted that the clause in question is a reservation, and not an exception, and that, as a reservation creates only a license or privilege which, if not exercised within a reasonable time, will lapse, appellees have lost their right to the timber by their failure to cut and remove it within a reasonable time.

A reservation is a clause in a deed, whereby the grantor reserves some new thing

to himself issuing out of the thing granted, and not in *esse* before; but an exception is always a part of the thing granted, or out of the general words or description of the grant. 4 Kent, Com. 468; Brown v. Anderson, 88 Ky. 577, 11 S. W. 607. However, a reservation is not always created because the word "reserves" or "reserving" is employed. "Reserving" sometimes has the force of "saving" or "excepting." 2 Co. Litt. 413; Whitaker v. Brown, 46 Pa. 197, 5 Mor. Min. Rep. 656; Dee v. King, 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839. In general, a reservation is like an exception,—something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant. Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399. "Reserving" and "excepting," although strictly distinguishable, are often used interchangeably or indiscriminately, and the use of either term is not conclusive as to the nature of the provision. Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618; Keeler v. Wood, 30 Vt. 246; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710; Stockwell v. Couillard, 129 Mass. 231; Martin v. Cook, 102 Mich. 287, 60 N. W. 679; 13 Cyc. 672; 34 Cyc. 1641. Thus, if A sell a farm of 100 acres, and reserves a certain tract of 5 acres contained in the 100 acres, the effect is just the same as if the 5 acres had been excepted from the operation of the deed. So, if A sell his farm and reserve the timber thereon, the effect is just the same as if the timber had been excepted. In either case, the title to the timber does not vest in the grantee, but remains in the grantor. Being a part of the thing granted, it constitutes an exception, and not a reservation in the technical sense. We are not, therefore, disposed to hold that, because the word "reserves" is used in the deed in question, the grantor retained merely the privilege or right to cut the timber. On the contrary, he had the right to reserve the timber itself, and did reserve it. The title, then, remained in him, and from this standpoint the question must be determined.

It follows, then, that this case falls within the rule laid down in *Baustic v. Phillips*, 134 Ky. 711, 121 S. W. 629, where, in the deed under consideration, certain timber was "accepted." It was held that the parties intended to use the word "excepted," and thereby to reserve in the grantors the timber in question; and, in discussing the question of the time within which the timber had to be cut, the court said: "But it is insisted that the grantors had only a reasonable time within which to remove the timber; that, having failed to remove it in a reasonable time, the title thereto became vested in the appellants. In 47 L.R.A. (N.S.)

support of this position, they cite several cases. An examination of these cases, however, will show that the time of removal was actually fixed, or the contracts of sale contemplated the severance of the timber from the realty. In such cases it is held that the purchaser has only a reasonable time within which to remove the timber. *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354; *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122; *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1119. In the case under consideration, however, the grantors did not reserve to themselves the mere right to cut and remove the timber. They excepted from the provisions of the deed the timber in question. Therefore the title never passed to the grantees, but remained in them." It was therefore held that the grantors did not lose their right to the timber by their failure to cut it within a reasonable time. In passing, it may be said in explanation of the sentence, "In such cases, it is held that the purchaser has only a reasonable time within which to remove the timber," the court meant those cases where the contract fixed no time, but a severance of the timber from the land was contemplated by the parties. Of course, where the time is fixed, that controls.

But it is again urged upon the court that it, in cases of sales of timber where no time for removal is mentioned in the contract, is committed to the doctrine that the timber must be removed in a reasonable time. This contention makes it necessary to review the cases at some length.

In *Cain v. McGuire*, 13 B. Mon. 340, the only question was whether a parol sale of trees was within the statute of frauds; and the court held that, as the sale was made in contemplation of their immediate severance from the ground, no writing was necessary. To the same effect are the cases of *Byassee v. Reese*, 4 Met. (Ky.) 372, 83 Am. Dec. 481, and *Tilford v. Dotson*, 106 Ky. 755, 51 S. W. 583.

In *Asher Lumber Co. v. Cornett*, 23 Ky. L. Rep. 602, 63 S. W. 974, the trees were sold by written contract, giving to the vendee five years in which to remove them. It was held that, as the trees were not sold in contemplation of their immediate severance from the soil, they remained a part of the realty.

In *Dils v. Hatcher*, 24 Ky. L. Rep. 826, 69 S. W. 1092, it was held that, where no time is fixed in the contract of sale for the severance of the trees, they are considered as realty.

In *Wiggins v. Jackson*, 24 Ky. L. Rep. 2189, 73 S. W. 779, it was held that a parol sale of trees, not made in contemplation of their immediate severance from the soil,

but giving to the purchaser two years within which to remove them, was within the statute of frauds.

In *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122, the contract for the sale of timber provided that it should be removed within fifteen months, and it was held that the purchaser could not remove the trees after that time.

In *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1119, the contract of sale required the trees to be removed within eighteen months, and it was held that the purchaser was entitled only to such of the trees as he removed with that time.

In *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* 32 Ky. L. Rep. 1015, 107 S. W. 733, the time for the removal of the trees and logs was fixed at four years, and the court held that no trees and logs could be cut and removed after that time, but that the lumber manufactured from the trees and logs cut previously to the expiration of the time limit could be removed within a reasonable time, since the contract contained no limitation with respect to the lumber.

In *Ford Lumber & Mfg. Co. v. Cress*, 132 Ky. 317, 116 S. W. 710, it was held that a sale of standing timber to be removed in a given time is only a sale of so much as is removed within the time, unless the purchaser is prevented from removing it within the time by act of God or of the seller.

In *Bowerman & Co. v. Taylor*, 127 Ky. 812, 106 S. W. 846, it was held that in the case of the sale of standing timber, where the contract of sale is made in contemplation of its being cut immediately and separated from the soil, it is treated as personalty, but that, where its immediate severance from the soil is not contemplated, it is to be treated as realty; and that, if no time is fixed in the contract of sale for its severance and removal, then it must be done within a reasonable time, if it is to be treated as personalty.

In *Evans v. Dobbs*, 33 Ky. L. Rep. 1053, 112 S. W. 667, Dobbs sold by deed all the trees suitable for staves, but the deed did not fix any time for removal. However, the deed showed that it was contemplated that the trees should be severed from the soil and removed, and, as this was the construction placed upon the contract by the parties themselves, it was held that the trees should be cut and removed within a reasonable time.

In *McCoy v. Fraley*, — Ky. —, 113 S. W. 444, the contract for the sale of timber did not fix any time for its removal, and it was held that the contract must be treated as conveying an equitable interest in the real estate.

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In *Hogg v. Frazier*, 24 Ky. L. Rep. 930, 70 S. W. 291, the court said: "The law is well settled in this state that the title to standing timber in the hands of a purchaser, under a written contract indicating no specific time for their removal, passes in the same way as the land itself; and that the covenant of title would run with the land into the hands of any subsequent vendee with either actual or constructive notice thereof."

There is certainly nothing in any of the foregoing cases that militates against the doctrine herein announced. But it is insisted that the case of *Morris v. Sanders*, 19 Ky. L. Rep. 1433, 43 S. W. 733, holds to the contrary. Not so, we think, when properly understood. There the deed provided: "It is furthermore distinctly understood that the parties of the first part reserve to themselves all the chestnut oak bark now growing on the land hereby conveyed to the parties of the second part, and free ingress and egress in and from said land, to cut, stack, and preserve and remove said bark, and privilege of making and using such landings upon Green and Nolin rivers as may be necessary and right, to erect shanties to shelter their hands and laborers and teams while engaged in cutting trees and saving and cutting the bark, but the trees, when stripped of their bark, are to be the property of the parties of the second part." Thus, it will be seen that the deed not only provided that the bark was to be cut and removed, but that the trees, after the cutting and removal of the bark, were to become the property of the grantees. A cutting and removal being contemplated by the parties, and the grantors in the deed having failed to exercise their right during a period of over twenty years, the court correctly said: "It seems clear to us that the law required Garrison and Stubbins [the grantors] to remove the tan bark reserved in the deed within a reasonable time, and that under the facts in this case their right to enter and remove the tan bark, or transfer such right to enter, terminated many years before the institution of this suit."

If resort be had to the decisions of other states, we shall find that the rule we have announced is sustained by very respectable authority.

Thus, in *Wait v. Baldwin*, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697, it was held that, by a reservation of timber in a deed fixing no time for its removal, the title remains in the grantor, and cannot be defeated by a failure to cut and remove the timber in a reasonable time.

In *Magnetic Ore Co. v. Marbury Lumber Co.* 104 Ala. 465, 27 L.R.A. 434, 53 Am. St.

Rep. 73, 16 So. 633, it was held that a sale by deed regularly executed, without condition or limitation, of the saw timber standing on certain land, no mention being made of the time when it is to be removed, vests absolute title to such timber in the purchaser, which is not lost or forfeited by his failure to remove it in a reasonable time, as against the vendor, or one to whom he sold the land with an express reservation of the trees.

In Goodwin v. Hubbard, 47 Me. 596, it was held that, where a deed of land contains a reservation of "the pine trees and pine timber standing and lying" thereon, the grantor retains the absolute title to all such trees, and may maintain trespass against a remote grantee of the land for cutting and carrying away certain of such trees more than twenty years after the execution of the deed, although most of the trees had been removed by the grantor during the first five years, and none had been cut and removed by him since.

In Smith v. Furbish, 68 N. H. 123, 47 L.R.A. 226, 44 Atl. 398, it was held that, where the grantor of land reserves an acre of the land for a specified purpose, the grantee to have the timber thereon, the grantee can cut the timber as soon as the deed is delivered; but his neglect for an unreasonable time to remove such timber does not operate as a conveyance of it to the grantor.

In Butterfield Lumber Co. v. Guy, 92 Miss. 361, 15 L.R.A.(N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78, it was held that, where standing timber is real estate, no implied contract of removal within a reasonable time arises from an absolute conveyance of it, noncompliance with which will work a forfeiture.

In Putnam v. Tuttle, 10 Gray, 48, where there was a provision in the deed that the wood was reserved to the grantor and his heirs forever, it was held that the right to the wood was not lost by a failure to remove it in a reasonable time.

An examination of the cases holding to the contrary will show that in many instances only a parol license was relied upon, while in other instances the contract of sale or reservation plainly indicated that a severance of the timber from the soil was contemplated. Thus, in Howe v. Batchelder, 49 N. H. 204, there was a parol sale of trees, and no time fixed for their removal. The right to enter and take the trees in a reasonable time was held to be an incident of the sale. In Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410, the agreement was in parol, and the same rule was

applied. Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 455, was based on a parol license.

In McRae v. Stillwell, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604, the deed conveyed "all the pine timber suitable for sawmill purposes." The timber was to be paid for, so much cash, and the balance when the different tracts were entered for the purpose of cutting the timber. The grantees were also given the right to construct railroads, tramroads, and wagon roads, for the purpose of getting the timber out. Here, then, there was a plain purpose to manufacture the timber, and a severance of it from the soil was necessarily contemplated.

In Boults v. Mitchell, 15 Pa. 371, where the reasonable time doctrine was applied, there was a sale of all the timber "suitable for rafting and sawing," thus showing an intention to sever.

On the whole, we think the correct rule is laid down in Patterson v. Graham, 164 Pa. 234, 30 Atl. 247, where it was held that one may buy growing timber with no intention of manufacturing it, and may hold it just as he might buy and hold the land, if he so frame his contract; but that, where the parties intend that the timber shall be severed from the land, and no time is fixed therefor, the law implies that the grantee will remove it within a reasonable time. So, too, the vendor of land may wish to reserve the timber thereon, not with a view of cutting and removing it, but with a view of its ultimate enhancement in value, when proper transportation facilities afford him a market. If so, he should be permitted to contract accordingly. But it is insisted that this will impose a heavy burden on the vendee of the land by defeating for an indefinite period of time the culture and improvement of the soil. If so, it will be a burden that he knowingly and voluntarily assumes. However, we apprehend that in the great majority of cases the burden will be more imaginary than real, for ordinarily the fact that the timber may be stolen, or may be destroyed by decay, by storm, or by fire, or may be lost in some other way, will be a sufficient incentive to the owner not to postpone indefinitely its severance from the soil.

Our conclusion then is that, where the grantor in a deed conveying land reserves the timber on a specified part of the land, and the deed is silent as to the time of removal, and there is nothing in the other stipulations of the contract, or in the situation of the parties or the circumstances surrounding them at the time the contract is executed, to show that a severance of the

timber from the soil was contemplated, the title to all timber then standing on the land specified remains in the grantor, and is not lost or defeated by his failure to cut and remove the timber within a reasonable time. Judgment affirmed.

Hobson, Ch. J., and Nunn and Winn, JJ., dissenting.

A petition for rehearing having been filed, Lassing, J., on May 31, 1912, handed down the following response (148 Ky. 670, 147 S. W. 42):

For original opinion in this case, see 146 Ky. 305, ante, 878, 142 S. W. 394.

It is most earnestly urged that the court is in error in holding that a vendor has more than a reasonable time within which to cut and remove from the soil the timber which he has reserved. Upon consideration, we adhere to the rulings expressed in the opinion.

It is also suggested that the rights of the parties, under the opinion, are not clearly defined, and much room is left for contention in determining what timber may be taken from the land by the representatives of Phillips, the original grantor. Webster defines "timber" to be: "Lumber used in building, carpentry, etc." It is immaterial whether the timber is cut and seasoned, or in the tree. This is the meaning usually given the term in its commonly accepted use. It is so understood by lumbermen and timbermen. Saplings and undergrowth are not covered by the term "timber." Hence the vendor, in reserving to himself the timber growing upon certain lands, retained the title to all of the trees standing thereon that were then of a size suitable to make lumber; and any saplings or undergrowth then growing upon the land that were not of a size suitable to make lumber, or that have since grown, were not reserved, and pass, under the conveyance, to the vendee. The rights of the parties, under the contract, must be determined by conditions as they then were, rather than as they now are. In removing the timber, the representatives of the vendor must, at their peril, see to it that they take only such timber as was reserved.

Lastly, it is urged that the reservation in the deed was personal to the vendor; and, the right to remove the timber not having been exercised by him in his lifetime, his right cannot now be asserted by his heirs. To this argument, we cannot agree. The timber which he reserved belonged to him, as much so as did any other property owned by him; and, at his death, it passed, as his other property, to his heirs at law.

Petition overruled.

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MARYLAND COURT OF APPEALS.

R. STANSBURY WIMBROW et al., Trading as Petey Manufacturing Company, Appts.,

v.

MANLIUS K. MORRIS.

(118 Md. 91, 84 Atl. 238.)

Replevin — demand — necessity.

1. No demand is necessary to sustain an action of replevin in the detinet for property to which the defendant claims absolute title.

Evidence — identity of timber — sufficiency.

2. That timber which was claimed under certain deeds is of the requisite size to meet the demand of such deeds sufficiently appears from testimony that it was part of the timber described in the deeds.

Trial — jury — identity of logs.

3. The jury must pass upon the sufficiency of competent evidence to identify logs claimed under a deed.

Logs — reservation of title — expiration of time for removal — effect.

4. Where a sale of timber is one of chattels, the mere failure to remove from the land within the time specified for ingress and egress logs which have been cut under a reservation of title in a sale of the real estate will not forfeit the title.

(March 17, 1912.)

Note. — Effect of expiration of time for removal of timber.

As to the effect of contract with respect to standing timber to pass title to the same, see note to United States Coal & Oil Co. v. Harrison, ante, 870.

In that note the point discussed was the somewhat abstract one as to whether the title to timber had passed by the contract in question, and in many of the cases included in that note there was discussed as subsidiary to the question suggested in the title to the note the further question of the effect of the expiration of the time for removal of the timber, where the contract expressly provided a fixed time within which the timber was to be removed. But in many cases of this character, the effect of the expiration of the time for removal was not presented or discussed, although indirectly such effect may be implied from the ultimate decision in the case. The present note is confined strictly to the question of the effect upon the rights of the parties of the expiration of the time given in the contract for the removal of the timber, without reference to the court's position as to the passing of the title.

In the note above referred to will be found references to other notes in this series, discussing various questions arising where the timber has been sold by the owner of the land, or where timber has been reserved by the grantee of the land.

APPEAL by plaintiffs from a judgment of the Circuit Court for Wicomico County in defendant's favor in an action brought to recover possession of certain timber. Reversed.

The facts are stated in the opinion.

Messrs. Ellegood, Freeny, & Walles, for appellants:

The exception of the timber, and the sale of it by the Powellville Manufacturing Co. to the plaintiffs, was a sale of goods to them, and the title never vested in defendant.

Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Leonard v. Medford, 85 Md. 666, 37 L.R.A. 449, 37 Atl. 365.

The plaintiffs, in whom the title was vested, did not forfeit it to the defendant, in whom it never was.

Knickerbocker L. Ina. Co. v. Norton, 96

U. S. 234, 24 L. ed. 689; Phoenix Mut. L. Ina. Co. v. Doster, 106 U. S. 34, 27 L. ed. 67, 1 Sup. Ct. Rep. 18; Hartford Life Annuity Ina. Co. v. Unsell, 144 U. S. 449, 36 L. ed. 500, 12 Sup. Ct. Rep. 671; Halstead v. Jessup, 150 Ind. 85, 49 N. E. 821; Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; C. W. Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; Plumer v. Prescott, 43 N. H. 277; Bunn v. Valley Lumber Co. 51 Wis. 376, 8 N. W. 232; Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Kellam v. McKinstrey, 69 N. Y. 266.

Messrs. John H. Handy and Joseph L. Bailey, for appellee:

Removal of the timber within the stipulated time is necessary to perfect the title to it in the grantee of the right to cut

It is very difficult to harmonize the cases dealing with contracts involving the sale of standing timber or with deeds in which the timber has been reserved by the grantor. This is due rather to the various forms of contracts used than to the principles of law involved. A very good statement of the difficulties met is found in the following quotation from an Arkansas case:

"The question has been many times considered by the courts of other states, and there is great conflict and some confusion in the decisions. The latter has largely arisen because each decision is to a great extent based upon its own peculiar facts, and the courts have not always been apt in citing decisions upon which their opinions have been based. Some of the contracts considered contained other stipulations and facts, which made the discussion of the general principles here involved unnecessary to be determined; in others the decisions were placed upon the evident design of the parties to the contract under examination as shown by the particular expression and provisions thereof." *Indiana & A. Lumber & Mfg. Co. v. Eldridge*, 89 Ark. 361, 116 S. W. 1173.

No attempt has been made to distinguish between contracts involving the sale of standing timber and cases involving deeds wherein the timber has been reserved by the grantor, as the same principles of law have been applied to both situations.

Thus, in *Wait v. Baldwin*, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697, wherein timber had been excepted and reserved from the grant of land, the court said that the grantor's title to the timber arising from the exception in the deed was of the same binding effect and force as if the whole estate had been granted by the deed and the grantee had then executed a deed to the plaintiff of all of the timber upon the land.

And in *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242, it was said that the same principles hold where the wood is reserved in a deed of the land as where it is conveyed by a contract of sale.

47 L.R.A.(N.S.)

Rule that grantee's rights are terminated by expiration of time given for removal.

The general rule is that the sale of the timber on a certain tract of land to be removed within a given length of time is a sale of only so much timber as is cut and removed within that time; and in the case of timber reserved in a grant of the land the grantor is entitled to take only so much timber as he may cut and remove within the time specified. It is to be observed that in some of these cases, the view is taken that the title did not pass, while the majority take the view that although the title passed, it was subject to defeasance by failure to remove the timber within the time specified. This rule has been held, either expressly or by implication, in a large number of cases.

Southern Lumber Co. v. Long, 182 Fed. 82; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Baxter v. Mattox*, 106 Ga. 344, 32 S. E. 94; *Perkins v. Peterson*, 110 Ga. 24, 35 S. E. 319; *Dickey v. Gray Lumber Co.* 127 Ga. 460, 56 S. E. 481; *Baker v. Davis*, 127 Ga. 649, 57 S. E. 62; *Sutton v. Gray Lumber Co.* 3 Ga. App. 377, 60 S. E. 2; *Gray Lumber Co. v. Harris*, 8 Ga. App. 70, 68 S. E. 749; *Sanders v. Clark*, 22 Iowa, 275; *Morris v. Sanders*, 19 Ky. L. Rep. 1433, 43 S. W. 733; *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122; *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1119; *Bell County Land & Coal Co. v. Moss*, 39 Ky. L. Rep. 6, 97 S. W. 354; *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* 32 Ky. L. Rep. 1015, 107 S. W. 733; *Ford Lumber & Mfg. Co. v. Asher*, 131 Ky. 796, 115 S. W. 790; *Ford Lumber & Mfg. Co. v. Cress*, 132 Ky. 317, 116 S. W. 710; *Ford Lumber Co. v. Cornett*, 146 Ky. 457, 142 S. W. 718; *Sansom v. Edwards*, 148 Ky. 503, 146 S. W. 1106; *Harrell v. Danks*, 151 Ky. 71, 151 S. W. 13; *Begley v. Consolidated Timber Co.* 152 Ky. 455, 153 S. W. 734; *Broussard v. Verret*, 43 La. Ann. 929, 9 So. 906; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742; *Pease v. Gibson*, 6 Me.

and remove. He acquires title only to so much timber as he can and does remove.

C. W. Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 588; 13 Am. & Eng. Enc. Law, title Logs and Lumber.

Pearce, J., delivered the opinion of the court:

This appeal is from a judgment of the circuit court for Wicomico county, directing a verdict in favor of the defendant below, in an action of replevin by the appellants for certain pine saw logs and pine trees cut down and lying upon land belonging, at the time the suit was instituted, to the appellee.

The appellants claim title to the property replevied upon the following state of facts: James E. Ellegood, as trustee under a decree of court, sold the land upon which the trees in question were then growing to the Powellville Manufacturing Company, a corporation; but, before a conveyance was made by the trustee to said company, it had entered into an agreement with Elijah A. Perdue for the sale of said land to him, reserving to itself certain described timber standing on said land. Subsequently, the trustee united with the said company in a deed of said land to said Perdue, conveying to him all the right and title of the parties to the cause in which the trustee had been appointed to sell, and all the right and

81; Howard v. Lincoln, 13 Me. 122; Webber v. Proctor, 89 Me. 404, 36 Atl. 631; Noyes v. Goding, 104 Me. 453, 72 Atl. 181; Kemble v. Dresser, 1 Met. 271, 35 Am. Dec. 304; Reed v. Merrifield, 10 Met. 155; Nelson v. Nelson, 6 Gray, 385; White v. Foster, 102 Mass. 375; Perkins v. Stockwell, 131 Mass. 529; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001; Richards v. Tozer, 27 Mich. 451; Johnson v. Moore, 28 Mich. 3; Haskell v. Ayres, 32 Mich. 93; Wasey v. Mahoney, 55 Mich. 194, 20 N. W. 901; Utley v. S. N. Wilcox Lumber Co. 59 Mich. 263, 26 N. W. 488; Williams v. Flood, 63 Mich. 487, 30 N. W. 93; Oconto Co. v. Lundquist, 119 Mich. 264, 77 N. W. 950; French v. Sparrow-Kroll Lumber Co. 135 Mich. 424, 97 N. W. 961; Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 111 N. W. 177; Wallace v. Kelly, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049; Newberry v. Chicago Lumbering Co. 154 Mich. 84, 117 N. W. 592; Dye v. East Shore Woodenware Co. 169 Mich. 78, 134 N. W. 986; Sullivan v. Godkin, 172 Mich. 257, 137 N. W. 521; Clark v. Ingram-Day Lumber Co. 90 Miss. 479, 43 So. 813; Hand v. Fillingame, 92 Miss. 185, 45 So. 569; Rowan v. Carleton, 100 Miss. 177, 56 So. 329; Hollensteiner v. Missoula Lumber Co. 37 Mont. 278, 96 Pac. 420; McIntyre v. Barnard, 1 Sandf. Ch. 52; Boisaubin v. Reed, 2 Keyes, 323, 1 Abb. App. Dec. 161; Inderlied v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 183; Kellam v. McKinstry, 69 N. Y. 264, affirming 6 Hun, 381; McNeil v. Hall, 187 N. Y. 549, 80 N. E. 1113, affirming without opinion, 107 App. Div. 36, 94 N. Y. Supp. 920; Decker v. Hunt, 11 App. Div. 821, 98 N. Y. Supp. 174; Bunch v. Elizabeth City Lumber Co. 134 N. C. 116, 46 S. E. 24; Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 6 L.R.A.(N.S.) 468, 53 S. E. 300; Ormand Min. Co. v. Bessemer City Cotton Mills, 143 N. C. 307, 55 S. E. 700; Midyette v. Grubbs, 145 N. C. 85, 13 L.R.A.(N.S.) 278, 58 S. E. 795; Davis v. Frazier, 150 N. C. 447, 64 S. E. 200; Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Jenkins v. Montgomery Lumber Co. 154 N. C. 355, 70 S. E. 633; Rountree v. Cohn-Bock Co. 158 N. C. 153, 73 S. E. 796; Frank Hitch Lumber 47 L.R.A.(N.S.)

Co. v. Brown, 160 N. C. 281, 75 S. E. 714; Wilson v. Scarboro, — N. C. —, 79 S. E. 811; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Anderson v. Miami Lumber Co. 59 Or. 149, 116 Pac. 1056; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Mahan v. Clark, 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729; Bennett v. Vinton Lumber Co. 28 Pa. Super. Ct. 495; Hill v. E. P. Burton Lumber Co. 90 S. C. 176, 72 S. E. 1085; Mengal Box Co. v. Moore, 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047; Carter v. Clark & B. Lumber Co. — Tex. Civ. App. —, 149 S. W. 278; North Texas Lumber Co. v. McWhorter, — Tex. Civ. App. —, 156 S. W. 1152; Strong v. Eddy, 40 Vt. 547; Preston v. Hill-Wilson Shingle Co. 50 Wash. 377, 97 Pac. 293; Lehtonen v. Marysville Water & P. Co. 50 Wash. 359, 97 Pac. 292, second appeal, 58 Wash. 86, 107 Pac. 878; Allen & N. Mill Co. v. Vaughn, 57 Wash. 163, 106 Pac. 622; Belcher v. Kleeb, 59 Wash. 166, 109 Pac. 798; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173; Adkins v. Huff, 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246; Brown v. Gray, 68 W. Va. 555, 70 S. E. 276; Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Strasson v. Montgomery, 32 Wis. 52; Golden v. Glock, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; Peshtigo Lumber Co. v. Ellis, 122 Wis. 433, 100 N. W. 834; Bretz v. R. Connor Co. 140 Wis. 269, 122 N. W. 717; Steinhoff v. M'Rae, 13 Ont. Rep. 546; Johnston v. Shortreed, 12 Ont. Rep. 633.

The same view was apparently taken in Boring Lumber Co. v. Roots, 49 Or. 569, 90 Pac. 487, but the case seems to have been decided upon other grounds. See also the same case on subsequent appeal. 50 Or. 298, 92 Pac. 811, 94 Pac. 182.

So, in Ford Lumber & Mfg. Co. v. Cress, 132 Ky. 317, 116 S. W. 710, the court said: "The rule is that a sale of standing timber on a certain tract of land, to be moved in a given length of time, is only a sale of so much of the timber as is moved within the time, unless on account of some act of God or of the seller the purchaser is prevented from moving the timber within the time given."

Where time is given to remove trees

title of the said company in the land sold, and described in said deed, with the following reservation: "Reserving, nevertheless, from the operation of this deed, to the Powellville Company, all the pine timber measuring 8 inches and over in diameter, at the height of 6 inches from the surface of the ground. And it is further agreed that the said Powellville Manufacturing Company is to have the right of ingress and egress for the term of eight years from January 1, 1903, for the purpose of cutting and taking away the timber hereby reserved; the said grantee having no right to cut any pine timber until the term aforesaid has expired."

On October 3, 1903, Perdue and wife sold growing on land they must be removed within the time stipulated. *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742.

The value of timber left uncut on the premises by the purchaser thereof at the expiration of the time fixed for the cutting and removal cannot be set up in recoupment in an action by the seller for damages for the cutting of trees not within the contract. *Jenkins v. Montgomery Lumber Co.* 154 N. C. 355, 70 S. E. 633.

In some Michigan cases it has been held that the grantee will lose all of his rights in the timber by failing to remove it within the time specified, but the forfeiture may be waived by the grantor by parol. *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049; *Newberry v. Chicago Lumbering Co.* 154 Mich. 84, 117 N. W. 592.

Under a contract for the sale of timber whereby the vendee has a certain fixed period wherein to remove the timber, he does not lose his right to the timber before the expiration of the period by abandoning the contract. *Sansom v. Edwards*, 148 Ky. 503, 146 S. W. 1106.

And in *Wiley v. Broadbudd & I. Lumber Co.* 156 N. C. 210, 72 S. E. 305, the court said: "When one has bought and paid for a lot of growing timber, and same has been conveyed him, with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited, and inures, as a rule, to the owner of the land."

The vendee of enough trees to make 100,000 feet of timber loses all of his rights thereto if it is not removed within the time specified. *Lockeshan v. Miller*, 16 Ky. L. Rep. 55.

In *De Goosh v. Baldwin*, 85 Vt. 312, 82 Atl. 182, the court went no further than to say that the vendee who went upon the premises to remove timber after the expiration of the time fixed by the contract was guilty of a trespass.

In *Green v. Bennett*, 23 Mich. 464, it was held that the vendee of certain timber could maintain an action in trover for timber

and conveyed the same land to Manlius K. Morris, the defendant, reserving, however, to the Powellville Company all the timber reserved in the deed above mentioned; the language of the first reservation being repeated in the deed last mentioned.

In March, 1906, the Powellville Company, by an agreement in writing, sold all the timber so reserved to it to the appellants, co-partners trading as the Petey Manufacturing Company, "with free ingress and egress for the purpose of cutting, hauling, or removing the said timber and lumber; . . . the said party of the second part, its successors, or assigns to have until January 31, 1909, within which to cut and remove said timber;" and on March 4, 1908,

ber which the vendor removed after the expiration of the time fixed for the removal in the contract of sale, where the vendor had sued the vendee and recovered for his failure to clear the land and to pile the brush in accordance with the terms of the contract. The court said: "If the contract is to be construed as making an absolute sale, then the wood and timber remained the property of the purchaser (plaintiff below), though not removed within the times provided; and the taking and removal of the wood by the vendor (defendant below) constituted a wrongful conversion for which the purchaser had a clear right of action; though he would have been liable to the vendor for a breach of the covenant to remove within the times agreed. But if the sale was, by the contract, conditional, and the provisions for the removal within the specified periods in the nature of a condition, instead of a covenant, then the purchaser, if the vendor should insist upon the condition, would lose all right to the wood and timber not removed within the time; and the vendor would have the right to insist upon this breach of the condition, and hold the wood not thus removed; and this would constitute his only security against, and his only remedy for, the failure of the purchaser to perform the condition by removing the wood within the time; for if the provision as to the time of removal constituted a condition to the sale, then it was not a covenant upon which the vendor could bring an action for damages at the same time that he insists upon its forfeiture as a condition, and holds the wood and timber upon that ground. If a condition, it was one which the vendor might waive; and by claiming and receiving from the purchaser the damages for the failure to remove them in time, he clearly waived the condition, and left the wood and timber as the property of the purchaser, to be removed within a reasonable time."

This rule has been modified in some cases where the grantee was hindered in his removal of the timber by the acts of the grantor.

Thus, where the contract for the sale of the cedar timber on a tract required it to

by another agreement in writing, the time for that purpose was extended until January 1, 1911.

It was testified by one of the plaintiffs, without contradiction, "that the timber described in the replevin proceedings was a part of the timber described in the said deeds and agreements, and was all cut into logs upon the said land and ready to be hauled off the same to the mill of the plaintiffs before January 1, 1911; that the last of it was cut about December 23, 1910, but that he had been unable to remove it all before January 1, 1911, and that on January 4, 1911, he went upon the land of the defendant, and hauled off one load of said timber, and thereupon, the defendant notified the plaintiffs not to haul or remove any

more of said timber; and that the plaintiffs thereupon sued out the writ of replevin."

The pleas were *non cepit* and property in defendant, upon which issues were joined, and the case was tried before the court, without a jury.

The defendant's first contention is that the case was properly withdrawn from the jury, because there was no evidence of demand by plaintiffs before the writ issued. It is true that the general rule requires a demand to be made before an action of replevin in the detinet (as this is) can be brought. "But when the plaintiff claims the ownership of the property, with the right of possession as incident to that ownership, and the defendant's claim of right is precisely the same, no demand is necessary."

be cut within a fixed time, but not to be cut before the pine timber on the tract had been cut, the grantor cannot enforce a forfeiture of the cedar timber where he had failed to remove the pine timber within the time limit. *Small v. Robarge*, 132 Mich. 358, 93 N. W. 874.

So, where the grantee from a tribe of Indians of certain timber which was to be removed within fifteen years was delayed nearly five years in commencing the cutting by reason of a suit brought by the United States in behalf of the Indians, he is entitled to remove all of the timber cut during the fifteen years within a reasonable time thereafter. *United States v. W. T. Mason Lumber Co.* 172 Fed. 714.

In a number of cases the right of removal is terminated at the expiration of the time fixed in the contract by the express agreement of the parties.

Lewis v. Parrott Lumber Co. 119 Ga. 476, 46 S. E. 647; *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135; *Monroe v. Bowen*, 26 Mich. 523; *Gamble v. Gates*, 92 Mich. 510, 52 N. W. 941, second appeal, 97 Mich. 465, 56 N. W. 855; *Prentiss v. Ross*, 96 Mich. 83, 55 N. W. 613; *Hall v. Eastman, G. & Co.* 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2; *Anderson v. Miami Lumber Co.* 59 Or. 149, 116 Pac. 1056; *Heybrook v. Beard*, — Wash. —, 135 Pac. 626.

Even in those jurisdictions holding that the rights of the grantee are not terminated by the expiration of the time specified in the contract, the parties may, by the express terms of the contract, provide that the rights of the grantee shall be terminated by the expiration of the time limit. *Harris v. Free*, 6 Ala. App. 113, 60 So. 423.

Cutting as a removal.

In the great majority of the cases cited in the list set out in the preceding subdivision of this note the rule was stated in general terms, and no distinction was made between timber which was standing at the expiration of the time, and timber which had been cut. But in some jurisdictions hold-

ing that the grantee loses all of his rights in the timber by failure to cut and remove it within the specified time, it has sometimes been held that actual physical removal of the timber from the tract is not necessary, but the mere felling of the timber is a sufficient removal.

Indiana & A. Lumber & Mfg. Co. v. Eldridge, 89 Ark. 361, 116 S. W. 1173; *Griffin v. Anderson-Tully Co.* 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297; *Jones v. Graham*, — Ga. —, 80 S. E. 7; *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242; *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376; *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133.

Failure to remove logs after they are cut, within the time named in the contract for the sale and removal of the timber, does not forfeit the title to the logs in question. *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376. The court said that this was the first case in Michigan wherein the effect of the actual cutting within the time limit had arisen. In this case the court speaks of trees being "manufactured into saw logs." But in *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078, the court said: "It is equally clear that all of the timber severed from the soil by the defendants was removed though still upon the premises, and belonged to them, for we think no distinction should be drawn as to such timber before and after it was cut up into saw logs. It was enough if the defendants severed standing timber from the soil or put work upon down timber, thereby taking it into their possession. Indeed, we see no reason for saying that they were not entitled to treat all down timber severed from the soil as removed whether they had put work upon it or not."

So, in *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242, it was held that the grantee does not lose his right to timber which was actually cut, but not removed, before the expiration of the time limit.

In other cases, however, it is expressly

Cobbey, Replevin, § 447. "Where the defendant pleads ownership in himself [as he does here], he cannot defeat a recovery under the pretense that he would have surrendered the property, if demand had been made." *Id.* § 448. *Morris, Replevin*, §§ 7, 8. Where circumstances show that a demand would have been unavailing, no demand is necessary. *Howard v. Braun*, 14 S. D. 579, 86 N. W. 635; *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219; *Pringle v. Phillips*, 5 Sandf. 161. The circumstances of this case, and the defendant's plea of property in himself, preclude any idea that he would have heeded a demand.

The next contention of the defendant was that there was no evidence identifying the timber replevied as that which the plain-

tiffs were entitled to take under the deeds and agreements offered in evidence,—that is, that it was cut from the land described in the said deeds and agreement, and that it was 8 inches across the stump 6 inches above the ground,—but we cannot agree to this. The witness *Wimbrow* testified that he was in charge of the cutting and hauling of the timber on the land described in the deeds and agreements; "that the timber described in the replevin proceedings was a part of the timber described in the deeds and agreements." This could not be so, unless it was 8 inches across the stump 6 inches above the ground. He also testified that "it was all cut into logs upon the said land and ready to be hauled off of the same to the plaintiffs' mill before January 1,

held that something more than the mere felling of the trees is necessary to constitute a removal.

Thus, in *Anderson v. Miami Lumber Co.* 59 Or. 149, 116 Pac. 1056, the court said: "It is claimed that the cutting of these trees and severing them from the soil constituted a technical 'removal from the premises,' and that the defendants had a reasonable time after the expiration of the grant to actually remove them. The very statement of the proposition involves a contradiction. If the timber was removed by the act of cutting, then it was removed, and no further act was required. To say that it was removed as a matter of law, and that defendants had a right to enter upon the premises, after the expiration of the time limit set in the deed, and thereafter to remove it, as a matter of fact involves a degree of legal metaphysics which we are unable to attain. If trees which have been cut down and which lie undisturbed at the foot of the stumps are timber, or if the same trees, which have been cut into saw logs and which are left lying where they fell, are timber, then it follows from a necessary, usual, and common-sense definition of the term, 'removal from the premises,' that they could not be, in a legal sense, removed, while they were, in fact, remaining physically on the premises."

And in *Clark v. Ingram-Day Lumber Co.* 90 Miss. 479, 43 So. 813, the court said: "If the parties had intended that the grantee under this contract should have any rights additional to those which are granted in the contract,—that is to say, if it was intended that they should have three years within which to cut the timber, and an additional time in which to remove it from the premises,—nothing would have been easier than for the parties to have put this in the contract; and, since they have not done so, we cannot say that the parties intended that the grantee should be limited to three years only as to the time in which he shall cut down the timber, and shall have an additional time in which to remove timber cut from the premises. To do this would be to make a new contract and to

disregard the agreement which the parties have actually made."

So, also, in *Belcher v. Kleeb*, 59 Wash. 166, 109 Pac. 798, it was held that the grantee of timber had no right to remove it after the expiration of the contract period.

And in *Rowan v. Carleton*, 100 Miss. 177, 56 So. 329, it was held that where logs, taken from the vendor's land after the expiration of the time limit for cutting the same, had been mingled with other logs, the burden was not upon the vendor to prove which were his logs.

So, too, in *Frank Hitch Lumber Co. v. Brown*, 160 N. C. 281, 75 S. E. 714, it was held that even if the timber had been cut during the continuation of the time limit, it would belong to the owner of the land if left thereon after the expiration of the time.

And in *Saltonstall v. Little*, 90 Pa. 423, 35 Am. Rep. 683, it was held that both the right of entry and the right of property was terminated by the expiration of the contract period.

So, in *Mengal Box Co. v. Moore*, 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047, where the contract of sale was in the form of a permission to enter and cut and fell the trees, it was held that the purchaser had no right to timber which had been felled before the expiration of the time, but not removed.

So, in *Allen & N. Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622, it was held that the grantee of timber is not in any way benefited in cutting the timber down and cumbering the ground with fallen trees.

Again, it has been held that a removal from one part of the tract to another is a sufficient removal.

Thus, removal of the timber to the bank of a navigable river within the stipulated time is a sufficient removal, although it was floated down the river after the expiration of the time, and the river bank was on the same tract as the standing timber. *Plummer v. Reeves*, 83 Ark. 10, 102 S. W. 376.

So, timber which had been cut and removed with the consent of the grantor to another

1911; that the last of it was cut about December 23, 1910, and that the logs in dispute were on the said land of the defendant on January 1, 1911, but he was unable to haul them until January 4, 1911, when he went upon said land and hauled one load of logs, when defendant forbade him to haul any more; and that the plaintiffs then sued out this replevin."

Even if this testimony were conceded to be inconclusive, yet, being derived from a legal source, and being pertinent to the issue, the jury was the proper tribunal to pass upon it. *Wetherall v. Garrett*, 28 Md. 450. Before the court could, on that ground, have granted an instruction that the plaintiff was not entitled to recover, it must have assumed the untruth of all *Wimbrow's* testi-

mony tending to identify the timber, and all inferences of fact fairly deducible therefrom (*Leopard v. Chesapeake & O. Canal Co.* 1 Gill, 222); and the instruction given could not have been properly granted on that ground.

The final contention of the defendant is that all right and title of the plaintiffs in and to the timber described in the said deeds and agreements, whether then attached to the soil, or severed and worked into logs and remaining on the land on January 1, 1911, was on that date forfeited, under the express terms of said deeds and agreements, to the appellee as owner of the land upon which said timber was grown, notwithstanding that the purchase price of said timber had been fully paid, and not-

portion of the farm is not forfeited by the expiration of the time limit. *Watson v. Gross*, 112 Mo. App. 615, 87 S. W. 104.

And logs carried from where they were cut to the yard of the mills erected by the vendee are not forfeited by the expiration of the time limit. *Lancaster v. Roth*, — Tex. Civ. App. —, 155 S. W. 597.

Where timber is manufactured into "lumber."

It seems to be the rule even in those jurisdictions which hold that all the rights of the parties to the timber terminated at the expiration of the time limit, if the timber is manufactured into lumber the owner of the timber does not lose his right thereto by the expiration of the time limit.

Thus, in *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135, it was held that where the timber was cut into "cross-ties" the title was in the grantee, and the expiration of the time limit for the cutting of the timber did not affect it; and this was true although by the express terms of the contract the rights in the timber reverted to the grantor at the expiration of the period.

And in *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12, it was held that the grantee of timber would not lose his rights to the timber by expiration of the contract period, where it had been manufactured into stove bolts.

Where the timber is manufactured into lumber the vendee does not lose his right by failure to remove. *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729.

The expiration of the time limit does not terminate the rights of the grantee in timber already worked up into railroad ties. *Hubbard v. Burton*, 75 Mo. 65.

Trespass will not lie for timber cut and manufactured into ties before the expiration of the time limit, but removed after. *Richmond Land Co. v. Watson*, 129 Mo. App. 554, 107 S. W. 1045.

So, in *Butler v. McPherson*, 95 Miss. 635, 49 So. 527, the court held that while the expiration of the time limit terminated all of the grantee's rights to standing timber 47 L.R.A. (N.S.)

or to timber lying in its natural state upon the land, this rule did not apply where the timber had been manufactured into lumber, such as railroad ties.

But saw logs are not manufactured articles within this rule. *Rowan v. Carleton*, 100 Miss. 177, 56 So. 329.

In *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133, the court said that it was the severance of the trees from the soil, and not the manufacture into lumber, that was material. The court said: "They are no longer a part of the land, and are not real property, and therefore must be personal property. Manufacturing the timber, after it is cut down, into any form is no part of the act of its severance from the land. It is personal property, because it is 'severed from the soil.' The sap can no longer go up into the tree from the soil, as some writers say." See also *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078, as quoted in the preceding subdivision.

Rule that grantee's rights are not terminated by expiration of time limit.

In a number of jurisdictions it is the rule that the grantee's rights are not terminated by the expiration of the time limit for the removal of the timber, although his right of entry upon the land may be.

In Alabama the rule is that while the expiration of the stipulated period may terminate the right of the grantee to enter upon the land for the purpose of removing the timber, yet it does not forfeit the grantee's interests therein. *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Mt. Vernon Lumber Co. v. Shepard*, — Ala. —, 60 So. 825.

As the grantee's right to entrance has terminated at the expiration of the time limited in the contract, equity cannot give him a right to enter even on condition of his paying all damages. *Mt. Vernon Lumber Co. v. Shepard*, *supra*.

If, however, the grantee enters upon the land and takes away the timber, the value

withstanding that in this state, ever since the decision in *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104, a sale of standing timber was held to be "a sale of goods only," and the timber so sold thereafter to retain its character of goods and chattels. In *Leonard v. Medford*, 85 Md. 666, 37 L.R.A. 449, 37 Atl. 365, Judge McSherry, speaking for the court, said: "We have no disposition to unsettle a doctrine that has been accepted, and not questioned, in Maryland for more than forty years. It seems to us that the conclusion reached in *Smith v. Bryan* is sound. In transactions of the kind there and here involved, it is obvious that the intention of the parties to the contract—the owner of the timber on the one side, and the purchaser of it on the other—was, not to

deal with an interest in the land upon which the timber stood, but, respectively, to sell and acquire the product of the soil, and nothing more." And he adopted the language of *Littledale, J.*, in *Smith v. Surman*, 9 Barn. & C. 561, where it was said: "The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels." Here the trees not only became in legal contemplation goods and chattels in virtue of the intention of the parties to the contract, but by severance from the soil before January 1, 1911, they assumed the physical aspect and characteristics of chattels from the moment of severance.

There is no reported decision in this state

of the timber is not an element of damage in an action by the owner of the land for trespass. *C. W. Zimmerman Mfg. Co. v. Daffin*, supra.

Even in Alabama, where the instrument purporting to convey the timber does not possess the dignity and formality of a deed of conveyance of real property, all of the rights of the grantee terminate at the expiration of the time limit. *Gibbs v. Wright*, 5 Ala. App. 486, 57 So. 258.

So, also, in California, the rule is that the expiration of the period for cutting does not deprive the grantee of the ownership of the timber. *Peterson v. Gibbs*, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121, second appeal, 163 Cal. 758, 127 Pac. 62; *Ciapucci v. Clark*, 12 Cal. App. 44, 106 Pac. 436.

In Florida the rule is that a contract for the sale of standing timber passes an absolute title thereto, and timber cut before the expiration of the time set in the contract may be removed after the expiration of the time. *Sanborn v. Franklin County Lumber Co.* 55 Fla. 389, 46 So. 85.

So, also, in Indiana it has been held that the expiration of the time limit does not affect the rights in the timber, although the owner of the timber may be liable to the landowner for damages.

Thus, in *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821 a case in which, in a contract of sale, the purchaser of timber was given four years within which to remove the same, it is expressly held that the purchaser did not forfeit his right to remove the timber after the four years, in the absence of a forfeiture clause. In the course of the opinion the court says, at page 87: "If by delay in taking the timber, after the period named, damage should accrue to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture." To the same effect, *Advance Veneer & Lumber Co. v. Hornaday*, 49 47 L.R.A. (N.S.)

Ind. App. 83, 96 N. E. 784; *Watson v. Adams*, 32 Ind. App. 281, 69 N. E. 696.

A similar rule prevails in Minnesota. In an early case, *King v. Merriman*, 38 Minn. 47, 35 N. W. 570, it was held that the grantee took only so much timber as was actually cut and removed; but this was taken as *dicta* in *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387, where it was held that where the grantee, after the expiration of the time limit for the cutting and removal of the timber, removed certain logs, part of which had been cut before the expiration of the time, the grantor could recover for the logs cut after the time limit, but that the extent of his remedy for the logs cut within the limitation was such damages as he might have sustained by reason of a trespass and occupation of his land.

The rule in New Hampshire is that only the right of entry is terminated by the expiration of the time for the cutting and removal of timber. *Plumer v. Prescott*, 43 N. H. 277; *Town v. Hazen*, 51 N. H. 596; *Dyer v. Hartshorn*, 73 N. H. 509, 63 Atl. 231; *Peirce v. Finerty*, 76 N. H. 38, 20 L.R.A. (N.S.) 547, 76 Atl. 194, 79 Atl. 23. But a conveyance of so much "timber as shall have been cut and removed" within a fixed time conveys only such timber as shall actually be removed. *Nutting v. Stratton*, — N. H. —, 87 Atl. 251.

In *Plumer v. Prescott*, 43 N. H. 277, the court distinguished *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470, upon the ground that in the latter case no attention was given by the court to the distinction between timber that was cut and that which was not cut. In the former case the court said: "When, however, these trees are lawfully cut by the vendee, within the time limited by the contract, they cease to be parcel of the land, and become the personal property of the vendee; and unless it can be considered that he has waived or forfeited his title to the timber by neglecting to remove it within the time, it must stand, for aught we can see, upon the footing of any other personal property of the vendee, which by his fault or neglect and without

of the question here raised; but it has been considered in numerous cases in different states of this country, and so variously decided that reconciliation of the decisions is impossible. It may be said, however, that in the American courts the apparent current and weight of authority seems to be that timber, not severed from the soil on the date limited for its removal, cannot be severed thereafter by the purchaser; the reasons generally assigned therefor being that to hold otherwise would be to subject the owner of the soil to an unlimited restriction upon the use of his land, going almost to the destruction of the value of the land for any other use than the support of the timber for the exclusive benefit of the purchaser of the timber.

In *Williams v. Flood*, 63 Mich. 491, 30 N. W. 93, the court said: "If the limitation as to time of removal should be construed as a covenant on the part of the purchaser that he would remove the timber in the time specified, the title to the timber would remain in the purchaser after the time limited had expired, and he could still enter upon the premises and remove the same at his pleasure, being liable to the vendor for such damages as he should cause in so doing. The vendor would also have a right of action . . . for a breach of the covenant in not performing the covenant as agreed. But it is perceptible, at a glance, that this might be a very inadequate remedy. The standing timber would be an encumbrance upon his land, and would deprive him of its use for agricultural purposes, and it would be a constantly recurring injury, quite incapable of estimation in dollars, and would depreciate the marketable

value of his land while the timber remained."

In that case some timber was cut, and some was still standing. The action was trespass by the vendee of the timber against the grantees of the vendor, who refused to permit the vendee to continue cutting, or to remove any cut timber. The trial court allowed a verdict for the value of both the cut and standing timber; and the court held the direction right as to the cut timber, but wrong as to standing timber. It thus held that as to the uncut timber the contract was upon a condition, the breach of which worked a forfeiture of the plaintiff's right and title to the remaining uncut timber, but not as to the timber cut up to the time when the defendant forbade his cutting more; and that, if the defendant refused to permit him to enter for the purpose of removing the timber cut up to that time, it would in law amount to a conversion by the defendant of the timber so cut.

The case of *Plumer v. Prescott*, 43 N. H. 277, was thus: Plumer sold to Prescott all the wood and timber on a certain lot, Prescott to have until a certain day to take it off. He cut all within the time limited, but left a part lying on the lot, and after the day limited entered and hauled it off. In an action for breaking the plaintiff's close and taking away his trees, it was held he could recover for the breaking of his close, but could not include in his damages the value of the wood. The court said: "When, however, these trees are lawfully cut by the vendee, within the time limited by the contract, they cease to be parcel of the land and become the personal property of the vendee; and, unless it can be considered that he has

any fault of the vendor, is upon the land of the latter. It is very clear, we think, that having been lawfully severed from the land, it has become personal property, and at any period before the expiration of the limited time, at least, the title is vested in the vendee as fully as any other chattels."

In *Tuttle v. D. W. Pingree Co.* 75 N. H. 288, 73 Atl. 407, although the contract provided that all "lumber" on the land after the expiration of the time given in the contract should revert to the grantor, it was held that sawed lumber would not revert, where the word "lumber," as used in the contract, had reference to the standing trees.

A similar rule prevails in New Jersey. Thus in *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, it was held that an exception in a deed of land of certain timber growing thereon was not made conditional by a clause requiring it to be cut and removed within a certain period.

So, where the owner of land converted it to his own use after the expiration of the time limited for the removal thereof, he is 47 L.R.A.(N.S.)

liable in conversion to the owner of the timber, and the latter's conduct in leaving the timber upon the land after the expiration of the time afforded no ground for reducing the damages resulting from the conversion. *Wyckoff v. Bodine*, 65 N. J. L. 95, 47 Atl. 23.

And also in Ohio. So, where, in a deed of conveyance of lands, the timber thereon is excepted and reserved by the grantors, with the privilege of removing the same within a stipulated time, and, within the time limited a portion of said timber is by them cut and severed from the realty, but it is not removed from the premises until after the limitation period has expired, it was held that, in the absence of a forfeiture clause in the deed, grantors' right to the timber so severed from the realty was not lost, nor their title thereto forfeited to the landowner, because of their failure to remove the same within the time stipulated in the deed. *Walcutt v. Treisch*, 82 Ohio St. 263, 29 L.R.A.(N.S.) 554, 92 N. E. 423.

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waived or forfeited his title to the timber by neglecting to remove it within the time, it must stand, for aught we can see, upon the footing of any other personal property of the vendee, which, by his fault or neglect, and without any fault of the vendor, is upon the land of the latter. It is very clear, we think, that, having been lawfully severed from the land, it has become personal property; and at any period before the expiration of the limited time, at least, the title is vested in the vendee as fully as any other chattels. If this be the case, it is difficult to see how the title can be lost by the neglect to remove it."

In the later case, *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119, the court went further and held, in a well-reasoned opinion, that an absolute grant of growing trees is not made a conditional grant by a stipulation, express or implied, as to the time of removal, and that if the grantee, after the expiration, either of a time expressly limited, or after a reasonable time, in the absence of express limitation, enters and cuts and carries away the trees so granted, he is liable for the entry, but not for the value of the trees; and the same conclusion was reached by the supreme court of Alabama in the recent case of *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 42 So. 858, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, where the authorities are reviewed in an elaborate opinion.

In *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821, the purchaser of certain timber was given four years to remove it, and at the expiration of that time some of the timber had been cut, but was lying on the land, and some had not been severed from the soil. The purchaser, being forbidden to remove any of this timber, sued for the value of all, cut and uncut. The trial court allowed a recovery for the cut timber, but not for that uncut, and the supreme court reversed the judgment, saying: "The law does not favor forfeitures, and will not enforce them, in the absence of clearly stated conditions of forfeitures." The foregoing three cases go farther than is necessary for us to go, as here we have only to consider cut timber, and our opinion is confined to the case before us.

In *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133, certain pine timber was conveyed to plaintiff, with a stipulation it should be cut and removed before a certain date, and the defendants bought the land with knowledge of all the facts. Held, that all timber severed from the soil before the date fixed became the personal property of the purchaser, and could be recovered by him in replevin.

In *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. 47 L.R.A.(N.S.)

Rep. 713, 66 N. W. 376, the supreme court of Michigan, approving the Wisconsin case, supra, held that failure to remove logs, after they are cut, within the time named in the contract, does not forfeit the title.

In *Walker v. Johnson*, 116 Ill. App. 145, it was held that such a time limit is a covenant to remove, and not a condition on which to base a forfeiture.

In *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, it was held that where in a deed of lands the timber was excepted, a stipulation that such timber should be removed in a given time did not make such exception conditional on removal; and the court stated, in *Hoit v. Stratton Mills*, supra, that, where there is "no express stipulation that the passing of the title should depend upon the removal . . . within the time fixed, . . . it does not necessarily follow as a matter of law (and, as a matter of fact, the parties do not generally understand) that the title is affected and the sale defeated by the nonperformance of that stipulation."

The decisions upon this question, as we have said, are in much conflict, and there are cases from courts of high repute that the title of the grantee terminates with his right of entry.

In *Boisaubin v. Reed*, 2 Keyes, 323, it was held by the court of appeals that "the vendee has no title to the timber by cutting logs and leaving them upon the land; but to complete his title he must also remove the logs within the term. . . . The defendant here cut down more timber than he could remove within his term. He knew that his right to enter and carry away expired at a particular day. He attempted to overreach the letter of his covenant, and must be allowed to bear his loss without remedy."

In *Saltonstall v. Little*, 90 Pa. 423, 35 Am. Rep. 683, there was a reservation from a deed of land of all the pine timber thereon, with the privilege to cut and remove the same within twelve years thereafter; and it was held that, the parties having fixed their own time for the removal of the timber, the right of entry, as well as the right of property therein, fell with the expiration of the time.

We are of opinion that the doctrine of the line of cases we have cited, sustaining the purchaser's title and right to the timber in controversy in the case before us, is the sounder and juster doctrine, and should be followed, rather than the harsh rule of forfeiture declared in New York and apparently in the Pennsylvania case cited.

Judgment reversed, and cause remanded for a new trial, appellee to pay the costs.

CALIFORNIA SUPREME COURT.
(In Banc.)

PASADENA CITY SCHOOL DISTRICT et
al., Appts.,
v.

CITY OF PASADENA et al., Respts.

(— Cal. —, 134 Pac. 985.)

Municipal corporation — power to control buildings of school district.

1. A municipal corporation may, under constitutional authority to make and enforce within its limits such police, sanitary, and other regulations as are not in conflict with general laws, compel a school district organized by the legislature within its territory to comply with its Building Code, notwithstanding the school district is organized by a general law, and its trustees are invested with power to control and manage all school property within the district.

Courts — jurisdiction — submission of controversy — scope of inquiry.

2. A submission of the question whether or not a municipal corporation has the power to enforce its ordinances in respect to

the construction of buildings by a school district organized within its territory, to the same extent that the ordinances would be enforceable against, and in respect to, any other building being built by an individual, gives the court no authority to determine the applicability of a provision of the ordinances respecting fire escapes.

(August 20, 1913.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Los Angeles County in defendants' favor in an action brought to restrain them from requiring plaintiffs to take out a permit and conform to the defendant city's ordinances before proceeding with the construction of high school buildings within the said city. Affirmed.

The facts are stated in the opinion.

Messrs. N. W. Bell and W. S. Wright, for appellants:

The proposed regulation by the city of school affairs is not at all "in harmony with general law," but entirely inharmonious

Note. — Police power of municipal corporation over school building within its limits.

The fundamental principles and reasons upon which the right of a municipal corporation to exercise police power is based are stated in 28 Cyc. 693, et seq. as follows: "The municipality as a governmental agency must, of course, have such measure of the power as is necessary to enable it to perform its governmental functions; and also those municipal functions which are 'necessarily and inseparably incident' to its existence as a corporation," and, although the municipality is "restrained from entering the field of general legislation or making declaration of public policy, . . . the legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power within their boundaries, . . . but it is never exclusive, as the legislature has no authority to divest itself of any of its sovereign functions or powers."

Applying these general rules, it would seem that the regulations of a municipal corporation made for the protection of the lives, health, and comfort of persons, and the protection of property, must of necessity apply to school buildings within its boundaries unless they conflict with some general law, or the legislature has expressly delegated the exclusive right so to regulate to a governmental agency other than the municipal corporation.

Aside from PASADENA CITY SCHOOL DIST. v. PASADENA, however, but one case (Bowers v. Wright, 4 W. N. C. 460) seems to have passed upon the question whether a public school building is subject to the police

regulations of the municipality within which it is located. In the Bowers Case the board of education, which by ordinance was vested with authority to have plans prepared, as well as with the direction of all matters in connection with the erection of school buildings contracted for the erection of a school building which did not conform to the regulations previously enacted by the city board of building inspectors, who brought suit to enjoin the construction pending approval of satisfactory plans, and it was held that the regulations of the building inspectors were binding upon the board of education, and that approval of the plans by such board was essential to the right to erect a school building.

A question closely analogous to that under consideration in the present note was raised in Kentucky Institution v. Louisville, 123 Ky. 767, 8 L.R.A. (N.S.) 553, 97 S. W. 402, wherein it was held that the general police power conferred upon a municipality does not include power to compel the placing of fire escapes upon an institution for the education of the blind which was entirely under the control and management of the state. As is indicated in the note to the L.R.A. report of this case it seems to be one of first impression on the question of the duty of the state institution to comply with municipal building regulations.

As to liability of municipal corporation for tort in connection with school buildings, see note to Columbia Finance & T. Co. v. Louisville, 25 L.R.A. (N.S.) 88.

As to municipal power in general over buildings and other structures as nuisances, see note to Evansville v. Miller, 38 L.R.A. 161.

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and inconsistent herewith, and violative of said political policy.

Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558; Dill. Mun. Corp. 4th ed. § 329.

The school district is a separate and distinct entity, independent of the city.

Board of Education v. Board of Trustees, 129 Cal. 605, 62 Pac. 173; Los Angeles City School Dist. v. Longden, 148 Cal. 381, 83 Pac. 246; Kennedy v. Miller, 97 Cal. 432, 32 Pac. 558; Hancock v. Board of Education, 140 Cal. 561, 74 Pac. 44.

As an exercise of the police power, the ordinances are in conflict with general law.

Kennedy v. Miller, 97 Cal. 431, 32 Pac. 558; Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44; Webster v. Board of Education, 140 Cal. 331, 73 Pac. 1070; Board of Education v. Board of Trustees, 129 Cal. 599, 62 Pac. 173.

The school system is a matter of general concern, not a municipal affair.

Hancock v. Board of Education, 140 Cal. 561; Los Angeles City School Dist. v. Longden, 148 Cal. 380, 83 Pac. 246.

The state is not bound by any words in the city charter giving the city power to regulate schools.

Witter v. Mission School Dist. 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; Savings & Loan Soc. v. San Francisco, 131 Cal. 363, 63 Pac. 665; Reclamation Dist. v. Sacramento County, 134 Cal. 480, 66 Pac. 668; Ruperich v. Baehr, 142 Cal. 193, 75 Pac. 782; Mayrhofer v. Board of Education, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646.

Messrs. William J. Carr, John Munger, and James S. Bennett, for respondents:

The school district has no governmental police powers. The Constitution confers the police power on the city; and the legislature, even by general law, cannot grant it to other public corporations.

Const. art. XI, § 11; Re Werner, 129 Cal. 567, 62 Pac. 97; Denman v. Webster, 139 Cal. 452, 73 Pac. 139; Skelly v. Westminster School Dist. 103 Cal. 652, 37 Pac. 643; Ex parte Roach, 104 Cal. 272, 37 Pac. 1044; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 772; Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Re East Fruitvale Sanitary Dist. 158 Cal. 453, 111 Pac. 368.

The mere fact that the state, in the exercise of the police power, has made certain regulations, does not prohibit a municipality from exacting additional requirements so long as there be no conflict between the two.

Re Hoffman, 155 Cal. 115, 132 Am. St. Rep. 75, 99 Pac. 517; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.
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Lorigan, J., delivered the opinion of the court:

In an agreed case between the Pasadena school district and the city of Pasadena submitted in the Superior Court of Los Angeles county under § 1138 of the Code of Civil Procedure, judgment was entered in favor of the city, and the school district appeals. The Pasadena school district embraces all the territory within the limits of the city of Pasadena and a large extent of contiguous territory. The city is a municipal, the school district a quasi municipal, corporation; each is a political governmental agency, and both distinct corporate entities. The city adopted a certain ordinance establishing an elaborate Building Code under which buildings to be constructed in the city are classified, fire districts established, and which provides that only certain classes of buildings shall be erected in certain fire districts. Other ordinances provide for the inspection of plumbing construction and electrical wiring and equipment of buildings, the issuance of permits, and the payment of fees to the city inspectors therefor, and it is made unlawful to commence the erection of any building or structure in the city (other than those erected by the United States), unless plans and specifications of the proposed building are submitted to the building inspector of the city and his permit for the erection thereof is first obtained and the requisite fees paid. The school district was proceeding to erect a concrete and steel school building in the school district within the city of Pasadena, at a cost of about \$400,000, without having submitted any plans or specifications, or obtaining any permit or paying any fees to the city, as provided for in said Building Code and ordinances. Thereupon the city threatened to arrest and prosecute the school trustees of the district and their builder and contractor. The school district claiming that it was not at all subject to the building regulations of the city and the city insisting that it was, this agreed case was made to settle that question.

In this controversy the only question for solution is one of power. Has the city of Pasadena the power to subject the school district erecting a school building within its corporate limits, but which also constitutes territory of the school district, to its regulatory building ordinances and Building Code in the exercise of its police power? Under the Constitution of this state (§ 11, art. 11) power is conferred upon every county, city, town, or township to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws. Un-

der this constitutional provision the city of Pasadena is vested with authority to make any such reasonable local police regulations as its legislative body may deem advisable, controlled only by the limitation that they must not conflict with any general laws enacted by the legislature on the subject. As said in *Ex parte Campbell*, 74 Cal. 20, 26, 5 Am. St. Rep. 418, 15 Pac. 318, 321: "Section 11 of article 11 is itself a charter for each county, city, town, and township in the state, so far as its local regulations are concerned; and nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section."

The sole contention of the appellant school district is that it is an independent governmental agency of the state created under a general law, which invests its trustees with the control and management of all school property within the school district, and hence it is insisted that its authority in that respect is conferred by such general law, and the district is not subject to be controlled in the exercise of its powers by the police regulations of a municipality purporting to apply to school districts in constructing buildings on its territory embraced within the municipal limits. This claim is particularly based upon the provisions of the Political Code adopting a uniform plan for a public school system, as found in title 3, chapter 3, thereof. The sections therein contained, as far as are pertinent to this inquiry, provide for the management and control of school property within school districts by the trustees or boards of education thereof, grants such school authorities the power to build schoolhouses by vote of the district or under a bond issue, and requires the county superintendent of schools, except in incorporated cities having boards of education, to approve all plans for schoolhouses, and, to enable him to do so, all boards of trustees, before adopting any plan for school buildings, must submit the same to the county superintendent for his approval. Under these enactments appellant contends that, in harmony with the constitutional provision requiring the legislature to provide for a system of common schools, it has created a scheme of complete government respecting school affairs, to the extent of vesting in the trustees of such districts power to locate, devise plans for, and build schoolhouses, and provide for their equipment, which necessarily confers the right to exercise the police power in the construction of such buildings, and is a general law on the subject, with the exercise of which by the school trustees, the municipality cannot interfere.

It is not claimed that there is any general

law conferring police power upon the trustees of school districts, except as it is insisted that these provisions of the Political Code have that effect. Nor as to these Code provisions is it claimed that they expressly give any power to such trustees, or enjoin on them the duty of adopting sanitary or building regulations or regulations in the nature of provisions for the public health, comfort, and safety in the construction of school buildings. It is insisted only that under the general power to control school affairs, and the particular authority to plan and erect school buildings, there is impliedly conferred full police power as to all matters pertaining to the erection of such buildings. We cannot agree with this view of appellant. School districts are quasi municipal corporations of the most limited power known to the law. Their trustees have special powers, and cannot exceed the limit. *Denman v. Webster*, 139 Cal. 452, 73 Pac. 139. Power in the school trustees to determine for themselves all matters concerning the school structures to be erected, to the exclusion of the right of the municipality to impose police regulations, cannot be implied from a grant solely of power to control school affairs of the district and plan and build schoolhouses. The constitutional right of the municipality to impose reasonable police regulations within its territorial limits, while it may be controlled by a general law, still such law must be, as is said in *Ex parte Campbell*, supra, a positive and general law upon that subject. The power conferred on the trustees of the school district to erect schoolhouses is to be taken only as a grant of power to effectually carry out the purpose of their creation. As a public agency of the state the trustees would have no such power unless it was specifically granted. As granted it is no different as a power from what is possessed under the corporation laws of this state by private corporations, as far as controlling corporate property and the right to erect structures thereon is concerned, nor different from the right which the owners of land have to control it and erect buildings upon it. The erection of school buildings necessitates the making of plans therefor just the same as it is necessary for private corporations or individuals to prepare them. These latter, when their structures are to be erected in the city, must prepare their plans therefor according to the building regulations thereof, and submit them for inspection to the municipality, so that the regulation which the city imposes may be conformed to. And as we do not think the provisions of the school law invoked by appellant constitute a general law relieving it from compliance with the

building regulations of the city of Pasadena, it was required to submit itself to and be governed by them.

It is claimed by appellant that if the power of the city authorities is sustained, the effect will be to deprive the state of its power through school trustees acting as a public agency of the state to regulate the construction of such buildings for school purposes as the state may desire. No such result will follow, nor is it to be apprehended. The state undoubtedly might provide, in the exercise of its police power and under a general law, for a complete system of regulation for the protection of the public health, safety, and comfort in the erection of school buildings. But this it has not done. It was not intended by the legislature, in empowering the trustees of school districts to control school property and erect schoolhouses, that the matter of regulations respecting school buildings should be left to the trustees; that a school district which embraces territory including a densely populated city, or where its territory as such is exclusively within the city in which the necessity for building regulations to promote the safety and security of the community is imperative, should not be controlled by the police power of the municipality, but might set at naught its regulations and construct a school building in any part of the city it saw fit, and of any kind of material or character it chose to, and thus in any serious conflagration jeopardize surrounding buildings and the lives of their occupants. While it is, of course, necessary that the safety and security of pupils should be assured in constructing school buildings, still other equally important interests of the inhabitants of a city are to be consulted. The legislature doubtless recognized that, in the matter of police regulations, though it had the power by general law to provide for them in school districts, yet their imposition might be safely left to the public bodies empowered by § 11 of article 11 of the Constitution, who would have more particular knowledge of the necessity and extent of imposing them. Different police regulations may be required in different municipalities, depending on the density of the population. The mere fact that the school district embraces a part of a city where building regulations are imperative for public safety could afford no reasonable excuse why, if it is necessary to construct a school building in the city, the trustees should not, in the interest of the public good, be subject to the same building regulations as others erecting structures therein are subjected to. In promoting the municipal welfare and safety, the school district ought to be subject to them. The only way

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it can be relieved from this would be by a general law on the subject, and as none exists, the municipal regulations control; and a school district desiring to erect a school building within the municipal territory, though it is likewise school district territory, must submit to its Building Code and ordinances and comply with their requirements.

The superior court in its conclusions of law from the stipulated facts, and likewise in the judgment, determined that the school district erecting school buildings within the territorial limits of the city of Pasadena was subject to the building regulations of the city enacted in the exercise of its police power, except as to one particular, namely, that it was not subject to the ordinances of the city relating to and governing the construction of fire escapes on school buildings erected by it two or more stories in height. This conclusion of the court was reached from a consideration of § 1890 of the Political Code, which provides that "each school building in the state shall, if two or more stories in height, be provided with suitable and sufficient fire escapes," and that the trustees of the district must provide them. If the consideration and construction of this provision was at all involved in the real controversy between the parties hereto under the agreed and stipulated facts in the case, we are not prepared to say that the conclusion of the superior court respecting its effect upon the ordinances of the city providing for the character of fire escapes was correct. But this particular matter was not involved. Appellant was not questioning the applicability of any particular provisions of the regulatory ordinances of the city, nor that a provision thereunder respecting fire escapes, or any other particular provision of the ordinances, was not binding on the school district. It submitted no plans showing whether it had provided for fire escapes at all, or whether, if it had, they were different from or the same as those which the ordinances required. It refused to submit to the city authorities any plans at all, or obey any of the regulatory ordinances, and was insisting solely that the city was without any power whatever to enact any ordinances respecting building regulations which would apply to or bind the school district in the erection of school buildings within the city. As is set forth in the statement of facts, the controversy and question directly submitted to the court for determination was "concerning the right and power of the city of Pasadena to enforce said ordinances . . . in respect to the construction of said school buildings to the same extent that said ordinances would be enforceable against and in respect

to any other building being built by an individual." This was the general and broad question presented under the statement of facts, and was all that the court was called upon to decide, and its determination should have been confined thereto.

For this reason the judgment of the Superior Court is modified by striking from the conclusions of law and the judgment as entered below the recitals therein in which it is determined that the school district is not subject to the ordinances of the city respecting the construction of fire escapes on school buildings of two or more stories in height, and that as so modified the judgment denying the school district an injunction be affirmed.

We concur: Angellotti, J., Shaw, J.;
Melvin, J.; Henshaw, J.; Sloss, J.

GEORGIA SUPREME COURT.

KATE G. HARDIN, Plff. in Err.,

v.

G. W. ADAIR et al.

(— Ga. —, 78 S. E. 1073.)

Judicial sale — right of bidder — laches.

While a bona fide bidder at a sheriff's

Headnote by BECK, J.

Note. — Rights and remedies of one whose bid at a judicial sale is ignored or disregarded.

As indicated in the title, this note is confined in general to a discussion of the rights and remedies of a bidder whose bid has been disregarded, and does not include cases in which the bid has been rejected for failure to comply with some condition of the sale, or for lack of responsibility of the bidder, or for any of the other reasons which lead the officer making the sale to reject the bid. Neither is the right of the court to reject a bid treated herein.

As to the right to withdraw property from an auction sale after it has been offered, see note to Tillman v. Dunman, 57 L.R.A. 784.

One whose bid has been disregarded by the sheriff upon an execution sale is not entitled to the property, but may come in to equity and compel the resumption of the sale at the point of the bid, and in case no higher bid is made, is entitled to have the property knocked off to him. *Duffy v. Ruth-erford*, 21 Ga. 363, 68 Am. Dec. 459. There is *dictum* to the same effect in *United States v. Vestal*, 12 Fed. 59.

In an *obiter* statement in *Richardson County v. Miles*, 7 Neb. 118, the court states that the highest bidder at a tax sale may enforce his bid by compelling the treasurer to issue him a certificate of sale for the land purchased.
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sale, who is able to comply with his bid, has a right, where his bid is wilfully disregarded by the officer offering the property for sale, to go into equity for the purpose of compelling a resale of the property, and to have the sale resumed at the point of his bid, provided such bidder acts with reasonable promptness, yet, if he delays for an unreasonable time, and is thereby guilty of laches, equity will interpose a bar to his action. In the present case, a delay of two years after the sale, before the bringing of the suit to compel a resale, showed a lack of due diligence and an unreasonable delay.

(July 18, 1913.)

ERROR to the Superior Court for Fulton County to review a judgment in defendants' favor in a suit to have a sale by the defendant sheriff set aside, and to compel a resale of the property. Affirmed.

Statement by Beck, J.:

On January 9, 1912, the plaintiff filed her petition against C. W. Mangum, sheriff of Fulton county, and George W. Adair, alleging as follows: Mangum, sheriff, exposed for sale, on January 4, 1910, a certain house and lot on West Peachtree street, in the city of Atlanta, under a certain *f. fa.* George W. Adair bid \$48,000 for the property, and petitioner bid \$50,000. Although she was the highest bidder, the sheriff wil-

A bidder may have the sale set aside where his bid, although the highest, was refused by the officer making the sale on the ground that the time to which the bidding had been limited had expired. *Parker v. Pratt*, 8 N. J. Eq. 104.

The objection of a bidder whose bid has been disregarded is frequently made when the question of the confirmation of the sale is before the court.

In *Spalding v. Murphy*, 63 Neb. 401, 88 N. W. 489, the court refused a confirmation where it was shown that the bid of one of the objectors to the confirmation was the highest bid at the sale, but was rejected after some dispute between the attorneys for the bidder who made the bid and the officers conducting the sale. The court states that it further appears that the bids of the successful bidder were not announced openly, but could be ascertained only upon inquiry, and that throughout the bidding the special master and such competitor were in frequent consultation, and in view of this fact, together with the fact that the highest bid was not accepted, there was great reason to doubt the fairness and impartiality of the sale, and it should be set aside.

In determining the question of confirmation of a sale, the court in *Gray v. Veirs*, 33 Md. 18, holds valid a sale of land to pay the purchase money thereof, where the trustees directed the auctioneer not to receive

fully and utterly disregarded her bid, and knocked the property down to Adair. On the day of the sale she went to the sheriff and offered to pay him the \$50,000, and he refused to take the money or to make her a deed. The property is worth \$100,000. She is ready and able to tender the \$50,000 into court, or give good security to guarantee an upset bid from her of \$50,000, if the court will order a resale of the property. She prays that the sale to Adair be set aside, that the property again be exposed for sale at the bid offered by petitioner, and that it be knocked down to her, or to such person as shall make a higher bid. The defendants demurred to the petition on various grounds, among others, on the ground that the petitioner's right of action was barred by reason of laches on her part in filing her equitable petition. The court sustained the demurrer generally, and the plaintiff excepted.

Mr. Lowndes Calhoun for plaintiff in error.

Messrs. Rosser & Brandon and Aldine Chambers for defendants in error.

Beck, J., delivered the opinion of the court:

Under the facts of the case the court properly held that the petition should be

the bid of the execution debtor. The execution debtor in this case produced at the sale a written authority from the third person to him as agent to buy the land at a certain price, and the bid which was rejected was largely in excess of this price, and only slightly larger than the bid of another purchaser to whom the land was struck off. It is stated by the court that the trustee was right in rejecting the bid, if the execution debtor claimed to have been acting as the agent of the third person when he made the bid which was rejected, because it exceeded the amount to which he was authorized to go: and if he made the bid on his own account it was equally proper to reject it, as he was the delinquent purchaser for whose fault the property had been decreed to be sold, and it was quite evident that his bid, instead of being made in good faith, was designed and intended to delay and harass the appellee in the recovery of his debt.

A sale was set aside in *Montclair Bldg. & L. Asso. v. Farmer*, — N. J. Eq. —, 67 Atl. 852, where the bid of a defendant in a foreclosure proceeding was not heard by the sheriff, and the property sold to another bidder who bid the same amount as the defendant.

Where, previously to the confirmation of the sale, the chancellor, to relieve the defendant in the execution, who bid at the sale, but whose bid was disregarded by the sheriff, extended to him the privilege of

dismissed. The plaintiff had been guilty of such laches as would render it clearly unjust and inequitable at this date to enforce her demand for a resale of the property. Section 4369 of the Civil Code is as follows: "The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights." And we can scarcely conceive of a clearer case for the application of the provisions in reference to the interposition of the equitable bar than this. The property sold for \$48,000. The plaintiff's own bid was \$50,000, according to her allegations. There is no allegation that, except in the matter of not crying the plaintiff's bid, the sale was not conducted in such a way as to give everyone attending full opportunity of bidding, and there is some presumption that the amount bid was in the neighborhood of the real value of the property. The property is alleged to be now worth \$100,000, a sum double in amount that of the plaintiff's bid. We do not think that a court of equity would tolerate—certainly not aid—a party in delaying the making of a claim, where delay would amount to giving to the party guilty of the delay an opportunity to specu-

giving bond and taking the property at his bid, and he failed to do this, whereupon the report of the sale was confirmed, such bidder has no cause for complaint. *Creutz v. Knecht*, 9 Ky. L. Rep. 772, 6 S. W. 717.

In continuing an injunction to restrain any further proceeding subsequent to the sale, the court in *Merwin v. Smith*, 2 N. J. Eq. 182, treats the fact that the sheriff declined receiving the bid of an agent of the execution creditors as a ground for the continuance of the injunction. Upon the sale the agent produced a written power of attorney, and offered to leave it with the sheriff, but the sheriff declined receiving his bid unless he gave security, and, not being able to do this, his bid was not received.

Cases in general in which the bidder has attached some condition to his bid have been excluded. The two following cases are illustrative of this class:

An execution creditor who bids at an execution sale, attaching a condition to his bid that the money be applied to his execution, cannot maintain an action on the case against the sheriff for refusing his bid. *Faunce v. Sedgwick*, 8 Pa. 407.

The court is of the opinion in *Downing v. Brown*, *Hardin* (Ky.) 181, an action to test the validity of the quashing of an execution, that a bid of \$200 payable in outlying lands is not such a bid as the sheriff is bound to accept, or in any way regard, upon the sale of a horse. *W. A. E.*

late in the value of the property which she seeks to have resold. In the two years between the sale and the filing of the petition in the present case, she had an opportunity to watch the trend of the market for real estate in the locality in which the property in controversy is situated, and to ascertain whether it would be profitable or not to press her claim of a right to a resale, or to abandon it. If bona fide she had desired to have a resale and to have opportunity of bidding on this property, she should have proceeded promptly. In reference to an analogous question, the substance of a decision of the Supreme Court of the United States is thus stated by Mr. Pomeroy, in his work on Equity Jurisprudence: "As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so, in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefited by a rise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible rise." 5 Pom. Eq. Jur. 47. Under the circumstances alleged in this petition, the plaintiff could not wait, and make her action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. Id. 47.

Although the statute in reference to the resale of land at administrator's sale, under Civil Code, § 6071, fixes no time limit within which sale must be had, this court held, in the case of *Saunders v. Bell*, 56 Ga. 442, that "where, at an administrator's sale, property is bid off and the bidder refuses to take it, and the administrator elects to resell, and proceed against the first purchaser for the deficiency arising from such sale, he must resell the property as soon as practicable; and if he delay, without the consent of the bidder, for twelve months, on the ground of stringency of the times, such delay will forfeit his right to recover, and a nonsuit will be properly awarded." In that case Bell was a bidder for the property, and it was knocked off to him at the amount of his bid, and afterwards he declined to comply with his bid and take the property. The administratrix, after delaying for twelve months, again offered the land for sale, and after receiving bids knocked it off at a certain price considerably less than Bell's bid at the first sale, and subsequently brought suit against Bell for the difference. Upon the trial of this suit the plaintiff was nonsuited upon the ground, among others, that she had not put up the land for resale until twelve months had elapsed from the 47 L.R.A.(N.S.)

time of the first sale. The excuse offered by the administratrix was the stringency of the money market and the hardness of the times. This court, in reference to this question, said: "We think that the court properly granted the nonsuit. The land should have been offered for sale again as soon as practicable. Any unreasonable delay, without the assent of the bidder, would put it in the power of the estate to speculate upon the bidder by selecting such time to resell as would be to the interest of the estate, and adverse to that of the bidder." See also the case of *Roberts v. Smith*, 137 Ga. 30, 72 S. E. 410. In the case of *Duffy v. Rutherford*, 21 Ga. 363, 68 Am. Dec. 459, it was ruled: "At a sheriff's sale, A bid \$1, B bid \$2, A bid \$3, B bid \$3.50; but the sheriff fraudulently refused to cry this bid, and knocked off the property to A at \$3. Held, that B had the right to go into equity, and have the sale resumed at the point of his bid." But in that case there is nothing to show that the plaintiff, asking the resale, did not move with reasonable promptness and diligence. Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

UNITED STATES BREWING COMPANY,
Plff. in Err.,
v.

DOLESE & SHEPARD COMPANY.

(259 Ill. 274, 102 N. E. 753.)

Corporation — lease to secure business — ultra vires.

1. A corporation organized to carry on a brewing business has no implied authority to rent land and construct a saloon and boarding house near a quarry, although it will thereby increase the market for its product.

Landlord and tenant — recovery of value of building on surrender of lease.

2. Although a contract by a corporation organized to conduct a brewing business, to rent land and erect thereon a saloon and

Note. — Power of brewing corporation to purchase or lease property to be used by retailers of its products.

As to power of corporation organized for the manufacture and sale of liquor to enter into contracts of guaranty or suretyship in behalf of its customers or prospective customers, see note to *Timm v. Grand Rapids Brewing Co.* 27 L.R.A.(N.S.) 186.

As to implied power of a railroad company to engage in or guarantee enterprise other than the transportation of goods or

boarding house, with a proviso that, should a prohibitory law be adopted, the lessor would pay it the value of the buildings, is *ultra vires*, the corporation may, under the common counts, recover the reasonable worth of the building when it passes into possession of the lessor, upon surrender of the lease.

Same — surrender of lease — refusal to take possession — effect.

3. One who lets land to another who is to erect thereon a boarding house and saloon, with the understanding that, upon the adoption of a prohibitory law, the lessor will pay the lessee the cost of the buildings, cannot defeat a recovery by refusing to take possession when the law is adopted and the property surrendered to him.

(June 18, 1913.)

passengers, see notes to *Western Maryland R. Co. v. Blue Ridge Hotel Co.* 2 L.R.A. (N.S.) 887, and *Louisville Property Co. v. Com.* 38 L.R.A. (N.S.) 830.

As to right of private persons to contest the power of a corporation to take or hold property, see note to *Kohlruss v. Zachry*, 46 L.R.A. (N.S.) 72.

See also notes in 1 L.R.A. 285, and 6 L.R.A. 290, as to the general question of power of corporations to make contracts, and doctrine of *ultra vires*; also note in 1 L.R.A. 458, on strict construction of corporate powers; and in 11 L.R.A. 845, on incidental powers of corporations.

There is a conflict of authority upon the question indicated in the title, arising from the application of accepted general rules to the purposes of particular corporations as expressed in their charters. The general rule in regard to incidental powers of corporations is thus stated in 10 Cyc. 1096: "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. An incidental power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it, that is to say, the powers necessary to accomplish the purpose of its existence, and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely, connected with its specific corporate purposes." But it is also said in regard to implied powers: "The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary in the sense of being appropriate, convenient, and suitable for such purposes, including the right of a reasonable choice of means to be employed. They must result from the charter by necessary implication, regard being had to the object and purpose of the corporation; and if there is any uncer-

ERROR to the Appellate Court, First District, to review a judgment reversing a judgment of the Municipal Court of Chicago in plaintiff's favor in an action brought to recover a certain amount alleged to be due plaintiff from defendant. Reversed.

The facts are stated in the opinion.

Mr. Walter H. Jacobs, with Messrs. Winston, Payne, Strawn, & Shaw for plaintiff in error.

Messrs. William J. Pringle and Edwin Terwilliger, Jr., for defendant in error:

Where a contract of a corporation is illegal or *ultra vires*, or beyond the power conferred upon it by its charter, it is absolutely void and without any legal effect. It cannot be ratified by either party. No

taint or doubt as to the terms of the charter, it must be resolved in favor of the public."

The mere statement of these general rules shows the probability of a conflict of authority in their application.

In conflict—in principle at least, though the facts were not entirely identical—with the rule laid down in *UNITED STATES BREWING Co. v. DOLESE & S. Co.*, it was held in *McQuaide v. Enterprise Brewing Co.* 14 Cal. App. 315, 111 Pac. 927, where the brewing company, in order to increase its sales of beer, leased the premises in question from the plaintiff, purchased bar fixtures and furniture, and sublet the property to various tenants for purposes of a saloon and hotel to sell the company's beer, that *ultra vires* was not a good defense to an action against the company for rent under the lease. One of the objects of the corporation was "to manufacture and sell beer." The court said: "One of the objects of defendant in procuring the lease was to sublet the saloon to one of its old customers who had been in the habit of buying beer from them, and who would buy beer and sell it at the saloon. It was one of its objects to find a market for its beer and increase its sale. With this purpose in view, it purchased the bar fixtures, and furnished the bar with such fixtures and furniture. It procured the place where the beer was to be sold, bought the furniture and bar glasses to be used in selling it, leased the property, and sublet it to the party who was to sell it. It would not have been in violation of law for the defendant to have purchased a lot and erected a building so as to have a place in which to dispose of its wares. If so, it was not in violation of law for it to lease such place and sublet it to others. Such transaction was germane to the purposes of the corporation defendant, and not foreign to it." The court also indicated that, except in cases of contract *malum in se* or *malum prohibitum*, the defense of *ultra vires*, where the contract was executed, was of very limited scope, and should be looked upon with disfavor.

performance on either side can give the unlawful contract validity, or be the foundation of any right of action upon it.

National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; Leigh v. American Brake-Beam Co. 205 Ill. 147, 68 N. E. 713; Chicago Pneumatic Tool Co. v. H. W. Jones Mfg. Co. 91 Ill. App. 547; Stacey v. Glen Ellyn Hotel & S. Co. 223 Ill. 552, 8 L.R.A. (N.S.) 966, 79 N. E. 133; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; Fritze v. Equitable Bldg. & L. Soc. 186 Ill. 183, 57 N. E. 873; Kelley, M. & Co. v. O'Brien Varnish Co. 90 Ill. App. 287; Converse v. Emerson, T. & Co. 242 Ill. 619, 90 N. E. 269.

It was also held in *McQuaide v. Enterprise Brewing Co.* supra, that the transaction of the brewing company in leasing a saloon and subletting it to tenants to sell the company's liquor was not prohibited by statute providing that "no corporation shall acquire or hold any more real estate than may be reasonably necessary for the transaction of its business or the construction of its works," since in this manner one of the objects of the corporation, namely, the manufacturing and sale of beer, would be carried out.

Also, in *Welsh v. Ferd Heim Brewing Co.* 47 Mo. App. 608, under a charter authorizing the brewing company "to handle, manufacture, and vend" intoxicating liquors, "and to that end to purchase, own, and lease . . . brewing establishments, . . . real estate, and such other property . . . incident or proper for carrying on the business of doing the things aforesaid," it was held that the company had power to lease a saloon building and to sublet it to a tenant to sell the company's liquors. It was said that a corporation might enter into any contract which was reasonably adapted to further the enterprise for which it was chartered, unless restrained by the charter; that the object of the company in this case, in renting the premises, was to introduce and sell its beer, and that such an object was within the plainly implied, if not the express, scope of its charter power.

In *Welsh v. Ferd Heim Brewing Co.* supra, the court drew a distinction between the contract of a brewing company by which it leased premises for a saloon, although with the object of subletting them to a tenant to sell its liquors, and a contract by the company to guarantee the payment of rent of a saloon keeper who agreed to sell the company's liquors, but who himself took the lease direct from the owner; it being held that the former class of contracts was within the power of the corporation, although in other cases cited it had been held to the contrary in the latter class. The court also distinguished the former class of contracts from those where the brewing

The contract was *ultra vires* on the part of the brewing company. It did not involve a single isolated transaction, but obligated the brewing company to engage in the separate, unauthorized business, for a period of twenty-five years, of operating a boarding house.

Brewer & H. Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; *Kraft v. West Side Brewery Co.* 219 Ill. 205, 76 N. E. 372; *People ex rel. Healy v. Illinois C. R. Co.* 233 Ill. 378, 16 L.R.A. (N.S.) 604, 122 Am. St. Rep. 181, 84 N. E. 368, 13 Ann. Cas. 285; *Midland Teleph. Co. v. National Teleg. News Co.* 236 Ill. 476, 86 N. E. 107; *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755.

company agreed to defray the expenses of a public festival, although the crowd thus assembled might consume much of the company's liquor.

The case of *Welsh v. Ferd Heim Brewing Co.* supra, was followed in *Glaas v. Ferd Heim Brewing Co.* 47 Mo. App. 639, but there was the additional circumstance in the latter case that the brewing company, which was sued for rent, had, in order to promote the sale of its liquor, signed a lease jointly with a third person who became the occupant of the property; so that there was evidence, it was said, which might be construed as tending to show that the defendant was a mere surety. But, without admitting that the evidence did show that the company was merely a surety, and without deciding whether the lease under the circumstances was *ultra vires*, the court held that, if the contract was *ultra vires*, it did not "belong to that class of unauthorized acts of a trading corporation which can be avoided in a collateral way, as by contesting the validity of a fair contract entered into bona fide."

In *Keating v. American Brewing Co.* 62 App. Div. 501, 71 N. Y. Supp. 95, while it was held that the question of *ultra vires* was not directly raised, the court said that, had it been raised, it was of the opinion that it could not have been determined as a matter of law that a contract by which the defendant brewing company agreed to purchase a quantity of hotel furniture was beyond the power of the corporation to make.

In several cases it does not appear that property leased by a brewing company was sublet, but, so far as the facts appear in the case, the company may have operated the saloon itself. Among probably other cases of this class, are *Brewer & H. Brewing Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49 (holding that a corporation organized to carry on a general brewing business, and to "manufacture and sell soda waters," could lease premises to be occupied exclusively as a "saloon," since it could not be said as matter of law that a "saloon" was a place where intoxicating liquors were

The question as to the power of the plaintiff to covenant to build and operate a boarding house for twenty-five years is directly, not collaterally, involved in this suit.

Brewer & H. Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49.

If any part of the consideration is illegal or *ultra vires*, the whole consideration is void, because public policy will not permit a party to enforce a promise obtained by an illegal or *ultra vires* promise, though connected with another promise which is legal. The undertaking was not severable.

Corcoran v. Lehigh & F. Coal Co. 138 Ill. 390, 28 N. E. 759; *People ex rel. Og-levée v. Smith*, 130 Ill. App. 407.

The contract was *ultra vires* on the part

of the plaintiff. It could not contract for the building and operation of a boarding house; certainly not for the building and operation of a saloon.

People ex rel. Moloney v. Pullman's Palace Car Co. 175 Ill. 150, 64 L.R.A. 386, 51 N. E. 664.

The contract contemplated that the defendant's obligation to pay might be determined, as it is claimed it was determined, by the result of a public election. It is against public policy and void.

Merchants' Sav. Loan & T. Co. v. Goodrich, 75 Ill. 555; *Jacobus v. Hazlett*, 78 Ill. App. 239; *Gregory v. King*, 58 Ill. 169, 11 Am. Rep. 56; *Elkhart County Lodge v. Crary*, 98 Ind. 241, 49 Am. Rep. 746; *Gillett v. Logan County*, 67 Ill. 256; *Crich-*

sold, and not a place for the sale only of soda water); *National Brewing Co. v. Ahlgren*, 63 Ill. App. 475 (holding that a brewing corporation was estopped to set up the defense of *ultra vires* after having received the benefit of the contract of lease); *Keeley Brewing Co. v. Emrick*, 64 Ill. App. 247 (following *National Brewing Co. v. Ahlgren*, supra, in holding that the brewing company was estopped to set up the defense of *ultra vires*; but stating also, as in the former case, that the renting of premises to be used as a place for the sale of beer was not in excess of the powers of a corporation organized for the purpose of brewing, manufacturing, "buying, and selling" liquors); *Northwestern Brewing Co. v. Manion*, 44 Ill. App. 424 (holding the brewing company estopped to set up the defense of *ultra vires* when sued on a contract of lease).

In *Kelley Brewing Co. v. Mason*, 116 Ill. App. 603, it was held that a corporation chartered "to carry on the business of brewing, manufacturing, buying, and selling" liquors had power to conduct a saloon; and that therefore a lease by the company of a three-story and basement dwelling house, the basement floor of which had been converted into a storeroom and saloon, was not *ultra vires* the corporation, although it was said that it did not appear whether the company used the basement for a saloon. It was said that the conducting of a saloon was clearly within the charter powers of the brewing company, and if the basement floor and rooms above were not used by the company in its business, such facts should have been shown before making a claim of the invalidity of the lease.

In *Klein v. Independent Brewing Asso.* 231 Ill. 594, 83 N. W. 834, the court said that it was not *ultra vires* a brewing corporation to acquire real estate for the purpose of procuring a place for the exclusive sale of the company's beer, thereby increasing and promoting the business of the corporation. The properties purchased in this instance were "beer stands;" but the purchases it was said were not attacked on the ground of lack of authority on the part of the corporation to make them.
47 L.R.A. (N.S.)

In *Conservative Realty Co. v. St. Louis Brewing Asso.* 133 Mo. App. 261, 113 S. W. 229, the provisions of a lease of a saloon by a brewing company were upheld, and the court apparently regarded a lease by the corporation of a saloon building in which its liquors would be sold by a subtenant as valid, although the evidence in this instance merely showed that the property was rented for saloon purposes, and probably to increase the sale of the company's liquor, and did not show whether the party renting the saloon was an independent proprietor or the agent of the brewing company. It was said, however, that it was not unlawful for a brewing corporation to lease premises for the purpose of having its beer sold in them.

While this note does not include in general cases as to the power of a brewing company to make a loan of money, whatever the purpose of the loan, attention is called to the case of *Kraft v. West Side Brewery Co.* 219 Ill. 205, 76 N. E. 372, cited in *UNITED STATES BREWING CO. v. DOLESE & S. CO.*, in which the question arose as to the power of the brewing company to make a loan for the purpose of erecting a saloon building for the sale of the company's liquor; and it was held that the transaction was not *ultra vires*.

Attention is also called to the case of *Falk v. Ferd Heim Brewing Co.* 10 Kan. App. 248, 62 Pac. 716, as representative of possibly other cases which, owing to the ground of the decision, are beyond the scope of the note. In that case, where the brewing company, in order to increase its sales of liquor, induced the defendants to erect a building upon their lots in prohibition territory, the company furnishing the money and taking a mortgage upon the building as security, and purchasing the necessary fixtures and furniture for the saloon, it was held that the brewing company could not recover upon the notes and mortgage, since they were given as part of an illegal transaction, the object of which was to further the sale of liquor in prohibition territory.

R. E. H.

field v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; Goodrich v. Tenney, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; Givens v. Rogers, 11 Ala. 543; 15 Am. & Eng. Enc. Law, 2d ed. 934.

The saloon business in the building and in the district never ceased in fact. Therefore it never "became necessary to suspend the saloon business," etc., "on account of the territory becoming local option," etc.

Old Town v. Dooley, 81 Ill. 255; Lockwood v. Mildeberger, 159 N. Y. 186, 53 N. E. 803; Webster's Dict.; Standard Dict.; Brewer & H. Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; O'Byrne v. Henley, 161 Ala. 620, 23 L.R.A.(N.S.) 496, 50 So. 83.

There is neither allegation in the declaration nor proof that the brewing company delivered receipts for expenditures immediately on their payment; this was a condition precedent to the right of recovery. There was no waiver by the defendant.

Downey v. O'Donnell, 86 Ill. 49; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Streeter v. Streeter, 43 Ill. 165; Vincent v. Stiles, 77 Ill. App. 200; Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; 6 Cyc. 88; 4 Am. & Eng. Enc. Law, 626.

Farmer, J., delivered the opinion of the court:

Plaintiff in error, hereafter called plaintiff, brought this action of assumpsit in the municipal court of the city of Chicago against defendant in error, hereafter referred to as defendant, for the recovery of \$10,000 alleged to be due plaintiff from defendant. Plaintiff is a corporation organized under the laws of Illinois "to manufacture and sell all kinds of beer, ale, and porter, to buy and sell all kinds of brewers' materials and supplies, and to carry on a general brewer's business in all its branches." Defendant is a corporation organized "to quarry stone, sand, clay, earth, and gravel, to manufacture and deal in stone, brick, lime, and cement, and deal also in sand, clay, earth, gravel, sewer and water pipe, stucco, lumber, and building materials of all kinds, coal and ice, and to contract for, make, and construct public and private improvements in which any such materials are employed, including roads and bridges." Defendant's quarries were near the village of Gray, or Hodgkins, in Lyons township, Cook county, about 15 miles from the business district of the city of Chicago. The village is situated on the Atchison, Topeka, & Santa Fé Railroad, and is about three quarters of a mile from the quarries. In 1905 there were but few houses in the neighborhood where em-

ployees of defendant could live, and the transportation facilities for conveying workmen to and from the quarries were inadequate and inconvenient. Defendant employed between 100 and 200 workmen, and in 1905 it employed an architect and caused plans to be prepared for a building it proposed to erect for a boarding house to accommodate its employees. Before any work was done by defendant on the building, negotiations were entered into by it with plaintiff for the construction of the building by plaintiff. These negotiations resulted in an agreement being reached by which plaintiff was to erect the building, part of it to be used as a saloon. On November 5, 1905, defendant leased to plaintiff, for a term commencing January 1, 1906, and ending December 31, 1930, a tract of land described 100 feet wide by 200 feet deep, upon which plaintiff agreed to erect at its own expense, and maintain for the term of the lease, unless sooner terminated under the provisions thereof, "a certain building, and to use and operate the same continuously for the entire term, aforesaid, as a saloon and boarding house, said building to cost the sum of \$6,700." Plans and drawings for the building were made part of the agreement. Plaintiff erected an L-building 24 feet wide by 177 feet long, and an addition 20 feet by 30 feet. The portion of the building devoted to use for boarding house purposes consisted of a kitchen, 24 feet by 24 feet, a dining room, 24 feet by 80 feet, forty-three double bedrooms, and an apartment for the tenant. The part of the building devoted to saloon purposes was 24 feet by 30 feet. The lease contained provisions concerning its termination by defendant upon notice, and for the appointment of appraisers to value the building and make an award for the payment therefor by defendant, if it elected to terminate the lease before its expiration; but those provisions are not here involved. The lease provided that, "should the district within which the premises herein demised are located become a prohibition or local option district, so that, on account thereof, it shall be necessary to suspend the saloon business on said premises within three years from the date of this contract, then no such appraisal shall be made, but said first party [defendant] shall pay to the said second party [plaintiff] the cost price of the building and improvements on said premises, such cost price not to exceed, however, the sum of \$10,000." The lease authorized plaintiff to sublet the building, and after its completion plaintiff leased it at a monthly rental of \$200, with a provision that if the lessee or his assigns purchased from plaintiff all beer sold on

the premises, a deduction or rebate would be allowed of \$120 on each month's rent. The building was conducted as a boarding house and saloon from the time of its completion. At the township election held April 7, 1908, the township of Lyons became prohibition or antisaloon territory, and on April 9th plaintiff notified defendant, in writing, of that fact, demanded the payment of \$10,000, and offered to surrender the building immediately upon payment. Defendant did not make the payment, and appears to have ignored the demand. This suit was begun for the recovery of \$10,000, on August 4, 1908. The declaration consisted of a special count on the contract and the common counts. Defendant pleaded the general issue and a special plea that the contract declared on in the special count was *ultra vires*. The cause was, by agreement, heard before the court without a jury. The court found the issues for the plaintiff, assessed its damages at \$8,490.12, and rendered judgment therefor. Defendant prosecuted an appeal to the appellate court for the first district, and that court reversed the judgment of the municipal court. The appellate court was of opinion the contract was *ultra vires* the plaintiff corporation; that there could be no recovery upon the common counts, under the evidence, upon an implied contract, and the cause was therefore not remanded. A writ of certiorari was granted by this court.

The view of the municipal court, as indicated by propositions of law held and refused, was that the contract was *ultra vires*, but that plaintiff was entitled to recover the reasonable value of the building under an implied contract. While plaintiff insists it is entitled to recover upon an implied contract, if the written contract is *ultra vires*, it contends that said written contract was not *ultra vires*, and this appears to have been the principal theory upon which the case was tried in the municipal court. We agree with the municipal and appellate courts that it was beyond the power of plaintiff to make the contract, and that the contract is void.

Plaintiff relies upon the rule announced in a number of cases, that it is within the power of a corporation to adopt any proper and convenient means tending directly to accomplish the purposes for which it was organized, not amounting to the transaction of a separate, unauthorized business. Among other similar cases, reliance is placed upon *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286, and *Kraft v. West Side Brewery Co.* 219 Ill. 205, 76 N. E. 372. In the *Heims Brewing Co.* Case the corporation was organized with

power "to acquire, own, and use all necessary property and means to prosecute and conduct the business of brewing and disposing of beer, with all such powers as shall be essential and incident to the convenient and successful operation of a brewery." It leased a building for a period of five years for saloon purposes. Before the term expired, it abandoned the premises and refused to pay the rent. When suit was brought, it defended on the ground that the contract was *ultra vires*. A part of the contract with the owner of the building was that the owner would not engage in the saloon business during the period of the lease, nor rent other property owned or controlled by him in the block for saloon purposes. The object of the contract and lease was to promote the business for which the brewery was organized by increasing the sale and consumption of beer manufactured by it, and it was held the contract was within the powers of the corporation, and was valid and binding. In the *Kraft Case* the brewery loaned Kraft money to erect a building for a saloon, living apartments for the owner, and for a hall in the upper story. The brewery was to be given a lease upon the premises, and no other beer than that manufactured by it was to be sold thereon during the term of the lease. A mortgage was given the brewery to secure the payment of the loan, and when it instituted proceedings to foreclose the mortgage the defense of *ultra vires* was interposed. This court held that the loan was made for a purpose not too remotely connected with the promotion of the business of the brewery, and that it was within the implied powers of the corporation.

We do not think the above cases, and others relied upon, sustain plaintiff's contention. It is probably true that the boarding house would be of benefit to the saloon because of increased patronage at the bar; but because a corporation like plaintiff might do some things under its implied powers to promote its business, it does not follow that it may engage in any line of business or occupation not authorized by its charter powers, because such business or occupation would promote the business for which the corporation was organized. It would be rather a far stretch of corporate powers to say that a corporation organized to manufacture and sell beer, ale, and porter, and carry on a general brewer's business in all its branches, could establish and operate boarding houses for the purpose of increasing the sale of its beer. This court said in *Fritze v. Equitable Bldg. & L. Soc.* 186 Ill. 183, 57 N. E. 873: "By an implied power is meant one that is directly and immediately appropriate to the execution of the

specific power granted, and not one that has slight or remote relation to it." In *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, the court said: "Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be, in exercising powers conferred by its charter, a corporation 'may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business.'" Here more than three fourths of the building and of the investment for its construction was for boarding house purposes, which was a business plaintiff had no power, either express or implied, to engage in. If it did have such power, we cannot see where the line could be drawn against its engaging in any business in connection with its manufacture and sale of beer that would promote that object. In our view of the case no action could be sustained upon the contract.

In *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, it was held that, where a corporation acts within the general scope of its powers, it, as well as persons dealing with it, may be estopped to deny that it has complied with the legal formalities prerequisite to its existence; but where the contract is beyond the powers conferred upon the corporation by law, neither the corporation nor the party dealing with it can be estopped from asserting that the contract was *ultra vires*. Such a contract cannot be ratified, and the courts can afford no remedy upon the contract by affirming or enforcing it. This was substantially repeated in *Steele v. Fraternal Tribunes*, 215 Ill. 100, 106 Am. St. Rep. 160, 74 N. E. 121. If plaintiff has any right to recover, therefore, it is not under the written contract, but it is because, defendant having received the benefit of the contract, the law implies an obligation on its part to pay what the building is reasonably worth.

In *Leigh v. American Brake-Beam Co.* 205 Ill. 147, page 152, 68 N. E. 713, the American Brake-Beam Company, a manufacturing corporation, loaned its money to individuals and took their notes therefor. The notes not being paid, an action was brought to recover the amount. The declaration contained two special counts on the notes, and also the common money counts. It was held the corporation had

no authority to loan money; that the transaction was *ultra vires*, and no remedy could be enforced upon the contract. A recovery, however, was sustained under the common counts upon a contract implied by law that the borrowers would return the money they had received. After stating that no action could be maintained upon the contract, the court said: "That rule of law, however, does not prevent a recovery from the defendant of the moneys of the plaintiff received by him. Although a party is not liable to pay according to a contract which is *ultra vires*, that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract; and the courts will give relief where it can be given independently of the contract. It would be unjust to hold that one who has received money or property under a contract which is *ultra vires* need not account for it, because the contract was illegal; but the law implies a contract to return what has been received. Where a contract is not *malum in se* or *malum prohibitum*, and it has been executed or benefits have been received, the party benefited, whether the corporation or individual, will not be permitted to retain the fruits of the transaction without compensation. It has sometimes been said that, where the contract has been in good faith fully performed by one party, the other party, who has had the benefit of the performance of the contract, will be estopped to plead its invalidity. *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563; *Darst v. Gale*, 83 Ill. 136; *Kadish v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236. Although this has been said in cases where the contract was not *ultra vires* in the proper sense, and the language was not, perhaps, strictly accurate, it was intended to declare the sound and wholesome doctrine that a party cannot retain the benefits, money, or property received under a contract which is void merely for want of power to enter into it, without making compensation therefor. Where a contract is *ultra vires*, and a corporation has received money under it which, in equity and good conscience, belongs to another, and which it ought to pay over, it is liable for it in an action for money had and received, with interest after demand. *Brennan v. Gallagher*, 199 Ill. 207, 65 N. E. 227. The converse of the proposition is equally true, and an action for the recovery of the money would not enforce or affirm the original contract, but would disaffirm it. 27 Am. & Eng. Enc. Law, 376. As said by the Supreme Court of the United States in *Central Transp. Co.*

v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478: 'The action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.' The recovery in this case was for moneys had and received by the defendant for the use of the plaintiff, and this action will lie whenever one person has received money which, in justice and right, belongs to another, and which should be returned. It is an equitable action to recover back money which the defendant ought to refund."

Under the rule above announced, which is well supported by authority, we are of opinion the plaintiff was entitled to recover, under the common counts, the reasonable worth of the building. Pullman's Palace Car Co. v. Centfal Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

The contract was not immoral nor contrary to public policy, because it might be determined by the result of an election. At the time it was made, there was no law authorizing a township to vote upon the question of becoming antisaloon territory, and no election was held upon that question for two and a half years after the contract was entered into. It was not, therefore, made in view of a pending election, but was merely a precautionary provision for the protection of plaintiff in the event of its being made unlawful, within three years, in Lyons township, to sell intoxicating liquors.

It is also insisted by defendant that there can be no recovery because it is not in possession of the building, or was not at the time of the trial, but that the tenant of plaintiff continued in possession thereof. When plaintiff elected to determine the lease because the township had become antisaloon territory, and demanded payment of \$10,000, it tendered defendant the building upon the payment of the money. Defendant neither paid nor took possession of the building, and at the time of the trial it was still occupied by the tenant to whom plaintiff had rented it. He testified he had never paid plaintiff any rent after its notice to and demand upon defendant, but that he was instructed by plaintiff to deposit the rent money in the bank at La Grange. We do not think defendant could defeat its liability to plaintiff by refusing to take possession of the building. So far as this record shows, defendant was receiving, all the time since April, 1908, the 47 L.R.A.(N.S.)

benefits for which it leased to plaintiff the ground upon which the building was erected.

On the trial of the case in the municipal court, no proof was offered of the reasonable value of the building. Plaintiff insisted upon its right to recover the cost price of the building, not to exceed the sum of \$10,000, and only offered proof as to the cost of the improvement. The trial court disallowed the cost of constructing out-buildings amounting to \$1,025, the cost of a hot-air pump, and some other items, reducing the amount of the judgment as rendered to \$8,490.12. The items disallowed by the court were disallowed for the reason that the court was of opinion they were not contemplated by the parties when the lease was made. The judgment, as we understand it, is for the cost of what the court understood to be the building proper, and was not for its reasonable value at the time of the termination of the contract. The cost and the reasonable value are not necessarily the same. There was no basis in the proof for a judgment for the reasonable value of the improvement, and the court erred in rendering judgment for the amount the improvement cost.

We think the Appellate Court properly reversed the judgment, but in our opinion the case should have been remanded to the Municipal Court for another trial. The judgments of the Appellate and Municipal Courts are reversed, and the cause remanded to the Municipal Court for further proceedings not inconsistent with this opinion.

Petition for rehearing denied October 8, 1913.

KANSAS SUPREME COURT.

STATE OF KANSAS, Appt.,

v.

ELLA G. DIXON et al.

(90 Kan. 594, 135 Pac. 568.)

Limitation of actions — action by state.

1. As a general rule statutory limitations do not run against the state when it sues in its sovereign capacity, unless the statute expressly includes the state, or the legis-

Headnotes by JOHNSTON, Ch. J.

Note. — Revival of judgments in favor of the state.

As to applicability of statute of limitations to action by agencies of state, see notes to Eastern State Hospital v. Winston, 3 L.R.A.(N.S.) 746, and Warren County v. Lamkin, 22 L.R.A.(N.S.) 921.

As to effect of bar of statute of limita-

lative intention to include it is shown by the clearest implication.

Judgment — revivor — in favor of state.

2. The Code provision limiting the time within which a revivor of an action or judgment must be had in case of the death of one or more of the parties thereto does not include the state or apply to it, and, in order to keep alive a judgment in favor of the state perpetually enjoining the maintaining of a common nuisance under the prohibitory liquor law on certain premises, and adjudging that the attorneys' fees and costs in the case be a lien thereon, it is not necessary that an execution be issued upon the judgment within five years from the rendition of it, as is required to prevent dormancy of an ordinary judgment.

(October 11, 1913.)

tions against action to enforce judgment, upon right to issue execution thereon, see note to *Brown v. Bell*, 23 L.R.A. (N.S.) 1096.

While the cases are numerous which deal with the question whether statutes of limitation in regard to the bringing of actions in general apply to the government and its subdivisions, there seem to be few authorities upon the question as to whether the rules in regard to dormancy and revival of judgments apply to a judgment in favor of the state. The weight of authority supports the decision in *STATE v. DIXON*, although, as indicated in the note, there are several exceptions to the general rule.

In 25 Cyc. 1006, in regard to the applicability of statutes of limitations in general to the government, it is said: "In the absence of express statutory provision to the contrary, statutes of limitations do not, as a general rule, run against the Sovereign or government, whether state or Federal. But the rule is otherwise where the mischiefs to be remedied are of such a nature that the state must necessarily be included, where the state goes into business in concert or in competition with her citizens, or where a party seeks to enforce his private rights by suit in the name of the state or government, so that the latter is only a nominal party."

And in 17 Cyc. 1004, it is said: "At common law a plaintiff who had recovered a judgment in a personal action could neither sue out his original execution nor revive the judgment by scire facias after the lapse of a year and a day, but he was obliged to bring an original action in which he could offer a judgment as evidence of the debt. But in real actions where land was recovered, demandant after the year might take out scire facias to revive his judgment. To make the form of the procedure more uniform, the statute of Westminster II. (13 Edw. I.) gave scire facias to plaintiff in a personal action to revive his judgment where he had omitted to sue execution within the year after judgment was obtained."

These common-law rules do not, however, appear to have been applied in the case of

A PPEAL by the State from a judgment of the District Court for Geary County in defendants' favor in a proceeding to enforce a lien for costs and attorneys' fees against certain premises upon which the owners had been enjoined from maintaining a liquor nuisance. Reversed.

The facts are stated in the opinion

Mr. William W. Pease, for the State:

The decree of court granting a perpetual injunction against the premises prescribed, and creating the lien thereon, being made in the lifetime of Mary Dixon, and prior to the sale and transfer of said premises, was perpetual, and did not become dormant at her death.

Snyder v. State, 40 Kan. 543, 20 Pac. 122;

Karcher v. State, 80 Kan. 762, 104 Pac. 568.

a judgment in favor of the Crown. Anonymous, 2 Salk. 603, where it is said: "In the case of the King there need not be any scire facias after the year."

In *People ex rel. McDougall v. Peck*, 5 Ill. 404, it was held that the state could compel the issuing of execution upon a judgment in favor of the auditor of public accounts, although more than a year had elapsed after the rendering of the judgment, and no execution had been previously issued. The court said: "It is not necessary to take out a scire facias on a judgment in favor of the auditor, notwithstanding more than a year and a day has intervened since the rendition of the judgment. The auditor is the representative of the people, and the law does not impute laches to them."

And in *Com. v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 33, it was held that the lien of the state created by a judgment in its favor was not lost by lapse of time, the state being exempt from the operation of statutes respecting the revival of judgments, and that this principle applied to a judgment recovered in the name of the treasurer for the use of the commonwealth. The theory of the decision is that the ancient rule that the Sovereign is exempt from the operation of statutes in which he is not named applies to the governments of this country, so far as it belonged to the King in the capacity of *parens patriæ* or "universal trustee;" that the people ought not to lose their rights through the laches of public servants, and that the legislature shall not be taken to have postponed a public right to that of an individual, unless such an intent is manifested by explicit terms; also that, although the suit in this instance was in the name of the treasurer, he was but a trustee for the commonwealth, which was the actual party.

To the same effect is *Joaselyn v. Stone*, 28 Miss. 753, holding that a lien created by a judgment in favor of the commissioners of the sinking fund, being the property of the state, and subject to treatment in all respects as though it were in the name of the state, was not affected by a statute lim-

The provisions of the statutes as to dormant judgments and revivor do not apply in this case.

State ex rel. Curtis v. Durein, 46 Kan. 700, 27 Pac. 148.

A statute of limitation does not run against the state.

Osawatomie v. Miami County, 78 Kan. 270, 130 Am. St. Rep. 369, 96 Pac. 670; Wood v. Missouri, K. & T. R. Co. 11 Kan. 349; United States v. McElroy, 25 Fed. 804; State v. School Dist. 34 Kan. 237, 8 Pac. 208; Roberts v. Missouri, K. & T. R. Co. 43 Kan. 113, 22 Pac. 1006; Schuyler County Bank v. Bradbury, 56 Kan. 355, 43 Pac. 254; Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630.

Mr. John Dawson also for the State.

Mr. John T. Dixon, for appellees:

An action to enforce a lien in a case of this kind is an action on a liability created by statute, and is therefore barred by the statutes of limitation in three years.

State v. Pfefferle, 33 Kan. 718, 7 Pac. 597.

The judgment was against Mary Dixon et al. Mary Dixon died May 22d, 1909, and such judgment then became dormant.

Ballinger v. Redhead, 1 Kan. App. 434, 40 Pac. 828; Manley v. Mayer, 68 Kan. 377, 75 Pac. 550, 1 Ann. Cas. 825; Updegraff v. Lucas, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860; Rev. Stat. 1909, § 6031.

An action cannot be maintained on a dormant judgment.

Mawhinney v. Doane, 40 Kan. 676, 17 Pac. 44.

iting the duration of liens in general. There was, however, the additional circumstance that the judgment was recovered prior to the passage of the statute. But the decision appears to be based partly, at least, upon the principle that the state is exempt from statutes of limitation in which it is not specifically named.

It has been said that the same principle which exempts a state from the operation of statutes in bringing a suit must also exempt her from their operation in impairing her right when judgment is obtained. Ibid.

The principles announced in Com. v. Baldwin, supra, were approved in McKeehan v. Com. 3 Pa. 151, although the question in the latter case appears to have been one as to the running of the statute of limitations against the bringing of an action by the state.

In Booth v. United States, 11 Gill & J. 373, it was held that a provision of a colonial statute limiting to twelve years the time within which a judgment should be admitted in evidence did not apply to the United States where the statute contained also a provision excepting judgments in the name or for the use of the King, his heirs and successors, the United States being regarded as succeeding to the rights of the King in the exercise of any power which, if not granted to the Federal government, would have fallen to the state, and in regard to which the state would have been excepted from the operation of the statute.

Accordingly, it was held in Booth v. United States, supra, that the United States could maintain scire facias to revive a judgment in its favor seventeen years after the rendition of the judgment, notwithstanding the general twelve-year statute of limitations.

An early statute in Virginia provided that "no time shall bar the commonwealth of execution." Nimmo v. Com. 4 Hen. & M. 57, 4 Am. Dec. 488, where it was held that the state could sue out scire facias to revive a judgment, notwithstanding the general L.R.A. (N.S.)

eral statutory limitation for the suing out of scire facias had expired.

But under act of Congress providing that "judgments or decrees rendered in the circuit or district courts within the state shall cease to be liens in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens therein," it was held in Thompson v. Avery, 11 Utah, 214, 39 Pac. 829, that a lien for a fine or penalty obtained in a criminal prosecution in favor of the United States had ceased under the territorial statute of Utah providing that, from the time that a judgment was docketed, it became a lien upon the real estate of the judgment debtor, and that the lien should continue for five years. In regard to the contention that statutes of limitations do not run against the government, it was said that the government by its legislation had stepped into the territorial forum, and in order to have the benefit of judgment liens, had placed itself upon the same footing as domestic judgment creditors; that no reasonable construction of the act of Congress would permit the United States to avail itself of just enough of the statute to give it the benefit of the lien, and warrant repudiation of that portion of the statute providing for its extinguishment; that the statute did not restrict a lien which otherwise would be unlimited, but created a judgment lien which otherwise would not exist; and that, while the judgment in favor of the United States might not be barred by the statute of limitations, the judgment lien was extinguished by the expiration of the five years. It was said also that the United States had never claimed any lien except such as was expressly provided by statute, and that at common law fines in criminal cases never were protected by liens on lands.

And in Strong v. State, 57 Ind. 428, it was held that an action for revival of and execution upon a judgment in favor of a state for a fine was barred by a twenty-year statute of limitations.

But while, by reason of positive enactment by Congress, the lien of the United

When the state is not acting in the exercise of any sovereign right, the statute of limitation may be invoked against it.

Osawatomie v. Miami County, 78 Kan. 270, 130 Am. St. Rep. 369, 96 Pac. 670; *Anderson v. Ritterbusch*, 22 Okla. 761, 98 Pac. 1013; *State ex rel. Bradford v. Stock*, 38 Kan. 154, 16 Pac. 106.

The provisions of the Kansas statutes providing the time and manner in which judgments may be revived are not statutes of limitation.

Steinbach v. Murphy, 70 Kan. 487, 78 Pac. 823; *Willoughby v. Kelly*, 19 Okla. 123, 91 Pac. 874; *Spaeth v. Sells*, 176 Fed. 800; *Berkley v. Tootle*, 62 Kan. 703, 64 Pac. 620; *Reaves v. Long*, 63 Kan. 700, 66 Pac. 1013.

Johnston, Ch. J., delivered the opinion of the court:

In an action by the state against Mary Dixon and others brought under a provision of the prohibitory liquor law, the defendants, their agents, successors, and assigns, and all other persons, were perpetually enjoined from keeping and maintaining, and from permitting others to keep and main-

tain, a liquor nuisance on certain premises in Junction City. The judgment was rendered on November 18, 1908, and, among other things, it was adjudged that the fees and costs of the proceeding should be a lien upon the premises. Pending an appeal from that judgment, and on May 22, 1909, Mary Dixon died. On November 4, 1910, the appeal was dismissed in the supreme court, and the enforcement of the judgment was directed. The attorneys' fees and costs adjudged to be a lien on the premises were never paid, and in this proceeding, which was brought June 29, 1911, the state asked that the lien be foreclosed and enforced as against the premises. The appellees, who now own the property, contended that the judgment was dormant and ineffectual, because no steps had been taken to revive it after the death of Mary Dixon. More than two years had elapsed between her death and the bringing of this proceeding. On the other hand, appellant contended that the provisions of the statute relating to dormancy of judgments did not operate to bar the state from the enforcement of its judgment, and especially of judgments of this

States on property within a state ceases within the period prescribed by the statute of the state as to such liens in general, the United States is not barred by general statutes of the state barring the maintenance of actions or the revival of judgments after a certain time, from reviving the lien through a scire facias proceeding. *United States v. Houston*, 48 Fed. 207. The court said: "The maxim, *Nullum tempus occurrit regi*, is of universal application, except where by express statute a period of limitation is prescribed;" that the statute of the state in question did not make any such prescription respecting actions in its favor, and if it had, such local regulations could have no application to the rights of the general government.

In *Com. v. Snyder*, 4 Pa. Co. Ct. 261, it was held that a decree for the payment of a fine and costs need not be revived by scire facias within the statutory period, in order for the state to compel payment by writ of fi. fa. It was said that a judgment in favor of the commonwealth was not within the statute.

Under a statute providing that "every statute of limitations, unless otherwise expressly provided, shall apply to the state," it was held in *State v. Mines*, 38 W. Va. 125, 18 S. E. 470, that the state was barred by the Code from execution upon a judgment after the expiration of the ten-year period provided in ordinary cases.

It was held also in *State v. Mines*, supra, that, although at one time an exception had been made to the above statute by another act providing that there should be no limitation to proceedings on judgments on behalf of the state, upon the repeal of the later act, the former statute again ap-

plied, so as to bar execution by the state after the statutory period.

State v. Mines, supra, was approved and followed in *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476.

An assignee of a judgment in favor of the state is bound by a statute limiting the time within which execution may be issued. *Predohl v. O'Sullivan*, 59 Neb. 311, 80 N. W. 903, where it was assumed, for the purposes of the decision, that one became an equitable assignee of a judgment in favor of the state by reason of the fact that his money was received in satisfaction of the judgment.

While the state is not compelled to revive a judgment in order to levy execution thereon after the expiration of the common-law period of a year and a day, yet the defendant cannot object if it does proceed by scire facias to revive the judgment. *Albin v. People*, 46 Ill. 372.

The decision in *Evansville Gaslight Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129, holding that the state might revive a decree of foreclosure sixteen years after it was rendered, is based upon the ground that a decree of foreclosure is not an ordinary judgment within the meaning of the statute limiting the lien of a judgment to a period of ten years.

The decision in *Moses v. United States*, 19 App. D. C. 290, that a second writ of scire facias might issue to enforce a judgment in favor of the United States, although nearly two years had elapsed, and no steps had been taken to revive the judgment, is based upon the fact that the defendant himself procured a delay of execution of the first writ issued a few days after the rendition of the judgment.

R. E. H.

character. The trial court sustained the contention of appellees, and the state appeals.

The Code, § 436 (Gen. Stat. 1909, § 6031), provides that, if parties die after judgment, a revivor may be had in the name of their representatives or successors. As to the time in which it may be done, it is provided that "if a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment at any time within two years after it becomes dormant." Civ. Code, § 437 (Gen. Stat. 1909, § 6032). Another provision relating to dormancy and revivor is: "If execution shall not be sued out within five years from the date of any judgment, including judgments in favor of the state or any municipality in the state, that now is or may hereafter be rendered, in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." Civ. Code, § 442 (Gen. Stat. 1909, § 6037).

Neither of these provisions bars the enforcement of the lien in favor of the state. Upon the death of a party after judgment, it may be good practice for the state to give notice to and bring in the representatives, successors, or subsequent owners; but it is a general rule that statutory limitations do not run against the state when it sues in its sovereign capacity, unless the statute expressly includes the state, or the intention to include the state is shown by the clearest implication. It has been frequently held that neither statutory limitations nor laches bars the state or its municipalities as to any claim for relief in a governmental matter, or the enforcement of what may be termed a public right. *Wood v. Missouri*, K. & T. R. Co. 11 Kan. 323-349; *State v. School Dist.* 34 Kan. 237, 8 Pac. 208; *Roberts v. Missouri*, K. & T. R. Co. 43 Kan. 102-113, 22 Pac. 1006; *State v. American Book Co.* 69 Kan. 1, 1 L.R.A. (N.S.) 1041, 76 Pac. 411, 2 Ann. Cas. 56; *Osawatimie v. Miami County*, 78 Kan. 270, 130 Am. St. Rep. 369, 96 Pac. 670, and cases cited.

The state is not included, either expressly or by necessary implication, in the Code provisions limiting the time within which a revivor may be had where the death of a party occurs. The provisions of § 442 do include the state in terms, and therefore, to prevent dormancy of an ordinary judgment, the state, as well as other litigants, is required to sue out an execution within the five-year period. An execution, however, was not essential to the vitality of the judgment in question. It was a judgment against the property, and also an adjudication not only against Mary Dixon, who owned the property when the judgment was rendered, but was equally binding on all others who may own or occupy the property in the future. In a proceeding to punish a party for violating an injunction in a similar case, it was contended that the judgment had become dormant and the lien inoperative because no execution had been issued thereon, and it was said that "the provision of the Code that a judgment shall become dormant and cease to operate as a lien upon the estate of the debtor when execution has not been taken out for a period of five years has no application to a judgment of this character. It was final and perpetual, and no execution was necessary to continue it in force." *State ex rel. Curtis v. Durein*, 46 Kan. 696, 700, 27 Pac. 148, 150.

Appellees contend that the judgment is twofold in its character, and that part of it adjudging that the attorneys' fees and costs be made a lien on the property is distinct and separable from other portions of it, and that the bar of the statute applies to it. An execution is no more necessary as to one part of the judgment than to the other. The state is not barred from enforcing either part of the judgment. It may be said, however, that, if the lien declared should be treated as a separate feature of the judgment, and subject to the limitations of ordinary judgments, the five-year period mentioned in § 442 had not expired when this proceeding to enforce the lien was commenced, and therefore it could not be held to be dormant, even if that provision of the Code were held to be applicable.

The judgment will be reversed, and the cause remanded for further proceedings.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Appt.,
v.

JEFF LOVELL'S ADMINISTRATOR.

(141 Ky. 249, 132 S. W. 569.)

Negligence — statutory duty — contributory negligence.

1. A constitutional or statutory provi-

Note. — Contributory negligence as affected by illegal or negligent custom of servants.

The fact that a servant when injured was following the customary practice of other employees in the same situation is fre-

sion making one liable in damages for negligently causing another's death does not preclude the defense of contributory negligence.

Master — railroad — standing train.

2. A rule requiring workmen about standing cars to protect them by signal may be found not to apply to train men who, in attempting to make couplings, are delayed by defects which they are required to remedy, where the evidence shows that it is not their custom to protect their trains under such circumstances, and that they have never been supplied with the necessary signals therefor.

Same — rules — applicability.

3. A bulletin forbidding the practice of leaving cars standing on the main line without protection by proper signals is not relevant upon the question of the negligence

quently referred to as a circumstance tending to negative contributory negligence upon his part; and the fact that he had on the occasion of the injury departed from such customary practice is in some cases a circumstance which the jury may consider as tending to show negligence upon his part. 3 *Lapatt, Mast. & S. 2d ed. §§ 1262, 1269*. In such cases, however, the custom or practice is treated either expressly or by implication as one which is reasonably safe for the servant to follow. Where, however, the custom is one which cannot be considered as reasonably safe a different situation arises.

This note is confined to cases which deal with the effect upon the servant's contributory negligence of a custom or practice followed by the servants themselves, and cases involving the liability of the master for injuries caused by permitting a negligent or illegal custom to be followed by servants, which injuriously affect other employees, have been excluded, where there is no question as to the contributory negligence of the injured servant.

In some cases the court has held that evidence of a custom on the part of the employees is inadmissible, since to allow the practice of others to be proved would be to create a collateral issue as to the prudence of their conduct; but this note is not concerned with cases which involve the admissibility of evidence of a negligent custom where the case turns solely upon the question of evidence as such as distinguished from the substantive question of the contributory negligence of the servant.

Nor is this note concerned with cases like *Louisville & N. R. Co. v. Herndon*, 126 Ky. 589, 104 S. W. 732, where a recovery was permitted for injuries to a servant because of a negligent custom on the part of employees, but in which no question of the injured servant's own contributory negligence was raised; nor with cases in which the servant is held to have assumed the risk of a negligent custom of the master with which he was familiar.

As to negligence of railroad employee in stepping between moving cars, see note to 47 L.R.A.(N.S.)

of a member of a switching crew in failing to protect a train which he is attempting to remove from the main line while he makes an emergency coupling upon finding the regular apparatus broken.

Same — custom — illegality.

4. The existence of a custom among switching crews in a yard to couple to standing cars whenever they interfere with the movement of cars being handled by them, without notice to persons who may be about them, or any attempt to ascertain whether other employees are in danger, does not render a member of a switching crew negligent in going between standing cars which he is attempting to move from the main track to effect a coupling, without setting signals against other crews, since the custom is illegal because involving a reckless disregard of human life.

Korab v. Chicago, R. I. & P. R. Co. 41 L.R.A.(N.S.) 32.

CINCINNATI, N. O. & T. P. R. Co. v. LOVELL appears to be the only case which deals with the question of contributory negligence of a servant in failing to guard himself against the consequences of a negligent custom followed by the other servants.

The same principle that a negligent or illegal custom will not affect the question of the servant's contributory negligence is presented in a considerable number of cases, which hold that if a custom is negligent in itself, the fact that it may be followed by a number of servants does not take away the negligent character of a servant's act who is injured while following such custom:

Dawson v. Chicago, R. I. & P. R. Co. 52 C. C. A. 286, 114 Fed. 870 (going between moving cars to mount them, instead of using handholds on side of car); *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529 (going between cars to couple them, instead of using lever on other side of car); *American Linseed Co. v. Heins*. 72 C. C. A. 533, 141 Fed. 45 (attempting to jump over revolving drum, rather than go around it); *Powell v. Wisconsin C. R. Co.* 87 C. C. A. 44, 159 Fed. 864 (stepping between moving cars to uncouple them, instead of going to other side); *Warden v. Louisville & N. R. Co.* 94 Ala. 277, 14 L.R.A. 552, 10 So. 276 (riding on pilot of engine); *Andrews v. Birmingham Mineral R. Co.* 99 Ala. 438, 12 So. 432 (jumping from moving engine onto track in front of it); *George v. Mobile & O. R. Co.* 109 Ala. 245, 19 So. 784 (going between moving cars to uncouple them); *Gribben v. Yellow Aster Min. & Mill. Co.* 142 Cal. 248, 75 Pac. 839, 16 Am. Neg. Rep. 1 (using rope and windlass for descending into mine, instead of ladder); *Mayfield v. Savannah, G. & N. A. R. Co.* 87 Ga. 374, 13 S. E. 459 (method of coupling cars); *Cawood v. Chattahoochee Lumber Co.* 126 Ga. 159, 54 S. E. 944 (method of operating shingle machine); *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113 (method of coupling cars); *Henderson v. Coons*, 31 Ill. App. 75 (uncoupling cars

Jury — conflicting evidence — duty of servant.

5. The jury must decide whether or not a rule of a railroad company applied to an employee at the time he was injured, so as to relieve the company from liability for the injury because of his disobedience of it, where under the evidence there is good reason to doubt whether it did or not.

Master — disobedience of rule — effect.

6. A railroad company cannot rely upon disobedience by an employee of a rule, to avoid liability for his injury, if, with its assent, it was habitually violated, and the injured person at the time of his injury was expected by his superior officers to disregard it.

Damages — wrongful death.

7. The damages for wrongful death are such sum as will compensate decedent's es-

tate for the destruction of his power to earn money, not exceeding the sum claimed in the petition.

Evidence — damages — wrongful death.

8. Upon the question of damages to be awarded for wrongful death the habits, character, physical condition, earning capacity, and possible duration of life of deceased may be considered.

Same — amount — excessiveness.

9. Fifteen thousand dollars are not excessive to award as damages for the negligent killing of a strong, vigorous man of good character and habits, twenty-seven years old, although at the time of his death he was employed as a member of a switching crew of a railroad, which is a hazardous business.

(December 14, 1910.)

while in motion); *Chicago & A. R. Co. v. Harrington*, 77 Ill. App. 499 (riding on footboard of engine); *Ferguson v. Central Iowa R. Co.* 58 Iowa, 293, 12 N. W. 293 (uncoupling cars while in motion); *Contri v. Hollingsworth Coal Co.* 143 Iowa, 115, 121 N. W. 506 (use of cage in mine as passageway); *Carrier v. Union P. R. Co.* 61 Kan. 447, 59 Pac. 1075, 7 Am. Neg. Rep. 594 (going between rails in front of approaching engine to couple engine to cars); *Loranger v. Lake Shore & M. S. R. Co.* 104 Mich. 80, 62 N. W. 137 (running in front of approaching engine to couple engine to cars); *Glover v. Scotten*, 82 Mich. 369, 46 N. W. 936 (riding in a sitting posture on the cowcatcher of a road engine); *Thompson v. Boston & M. R. Co.* 153 Mass. 391, 26 N. E. 1070 (practice of jumping off cars without looking where they would alight); *Doerr v. St. Louis Brewing Asso.* 176 Mo. 547, 75 S. W. 600 (method of working around revolving machinery); *Smith v. Forrester-Nace Box Co.* 193 Mo. 715, 92 S. W. 394 (method of unclogging planing machine); *Dowell v. Vicksburg & M. R. Co.* 61 Miss. 519 (mounting train in motion); *Grant v. Pittsburgh & W. R. Co.* 6 Ohio C. D. 516 (practice of running on track in front of moving train to turn switch); *Hunter v. D. W. Alderman & Sons Co.* 89 S. C. 502, 71 S. E. 1082 (failure to take proper precaution before going to work in saw pit); *Virginia Portland Cement Co. v. Seal*, 110 Va. 484, 66 S. E. 75 (method of firing blast); *Colf v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 273, 58 N. W. 408 (practice of jumping off moving train). See also *Bucklew v. Central Iowa R. Co.* 64 Iowa, 603, 21 N. W. 103 (coupling cars while in motion).

Thus, in *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113, in an action for injuries to a servant engaged in coupling cars, it was held that the court erred in admitting evidence as to the usual mode of coupling and uncoupling cars at the switch in question. The court said: "One of the issues being tried was, whether deceased performed his duty with such negligence as to preclude a recovery. He was bound to

use care, or no recovery can be had; and what others did, or were in the habit of doing, did not tend to prove that issue. Such a course may have been careless, or even reckless, and, if so, it did not justify him in omitting the observance of care. We therefore think that such evidence did not tend to prove care on the part of deceased, and the court erred in its admission."

And in *Carrier v. Union P. R. Co.* 61 Kan. 447, 59 Pac. 1075, 7 Am. Neg. Rep. 594, the court said: "The standard of due care required of a person engaged in the hazardous business of railroading cannot be lowered by the habitual negligence of others in the same line of work."

So, also, in *Warden v. Louisville & N. R. Co.* 94 Ala. 277, 14 L.R.A. 552, 10 So. 276, the court said: "Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent."

And in *Mayfield v. Savannah, G. & N. A. R. Co.* 87 Ga. 374, 13 S. E. 459, it was held that a custom or usage obviously dangerous is not admissible to excuse contributory negligence by the plaintiff, especially where it did not appear that such custom or usage had been adopted by the defendant, or that it prevailed at the place or on the particular railroad concerned.

So, in *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529, the court said: "The danger of entering and walking between moving cars was so imminent and obvious that no custom to do so

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. John Galvin and O. H. Waddell & Sons for appellant.

Messrs. Robert Harding, E. V. Puryear, James Denton, Robert Waddle, and Green, Van Winkle, & Schoolfield for appellee.

Carroll, J., delivered the opinion of the court:

Jeff Lovell, an employee of the appellant company, was killed in its yard at Somerset, Kentucky, by being crushed between two cars. His administrator brought this action under the statute to recover damages for the destruction of his life. Upon a trial before a jury the damages were assessed at \$15,000, and judgment accordingly rendered for this amount. In asking a reversal of the judgment, it is earnestly insisted that

unnecessarily could deprive the act of its inherently negligent character.

And in *Bodie v. Charleston & W. C. R. Co.* 61 S. C. 468, 39 S. E. 715, 10 Am. Neg. Rep. 473, it was held error to charge that if the servant was doing the work in the ordinary and customary way he would not be guilty of contributory negligence.

In *Hunter v. D. W. Alderman & Sons Co.* 89 S. C. 502, 71 S. E. 1082, the court approved an instruction to the jury to the effect that if the plaintiff, while in the discharge of his duty, had two ways of performing it,—one entirely safe and the other obviously and greatly dangerous,—and adopted the dangerous way and as a result was injured, he was guilty of negligence from which he could not relieve himself by showing that it was customary to perform the duty in that way.

In *Gibler v. Quincy, O. & K. C. R. Co.* 129 Mo. App. 93, 107 S. W. 1021, the court said: "A general custom, tolerated by defendant, and not merely by the foreman of a crew, under which members of the crew rode on flat cars, instead of in the dining car, would cut off the defense that an employee injured while on the flat car had violated a rule of the company in riding there. But even such a custom might not be decisive in all cases of the question whether the employee was careless in taking the position."

A recovery was allowed in *Rebb v. East Tennessee, V. & G. R. Co.* 87 Ga. 631. 13 S. E. 566, where it was held that, although attempting to couple cars when the engine is running at a speed of 15 miles an hour is apparently not only dangerous but reckless, yet if it is true that it is frequently done, and in the experience of engineers and railroad men it is safe provided 47 L.R.A. (N.S.)

the peremptory instruction requested by the railway company should have been given. The disposition of this question, which is the principal one in the case, makes it necessary that we should state with some elaboration the evidence.

At Somerset the railway company had two yards, known as the "north yard" and the "south yard," and in each there were a number of side tracks or switches. These yards were about a mile apart, and connected by the main line of the railway. In each of these yards it had a switching crew, consisting of an engineer, fireman, two brakemen, and a foreman. Jeff Lovell was the foreman of the north yard, and Garfield Cruse was the foreman of the south yard; each having the full complement of men. The duties of these respective yard crews were the same. To illustrate: When a freight train came in from the north, it would stop on the main track in the north yard, and the engine would be detached from the train and taken to the roundhouse, leaving the train to be handled and moved by the north yard crew, whose duty it was

the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by a car coupler for personal injuries sustained by him in making the attempt. In this case it is to be noted not only that there was testimony to the effect that the custom was safe, but it was the handling of the engine that was the proximate cause of the accident, rather than the act of the injured employee.

In the cases cited above, the practice in question was considered to be negligent but the same rule has been applied and a recovery denied where the custom or practice followed by the servant was in violation of the law.

Thus, in *Vosheskey v. Hillside Coal & I. Co.* 21 App. Div. 168, 47 N. Y. Supp. 386, where there was a statute forbidding all persons from riding upon loaded cars in any shaft or place in or about a mine, it was held that there was no force in the contention of the plaintiff that it was customary for himself and the other drivers to ride upon loaded cars, that this custom was sanctioned and approved by the defendants' orders, and that he was ordered by them to ride upon the cars.

So, under a statute requiring miners to prop the roof of any room under their control, a custom which imposes upon some other employee the duty of propping the roof of the room cannot have the effect to exonerate the miner from the duty enjoined by the statute, nor to shift the risk undertaken by himself over onto the company. *Coal & Min. Co. v. Clay* (Consolidated Coal & Min. Co. v. Floyd) 51 Ohio St. 342, 25 L.R.A. 848, 38 N. E. 610. W. M. G.

to take the train as speedily as practicable off of the main track and put it on one of the sidings in the yard, and then distribute the cars at such places in the yard as the destination of the cars required. In distributing the cars it often happened that it would be necessary to take them from one yard to the other, and so, if cars in the north yard were to be transferred to the south yard, the north yard crew would take them to that yard; the same course of conduct being observed by the crew in the south yard.

On the occasion of the accident, a freight train going south came into the north yard on the main track about 8 o'clock at night, and as soon thereafter as it could be done the engine was uncoupled and taken to the roundhouse, leaving the cars on the main track. When this train came in, Lovell, in the performance of his usual duties, took his engine out on the main track for the purpose of coupling to the north end of the train; the tender being in front, that is, next to the train to be coupled to. When the tender came within some 2 feet of the north end of the north car, the engine stopped, so that preparations might be made to make the coupling. At this time Lovell and his two brakemen were present, and it was discovered that the coupling on the north end of the north car was broken or in such a defective condition that it could not be coupled to the tender. Thereupon Lovell attempted with a brake rod or similar piece of iron to make a temporary connection that would enable the engine to move the cars; but he found that, with the implement he had, a coupling could not be made, and that it would be necessary to get a chain, and so he directed one of his brakemen to get the chain. In obedience to this direction, the brakeman started to find a chain, leaving Lovell on the track between the tender and the car, and the other brakeman standing just outside the rails of the track. Within almost a moment after the brakeman started for the chain, the train of cars between which and the tender Lovell was standing was moved some 2 or 3 feet, and in the movement he was caught between the car and the tender and instantly killed. The movement of the train was occasioned by a cut of cars coming from the south yard to the north yard on the main track, and that were coupled to the south end of Lovell's train. This cut of cars was under the control of Garfield Cruse, the foreman in charge of the south yard crew, and consisted of 15 cars, which were being pushed by the engine. Cruse was standing on the top of the front car of this train that was moving at a moderate rate of speed. When the car on which he was standing got

within a short distance of the south end of the train that Lovell was preparing to move, he discovered the cars standing on the main track, and immediately signaled his engineer to stop, which he did, and, as soon thereafter as it could be done, a coupling was made between the train in charge of Cruse and the cars of the other train.

Cruse testifies that, at the time and before he made the coupling, he did not know that any person was between or about the cars standing on the main track to which his train was coupled. And, further, that it was customary in moving cars from one yard to the other to couple to any cars found standing on the main track, and that in obedience to this custom he made the coupling mentioned. Lovell's brakeman, who was standing on the side of the track near the engine, had a lantern in his hand, and Lovell also had a lantern, but it was in the middle of the track. There was a headlight on the end of the tender of Lovell's engine, as well as the ordinary headlight on the engine, and both of these headlights were burning. The headlight on the tender shone against the end of the box car standing a few feet from it, but there is some evidence that the rays extended 3 or 4 feet out on each side of this box car. But Cruse did not see either the rays from the headlight or the lantern of the brakeman. Nor is it shown that he made any attempt to discover them. In fact, we may safely say from the evidence that when he came to these cars standing on the main track, he at once, or, as soon as it could be done, coupled to them, without making any effort of any kind or character to discover whether or not any person was between the cars or about them.

With the facts immediately connected with the injury in the condition stated, the railway company bases its contention that the peremptory instruction should have been given upon the ground that Lovell should have protected, by a signal or light of some kind, the south end of the train he was preparing to move. In support of the proposition that it was Lovell's duty to protect the south end of the train, a rule of the railway company was introduced, reading as follows: "A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected, the engine, car, or train must not be moved or coupled with any other train, car, or engine. Workmen will display the blue signals, and the same workmen alone are authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the

blue signals, without first notifying the workmen."

It is conceded that Lovell did not protect the south end of his train with the blue signal referred to in this rule, or a signal or warning of any kind. And if this rule was applicable to Lovell, or if, independent of any rule, it was his duty under the circumstances to protect the south end of his train by a signal sufficient to have warned Cruse not to permit his train to move or disturb it, then Lovell's death was caused by his own negligence in failing to observe a rule of the railway company intended to protect him from injury, or in failing to take proper precautions for his safety, and consequently his personal representative could not successfully maintain an action to recover damages for his death. *Alexander v. Louisville & N. R. Co.* 83 Ky. 589; *Louisville & N. R. Co. v. Scanlon*, 22 Ky. L. Rep. 1400, 60 S. W. 643; *Thomp. Neg.* § 5395; *Shearm. & Redf. Neg.* § 207; note to *Nolan v. New York, N. H. & H. R. Co.* 43 L.R.A. 305. For, although it is provided in § 241 of the Constitution of the state, as well as in § 6 of the Kentucky Statutes (Russell's Stat. § 11), that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same, . . ."—it has yet been held in a number of cases that contributory negligence is a good defense to an action to recover damages for death caused by negligent or wrongful act if it be of such a character as that the death would not have occurred except for the contributory neglect. *Clarke v. Louisville & N. R. Co.* 101 Ky. 34, 36 L.R.A. 123, 39 S. W. 840, 2 Am. Neg. Rep. 360; *Cincinnati, N. O. & T. P. R. Co. v. Yocum*, 137 Ky. 117, 123 S. W. 1200.

It will be observed that the rule on its face refers to "workmen" who are engaged under or about a car or standing train, and it is therefore argued for appellee that this rule did not apply to, and was not designed to embrace, train men engaged in an effort to make an emergency coupling, but was intended to be applicable to workmen engaged in the business, whether temporarily or not, of repairing a car. This argument is forcefully supported by the uncontradicted evidence of the yard masters and other employees at Somerset that it was never the custom or practice in the yards at Somerset for yard crews, in moving cars or trains, to use a blue light or a signal of any kind to protect the cars or train, although they might be, as Lovell was, delayed for a few minutes by an emergency such as he encountered; and by the further uncontra-

dicted fact that the yard crews had never been supplied with the signals referred to in this rule, or any signals except the ordinary white lantern used by train men. From this evidence, read in connection with the rule referred to, the jury was fully warranted in concluding that it did not and was not intended to apply to Lovell, as he was not, in the effort to make the coupling, a "workman" within its meaning. This rule, and a bulletin posted in the yard office, reading: "All Conductors: The practice of leaving cars standing on main tracks in yards or elsewhere must not be countenanced. When by reason of an accident or other emergency it is necessary, such cuts of cars must be protected in yard limits by proper signals, and every precaution taken to avoid accidents,"—are the only rules or regulations established by the company that it is claimed have any relation to the matter we are now considering. That this bulletin was not intended to apply to Lovell is, we think, apparent, from the evidence of Higgins, who was yard master at Somerset in February, 1907, and who testified that this bulletin was issued by the superintendent at his instance, and, as he states, "on account of what I regarded as being the negligent practice of leaving cars standing on the main line." According to its terms, it had reference to "leaving cars standing on the main tracks in yards or elsewhere," and evidently contemplated a condition arising when a train or a car was left standing without any person being at the time engaged in an attempt to move it, and so, we think, the trial court correctly excluded it as evidence.

But the argument is further made that, even if this rule and bulletin did not apply to Lovell, that he knew trains or cars from the south yard were likely at any time to be moved to the north yard upon the main track, and therefore he should have adopted some method of protecting the south end of his train, so that if the south yard crew found it necessary to move any cars to the north yard they would observe the signal, and not disturb, without sufficient notice or warning, his train. And it is said that, if he had no blue signal, he could have protected the south end of his train by a red light, or by stationing there a brakeman with a white light; and that his failure to do this was fatal to a recovery, especially in view of the evidence before mentioned that it was customary for yard crews, in going from one yard to the other, to couple to cars standing on the main track without any notice or warning. Keeping in mind the uncontradicted evidence that it was not usual or customary for yard crews, when engaged as Lovell was, to protect their

trains, and that there was no rule requiring it to be done, let us now see if Lovell, who, we will presume knew that the south yard crew might at any time come with a cut of cars into the north yard, voluntarily put himself in a place of danger that excuses the company for his death, by his failure to protect the south end of his train. If he did, then it must be because of the custom or practice that had grown up in the yard of making couplings to cars or trains standing on the main track without giving any notice or warning that a coupling would be made. And it is this custom that the railroad company asserts as one of the chief reasons why a verdict in its favor should have been directed.

The evidence of Garfield Cruse states very fully and clearly the practice under this custom, and so we will let him tell about it:

Q. You have stated in your original examination that it was your duty to deliver cars from your yard to the main line in the north yard, and if you found the main line occupied, to couple onto the cars standing on the main line, have you not?

A. Yes, sir.

Q. Now, that was only a custom, was it not, in that yard?

A. Yes, sir; it is a custom.

Q. You knew that it was Lovell's duty to distribute these cars standing on the main line, did you not?

A. Yes, sir.

Q. You knew that Lovell and his crew were likely to be around on or about those cars at that time, did you not?

A. Yes, sir.

Q. You had no information as to when Lovell and his crew expected to move those cars from the main line?

A. No, sir.

Q. And when you delivered the cut of cars from the south yard to the north yard you didn't know, and made no investigations to see, whether or not Lovell or his crew were busy handling that cut of cars?

A. No, sir.

Q. Did you give any warning, or had your engineer given any warning, to Lovell and the north yard crew, that you were to couple onto the cut of cars which were standing on the main line?

A. No, sir. . . .

Q. You knew it was Lovell's duty to remove that cut of cars from the main line and distribute them on the side tracks?

A. Yes, sir.

Q. It was necessary, then, in order for Lovell and his crew to remove those cars from the main line, to either couple onto the south end or the north end of the cut?

A. Yes, sir.

Q. You knew when you approached this cut of cars that Lovell and his engineer or crew was not at the south end of the cut?

A. Yes, sir. . . .

Q. Then, as I understand you, it was customary and required by the company that you, as a foreman of one crew, should deliver cars into the hands of another crew, and make couplings without reference to the location of that crew?

A. Yes, sir.

Q. What provision was made by the company for the protection of those employed, under those circumstances?

A. There wasn't any that I know of; I do not know of any.

It is manifest from this evidence that, if there was a custom of this kind, it was a reckless and dangerous—if not inhuman—one. It placed yard crews at all times in danger from sources they could not, in the ordinary conduct of the business, well guard against, and left them to be killed or crippled without any opportunity to escape, unless every time one of them went between the cars for any purpose another was on the lookout to protect the cars he went between from being moved by a train in charge of the other crew. For example, suppose the coupler had not been defective, and that Lovell, in the ordinary course of his duties, had stepped in between the tender and the car to make the usual coupling, and just at the moment he was so engaged the south end of his train had been hit by the cars in charge of Cruse, could it be contended for a moment, in the absence of a rule requiring Lovell in making an ordinary coupling to put out signals at the south end of his train, that his failure to do so would be negligence? We think not, and the mere fact that Lovell was engaged for a few minutes in attempting to arrange the coupling does not change our view of the situation, or make this custom less obnoxious. And so we will set aside as indefensible the proposition that Cruse, according to a custom of the yard, had the right to move a train of cars standing on the main track in the north yard, without taking any precautions whatever to ascertain whether or not any member of the north yard crew was engaged in making a coupling or in other necessary work in or about these cars. The railroad company will not be permitted to shelter itself under a custom that involves a reckless disregard of human life. When Garfield Cruse saw the train of cars standing on the main line in the north yard track, he knew it had been left there for the purpose of being moved by the north yard crew, and that they were probably at that very time engaged about it. Having

this knowledge, he was and should be charged with the duty of taking some means to inform himself whether or not any of that crew were occupied about this cut of cars before he undertook to move it, or at least the duty of giving timely and reasonably sufficient warning that he intended to move it.

We are therefore of the opinion that there was ample evidence to take the case to the jury, and that they had the right to find, under the instruction submitting this issue, that the death of Lovell was brought about by the negligence of Cruse in moving Lovell's train without making any effort to ascertain whether or not any member of the north yard crew was engaged in or about the train that he contemplated moving. Lovell was not negligent. He was engaged in the performance of his duty, and while so engaged it was the duty of the company to see to it that he should not be wantonly killed under authority of a custom allowed by the company to be practised by its employees without any reason to support it. The business in which railroad operatives are engaged is extremely hazardous, even when the utmost care is observed, and the railway company will not be permitted, under the facts of this case, to set up, as a complete defense to an action brought to recover damages for the death of an employee, a practice or custom, permitted or authorized by it, that manifests a wanton and reckless disregard of his safety. Rules and regulations are necessary in the conduct of the business of railroading, and when reasonable and not against public policy they should be and are looked upon with favor by the courts. *Chesapeake & O. R. Co. v. Barnes*, 132 Ky. 728, 117 S. W. 261. But a rule or custom that endangers life, and puts in peril the safety of employees or others, cannot receive our approval. *Louisville & N. R. Co. v. Herndon*, 126 Ky. 589, 104 S. W. 732.

The cases of *Louisville & N. R. Co. v. Lumpkin*, 136 Ky. 290, 124 S. W. 318, and *Russell v. Louisville & N. R. Co.* — Ky. —, 124 S. W. 841, are relied on; but the facts of these cases are so radically different from the facts of this one that they are not authority for the position taken by counsel.

It is further insisted that the court especially erred in leaving it to the jury to say whether or not the written rule relied on by the company applied to Lovell, and in ruling generally upon the rules offered in evidence. Without attempting to set down principles applicable to every case in which the question of rules comes up, we may say that generally, if a railroad company or other master has established and promulgated written or printed rules for the gov-

ernment of employees, their construction is for the court; but their application to the facts, if there is reasonable doubt about their applicability, is for the jury. Again, if a written or printed rule is reasonable, and not against public policy, and it is known to the employee or servant, or should be known by him, and the undisputed facts show it was established and in force, and that it is applicable to him, and that his violation of it was the proximate cause of the injury he complains of, then the court should take the case from the jury. *Western U. Teleg. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963. If, however, there is ground for reasonable difference of opinion as to whether it applies to the facts developed by the evidence, or as to whether the servant had or should have notice of it, or as to whether it has been made and promulgated, or as to whether it was in force, then these issues of fact—like any other—are for the jury, and they should be instructed accordingly. 1 *Elliott, Railroads*, § 202; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138, 8 Am. Neg. Cas. 157; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L.R.A. 733, 23 Am. St. Rep. 506, 5 So. 633. In this case there was good reason to doubt whether or not the written rule invoked by the company applied to Lovell, and so the court properly left this question to the jury in an instruction telling them, in substance, that if they believed from the evidence that Lovell was guilty of negligence in going between the engine and car without displaying signals at the south end of the train as required by the rules of the company, and that but for such negligence he would not have been injured, they should find for the railroad company. Supplementary to the foregoing statement of the law, it should be said that it is also well established that, although a rule may be applicable to the injured party, and of such a nature that if in force as to him it would defeat a recovery, he may yet avoid its operation and effect by evidence that, with the knowledge or acquiescence of the master or a superior employee whose duty it was to enforce the rule, it was habitually disregarded; and, when an issue of this character is made by the evidence, the court should submit it to the jury. 1 *Labatt, Mast. & S.* § 232; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866; *Louisville & N. R. Co. v. Bocoock*, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262; note to *Nolan v. New York, N. H. & H. R. Co.* 43 L.R.A. 305. And so the trial court correctly submitted this question to the jury in an instruction telling them that, although they believed the

rule was intended to apply to employees performing the service Lovell was, yet if they further believed that this rule, with the assent of the company and the officers superior in authority to Lovell was habitually violated, and Lovell was expected by his superior officers to make couplings without protecting himself by signals, the company could not rely upon the rule to defeat a recovery.

The other instructions, except the one relating to the measure of damages, are not complained of. The instruction on the measure of damages was as follows: "If your finding be for the plaintiff, then you will find such a sum in damages as you may believe from the evidence will reasonably compensate the estate of Jeff Lovell, deceased, for the destruction of his power to earn money, not exceeding, however, the amount of \$30,000, the sum claimed in the petition." This instruction has been so frequently and uniformly approved that it does not seem necessary that we should extend this opinion in an effort to sustain it. But, in response to the argument against it submitted by counsel for appellant, we may say this: In estimating compensatory damages in cases like this, the jury may receive evidence concerning, and have the right to consider, the habits, character, physical condition, earning capacity, and probable duration of life of the deceased. They are allowed to have this data before them so that they may approximately at least fix the recovery at such a sum as will compensate the estate of the deceased for the destruction of his power to earn money. The loss to his estate is the amount that he will probably make and save if he should live the full limit of his expectancy of life. It would be unjust to the estate of the deceased if this loss was estimated on the theory that he would not increase his earning capacity, or that he would not make or save more than he was making or saving at the time of his death. It is of course probable that, had Lovell lived to be an old man, his earning capacity would not have increased, and that his estate would be worth but little when he died; but, it is equally, if not more, probable that a young man of his habits and character would increase his earning capacity each year for many years, and in the end have an estate much larger than the amount awarded by the jury. Of course, how long a person will live, or how much he will earn, or how much he will save, or how much he will leave at his death, are in the very necessity of things unknown problems. No human being can tell how long any person will live, and consequently no person can say how much his estate from a pecuniary standpoint will lose by his death.

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But, in compensating the estate of a person who has been killed by negligence, for the destruction of his power to earn money, it is more just and reasonable to assume that he will live the allotted time, and that he will observe habits of thrift and industry, than to assume that he will be stricken with disease, or become idle and worthless, or die many years before his expectancy of life has ended. And so it is that, in dealing with the wrongdoer, the law requires him to give the injured person or his estate such a sum as, under the most favorable conditions, will compensate him or his estate for the loss occasioned by his wrongful act. In some jurisdictions the courts have thought it fair and just that, in considering the loss the estate of the deceased has suffered by his death, the jury should be directed to take into consideration what he would necessarily or probably expend, as well as what he might earn, and then to deduct one from the other, awarding such a sum as would amount to the difference between the gain and the expense. But we have never thought that it would be advisable or helpful to the jury to instruct them as to items of earning and expense, or to direct them specifically to consider one or the other. The fact is that our rule is as just to the parties as the one that obtains in jurisdictions where an instruction calling the attention of the jury in detail to the things they should take into consideration in assessing the damages is authorized. Under neither rule can the sum that should be awarded be ascertained with reasonable certainty. When the jury has before it all the evidence that either party desires to introduce, relating to the health, habits, earning capacity, character, and probable duration of life of the deceased, and are then directed to assess the damages at such a sum as will compensate his estate for the destruction of his power to earn money, they have before them every fact upon which an estimate of the loss sustained can be based, and it is to be presumed that in making up their verdict the jury will take into consideration all of the facts indicated. *Stewart v. Louisville & N. R. Co.* 136 Ky. 717, 125 S. W. 154; *Netter v. Louisville R. Co.* 134 Ky. 678, 121 S. W. 636.

It is complained that the verdict is excessive. It is true the amount of damages assessed is unusually large, and yet we cannot say that as compensation it is so excessive as to indicate that the jury were influenced by passion or prejudice in awarding it. Lovell was about twenty-seven years of age, a strong, vigorous man, of good character and habits, who had before him in the ordinary course of events a long and useful life. He was sober, industrious, and eco-

nomical, and who can say that if he had lived his expectancy of life his estate would not be worth as much as the amount allowed for its destruction? True, he was engaged in a hazardous business; but it does not follow from this that he must or would continue in this dangerous business all of his life, nor is it fair to assume that his salary would remain the same as he was receiving at the time of his death. He had already been promoted in the service of the company, and it is likely that he would have received other promotions; each bringing with it increased compensation.

A few other alleged errors are pointed out in brief for the appellant; but we have not deemed them of sufficient importance to discuss them.

Upon the whole case we are of the opinion that the appellant had a fair trial, and so the judgment is affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

L. F. JOHNSON, Admr., etc., of Reuben Harrod, Deceased.

(155 Ky. 155, 159 S. W. 685.)

Pleading — negligence — general allegation — sufficiency.

1. A petition to hold a railroad company liable for frightening a horse to the injury of plaintiff, which alleges that those in charge of an engine, after discovering the frightened condition of the horse and the peril of plaintiff, negligently continued to operate the train, moving it up to and past the horse, is sufficient without setting out the evidence upon which liability depends.

Instruction — submitting issues not pleaded.

2. It is error to submit to the jury grounds for recovery in an action for damages for negligent injuries which are not set out in the petition.

Railroads — frightening horse on highway — keeping lookout.

3. Those in charge of a train running parallel with a highway are not bound to keep a lookout for frightened horses on the highway.

Same — injury to driver — liability.

4. A railroad company running a train parallel to a highway, whose employees discover that a horse has been frightened

by the train, and know or have reason to know that the driver is in peril, is liable for the resulting injury if they fail to use reasonable care with the means at hand to prevent injury to him.

Same — last clear chance — negligent operation of train.

5. Although one in charge of a team of horses is negligent in driving them near a railroad track, with knowledge that a train is approaching and that they will be frightened by it, he is not precluded from holding the railroad company liable for an injury resulting from their fright if those in charge of the train discovered the peril in time to have avoided the injury, and failed to make any effort to do so.

Same — presumption as to gentleness of team.

6. Those in charge of a railroad train running parallel with a highway, who see a team on the highway ahead of the train, have a right to presume that the team is ordinarily gentle, until they know or have reason to know the contrary, and to act upon that presumption.

(October 8, 1913.)

A PPEAL by defendant from a judgment of the Circuit Court for Franklin County in plaintiff's favor in an action brought to recover damages for the death of his intestate alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Benjamin D. Warfield and McQuown & Beckham, for appellant:

The petition was bad on demurrer.

Cox v. Illinois C. R. Co. 142 Ky. 478, 32 L.R.A.(N.S.) 831, 134 S. W. 911; Louisville & N. R. Co. v. Armstrong, 127 Ky. 377, 105 S. W. 473; Reed v. Louisville & N. R. Co. 104 Ky. 607, 44 L.R.A. 823, 47 S. W. 591, 48 S. W. 416.

Harrod was guilty of contributory negligence, and the defendant's employees were not negligent in the operation of the train.

Louisville & N. R. Co. v. Street, 139 Ky. 191, 129 S. W. 570; Cox v. Illinois C. R. Co. 142 Ky. 478, 32 L.R.A.(N.S.) 831, 134 S. W. 911.

The verdict, signed by only nine jurors, is flagrantly against the evidence. There was "a decisive preponderance" in favor of the defendant, and it was the duty of the court to set the verdict aside and grant a new trial.

Chesapeake & O. R. Co. v. Johnson, 151

Note. — As to liability for frightening horse on highway by locomotive, car, or train running parallel therewith, see note to Effinger v. Ft. Wayne & W. Valley Traction Co. 33 L.R.A.(N.S.) 123. And see later case, Lyons v. Chicago, M. & St. P. R. Co. 35 L.R.A.(N.S.) 1219. 47 L.R.A.(N.S.)

On the related question as to the duty to give crossing signals for the benefit of persons near a crossing, but who are not about to use the same, see notes to Missouri, K. & T. R. Co. v. Saunders, 14 L.R.A.(N.S.) 998, and Warn v. Chicago G. W. R. Co. 31 L.R.A.(N.S.) 667.

Ky. 811, 152 S. W. 962; Louisville & N. R. Co. v. Hall, 115 Ky. 567, 74 S. W. 280.

Instruction No. 1 is based upon a case not made by the pleadings. Liability is predicated upon the careful and prudent operation of the train, and fright of the horses from its usual and necessary noise, and the requirement to stop the train to prevent this noise. The rule announced in this instruction is contrary to the settled law.

Louisville & N. R. Co. v. Street, 139 Ky. 191, 129 S. W. 570; Cox v. Illinois C. R. Co. supra.

Instruction No. 3, given by the court on contributory negligence, has been repeatedly condemned; and the instruction "d" offered by defendant, and refused by the court, has been as often approved as instruction No. 3 has been condemned.

Louisville & N. R. Co. v. King, 131 Ky. 347, 115 S. W. 196; Jellico Coal Min. Co. v. Lee, 151 Ky. 55, 151 S. W. 26; Louisville & N. R. Co. v. Crutcher, 135 Ky. 381, 122 S. W. 191; Louisville & N. R. Co. v. Penrod, 108 Ky. 172, 56 S. W. 1.

Messrs. Scott & Hamilton for appellee.

Hobson, Ch. J., delivered the opinion of the court:

One of the roadways of Pleasureville runs parallel to the tracks of the Louisville & Nashville Railroad Company, and about 20 yards from the tracks. Reuben Harrod was driving westward on this roadway when his team became frightened and ran off, throwing him out and so injuring him that he died. Harrod was driving two horses to a wagon. There was no bed on the wagon, and he was sitting on the coupling. The freight train had been at the station for some time, switching cars, and was up about the depot, which is several hundred feet east of the point of the accident. Harrod came up a cross street and turned down west on the roadway parallel to the railroad track, about the time the freight train started west to its destination on the main track. The horses became restive; when the engine got about opposite Harrod, the wind blew the smoke from the train down upon the horses and they began to run; the train men took no steps to check the train or to stop it, and Harrod was thrown out when the horses attempted to turn northward away from the train, about 100 or 200 feet west of where they started to run, the engine in the meantime having gotten in front of them. This suit was brought by Harrod's personal representative to recover for his death; it being alleged in the petition that the defendant operated its engine and cars in a negligent manner, making unnecessary and unusual noises, per- 47 L.R.A. (N.S.)

mitting steam to escape from its engine in an unusual and unnecessary quantity, and thus causing the horses to run away. It was also alleged that the team began to run in plain view of the engineer and fireman and employees on the train; that they observed the frightened condition of the horses; but after they had discovered the frightened condition of the team and the danger of the intestate, they negligently continued to operate the train, moving it up beyond the horses and along and parallel with them, and that the intestate's injuries were the direct result of the negligence of the defendant, its agents, and servants. An answer was filed by the defendant, denying the allegations of the petition, pleading contributory negligence on the part of Harrod, and alleging affirmatively that the team was wild and afraid of the train; that Harrod knew this, and with this knowledge brought on the danger himself. On a trial of the case before a jury there was a verdict and judgment in favor of the plaintiff for \$10,000. The railroad company appeals.

There was no evidence of negligence on the part of those in charge of the train in permitting it to make unusual and unnecessary noises. The circuit court properly declined to submit the case to the jury on this ground; but there was some evidence that the employees of the train, after discovering the fright of the horses and after perceiving the danger in which Harrod was placed, failed to use ordinary care for his protection. The circuit court therefore properly refused to instruct the jury peremptorily to find for the defendant. The allegations of the petition were sufficient to sustain the action on this ground. It was not necessary that the plaintiff should state the evidence in his petition; it was sufficient for him to allege negligence in general terms, and while the company would not be guilty of negligence in not stopping the train because of the danger of collision with a train following it, or in not taking other steps because they did not have the means at their command, these were all matters of evidence. To require all such things to be pleaded would be to make the pleadings unduly prolix. In *Reed v. Louisville & N. R. Co.* 104 Ky. 607, 44 L.R.A. 823, 47 S. W. 591, 48 S. W. 416, a passenger fell from a moving train, and the action was brought to recover damages because the train men did not stop the train, back it, and take care of him. The rule announced in that case is not applicable to a case like this. We have held in a number of cases that the train men are not required to keep a lookout on a highway adjacent to the railroad, but that if they in fact discover

the fright of a team on the adjacent highway, they must, after perceiving the danger in which the driver of the team is placed, use such care for his safety as may be reasonably expected of a person of ordinary prudence under the circumstances. *Louisville & N. R. Co. v. Penrod*, 24 Ky. L. Rep. 50, 66 S. W. 1013, 1042; *Louisville & N. R. Co. v. Smith*, 107 Ky. 179, 53 S. W. 269; *Louisville & N. R. Co. v. Street*, 139 Ky. 191, 139 Am. St. Rep. 471, 129 S. W. 570.

While the case should have gone to the jury, the instructions of the court did not properly present to the jury the law of the case. There was no complaint in the petition as to the smoke of the train. The smoke could not be controlled in the short time that elapsed after this team took flight and before the injury. The wind caused the smoke to blow down upon the team, and this was a matter the train men could not control. The court therefore erred in submitting to the jury in the first instruction the negligence of the defendant in emitting smoke from the engine. In addition to this the first instruction gives undue prominence to certain facts shown in the case. In lieu of the first instruction the court should have told the jury that if they believed from the evidence that the horses which the plaintiff's intestate was driving became frightened at a train operated on the defendant's railroad adjacent to the roadway on which he was driving, and that the conductor of the train or the engineer or fireman discovered that the horses were frightened, and knew or had reason to know that the plaintiff's intestate was thus placed in peril, and, with such knowledge, then failed to use ordinary care with the means at hand to prevent injury to him, and by reason of such failure the plaintiff's intestate received the injuries from which he died, the jury should find for the plaintiff.

The evidence showed that the conductor was in the cab of the engine with the engineer and fireman, and there was no evidence that any of the employees on the train, except these three, could have done anything to avoid injury to the intestate. The defendant asked the court to instruct the jury, in substance, that they should find for the defendant unless its servants, after they discovered the intestate's peril, failed to use ordinary care to avoid injury to him. The court refused the instruction, and did not clearly present this idea to the jury in any instruction which he gave. On another trial the court will instruct the jury that those operating the train were not required to keep a lookout upon the adjacent highway to see if a team was frightened, and that the jury should find for

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the defendant unless they believe from the evidence that the conductor of the train or the engineer or the fireman discovered the horses were frightened, and knew or had reason to know that the plaintiff's intestate was placed in peril, and with such knowledge then failed to use ordinary care with the means at hand to prevent injury to him. The court instructed the jury that if the intestate himself was negligent and his negligence contributed to his injury, and but for this he would not have been hurt, they should find for the defendant.

The defendant asked the court to instruct the jury, in substance, that if the intestate had reason to believe that the team would be frightened by the train, if driven near the railroad track, then it was his duty to stop the team until the train passed, and if he drove the team near the track, when he knew or had reason to believe that the train would pass, and that the team would thereby become frightened, he was guilty of contributory negligence, and the jury should find for the defendant. The court refused to so instruct the jury, and of this the defendant complains. The plaintiff's whole case rests upon the idea that after he was in peril, and his peril was perceived by those in charge of the train, ordinary care was not used for his safety. If he was negligent in driving his team near the train when he knew it was liable to become frightened by the train, this did not warrant those in charge of the train in failing to exercise ordinary care for his safety after they perceived the danger in which his negligence had placed him. His negligence in driving an unsafe team near the train did not authorize the defendant's agents, after they perceived the danger in which his negligence had placed him, to proceed with the train regardless of any care for his safety on their part. The familiar rule is that, though the plaintiff may have been negligent, still his negligence does not bar a recovery, if, after his peril has been discovered, the defendant with knowledge of his danger fails to use ordinary care for his protection; and we see no reason why this rule should not apply here. We therefore conclude that the court properly refused the instruction asked by the defendant, and that the instruction given on contributory negligence should not have been given. There was evidence tending to show that the team was wild, and had run off a few days before, although there was contrary evidence. There was no evidence that the intestate failed to do anything that he could have done by ordinary care after his team became frightened; but there was evidence warranting the jury in concluding that the real cause of the

trouble was not the negligence of the railroad men, but the wildness of the team. In view of all the evidence, the court on another trial, in lieu of the instruction on contributory negligence, will give the jury this instruction:

Those in charge of the train had the right to presume that plaintiff's team was ordinarily gentle, until they knew or had reason to know the contrary; and, if the team was not gentle, but afraid of a train, and the injury of the intestate was by reason of this, and not by reason of a want of ordinary care on the part of those in charge of the train after they knew or had reason to know of the intestate's danger, as set out in No. 1, the defendant is not liable. A person has reason to know that which a person of ordinary prudence would know under like circumstances.

The instructions we have indicated, with those given by the court defining ordinary care, and the measure of damages, cover the whole law of the case.

The evidence for the defendant is to the effect that those in charge of the train did not discover the fright of the horses until they were running away, and it was too late for them to avoid injury to the intestate by any steps they might then take, and there is much in the testimony of the plaintiff's witnesses sustaining this view of the case. In view of all the facts, we conclude that a new trial should be granted.

Judgment reversed, and cause remanded for a new trial.

LOUISIANA SUPREME COURT.

DAVID SCHWARTZ et al.

v.

PRENTICE E. EDRINGTON, Judge.

(— La. —, 62 So. 660.)

Injunction — against publishing petition.

The privilege of free publication, guaranteed by the Constitutions of the United

Headnote by MONROE, J.

Note.—The question whether the publication of a person's name as signer of a petition may be enjoined after repudiation of the petition by him seems to have arisen for the first time in *SCHWARTZ v. EDRINGTON*.

The question of the right to withdraw names from a petition or remonstrance has often arisen, however, as is shown by the notes to *Sim v. Rosholt*, 11 L.R.A.(N.S.) 372, and *Territory ex rel. Stockard v. Veal*, 35 L.R.A.(N.S.) 1113.

In connection with the constitutional phase of the question treated in *SCHWARTZ* 47 L.R.A.(N.S.)

States and of this state, has its limitations. It does not, for instance, include the right to publish the private letters or copyrighted compositions of another; obscene matter, lottery advertisements, or notices used as instrumentalities for making effective a boycott which has been enjoined under the Sherman act (act July 2, 1890, chap. 647, 26 Stat. at L. 209), or some other matters that might be mentioned. Under the state Constitution, "any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty," but that grant does not include the right to publish what purports to be a signed petition, as expressing the sentiments, not of the publisher, but of the signers, after the signers have disowned and repudiated it, as having been signed under a misapprehension; and the continued publication of the names of such signers, in that connection, may be enjoined, and the parties violating the injunction may be punished for contempt of the court by which it was issued.

(June 9, 1913.)

APPPLICATION for writs of certiorari and prohibition to review an order of the respondent judge sentencing relators to imprisonment for contempt in violating an injunction issued by him. Dismissed.

The facts are stated in the opinion.

Messrs. Fred. A. Middleton and Robert H. Marr, for relators:

The court is entirely without power to control, in advance, the publication of an article in a newspaper.

State ex rel. *Liversey v. Civil Dist. Judge*, 34 La. Ann. 741; *Levert v. Daily States Pub. Co.* 123 La. 594, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356, 49 So. 206; *Marx & H. Jeans Clothing Co. v. Watson*, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *Dailey v. Superior Ct.* 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; *Ex parte Foster*, 44 Tex. Crim. Rep. 423, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593; *Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S. E. 472; *Ulster Square Dealer v. Fowler*, 58 Misc. 325, 111 N. Y. Supp. 16.

Mr. J. E. Fleury for respondent.

v. EDRINGTON, see the notes to *Dailey v. Superior Ct.* 32 L.R.A. 273, and *Cowan v. Fairbrother*, 32 L.R.A. 831, both of which treat the question of injunction against speech or publication as affected by the constitutional right of free speech and free press.

Other analogous notes which may be of interest are: Injunction against sale or publication of letters (*Baker v. Libbie*, 37 L.R.A.(N.S.) 944); injunction against publishing or circulating statements relative to industrial disputes by labor unions (*M. Steinert & Sons Co. v. Tegen*, 32 L.R.A.

Monroe, J., delivered the opinion of the court:

Relators allege that, at the instance of certain persons, whom they name, the judge of the twenty-eighth judicial district court issued an injunction prohibiting them and the Jefferson Voice Publishing Company, Limited, from publishing the names of said persons, "as petitioners for incorporation of the village of Gretna, in the parish of Jefferson, in the Jefferson Voice, a newspaper published in the parish of Jefferson, and from further publishing the names of said parties under the heading of the petition to incorporate the village of Gretna;" that the publication thus referred to "was made in pursuance of act No. 136 of 1898, and in obedience to § 11 of said act, and that the twenty-eighth judicial district court was absolutely without power, jurisdiction, or authority to issue said injunction;" that relators did not obey the injunction, but made the publication as though it had not been issued, and were ruled to show cause why they should not be punished for contempt, and after hearing, were sentenced to imprisonment for so doing; wherefore, they pray for writs of certiorari and prohibition, etc.

Act 136 of 1898, §§ 11 and 12, provide that, whenever a petition signed by two thirds of the electors of a village, setting forth certain facts, and praying that the village be incorporated, shall be presented to the governor, and he shall be satisfied in certain respects, and, among others, that the petition has been published for three weeks, he shall declare the village incorporated, and appoint the officers; and it appears that the plaintiffs in the injunction here in question had signed such a petition, and that it was in course of publication when they appealed to the court to prohibit the further publication, on the ground that they had affixed their signatures "with the understanding that there would be an election held to elect the first officials, and that the governor would appoint, as the first officials, the persons receiving the majority of votes for the respective offices, elected at said election;" but "that, since the movement to incorporate started, the proposition to allow the electors to take part and vote at an election for the first officials of the proposed

municipality has been entirely eliminated, and the parties in charge of the petitions propose to have the territory described in said annexed petition incorporated, without having an election to elect the first officials, which will be tantamount to a recommendation to the governor of this state of the parties whom the qualified electors desire as their first officers, and that the parties in charge of said petitions intend to have said officers appointed without consultation or consent of the voters of the proposed municipality. . . .

"Petitioners further allege that the Jefferson Voice Publishing Company, Limited, David Schwartz, Arthur E. Stone, and Charles F. Gelbke, or either of them, are causing to be published in the Jefferson Voice, a newspaper published in this parish, a petition for incorporation of the proposed village of Gretna, on which said petition there appear the names of your petitioners; that, although the parties who solicited your petitioners' signature to said petition have been duly notified that petitioners desire to withdraw their names from said petition, and that petitioners are not in favor of incorporation of the said town without having a voice in the selection of the first officials, through an election duly held for this purpose, as originally and generally understood, nevertheless, the said newspaper and the parties herein named have published, and continue, and will continue, to publish petitioners' names in said newspaper as petitioners for incorporation, unless they are restrained from so doing."

Petitioners prayed that an injunction issue, prohibiting the further publication of their names "as petitioners for incorporation of the village of Gretna;" and the injunction issued accordingly.

The respondent judge, by way of return to the alternative writ issued from this court, says (among other things): "The allegation in the plaintiffs' petition that the defendants were using their names in a certain way, under a certain heading, in the Jefferson Voice, . . . without the consent of the petitioners, and that such use of their names was an invasion of their right of privacy, clearly entitled the plaintiffs to the writ of injunction, and I accordingly issued the order."

The question to be decided is whether,

(N.S.) 1013); injunction against false statements as to plaintiff's property or business (Flint v. Hutchinson Smoke Burner Co. 16 L.R.A. 243); injunction to protect personal right (Chappell v. Stewart, 37 L.R.A. 783, and Itzkovitch v. Whitaker, 1 L.R.A. (N.S.) 1147); common-law rights of authors and others in intellectual productions (Press Pub. Co. v. Monroe, 51 L.R.A. 353); 47 L.R.A. (N.S.)

rights and remedies of author who has parted with property right in work (Cleveland v. Martin, 3 L.R.A. (N.S.) 629); right of action for use of photograph or name for advertising purposes (Henry v. Cherry, 24 L.R.A. (N.S.) 991, and Foster-Milburn Co. v. Chinn, 34 L.R.A. (N.S.) 1137).

G. J. C.

upon the whole case as thus presented, the respondent judge was vested with jurisdiction to issue the injunction. The 1st Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press;" but that provision, though pregnant with a prohibition directed to the courts, as well as to the lawmakers, has never been construed as inhibiting the issuance of injunctions to restrain publications in certain cases, and the same thing may be said with regard to similar provisions in the Constitutions of the different states.

In *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712, Judge Martin, presiding in the superior court of the territory of Orleans, held that the defendant, who had been enjoined from publishing a private letter written by the plaintiff, and who had, thereafter, attached the letter to the answer filed by him, and, by an advertisement in a newspaper, had invited the public to visit either the clerk's office or his printing office and read it, was guilty of contempt; and, in the course of the able and exhaustive opinion leading to that conclusion, the learned judge said: "In the United States, by an act of Congress, it is made penal to print the manuscript of another, and the property of the writer is secured from invasion. 1 Laws U. S. 118 [1 Stat. at L. 125, chap. 15]. This act is expressly extended and declared to be in force and effect in this territory. 7 Laws U. S. 117 [2 Stat. at L. 285, chap. 38]."

The copyright laws of the United States are not therefore within the prohibition of the Constitution, and the press is not free to publish matter protected by them.

In *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877, the Supreme Court of the United States, speaking through Mr. Justice Field, said: "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

But, after quoting from act of March 3, 1873, chap. 258, 17 Stat. at L. 598, to the effect that no books, pamphlets, papers, prints, or other publications of certain mentioned kinds shall be carried in the mails, the court went on to say: "All that Congress meant by this act was that the mail should not be used to transport such corrupting publications and articles. . . . The same inhibition has been extended to circulars concerning lotteries,—institutions 47 L.R.A. (N.S.)

which are supposed to have a demoralizing influence upon the people."

And it was held that the inhibition last referred to was within the power of Congress.

In the matters of *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492, it was held that the continuance of a boycott may be enjoined, though spoken words or written matter is used as the instrumentalities by which it is made effective.

In *Laidlaw v. Lear*, 30 Ont. Rep. 26, it was held that "the publication of notes or drafts of private letters dictated to a stenographer in the ordinary course of business, and, by him, surreptitiously taken from the office and given to a third person who knew how they were obtained, will be enjoined, at the instance of the person who dictated them." 22 Cyc. 900, note.

In *Mackenzie v. Soden Mineral Springs Co.* 27 Abb. N. C. 402, 18 N. Y. Supp. 240, it was held that "a physician may enjoin the advertising of an unauthorized recommendation of a medicinal preparation under his name, on the grounds that such publication is injurious to his professional reputation, and an infringement of his right to the use of his name, and prejudicial to public interest." 22 Cyc. 900, note.

The Louisiana Constitution of 1879 contained a provision very similar to that contained in the Constitution of the United States, to wit: "Art. 3. No laws shall be passed . . . abridging the freedom of speech, or of the press. . . ." And, construing that article, it was held by this court, in *State ex rel. Liversey v. Civil Dist. Judge*, 34 La. Ann. 741, that (quoting from the syllabus) "by our Bill of Rights, the 'press' is free from all censorship over what shall be published, and entirely exempt from control, in advance, as to what shall appear in print. Courts in this state are therefore absolutely without authority to control in advance, or to restrain by injunction, the liberty enjoyed by the 'press' to publish what even may be of a libelous nature, the party injured having his remedy after the publication."

The question presented for decision in the case thus cited was whether the relations had been properly condemned to imprisonment for contempt of court for having violated an injunction prohibiting them from publishing certain "false, malicious, and libelous cartoons and editorial paragraphs," to the alleged irreparable injury of the applicant for the writ. When, therefore, the court had decided that the courts of this state are without authority to enjoin the publication of a libel, and, hence, without authority to punish the violation

of such an injunction, it had decided the only questions that were before it, and in so far as the opinion and the syllabus go beyond those questions they are *obiter dicta*.

The weight of authority in England and in this country, no doubt, sustains the doctrine applied by the court to the questions presented for decision. Whilst, however, it is true that the privilege of free publication seems thus to be held paramount, to that extent, to some other rights and "blessings," to secure which the government was established, it remains, nevertheless, that, according to the same weight of authority, that privilege has its limitations. It does not, for instance, include the right to publish the letters or copyrighted compositions of another person, or obscene matter, or lottery advertisements, or notices in aid of a boycott which has been enjoined under the "Sherman act."

In *Dailey v. Superior Ct.* 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458, it was held by the supreme court of California that "the production in a theater of a play based upon the facts of a criminal case then on trial, although it may interfere with the administration of justice and deprive the accused of a fair trial, and may constitute a punishable contempt, cannot be restrained by injunction, under Const. art. 1, § 9, declaring: 'Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.'"

In a note appended to the decision thus referred to (32 L.R.A. 273), it is said (among other things): "The court in the above case assumes that the theatrical representation involved a speaking of the 'sentiments' of the author. Even if this is conceded, it would seem doubtful if the mere publication of a false statement of alleged fact, involving no comment, criticism, or expression of opinion could be called a speaking of 'sentiments,' or come within this constitutional guaranty."

The criticism thus quoted is particularly applicable in the instant case, since the question here at issue arises not under the Constitution of 1879, which declared, merely, that "no law shall be passed . . . abridging the freedom of speech, or of the press," but under the present Constitution, which declares that: "Art. 3. No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

The second clause of the sentence thus quoted explains and modifies the first; for, whereas the first refers to "the liberty of speech and of the press," without defining 47 L.R.A.(N.S.)

"the liberty," the second explains its meaning in saying "any person may speak, write, and publish his sentiments on all subjects," etc., which saves the article from conflict with the laws of the United States penalizing the publication of the copyrighted sentiments of another, and, as it appears to us, excludes from its operation the case now under consideration, since there is no attempt, here, to restrain the relators from publishing their sentiments. What they were enjoined from doing was the publication of a petition purporting to be signed by, and which was, in fact, signed by, the plaintiffs in injunction, and purporting to be their petition, but which was not their petition, because, having signed it under a misapprehension, they disowned and repudiated it, and no longer desired that to be done which it was the purpose of the petition to accomplish. And the publication not being an exercise by relators of the privilege of publishing their sentiment., but being an unauthorized use by them of a composition purporting to represent the sentiments of the signers, was, as to the use of their names, under the control of the signers.

We therefore conclude that the respondent judge acted within the limits of his lawful authority in issuing the injunction, and in calling relators to account for disobeying it.

This application is accordingly dismissed at relators' cost.

Petition for rehearing denied June 30, 1913.

VERMONT SUPREME COURT.

JOSEPH W. ROBINSON
v.

MASONIC PROTECTIVE ASSOCIATION.

(— Vt. —, 88 Atl. 531.)

Accident insurance — felon — injury.

1. A felon caused by an accidental bruise upon the finger of the holder of an accident insurance policy is within the clause of the policy providing compensation for accidental injury resulting from some violent,

Note. — Liability under accident policy for injury resulting in felon or abscence.

As to previous diseased condition as affecting liability for death or injury from accident, see note to *Stanton v. Travelers' Ins. Co.* 34 L.R.A.(N.S.) 445.

As to liability on accident policy for sickness or death caused by blood poisoning, see note to *Cary v. Preferred Acci. Ins. Co.* 5 L.R.A.(N.S.) 926.

The decision in *ROBINSON v. MASONIC*

external, and involuntary cause, leaving external and visible marks of a wound.

Same — date of accident — construction.

2. Total disability ensuing within twenty-four hours after an accident, although not within the calendar day upon which it occurs, is within the operation of a provision of an accident insurance policy for indemnity for an injury which totally disables insured from "the date of the accident."

(October 13, 1913.)

EXCEPTIONS by plaintiff to rulings of the Chittenden County Court made during the trial of an action upon an accident insurance policy which resulted in a verdict for defendant. Reversed.

The facts are stated in the opinion.

Messrs. Cowles & Stearns, for plaintiff:

An accident may happen from an unknown cause.

Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

Where the effect is not the natural and probable consequence of the means which produce it,—an effect which does not ordinarily follow, and cannot be reasonably anticipated from the use of the means, or an effect which the actor did not intend to produce, and which he cannot be charged with a design of producing,—it is produced by accidental means.

1 Cyc. 249; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Owens v. Travelers' Ins. Co. 12 Ins. L. J. 75; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Fidelity & C. Co. v. Morrison, 129 Ill. App.

360; Freeman v. Travelers' Ins. Co. 144 Mass. 573, 12 N. E. 372; Schneider v. Provident L. Ins. Co. supra; Fidelity & C. Co. v. Johnson, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2.

Evidence sufficient to satisfy a jury that the accident or death resulted from one of the causes insured against is sufficient.

Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Larkin v. Inter-State Casualty Co. 43 App. Div. 365, 60 N. Y. Supp. 205; Preferred Acci. Ins. Co. v. Barker, 35 C. C. A. 250, 93 Fed. 158.

The use of the words "affirmative proof" does not mean that there must be direct and positive proof of the accident or death.

Preferred Acci. Ins. Co. v. Barker, supra; Konrad v. Union Casualty & S. Co. 49 La. Ann. 636, 21 So. 721.

And the testimony of eyewitnesses as to the cause of the accident or death is not required.

Preferred Acci. Ins. Co. v. Barker, supra; Wright v. Sun Mut. Ins. Co. 29 U. C. C. P. 221.

It is not necessary that such evidence be present immediately after the happening of the accident.

1 Cyc. 252; Thayer v. Standard Life & Acci. Ins. Co. 68 N. H. 577, 41 Atl. 182; Pennington v. Pacific Mut. L. Ins. Co. 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482.

The time between the receiving of the injury and beginning of total disability was reasonable.

Ritter v. Preferred Masonic Mut. Acci. Asso. 185 Pa. 90, 39 Atl. 1117; Brendon v. Traders & Travelers' Acci. Co. 84 App. Div. 530, 82 N. Y. Supp. 860; Hohn v. Inter-State Casualty Co. 115 Mich. 79, 72 N. W. 1105; Order of United Commercial Travelers v. Barnes, 72 Kan. 293, 80 Pac. 1020, 82 Pac.

PROTECTIVE ASSO., that a felon caused by an accidental bruise is within the clause of an accident policy providing compensation for accidental injury resulting from some violent, accidental, and involuntary cause, leaving external and visible marks of a wound, appears to be a pioneer upon this question, and no other case dealing with the right to recover under an accident policy for an injury resulting in a felon has been disclosed.

It has been held that an injury known as "beat hand," which consists in inflammation and abscesses, and which is common among miners and results from the jar, friction, or pressure to the hand by using a pick, is not caused by an accident within the meaning of § 1 of the workman's compensation act 1897. Marshall v. East Holywell Coal Co. 93 L. T. N. S. 360, 21 Times L. R. 494.

And it has been held that "beat knee," which consists in inflammation and ab-

scesses on the knee, resulting from a miner's continuous kneeling, is not caused by an accident within the meaning of the same section. Gorley v. Backworth Collieries, 93 L. T. N. S. 360, 21 Times L. R. 494.

In McCarthy v. Travelers' Ins. Co. 8 Biss. 362, Fed. Cas. No. 8,682, where an accident policy provided that an injury, in order to render the insurer liable, must be the proximate and sole cause of death, it was held that, if death occurred because of inflammation, abscesses, and a diseased condition of the insured's lungs, and these followed an injury rupturing the blood vessels of the lungs, as its necessary consequence, the injury was the proximate cause of the insured's death; but that if an independent disease supervened, or if the injury merely brought into activity a slumbering disease, and death was caused wholly or in part by such disease, the injury was not the sole and proximate cause of death.

J. T. W.

1099, 7 Ann. Cas. 809; *Baumister v. Continental Casualty Co.* 124 Mo. App. 38, 101 S. W. 152; *Farner v. Massachusetts Mut. Acci. Asso.* 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927.

The felon was not a sickness.

Farner v. Massachusetts Mut. Acci. Asso. 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927; *Acci. Ins. Co. v. Young*, 20 Can. S. C. 280; *Miner v. Travelers' Ins. Co.* 3 Ohio S. & C. P. Dec. 289, 2 Ohio N. P. 103; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774; *Fitton v. Accidental Death Ins. Co.* 17 C. B. N. S. 122, 34 L. J. C. P. N. S. 28; *Martin v. Equitable Acci. Asso.* 61 Hun, 407, 16 N. Y. Supp. 279.

Messrs. Rufus E. Brown and Sherman R. Moulton, for defendant:

Plaintiff is not entitled to recover under clause "B" of the policy, because the injury did not leave external and visible marks of a wound, fracture, or dislocation upon his body.

Wehle v. United States Mut. Acci. Asso. 11 Misc. 36, 31 N. Y. Supp. 805; *Thayer v. Standard Life & Acci. Ins. Co.* 68 N. H. 577, 41 Atl. 182; *Root v. London Guarantee & Acci. Co.* 180 N. Y. 527, 72 N. E. 1150; *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; *Union Casualty & Surety Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677; *United States Casualty Co. v. Hanson*, 20 Colo. App. 399, 79 Pac. 176.

The external marks must be of wounds, fractures, or dislocation.

Montgomery v. Lansing City Electric R. Co. 103 Mich. 46, 29 L.R.A. 287, 61 N. W. 543; *Shadock v. Alpine Pl. Road Co.* 79 Mich. 7, 44 N. W. 158; *Moriarty v. Brooks*, 6 Car. & P. 685; *Thompson v. Loyal Protective Asso.* 167 Mich. 31, 132 N. W. 554.

The plaintiff is not entitled to recover under clause "B" of the policy, because his total disability did not commence at the date of the accident.

Pepper v. Order of United Commercial Travelers, 113 Ky. 918, 69 S. W. 956; *Williams v. Preferred Mut. Acci. Asso.* 91 Ga. 698, 17 S. E. 982; *Preferred Masonic Mut. Acci. Asso. v. Jones*, 60 Ill. App. 106; *Merrill v. Travelers' Ins. Co.* 91 Wis. 329, 64 N. W. 1039; *Ritter v. Preferred Masonic Mut. Acci. Asso.* 185 Pa. 90, 39 Atl. 1117; *Hohn v. Inter-State Casualty Co.* 115 Mich. 79, 72 N. W. 1105.

Watson, J., delivered the opinion of the court:

The plaintiff cannot recover under clause B of the policy, unless the felon on his finger was due to an accidental injury resulting from some violent, external, and

involuntary cause, leaving external and visible marks of a wound upon the finger, which totally disabled him from the date of the accident. He could not tell when, nor that he received an injury to the finger upon which the felon appeared. But there was evidence tending to show that on July 7, 1911, he was working as road commissioner with men and teams drawing gravel and replacing fallen stones in the abutment of a bridge, and that after dinner of that day he helped his men in replacing such stones, using an iron crowbar. He did no manual labor after thus helping to replace the stones, up to the time in the forenoon of the next day, when, according to the tendency of the evidence, his finger began to swell and became painful. The physician who examined the plaintiff's finger in the afternoon of the latter day did not notice any abrasion of the skin. The finger was badly swollen, inflamed, and reddened. It grew worse steadily, and a frog felon of the most severe kind developed.

We think the evidence fairly and reasonably tended to show that the felon resulted from, and was the natural consequence of, a bruise of the finger within less than twenty-four hours from the time of the injury, without any intervening cause. That it was an accidental injury, if such a bruise was received by the plaintiff, no question is made.

Did the felon constitute an external and visible mark of wound, within the meaning of clause B of the policy? The word "wound" is defined in *Bouvier's Law Dictionary* as follows: "Any lesion of the body. In this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity; while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like." The definition given by *Rapalje and Lawrence* in their *Law Dictionary* is exactly to the same effect, making the same distinction. And in *Stewart's Legal Medicine*, a book published in 1910, § 100, the same distinction between the surgical and the legal definitions is noticed. In *Thompson v. Loyal Protective Asso.* 167 Mich. 31, 132 N. W. 554, the insurance certificate was issued upon an application for membership, wherein it was agreed that there could be no claim for indemnity "for any disability where there shall be no external or visible sign or symptom of disease or bodily injury;" and bodily injury was defined to include "only the result of external, violent, and accidental means, leaving on the body marks of contusion or wounds visible to the naked eye." The insured was a "boiler house foreman,"

and the evidence showed that the claimed injury was received by him while working inside a boiler, cleaning it; that on getting home he went immediately to bed, and on his right side, between the hip and the back, there was a red, inflamed mark, about half the size of his wife's hand; that the next day he was suffering much pain, and on examination the physician found a discoloration of the skin, swelling, and redness over the right kidney and hip. The physician testified that this injury caused the insured's death, which occurred five days later, and that the death was wholly due to the external injury. It was claimed that the charge, shown in the third paragraph, was erroneous, wherein the court said: "The mark visible to the eye on the body, required by the policy, need not be a bruise, contusion, laceration, or broken limb, but may be any visible indication of an internal injury, which may appear within a reasonable time after the injury is received, such, for instance, as discoloration of the part of the body affected." The court said this part of the charge must be read in connection with the sentence immediately following it: "In legal medicine the word 'wounds' means injuries of every description that affect either the hard or soft parts of the body, and comprehends bruises, contusions, fractures, luxations, etc. In law the word means any lesion of the body." Thereon the court of last resort further said the jury had been charged explicitly, in substance, that it must appear that the death was caused, exclusively of other causes, "by a bodily injury sustained through external violence and accidental means, leaving upon the body marks of contusion, or wounds, visible to the naked eye. The third paragraph excepted to explains and defines to the jury the meaning of the term 'visible mark' and the word 'wounds' as used in the insurance contract," and there was no error in such instruction.

We are of the opinion that the word "wounds," as used in clause B of the policy upon which the action before us is based, should be given the so-called legal, rather than the surgical, construction, and that it includes the bruise of the plaintiff's finger, if any there was, of which the felon was the direct and natural consequence, and that in such circumstances the felon constituted "external and visible marks" of the wound left upon the plaintiff's body by the accidental injury, within the meaning of that clause of the policy.

The claim that no recovery can be had under clause B, because the plaintiff's injury did not "totally disable him from the date of the accident," must also be determined against the defendant on the tend-

ency of the evidence and the construction of the contract. As already seen, the evidence tended to show that the felon appeared within less than twenty-four hours from the time of the injury. It further tended to show that total disability resulted from the time of its appearance. The question then is, Was such disability, within less than twenty-four hours after the time of the accident, though on the next calendar day "from the date of the accident," within the meaning of that clause of the policy? A construction making the words, "from the date of the accident," mean from the calendar day on which the accident occurred, would be so unreasonable in some cases as to render it almost certain that such a construction was not contemplated by the parties to the contract. For instance, the insured might meet with accidental injuries between 11 and 12 o'clock at night, it being within the last hour of the calendar day, and yet, if that is the date contemplated by the policy, the total disability of the insured must begin within the same hour, and perhaps instantly, in order to entitle him to the benefits provided by clause B. Assuming that this provision was inserted in the contract by the insurer with intentions reasonable and just toward the insured, we think the words, "date of the accident," as used in that clause, were intended to mean total disability from the day of the accident, reckoned from the time of the accident; that is, within twenty-four hours thereafter.

Judgment reversed and cause remanded.

WASHINGTON SUPREME COURT. (Department No. 2.)

GRAND COURT OF WASHINGTON,
FORESTERS OF AMERICA, et al.,
Respts.,

v.

CHARLES A. HODEL et al., Appts.

(74 Wash. 314, 133 Pac. 438.)

Benevolent societies — power of lodge to secede.

The majority of a subordinate lodge of a benevolent society cannot authorize a secession of the lodge from the parent organization, and take with them the property of the order, if the general laws of the order provide that all property and funds of a lodge shall be held exclusively as a trust fund for carrying on the frater-

Note. — Right to property of local branch of benefit society in event of secession or attempted secession.

The note is confined to the right of local benefit insurance societies to secede from

nal and benevolent features of the order, and shall not be expended for any other purpose, and that no part of the property shall ever be divided among the members, and if any lodge, for any reason, shall cease to exist, all its property shall immediately and *ipso facto* revert to the superior lodge.

(July 12, 1913.)

APPEAL by defendants from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover possession of property of a local lodge of the plaintiff order which had been carried away by defendants at the time of an attempted secession from the parent organization. Affirmed.

The facts are stated in the opinion.

the parent organization and divert the society's property.

As to right, upon dissolution of benefit association or local branch thereof, to funds voluntarily accumulated by the branch, to be expended solely for the benefit of its members, see note to *State Council v. Emery*, 15 L.R.A. (N.S.) 336.

As to disposition of real estate upon dissolution of a corporation created for benevolent or social purposes, see note to *McAlhany v. Murray*, 35 L.R.A. (N.S.) 895.

Rights as between seceding majority and loyal minority of subordinate body.

The authorities are agreed that a majority of the members of a subordinate branch of a benefit association cannot, against the will of the minority, secede from the parent organization, and take with them the property of the subordinate branch.

Thus, it has been held that where a benefit association is an integral part of a larger body having specified objects, a majority of the members of the subordinate lodge cannot, against the will of the minority, who remain loyal and constitute a sufficient number to continue the subordinate branch, secede from the parent organization, and divert the property of the subordinate branch to another society. *Ahlendorf v. Barkous*, 20 Ind. App. 657, 50 N. E. 887 (where it was provided that the property of the subordinate lodge was a trust fund which could not be diverted from the parent organization); *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 868 (where minority were recognized by parent organization as constituting old lodge); *Altmann v. Benz*, 27 N. J. Eq. 331 (where majority formed new society of same name as old, and minority were recognized by parent organization as continuing old society); *Shubert Lodge, No. 118, K. P. v. Shubert Kranken-Interstuzen Verein*, 56 N. J. Eq. 78, 38 Atl. 347 (where parent organization recognized minority as continuing society); *Gorman v. O'Connor*, 155 Pa. 239, 26 Atl. 379; *Kayley v. McCourt*, 235 Pa. 304, 83 Atl. 47 L.R.A. (N.S.)

Mr. J. D. Bauer for appellants.

Messrs. George H. Rummens and J. Henry Denning, for respondents:

The attempted secession on the part of the members amounted in law to nothing more than a voluntary withdrawal from the society, and upon such withdrawal they each forfeited all their rights in the lodge property, and those remaining faithful are entitled to hold all the property of the lodge.

1 Beach, Priv. Corp. § 99; *Brown v. Monroe*, 80 Ky. 443; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Altmann v. Benz*, 27 N. J. Eq. 331; *Holt v. Downs*, 58 N. H. 170; *Isaham v. First Presby. Church*, 63 How. Pr. 465; *Den ex dem. Day v. Bolton*, 12 N. J. L. 206; 2 Beach, Priv. Corp. 908; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32

830; *Minor v. St. John's Union Grand Lodge, F. A. A. Y. M.* — Tex. Civ. App. —, 130 S. W. 893.

And the same result was reached in *Freundschaft Lodge No. 72 D. O. H. v. Alchenburger*, 235 Ill. 438, 85 N. E. 653, affirming 138 Ill. App. 204, and *Union Benev. Soc. v. Martin*, 113 Ky. 25, 67 S. W. 38, where the laws of the order stipulated that the majority could not dissolve the society so long as a minimum number remained loyal.

And in *Sabourin v. Lippe*, 195 Mass. 470, 81 N. E. 282, where the laws of the parent association provide that fifteen or more members might "be recognized by the executive council of the Grand Court as the same court to which they formerly belonged, under a new dispensation bearing the same number," and another provision stipulated that fifteen members were required to constitute a court, and that if this number remained constantly loyal to the order, they should be recognized as still constituting a court, and a formal dispensation to that effect should be issued, it was held that the existence of the original subordinate court was continued after the issuance of a dispensation to a minority, who had refused to secede, where it recognized these members as constituting a court of the same name, and as retaining the charter and all authority conveyed by it, and provided that all authority conveyed to the expelled members by any dispensation was abrogated and canceled.

But on a subsequent appeal of *Union Benev. Soc. v. Martin*, 25 Ky. L. Rep. 1039, 76 S. W. 1098, it was held that the minority members were not entitled to the funds of the society, unless they, in good faith, organized and operated the society and carried out the purposes of the organization, and whether they did this was held to have been properly submitted to the jury.

And it was held that if the resolution to withdraw is passed without dissent, a minority cannot subsequently be held to be the society and entitled to the property. *Ibid.*

The rule that a majority of a subordinate

L.R.A. 839, 44 N. E. 363; Hackney v. Vawter, 39 Kan. 615, 18 Pac. 704; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 803, 18 S. W. 874; Union Benev. Soc. No. 8 v. Martin, 113 Ky. 25, 67 S. W. 38; Wheelock v. First Presby. Church, 119 Cal. 485, 51 Pac. 844; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Farraria v. Vasconsellos, 31 Ill. 25; Gorman v. O'Connor, 155 Pa. 239, 26 Atl. 379; Duke v. Fuller, 9 N. H. 536, 32 Am. Dec. 392; Grand Lodge K. P. v. Germania Lodge, 56 N. J. Eq. 63, 38 Atl. 341; Schubert Lodge No. 118, K. P. v. Schubert Kranken Unterstutzen Verein, 56 N. J. Eq. 78, 38 Atl. 347; Summer Lodge, No. 180, I. O. O. F. v. Odd Fellows Home, 77 N. J. Eq. 386, 77 Atl. 36; Nichols v. Bardwell Lodge, No. 179, I. O. O. F. 105 Ky. 168, 48 S. W. 426.

Fullerton, J., delivered the opinion of the court:

The Foresters of America is a voluntary benevolent and social association, having courts or lodges throughout the United States. The highest court in authority is called the Supreme Court, which "is the source of all true and legitimate power and authority in the Foresters of America, wheresoever established." Next in order are the Grand Courts, which possess certain defined powers granted them by the Supreme Court. Lastly come the subordinate courts which receive their charters from the Grand Court. The order is governed by a written constitution and laws enacted thereunder, which provide minutely for the collection of the revenues of the order and the purposes for which it may be expended; § 110

lodge cannot secede from the parent organization, and take the subordinate society's property against the will of the minority, is not altered by the fact that the parent association unites with another association, where the parent organization reserves the management of its internal affairs. Polish Falcons' Gymnastic & Literary Asso. v. Kubiak, 238 Pa. 464, 86 Atl. 296.

But in Pierson v. Gardner, 81 N. J. Eq. 505, 86 Atl. 442, where the parent organization and the subordinate body had originally been unincorporated, it was held that the unauthorized incorporation of the parent body in another state than that in which the subordinate body was located materially changed the relations between the two bodies, and that, the purposes for which the members of the subordinate lodge had been originally organized having failed, the funds of the society should be distributed so that each member should receive a *pro rata* share. The controversy in this case arose between members who associated themselves with the parent body after its incorporation and other members who had voted to sever the connection of the subordinate lodge with the parent body.

In Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746, where a statute under which a subordinate lodge was incorporated provided that its object was to assist distressed members and perform other benevolent offices, and conferred upon it the power of making laws which were not in conflict with those of the United States or the states, and the constitution of the superior body, which was binding upon the local lodge, provided for the payment of certificates issued to members by a collection made from the several local lodges, it was held that an attempt, by much less than the majority of the membership of the local lodge, to secede and assume the care of all the claims of its membership, was invalid, since it violated the provisions of the state and Federal Constitutions prohibiting the impairment of the obligation of contracts.

In Blais v. Brazeau, 25 R. I. 417, 56 Atl. 47 L.R.A. (N.S.)

186, the benefit association involved was apparently a member of a parent organization, but no point is made of this fact; and where it appeared that a majority of the society voted to pay no more dues in order to put the society in an insolvent condition and then force a sale of its property, and subsequently voted to sell the property and appointed a committee who advertised it for sale on sealed bids, and, no bids being received, it was voted to sell to a syndicate composed of a majority of the members, who had banded together to purchase the property, it was held, on a bill brought by the minority, that a sale for a sum below the real value of the property should be set aside, since it worked a fraud on the minority members.

It has been held that the action of members of a lodge as individuals, and not as a lodge, is ineffectual to effect a withdrawal from the superior organization. Circus v. Independent Order, A. I. 55 App. Div. 534, 67 N. Y. Supp. 342.

And in Sabourin v. Leppe, 195 Mass. 470, 81 N. E. 282, it was held that where the constitution and by-laws of an order provided that in no event could a subordinate court withdraw from the parent society, except for causes provided by certain articles, an attempt by a subordinate body to withdraw for a reason not mentioned in such articles was invalid.

In Chamberlain v. Lincoln, 129 Mass. 70, the right of the minority to recover, in an action for that purpose, the property from the majority faction, which had voted to sever its connection with the grand lodge, was denied on the ground that it had not exhausted its remedies within the order.

Rights as between members of subordinate lodge and parent organization.

It is held that where the funds of a subordinate lodge, which is part of a parent organization, are contributed for specified purposes, and the subordinate lodge obligates itself, upon disbanding, to deliver its property to the parent organization, its

of the general laws relating thereto reading as follows: "All property and funds of a court and their increment shall be held exclusively as a trust fund for carrying on the fraternal and beneficial features of the order, and shall not be expended for any other than those purposes, and the payment of the necessary expenses of a subordinate court and the order. The funds may be invested from time to time, but such investment shall be made only in the stock of hall associations for the order, which associations shall be owned exclusively by the members of the order; bonds of the United States, state of Washington, building and loan societies under the control of the state building and loan commissioners, or deposited in savings banks, under the control of the state bank commissioners, or loaned on unencumbered real estate. Neither the whole nor any part of the court property or money shall ever be divided among the

members, and no gift thereof shall ever be made, except from the benevolent fund, and in accordance with the laws of the order. Funds of the court shall never be loaned to any of its members. In case a court, from any cause shall cease to exist, or be suspended or dissolved, or have its charter or dispensation revoked, or be surrendered, all the funds and property of the courts of whatsoever kind shall immediately and *ipso facto* revert to the Grand Court of the state of Washington, and shall be immediately surrendered and delivered up to the Grand Court officers or agents authorized to receive the same."

The order has a subordinate court at the city of Seattle, known as Court Enterprise No. 3, which is within the territorial jurisdiction of the Grand Court of Washington. On August 18, 1911, at a regular meeting of the subordinate court, a resolution was introduced to the effect that the local court

assets constitute a trust fund, and that, upon the subordinate society's seceding and appropriating the property, the parent organization may maintain an action to recover the property. *Die Gross-Loge Des Ordens der Hermanns-Soehne v. Wolfer*, 42 Colo. 393, 94 Pac. 329; *Koerner Lodge No. 6, K. P. v. Grand Lodge, K. P.* 146 Ind. 639, 45 N. E. 1103; *State Council O. U. A. M. v. Sharp*, 38 N. J. Eq. 24; *Grand Lodge, K. P. v. Germania Lodge*, 56 N. J. Eq. 63, 38 Atl. 341.

And this is true where, by the attempted withdrawal, the membership of the subordinate lodge is reduced to less than the number required to form a lodge. *Ahlendorf v. Barkous*, 20 Ind. App. 657, 50 N. E. 887.

And it has also been held to be true though the members of the subordinate lodge, by unanimous consent, undertook to dissolve and divert the funds. *Gross Lodge der Harugari v. Brausch*. 256 Ill. 185, 99 N. E. 908, reversing 167 Ill. App. 13.

In *Koerner Lodge No. 6 K. P. v. Grand Lodge, K. P.* 146 Ind. 639, 45 N. E. 1103, where the constitution prohibited a subordinate lodge dissolving or surrendering its charter as long as nine members remained willing to sustain the lodge, and sixty members present at a meeting of a lodge composed of one hundred and sixty members adopted a resolution to separate the subordinate lodge from connection with the grand lodge, it was held that their act did not *ipso facto* effect a dissolution of the subordinate lodge, and that, in an action by the grand lodge to recover possession of money and property on the ground that the subordinate lodge had voluntarily surrendered its charter, evidence was admissible that eleven members who were not present at the meeting adopting the resolution of withdrawal, at the next meeting, formally protested against the action.
47 L.R.A. (N.S.)

In *Liberty Bell Lodge's Petition*, 231 Pa. 112, 80 Atl. 532, where it appeared that, prior to the incorporation of a benefit society, it had existed as an unincorporated society for a period of several years, subject to the laws, rules, and regulations of a parent organization, and that after its incorporation, a controversy had arisen between the subordinate and supreme lodges, it was held that a petition for a change of name of the subordinate lodge, which was signed by the officers and was under the seal of the subordinate lodge of another parent organization, should be refused, where it appeared that the members of the original subordinate lodge were thereby attempting to transfer its rights and franchises to the lodge in whose name the petition was brought. The court said: "This court has uniformly held that when application is made to alter or amend the charter of a corporation, it must appear that it is the act of the corporation in its corporate capacity, and not the act of individual members thereof. The petition in this case does not comply with this rule. Again, it is a general rule recognized by courts and by officers of the commonwealth having the power to alter and amend charters, not to exercise the power so as to change the original purpose for which the corporation was created. In the present case the effect of granting a change of name is to entirely change the original purpose for which the charter was granted. This cannot be done. As originally chartered, Liberty Bell Lodge No. 42 was a component part of the Order of Shepherds of Bethlehem, but if the change of name is allowed to stand, it is intended by this simple process to make it a component part of the Shepherds of America. This changes the entire purpose of the original charter, and we know of no authority to warrant such a result by a simple change of name."
J. T. W.

secede from the order and amalgamate with another fraternal order, known as the Knights of the Golden West, which was then being organized. The court fixed the next regular meeting as the time for voting on the resolution, and directed that notice be sent to each member in good standing notifying him of the introduction of the resolution, and that a vote would be taken thereon at the next regular meeting of the court. The court then had a membership in good standing of 203; it owned property and lodge fixtures of some value, had cash on hand in the sum of \$387.67, and owned local improvement bonds of the city of Seattle of the face value of \$1,260.07. At the meeting named in the notice, August 25, 1911, about 70 of the members attended. The meeting was opened in ritualistic form and proceeded with the formal order of business until the appropriate order for the resolution was reached, when a vote was taken on the same. All of the members present, except some five or seven, voted in favor of the resolution, whereupon the same was declared carried, and the members present and voting in the affirmative withdrew from the order and carried with them the money and property of the court.

At the meeting at which the vote was taken, the Grand Chief Ranger of the Grand Court of Washington was present, and when the vote was announced, that officer, acting in his official capacity, suspended from the order the members voting for the resolution, and declared all the offices of the court vacant. At a later date on a regular meeting night of the court, this officer, acting pursuant to the laws of the order, issued a dispensation permitting the members of the court then present to hold an election for the purpose of filling the vacated offices. A new election was thereupon held and installed, and the persons so elected have since performed the duties of officers of the subordinate court.

This action was instituted by the Grand Court of Washington, and Court Enterprise No. 3, and certain of their officers and members, against the individuals carrying away the court's property, for the recovery of the same. Judgment went in the plaintiffs' favor in the court below, and this appeal was taken therefrom.

The principal contention made by the appellants is that a subordinate lodge in an order such as the one in consideration here may secede from the parent organization, if the majority of such lodge wills it, and may take with them the money and property of the subordinate lodge. But such is not the

rule. All of the property which this branch of the order, as a fraternal and benevolent organization, had gathered together, was trust funds, in the sense that they were collected for particular uses. They were held in trust for the purposes designated by the constitution and laws of the order, and every member of the order has an interest in the fund to the extent of seeing that it is appropriated to the uses for which it was collected. No number of the members of the order less than the whole could therefore divert the funds to other uses than the uses defined in the constitution and laws of the order. The majority of any subordinate court can undoubtedly direct the use of the funds of the order for purposes of the order, and when there are two or more purposes for which the funds can be lawfully used, may select between them, but the majority cannot, against the will of the minority, lawfully divert such funds for uses other than those permitted by the constitution and laws of the order. This, as we understand the authorities, is the universal rule. *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Stebbins v. Jennings*, 10 Pick. 172; *Nance v. Busby*, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; *Grand Lodge A. O. U. W. v. Grand Lodge A. O. U. W.* 81 Conn. 189, 70 Atl. 617; *Grand Lodge, K. P. v. Germania Lodge*, 56 N. J. Eq. 63, 38 Atl. 341; *Schubert Lodge No. 118, K. P. v. Schubert Kranken Unterstutzen Verein*, 56 N. J. Eq. 78, 38 Atl. 347; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 606; 2 Beach, Priv. Corp. §§ 908, 910.

Some time after the institution of Court Enterprise No. 3, an attempt was made to incorporate the court under the statutes relating to the incorporation of fraternal societies. It may be questioned, we think, whether the proceedings were sufficiently regular to accomplish the purpose intended. But were the facts otherwise, the rule with relation to its property would not be changed. Its funds would still be trust funds, subject to such disposition as the laws of the order permitted to be made of them, and could not be diverted to a use contrary to such laws without the unanimous consent of the members of the order.

The judgment is affirmed.

Main, Morris, and Ellis, JJ., concur.

Petition for rehearing denied.

DELAWARE SUPREME COURT.

PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Plff.
in Err.,

v.

FRANCES THERESA GATTA.

(— Del. —, 85 Atl. 721.)

Appeal — ruling on motion for new trial.

1. Error will not lie to a ruling on motion for new trial where such motion is addressed to the legal discretion of the trial court.

Limitation of action — amendment — stating different cause of action.

2. Where actions are commenced by pra-

Note. — Relation of new pleadings to statute of limitations.

This note is supplementary to the notes to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259, and Boudreaux v. Tucson Gas, E. L. & P. Co. 33 L.R.A.(N.S.) 196.

As to amendment of pleading after limitation period by changing from common law to statute, or vice versa, or from statute of one jurisdiction to statute of another, see notes to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 287, and Allen v. Tuscarora Valley R. Co. 30 L.R.A.(N.S.) 1096.

As stated in note to Boudreaux v. Tucson Gas, E. L. & P. Co. supra, an amendment to a declaration which sets up no new cause of action and makes no new demand relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. Ruiz v. Santa Barbara Gas & Electric Co. 164 Cal. 188, 128 Pac. 330; Sanders v. Allen, 135 Ga. 173, 68 S. E. 1102; Ft. Wayne Iron & Steel Co. v. Parsell, 49 Ind. App. 569, 94 N. E. 770; Bacon v. Iowa C. R. Co. — Iowa, —, 137 N. W. 1011; Bowen v. Buckner, 171 Mo. App. 384, 157 S. W. 829; Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943; Duffy v. McKenna, 82 N. J. L. 62, 81 Atl. 1001; Chas. T. Derr Constr. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253; Ft. Worth & D. C. R. Co. v. Matador Land & Cattle Co. — Tex. Civ. App. —, 150 S. W. 461; Shires v. Boggeess, — W. Va. —, 77 S. E. 542.

And so amendments which only amplify or make more specific the averments in the original petition, or which state the wrong suffered or the right relied on in a different form, are ordinarily permissible, and will relate back to the beginning of the action. Armstrong Cork Co. v. Merchants' Refrigerating Co. 107 C. C. A. 93, 184 Fed. 199; Southern Bell Teleph. & Teleg. Co. v. Davis, 12 Ga. App. 28, 76 S. E. 786; Devaney v. Otis Elevator Co. 251 Ill. 28, 95 N. E. 990; Asplund v. Conklin Constr. Co. 154 Ill. App. 164; McInerney v. Western Pack-

age which merely states the form of action, an amendment may be allowed in an action charging injury by a master to his servant so as to eliminate the element of service, and charge negligent injury to one bearing no contractual relation to defendant, even though the limitation period has elapsed at the time the amendment is filed, if it had not done so when the precept was issued.

Trial — directing verdict — preponderance of evidence.

3. A court cannot direct or set aside a verdict merely upon a preponderance of evidence.

Same — negative and positive evidence — right of court to act upon.

4. The court cannot direct a verdict in an action to recover damages for personal

injury and Provision Co. 154 Ill. App. 559; Cunningham v. Patterson, 89 Kan. 684, 132 Pac. 198; Ft. Wayne Iron & Steel Co. v. Parsell, 49 Ind. App. 565, 94 N. E. 770; Duffy v. Scheerger, 91 Neb. 511, 136 N. W. 724; Witt v. Old Line Bankers' L. Ins. Co. 92 Neb. 763, 139 N. W. 639; Eastern R. Co. v. Ellis, — Tex. Civ. App. —, 153 S. W. 701.

So of an amendment stating correctly the cause of action improperly set forth in the original complaint. Hagenauer v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 803; Arizona Lumber Co. v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 811; Backstein v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 811; Balin v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 811; Bazaar Department Store v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 811; Bienes v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 811; Boyles v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 812; Chavez v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 812; Dunagan v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 812; Dunigan v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 812; Garcia v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 813; Hagan v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 813; Pitt v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 813; Saba v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 814; Lola Saba & Son v. Detroit Copper Min. Co. — Ariz. —, 124 Pac. 814; Maier v. Chicago City R. Co. 166 Ill. App. 500; Johnson v. Perkins, 167 Ill. App. 611.

If a new cause of action is stated by way of amended pleading, and the statute of limitations is involved, the amended pleading cannot be made to relate back to the beginning of the action to defeat the statute. Likewise, where a new cause of action is stated in the amended pleading, and the statute of limitations is pleaded, its sufficiency must be tested as of the date of the filing of the amended pleading. Williams v. Lowe, 40 Ind. App. 606, 97 N. E. 809.

The generally accepted and recognized tests by which to determine whether a cause of action stated in an amended pleading is

injury alleged to have been negligently inflicted because the evidence in support of negligence is negative, while that in support of care is positive, nor can it set aside a verdict based on the negative testimony if the negative testimony, standing alone, is of sufficient probative force to support the verdict.

Evidence — character — positive and negative.

5. The testimony of employees working about standing cars, with knowledge of the danger when such cars are to be shifted, that no warning was given of intention to shift at a certain time, is not merely negative, but may sustain a verdict based on absence of such warning, against positive evidence that the warning was given.

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the same as that stated or attempted to be stated in the original pleading are suggested by asking: (1) Will the same evidence support each? (2) Will a judgment on one be a bar to a judgment on the other? (3) Will the same measure of damages govern both? (4) Is each open to the same defense? An affirmative answer to these questions indicates that the cause of action is the same in each, while a negative answer indicates that they are different. These tests taken separately may not always be decisive or infallible; but when all are applied to the facts of a particular case they will indicate with reasonable certainty whether the cause of action stated in the amended pleading is or is not new and different from that of the original. *Ibid.*

Amendments ordinarily relate back to the beginning of the suit. This rule, however, is not to be so applied as to affect the right to sue over within six months upon causes of action which by amendment were stricken from a case, and which would be barred by the statute of limitations but for the pendency of the suit from which they were so stricken. *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S. E. 51.

Where the cause of action stated in the amended complaint is the same cause of action as alleged in the original complaint, the court must look to the date of filing the latter to determine whether limitation had run when the action was brought. *Kain v. Arizona Copper Co.* — *Ariz.* —, 133 Pac. 412.

The rule is laid down in *St. Louis & S. F. R. Co. v. Loughmiller*, 193 Fed. 689, an action for death, that when a petition, however inaccurately, imperfectly, or artistically drawn, is sufficient in allegations of fact to show the claim asserted therein by plaintiff, is based on the statute creating the right of action, and is brought by the person on whom the statute confers such right, it may be amended at any time, and the amendment will relate back to the date of the institution of the action; but when no reference whatever is made in the petition to the statute or any 47 L.R.A. (N.S.)

ERROR to the Superior Court for New Castle County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of her intestate, alleged to have been caused by defendant's negligence. Affirmed.

Statement by Woolley, J.:

On trial before the superior court for New Castle county, in which a verdict was rendered for the plaintiff, it appears from the testimony, as disclosed by the record, that Charles Gatta, the plaintiff's husband, was, on the day of the injury that caused his death, and for a considerable period theretofore had been, in the employ of the Pullman Company, at its car works in the city of Wilmington; that the premises of

claim based thereon until the time limit prescribed in the statute has expired, all right of action thereunder is lost, and any amendment thereafter attempted is as inefficient to restrain or revive the lost cause of action as would be a new action then instituted.

Where a cause of action set forth in an amended pleading is new, different, and distinct from that originally set up, the new pleading is equivalent to the bringing of a new action; and the statute of limitations runs against the new cause of action to the time it is introduced into the pleading. *La Floridienne, J. Buttgenbach & Co. v. Atlantic Coast Line R. Co.* 63 Fla. 213, 58 So. 186.

Illustrative cases—identity maintained.

The following amendments have been held not to change the cause of action originally pleaded, and therefore not to admit the bar of the statute, although the limitation period expired in the interval between the original and amended pleading:

—an amendment supplying the omission where complaint in action for wrongful death failed to allege that deceased left any heir. *Ruiz v. Santa Barbara Gas & Electric Co.* 164 Cal. 188, 128 Pac. 330.

—amendment in personal-injury action adding promise by master to repair, both original and amended declarations counting upon the same negligence. *Horstman v. Staver Carriage Co.* 153 Ill. App. 130.

—amendment eliminating "as" from before the word "receiver," and which merely states more specifically what the law implies from the original declaration and plea, that the receiver operated and controlled the corporation in question, and that it was not his duty to keep the part of the street specified in good and safe repair. *Lyons v. Sampsell*, 168 Ill. App. 542.

—amendment of declarations, præcipe, and summons, by inserting the word "as" before "receiver," where the original complaint was against a certain person, receiver, etc. *Wilcke v. Henrotin*, 241 Ill. 169, 89 N. E. 329.

the Pullman Company were located on the easterly side of and adjoining the elevated tracks of the main line of the defendant railroad company, its buildings and shops were situated some distance southerly therefrom, and between the elevated tracks of the railroad company and the shops of the Pullman Company there was an inclosed yard; that within this yard, placed parallel with the shops of the Pullman Company and the elevated structure of the railroad company, were three railroad tracks, which were designated and known as tracks A, B, and C, A being the one nearest the shops, C the one nearest the elevated road and furthest from the shops, and B the one between the other two; that these tracks were connected at or about the entrance to the

yard with tracks and sidings belonging to the railroad company, which further on were connected with its main line of railway; that tracks A, B, and C, as well as the yard within which they were located, were the private property of the Pullman Company, upon which Pullman cars stood while being repaired, and over which the railroad company shifted Pullman cars in delivering or receiving them in its business of transportation.

It appears that between the shops and track A there was a wooden platform or flooring and a like platform or wooden passageway between tracks A and B, and that the distance between the shops and track A was about 8 or 9 feet, and that a heavy wooden fence, 6 or 7 feet high, di-

—amendment changing averment that plaintiff tripped on "cable" to averment that he tripped on "drum," but making no change as to defendant's negligence. *Christensen v. Oscar Daniels Co.* 170 Ill. App. 59.

—amendment in the action for death, alleging that persons causing injury were not fellow servants. *McInerney v. Western Packing & Provision Co.* 249 Ill. 240, 94 N. E. 519, affirming 154 Ill. App. 559.

—an amendment changing the date to 1907, to correspond with the facts, where the date of the personal injury, June 14, 1906, was laid under a *videlicet*. *Langguth v. Glencoe*, 253 Ill. 505, 97 N. E. 1052, reversing 161 Ill. App. 294.

—amendment substituting the party having the legal right to sue for the claim for which an action was brought instead of another party improperly named as plaintiff. *Beresh v. Supreme Lodge, K. H.* 255 Ill. 122, 99 N. E. 349.

—amendment of petition to conform to proof. *Knight v. Moline, E. M. & W. R. Co.* — Iowa, —, 140 N. W. 839.

—amendment in personal-injury action, merely amplifying charge of negligence by giving more detail. *Russell v. Chicago, R. I. & P. R. Co.* — Iowa, —, 141 N. W. 1077.

—amendment in action for personal injuries, alleging negligence as cause of same accident, being simply a statement of another ground on which the same cause of action is presented. *Berube v. Horton*, 199 Mass. 421, 85 N. E. 474.

—amendment relating only to quantum of damages. *Pickett v. Atlantic Coast Line R. Co.* 153 N. C. 148, 69 S. E. 8; *Puritan Coal Min. Co. v. Pennsylvania R. Co.* 237 Pa. 420, 85 Atl. 426; *D. Sullivan & Co. v. Ramsey*, — Tex. Civ. App. —, 155 S. W. 580; *Tomson v. Iowa State Traveling Men's Asso.* 88 Neb. 399, 129 N. W. 529.

—amendment in action for injury by mold falling on servant, stating additional ground of negligence, such a use of improper hooks to lower mold, and employment of incompetent fellow servant. *Chobanian v. Washburn Wire Co.* 33 R. I. 289, 80 Atl. 394, Ann. Cas. 1913 D, 730.

—amendment alleging that money sought 47 L.R.A. (N.S.)

to be recovered was paid as consideration for four sections of land charged instead of one section, as averred in the original petition, and that three of the sections were conveyed in the consummation of a previous agreement between the parties, the change thus made by the amendment being merely an enlargement, but not a contradiction, of allegations contained in the original petition. *Goodwin v. Simpson*, — Tex. Civ. App. —, 136 S. W. 1190.

—an amended petition seeking recovery of the value of a note instead of the note itself, and to cancel the assignment by which the defendant claimed to hold it, the wrongful detention of the note being the basis of the cause of action in both petitions. *Jones v. Thompson*, — Tex. Civ. App. —, 138 S. W. 623.

—amendment which merely elaborates the grounds upon which suit is based, but relies upon the identical debt in the original petition, notwithstanding the charge of allegations in regard to the matter of its acquisition, is not the statement of a new cause of action; consequently where, in the original petition, plaintiff sought to recover a loan upon the gift of a note, but amended his petition, predicated his right to recover not only on the gift, but upon an estoppel and parol partition of the notes, no new cause of action was set up. *Schauer v. Von Schauer*, — Tex. Civ. App. —, 138 S. W. 145.

—amendments alleging that cars of bananas sued for were the same cars for which damages were sued for in the original petition and in each of the subsequent pleadings. *Rotan Grocery Co. v. Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 142 S. W. 623.

—amendment whereby cause of action for services rendered in preparing pamphlet to be used as an advertisement was the same, but the manner of proof was altered. *Galveston, H. & S. A. R. Co. v. Affleck*, — Tex. Civ. App. —, 147 S. W. 288.

—amendment alleging negligence of engineer of train in action for death of railway employee, instead of negligence of foreman, as alleged in original complaint. *Tex-*

vided the end of the yard from Twelfth street, somewhat obstructing the view beyond the yard. It is further shown that, on the morning of the accident, five Pullman coaches were standing on track A, at least three of which were uncoupled and stood at short distances apart from each other, that two or more were on track B, and that at least one was on track C; that upon that day Gatta was working in what was known as the washstand and hopper gang, and a few minutes prior to his death had been making repairs to a hopper in a car on track B; that approximately five minutes before the injury he left this car for the purpose of seeing his foreman, Cooney, who was in a shop a short distance east of track A; that in going from

the car on track B to see his foreman, it was necessary for Gatta to cross track A; that some time on the morning of the accident a shifter had worked on track C, after which it left track C and went out of the yard; that while Gatta was in the shop the shifter approached the yard upon or toward track A, preparatory to doing shifting in that track, and stopped either outside of the yard, or partly without and partly within the yard; that while Gatta was still in the shop, the crew of the shifter, which was owned and operated by the defendant railroad company, caused notice to be given that shifting was about to be done on track A, by ringing the bell and by having one of its crew and one of the Pullman employees pass along each side of

as & P. R. Co. v. Myers, — Tex. Civ. App. —, 151 S. W. 337.

—amendment in action to recover broker's commissions, naming husband as sole plaintiff instead of husband and wife, the contract alleged in both petitions being the same. Lilly v. Yeary, — Tex. Civ. App. —, 152 S. W. 823.

By statute, an additional count referring to the same transaction, property, title, and parties as the original does not state a new cause of action, and hence is not subject to the plea of the statute of limitations. Byrd v. Hickman, 167 Ala. 351, 52 So. 426.

Where suit was filed at the January term, 1901, for damages from breach of contract to deliver cotton in 1900, and the damage alleged was the difference between the contract price and the price which the plaintiffs were compelled to pay in order to procure other cotton to supply the place of that specified in the contract, and an amendment was allowed and filed on January 14, 1907, laying the measure of damages for the same breach of contract as the difference between the contract price and the market price at the time and place of delivery, the amendment related back to the time of filing the suit, and was not barred by the statute of limitations. Sanders v. Allen, 135 Ga. 173, 68 S. E. 1102.

Where a declaration states no cause of action, an amendment which does state a new cause of action, and is open to the plea of the statute of limitations; but the statute requiring a suit for personal injury to be brought within two years does not apply to matters of pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement at all. Consequently a restatement in a somewhat different form of the cause of action set up in the original declaration is, in Jacobson v. Duffy, 154 Ill. App. 505, held not a statement of a new cause of action, subject to the statutory bar.

It was held in Indiana Union Traction Co. v. Pring, — Ind. App. —, 96 N. E. 180 (an action for injury to a motorman in collision between his car and a wild car in 47 L.R.A. (N.S.)

charge of defendant's general train master), that an amendment alleging the defective condition of certain telephones and telephone lines as a consequence of the weather did not set up an independent charge of negligence as a proximate cause of plaintiff's injury, but showed, or tended to show, that under the alleged prevailing weather conditions and the resulting telegraphic conditions, it was negligence on the part of the train master to send the car out in the first instance without first knowing that the car coming from the other direction could be notified of the other car's whereabouts, and the statute limiting the time for the commencement of a new action did not apply.

An amendment in an action for personal injuries, alleging freedom from contributory negligence, where such allegation was not made in the original petition, may be filed after the expiration of the period of limitations for the bringing of the action. Bacon v. Iowa C. R. Co. — Iowa, —, 137 N. W. 1011.

A petition alleging that the defendant unlawfully carried away stone from land owned by the plaintiff, asking treble damages therefor, sufficiently states a cause of action under the act allowing treble damages against one who carries away stone in which he has no interest or right, from land which is not his own, so that, even after the lapse of the period fixed by the statute of limitations, it may be amended to conform strictly to the language of that act. Fox v. Turner, 85 Kan. 146, 116 Pac. 233; Green v. Turner, 85 Kan. 877, 116 Pac. 234.

In Blair v. Craddock, 87 Kan. 102, 123 Pac. 862, a tax deed holder in possession brought suit to quiet his title. While the action was pending, and before the tax deed was five years of record, the holder of the patent title brought an independent action of ejectment. After the tax deed was five years of record, the two actions were consolidated. The holder of the patent title took leave to file an answer in lieu of his ejectment petition, in which he abandoned his claim for affirmative relief, con-

track A, calling, "Look out on track A;" that this warning was given from two to four minutes before Gatta and Cooney came out of the shop on their way back to track B, but whether it was given before or after Gatta went into the shop is a matter of dispute. By some witnesses it was testified that the warning was repeated down to the time of the injury in such a manner that Gatta could and should have heard it. By others it was testified that no warning was heard after that given at a time when Gatta was in the shops and out of hearing.

It further appears that from the time Gatta left the building until he started between the cars, the cars were still, and while passing between them, Gatta stopped to let someone pass above him from the plat-

form of one of the cars to the platform of the other, and as he afterward proceeded, the shifter caused the cars to come together and he was crushed.

It was shown that upon several of the buildings of the Pullman Company the following notice was posted: "Notice. Employees must not work under cars or on scaffolds or ladders inside of cars, or pass between cars while cars are being shifted in the yard. John Cannon, Manager." As to the observance of this rule, witnesses testified in substance that they knew of the existence of the rule, but never paid much attention to it, for while it was a general rule applying to all within the yard, it was likewise generally understood to apply only to those working on or about the

tented himself with defending against the proceeding to quiet title, and asked merely to be discharged with costs. The tax deed holder then dismissed at his own cost. Immediately after the dismissal, the patent title holder was permitted to amend his answer by reasserting his cause of action for ejectment, upon which he recovered. It was held that the filing of the amendment should not relate back to the commencement of the action so as to deprive the tax deed of the protection of the five-year statute of limitations, and that with this restriction placed upon the amendment, the court did right in allowing it to be filed notwithstanding the dismissal.

Where a widow in an action for the death of her husband files an amended petition by leave of the court, and recites therein substantially the same facts as in her original petition, and adds the omitted allegations with reference to the nonresidence of the deceased, the authority to bring the action under the laws of the other state, etc., her action is not barred by the statute of limitations relating to actions of this class. *Robinson v. Chicago, R. I. & P. R. Co.* — Kan. —, 133 Pac. 537.

Inserting a designation of the beneficiary in a complaint filed to recover money for wrongful death, which, under the statute, can be recovered only for the benefit of widow and next of kin, does not, although the complaint is insufficient without it, state a new cause of action so as to be ineffectual if the limitation period has elapsed before the amendment. *Neubeck v. Lynch*, 37 App. D. C. 576, 37 L.R.A. (N.S.) 813.

An amendment, which, in effect, merely indicated the capacity in which the plaintiff was to prosecute the action for her son's death, namely, as personal representative under the Federal statute, instead of as sole beneficiary of deceased under the state statute, was, in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, held not equivalent to the commencement of a new action, and not subject to the statute of limitations.

Where, at the commencement of a suit, 47 L.R.A. (N.S.)

the original petition contains two causes of action which are improperly joined, and afterwards one of such causes is eliminated by the filing of an amended and substituted petition, and a trial is had upon the remaining cause of action, as set forth in both petitions, the filing of the original petition and the service of summons thereon arrests the running of the statute of limitations as to the remaining cause of action. *McCague Sav. Bank v. Croft*, 87 Neb. 770, 128 N. W. 504.

In an action for deceit, an amendment of the declaration branding as false an additional one of the representations of the defendant, set forth in the original declaration, did not set forth a new cause of action. *Duffy v. McKenna*, 82 N. J. L. 62, 81 Atl. 1101.

If, after commencing on time an action against the owner or operator of a manufacturing establishment for the death of her husband, while employed therein, which is caused by the wrongful omission of safeguards or precautions required by the factory act, the widow be appointed administratrix of her deceased husband's estate, and she accordingly amends the petition more than two years after the death, her action as administratrix is not barred by the two-year statute of limitation. *Mott v. Long*. — Kan. —, 132 Pac. 998.

Where, in a stockholder's action to recover converted assets, the amended petition was filed November 3, 1910, and purports to be an amendment of the original petition filed November 20, 1908, September 1, 1908, being the date upon which it was alleged that defendants illegally acquired possession of the assets, and that they illegally disposed of and dissipated them on or about February 1, 1910, the action was not barred by the two-year statute of limitation. *Kingsbury v. Phillips*, — Tex. Civ. App. —, 142 S. W. 73.

Although the original petition in an action against a telegraph company to deliver a message was so defective in failing to allege a contract to deliver as not to state a cause of action, it arrested the statute of limitations so that an amendment supply-

track with respect to which warning had been given, and that men working on cars on other tracks were expected to keep right on working, in a knowledge that the danger was not on their tracks.

Messrs. Andrew E. Sanborn and Ward, Gray, & Neary, for plaintiff in error:

A new, different, or distinct cause of action cannot be pleaded by amendment after the statute of limitations has run.

Central R. Co. v. Williams, 105 Ga. 70, 31 S. E. 134; Mahoney v. Park Steel Co. 217 Pa. 20, 66 Atl. 91; Box v. Chicago, R. I. & P. R. Co. 107 Iowa, 660, 78 N. W. 694; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Wood, Limitations, 14, note 4; Mohr v. Lemle, 69

Ala. 180; Alabama G. S. R. Co. v. Smith, 81 Ala. 229, 1 So. 723; Chicago & A. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879; Chicago City R. Co. v. Leach, 182 Ill. 359, 55 N. E. 334; Fish v. Farwell, 160 Ill. 236, 43 N. E. 367; McAndrews v. Chicago, L. S. & E. R. Co. 222 Ill. 232, 78 N. E. 603; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818; Buntin v. Chicago, R. I. & P. R. Co. 41 Fed. 744; Nelson v. First Nat. Bank, 139 Ala. 578, 101 Am. St. Rep. 521, 36 So. 707; Fleming v. Anderson, 39 Ind. App. 343, 76 N. E. 267; People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 140; Boston & M. R. Co. v. Hurd, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 124; Illinois C. R. Co. v. Campbell,

ing the omission, filed more than two years after the cause of action had accrued, was held in Western U. Teleg. Co. v. Smith, — Tex. Civ. App. —, 146 S. W. 332, not barred by limitations.

An amendment striking out certain words contained in a declaration which does not vary the nature or character of the charge of negligence made is not the setting up of a new cause of action, and the plea of the statute of limitations is inapplicable. Bober v. Chicago, 155 Ill. App. 561.

A petition which alleges the death of the plaintiff's husband to have been caused in another state by the negligence of the defendant, but fails to add that a statute of that state authorized a recovery under the facts pleaded, may be amended by setting out the existence of such a statute even after the expiration of the time within which an action thereunder is allowed to be brought. Cunningham v. Patterson, 89 Kan. 684, — L.R.A. (N.S.) —, 132 Pac. 198.

Amendments to petition in action for personal injuries by coming in contact with broken electric wire, which set forth acts of negligence additional to those alleged, relating to and amplifying some general charges of negligence, did not constitute a new cause of action, and were properly allowed. Southern Bell Teleph. & Teleg. Co. v. Davis, 12 Ga. App. 28, 76 S. E. 786.

In Armstrong Cork Co. v. Merchants' Refrigerating Co. 107 C. C. A. 93, 184 Fed. 199, a complainant, on the last day for commencing a suit to enforce a mechanics' lien, filed in the circuit court of the United States, in a state in which a suit to enforce a mechanics' lien may be tried, treated in the state courts as an action at law, a petition to enforce a mechanics' lien which was in the form used in such courts, and not in the form of a bill in equity in the Federal courts, but which stated facts and prayed relief sufficient to constitute a good cause of action in equity. Three days after the filing of the bill, and before any copy had been taken out of the clerk's office, the complainant filed an amended bill in the form of a bill in equity which stated no new cause of action. It was held that the 47 L.R.A. (N.S.)

filing of the original pleading was the commencement of a suit in equity, the amended bill related back to that time, and the suit was not barred by laches, although the subpoenas were not issued until three days after the time to commence the suit, prescribed by statute, had expired.

Where plaintiff was doing business under the name of a nonexistent corporation, and brought suit in that name, an amendment after the running of the statute of limitations, substituting plaintiff's individual name, was held proper in Bowen v. Buckner, 171 Mo. App. 384, 157 S. W. 829. The court said: "We think there was a misnomer of the real party in interest; but since the misnomer was descriptive of the real plaintiff, was the name under which he was doing business with the public, and by which he might be sued, we hold there was no lack of a legal entity before the court, and that the amendment allowed by the justice was proper."

Where a complaint has been held bad on appeal, and the case is afterwards tried upon an amended complaint, the action relates back to the time of the beginning of the original suit, and the plea of the statute of limitations will be determined as of that date unless the amended pleading states a new cause of action. Ft. Wayne Iron & Steel Co. v. Parsell, 49 Ind. App. 569, 94 N. E. 770.

—identity changed.

The following amendments have been held to change the cause of action originally pleaded, and therefore to admit the bar of the statute, the limitation period having expired in the interval between the original and amended pleading:

—amendments supplying the averment omitted from the original declaration in an action against a municipality for personal injuries, that notice was given to the municipality as required by statute. A declaration which fails to allege the serving of the statutory notice in a personal-injury action against a municipality does not

170 Ill. 163, 49 N. E. 315; 25 Cyc. 1308; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305.

The positive testimony of an unimpeached, uncontradicted witness cannot be discredited or disregarded arbitrarily or capriciously by the jury.

Seibert v. Erie R. Co. 49 Barb. 583; Lomer v. Meeker, 25 N. Y. 363.

Negative testimony proper is entitled to no weight. If a credible witness, with apparently adequate opportunity for observation, testifies to an occurrence, no conflict arises by the testimony of other witnesses that they were not cognizant of the occurrence, where the latter witnesses' opportunities for observation are not stated, or where their attention was so engrossed that they probably would not have observed the event if it had occurred, or where their opportunities were not coextensive with those of the witnesses who testify positively to the occurrence.

Culhane v. New York C. & H. R. R. Co. 60 N. Y. 134; Foley v. New York C. & H. R. R. Co. 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631; Queen Anne's R. Co. v. Reed, 5

state a cause of action, and an amendment which alleges such material fact sets up a new cause of action. Willig v. Chicago Heights, 149 Ill. App. 8.

—additional counts setting up assault and battery while original counts charged malpractice. Kolber v. Frankenthal, 159 Ill. App. 382.

—amendment dismissing suit as to one partner, and seeking to hold other partner for check, where original suit was against a firm of attorneys for money collected. Williams v. Lowe, 49 Ind. App. 606, 97 N. E. 809.

—amended petition setting forth that destruction of a house was due to the contact of defendant's wires, not properly insulated, with other heavily charged wires on the outside of the house, the original petition charging that the destruction was due to the improper installation of defendant's wires and apparatus on the inside of the house. Mercantile F. & M. Ins. Co. v. Cumberland Teleph. & Teleg. Co. 126 La. 621, 52 So. 851.

—amendment of complaint on contract, alleging conversion. Nathan v. Woolverton, 149 App. Div. 791, 134 N. Y. Supp. 469.

—amendment alleging that fire set out by railroad company caused direct physical injury, while original petition alleged mental suffering because of being in vicinity of approaching fire. Tiller v. St. Louis & S. F. R. Co. 189 Fed. 994. In the above case the court said: "The question remains: Did the original petition charge the defendant by the act of setting out the fire with such resultant injuries to his wife as the law will recognize and compensate in what it denominates by the word 'damage'? In other words, will the law, in cases of this 47 L.R.A.(N.S.)

Penn. (Del.) 227, 119 Am. St. Rep. 301, 59 Atl. 860; Keiser v. Lehigh Valley R. Co. 212 Pa. 409, 108 Am. St. Rep. 872, 61 Atl. 903; Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 93; Holmes v. Pennsylvania R. Co. 74 N. J. L. 469, 66 Atl. 412, 12 Ann. Cas. 1031; Bohan v. Milwaukee, L. S. & W. R. Co. 61 Wis. 391, 21 N. W. 241; Horn v. Baltimore & O. R. Co. 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 301; Rich v. Chicago, M. & St. P. R. Co. 78 C. C. A. 663, 149 Fed. 79; Baltimore & O. R. Co. v. Baldwin, 75 C. C. A. 211, 144 Fed. 53; Stitt v. Huidekoper, 17 Wall. 384, 393, 21 L. ed. 644, 647; Cable v. Paine, 3 McCrary, 169, 8 Fed. 788; Starkie, Ev. 578; The Thingvalla, 1 C. C. A. 87, 1 U. S. App. 82, 48 Fed. 764; The Michigan, 11 C. C. A. 187, 25 U. S. App. 1, 63 Fed. 280; The Charlotte, 124 Fed. 989; Chicago & N. W. R. Co. v. Andrews, 64 C. C. A. 339, 130 Fed. 65; Green v. Rhode Island Co. — R. I. —, 73 Atl. 308; Williamson v. Wabash R. Co. 139 Mo. App. 481, 122 S. W. 1113; Fay v. Hartford & S. Street R. Co. 81 Conn. 573, 71 Atl. 734; McCreery v. United R. Co. 221 Mo. 18, 120 S. W. 24; Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813;

character, recognize as actionable such acts of invasion of the rights of another as produce mere mental suffering and anguish when entirely disassociated from any and all acts of physical personal injury or violence? While there may be adjudicated cases to the contrary, it is quite certain the very great preponderance of authority denies relief in such case. Compensation is made by the law of mental anguish, suffering, terror, and other states of the mind in cases of this character only when associated with and as incident to physical injuries and sufferings."

—amendment making executor defendant individually as sole devisee under a decedent's will in an action for negligence against executor of decedent's estate. Bender v. Penfield, 235 Pa. 58, 83 Atl. 585.

—amendment alleging sale of horse, believing it was glandered, or where, by the exercise of ordinary care, that fact could have been known, where the original petition alleged a sale of the horse knowing it was afflicted with glanders. Griffin v. Allison, — Tex. Civ. App. —, 138 S. W. 1068.

The attempted amendment by one of the complainants of an action by heirs at law as cotenants, to recover possession of land of their ancestor, held under tax titles, so as to claim the whole property as devisee of the testator, sets up a new cause of action as to the interest claimed by his cotenants, and will be ineffectual if the limitation period has run since the cause of action arose. Cottonwood Lumber Co. v. Walker. — Ark. —, 45 L.R.A.(N.S.) 429, 152 S. W. 1005.

So, where, in an action against a carrier, plaintiff in his original petition declared

Northern C. R. Co. v. Medary, 86 Md. 168, 37 Atl. 796; Ryan v. LaCrosse City R. Co. 108 Wis. 122, 83 N. W. 772; The Fin Mac Cool, 77 C. C. A. 349, 147 Fed. 123; Chicago, R. I. & P. R. Co. v. Givens, 18 Ill. App. 404.

Deceased was guilty of contributory negligence.

Patterson v. Philadelphia, W. & B. R. Co. 4 Houst. (Del.) 103.

There was error prejudicial to the defendant in the action taken by the court below.

2 Thomp. Neg. § 1445; Parvis v. Philadelphia, W. & B. R. Co. 8 Houst. (Del.) 439, 17 Atl. 702, 11 Am. Neg. Cas. 280; Mullin v. Philadelphia, B. & W. R. Co. 5 Penn. (Del.) 156, 63 Atl. 26; Lynch v. Wilmington City R. Co. 7 Penn. (Del.) 14, 76 Atl. 959; Edwards v. Philadelphia, B. & W. R. Co. 1 Boyce (Del.) 78, 75 Atl. 613; Hearn v. Wilmington City R. Co. 1 Boyce (Del.) 271, 76 Atl. 629; Patterson v. Philadelphia, W. & B. R. Co. 4 Houst. (Del.) 109; Lenkewicz v. Wilmington City R. Co. 7 Penn. (Del.) 64, 74 Atl. 11; Queen Anne's R. Co. v. Reed, 5 Penn. (Del.) 231, 119 Am. St. Rep. 301, 59 Atl. 860; Chicago City R. Co. v. O'Donnell,

208 Ill. 267, 70 N. E. 294; Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Springfield Consol. R. Co. v. Hoefner, 175 Ill. 634, 51 N. E. 884; Brickwood's Sackett, Instructions to Juries, 176, 197.

If we were entitled—as we claim that we were—to have the court below consider the affidavit in determining the motion for a new trial, then the court below failed to exercise that discretion which they were bound to exercise in deciding the motion for a new trial, and the verdict, on this ground alone, should be reversed.

Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; United States v. Reid, 12 How. 361, 13 L. ed. 1023.

The court below abused its legal discretion by refusing to grant the defendant's motion for a new trial, in view of all the evidence, especially the uncontradicted, positive, and overwhelming testimony of absolutely unimpeached witnesses, opposed only by purely negative testimony.

Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Felton v. Spiro, 24 C. C. A.

upon a tort, charging defendant with negligently and maliciously failing upon his request to perform its legal duty to divert a car of vegetables from its original destination to another point, an amended petition declaring upon an express verbal contract made by him with the railroad company through one of its agents, whereby plaintiff should have the right to sell his goods in transit, and, upon notice, to have them diverted to a new destination and delivered to such purchaser, set up a new cause of action, open to the plea of the statute of limitations; for the same evidence would not support the allegations of the original and amended petitions, and the measure of damages would not be the same. San Antonio & A. P. R. Co. v. Bracht, — Tex. Civ. App. —, 157 S. W. 269.

It was contended in Arizona Eastern R. Co. v. Old Dominion Copper Min. & Smelting Co. — Ariz. —, 127 Pac. 713, that where the original complaint states no cause of action, any cause of action thereafter set up by amendment is necessarily and inevitably a new and different cause of action, although the claim asserted in the amended complaint is the same claim sought to be set up in the original complaint. The court reaffirmed the doctrine announced in Boudreaux v. Tucson Gas, E. L. & P. Co. 13 Ariz. 361, 33 L.R.A. (N.S.) 196, 114 Pac. 547, and Hagenauer v. Detroit Copper & Min. Co. — Ariz. —, 124 Pac. 803. Thus: "Where a complaint has been held obnoxious to a general demurrer, and an amended complaint is filed to which amended complaint the bar of the statute of limitations is pleaded, and at the time of the filing of the amended complaint the bar of the statute is complete, unless the amendment re-

lates back, it is our duty to ascertain if the facts alleged in the original complaint are sufficient, when considered in the light of the facts pleaded in the amended complaint, to show that the amendment is but the perfected statement of the cause of action originally attempted to be pleaded, and is not the statement of a new or different cause of action."

When the action in Westover v. Hoover, et al. — Neb. —, 143 N. W. 946, was commenced, it was brought and was tried on the sole theory of a failure of a master to provide a safe place for his servant to work. Plaintiff recovered, and on appeal to the Supreme Court it was held that the relation of master and servant did not exist between plaintiff and defendant at the time the plaintiff received his injuries. When the cause was remanded to the district court, the plaintiff filed an amended petition eliminating the allegations relating to master and servant, and alleged that plaintiff was working for an independent contractor at the time he was injured, and was on the defendant's premises by their invitation; that he received his injuries by reason of defendants' negligence as inviters upon their premises. It was held that the amended petition having been filed more than four years after the plaintiffs' injuries occurred, the cause of action stated therein was barred by the statute of limitations.

Where a petition did not even inferentially charge a specific act of negligence, the pleading could not be amended to charge such negligence if the statute of limitations barred a recovery thereon. Elrod v. St. Louis & S. F. R. Co. 84 Kan. 444, 113 Pac. 1046.

J. D. C.

321, 47 U. S. A. 402, 78 Fed. 576, 2 Am. Neg. Cas. 682; *Mattox v. United States*, supra; *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974; *Gunn v. Union R. Co.* 22 R. I. 579, 48 Atl. 1045; *Cincinnati, H. & I. R. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *Scheutte v. St. Louis Transit Co.* 108 Mo. App. 186, 83 S. W. 297; *Reid v. Piedmont & A. L. Ins. Co.* 58 Mo. 421; *Chavias v. Dry Dock, E. B. & B. R. Co.* 34 Misc. 694, 70 N. Y. Supp. 1014; *Clark v. Great Northern R. Co.* 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 409; *Houston & T. C. R. Co. v. Loeffler*, — Tex. Civ. App. —, 59 S. W. 558; *Mulligan v. New York C. & H. R. Co.* 33 N. Y. S. R. 534, 11 N. Y. Supp. 452; *Cumberland Teleph. & Teleg. Co. v. Smithwick*, 112 Tenn. 467, 79 S. W. 803; *Griffin v. Jersey City, H. & P. Street R. Co.* 73 N. J. L. 389, 63 Atl. 863; *Boe v. Lynch*, 20 Mont. 80, 49 Pac. 381; *Morris v. Imperial Ins. Co.* 106 Ga. 461, 32 S. E. 595; *Pollard v. Grand Trunk R. Co.* 62 Me. 93; *Montmorency County v. Putnam*, 144 Mich. 135, 107 N. W. 895; *Melody v. Chester Traction Co.* 9 Del. Co. Rep. 105; *Grieve v. Molsons Bank*, 8 Ont. Rep. 162; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; *Hilliard, New Trials*, p. 444; 6 *Thomp. Neg.* § 7348; *McCoy v. Milwaukee Street R. Co.* 82 Wis. 215, 52 N. W. 93; *Dickey v. Davis*, 39 Cal. 565.

Messrs. Horace Greeley Eastburn and Anthony Higgins, for defendant in error:

The amended declaration did not set up a new and different cause of action, and under our law and practice, the act of limitations, which had not barred the right at the time the action was instituted, can never run while the action is pending, nor be interposed in defense of any pleading which the plaintiff, in the discretion of the court, was permitted to file in the case.

Gatta v. Philadelphia, B. & W. R. Co. 1 Boyce, (Del.) 293, 76 Atl. 56; *Thornton, C. & Co. v. Herring*, 5 Houst. (Del.) 154; *Cirwithin v. Mills*, 2 Marv. (Del.) 232, 43 Atl. 151; *Marlborough v. Widmore*, 2 Strange, 890; *Aylwin v. Todd*, 1 Bing. N. C. 170; *Beacroft v. Burnham & Stone*, 3 Lev. 347; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L.R.A. 47, 41 C. C. A. 535, 101 Fed. 623; *Vandoren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 260; *Hodges v. Kimball*, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845; *Carnegie v. Hulbert*, 16 C. C. A. 498, 36 U. S. App. 81, 70 Fed. 209; *Smith v. Missouri P. R. Co.* 5 C. C. A. 557, 12 U. S. App. 426, 56 Fed. 458; *Tiernan v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027; *McLaughlin v. West End Street R. Co.* 186 Mass. 150, 71 N. E. 317; 47 L.R.A.(N.S.)

Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461; *Driscoll v. Holt*, 170 Mass. 262, 49 N. E. 309; *Sanger v. Newton*, 134 Mass. 308; *Winchester v. Middlesex County*, 114 Mass. 481; *George v. Reed*, 101 Mass. 378; *Smith v. Palmer*, 6 Cush. 513; *Swan v. Nesmith*, 7 Pick. 220, 19 Am. Dec. 232; *Ball v. Clafin*, 5 Pick. 303, 16 Am. Dec. 407; *Davis v. Saunders*, 7 Mass. 62; *Nash v. Adams*, 24 Conn. 33; *Howell v. Moeller*. 91 Hun, 421, 36 N. Y. Supp. 223; *Wilson v. Smith*, 27 Jones & S. 380, 14 N. Y. Supp. 628; *Miller v. Watson*, 6 Wend. 506; *Tobias v. Harland*, 1 Wend. 93; *Seely v. Manhattan L. Ins. Co.* 72 N. H. 49, 55 Atl. 425; *Gagnon v. Connor*, 64 N. H. 276, 9 Atl. 631; *State use of Zier v. Chesapeake Beach R. Co.* 98 Md. 35, 56 Atl. 385; *Hoboken v. Gear*, 27 N. J. L. 265; *Price v. New Jersey R. & Transp. Co.* 31 N. J. L. 229; *Saltar v. Saltar*, 6 N. J. L. 405; *Rand v. Webber*, 64 Me. 191; *Haley v. Hobson*, 68 Me. 167; *Dana v. McClure*, 39 Vt. 197; *Austin v. Burlington*, 34 Vt. 506; *Trego v. Lewis*, 58 Pa. 463; *M'Adam v. Orr*, 4 Watts & S. 550; *Cunningham v. Day*, 2 Serg. & R. 1; *Shielfelin v. Whipple*, 10 Wis. 81; *Lottman v. Barnett*, 62 Mo. 159.

This court had no jurisdiction to determine whether the verdict of the jury was right or wrong, and no power to review their finding upon a mere question of fact.

Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 8 Houst. (Del.) 203, 14 Atl. 847; *Philadelphia, B. & W. R. Co. v. Buchanan*, — Del. —, 78 Atl. 776; *Queen Anne's R. Co. v. Reed*, 5 Penn. (Del.) 227, 119 Am. St. Rep. 301, 59 Atl. 860; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60-75, 36 L. ed. 71-80, 12 Sup. Ct. Rep. 356; *Aetna L. Ins. Co. v. Ward*, 140 U. S. 76-91, 35 L. ed. 371-376, 11 Sup. Ct. Rep. 720.

A verdict on conflicting evidence will not be disturbed.

Philadelphia, B. & W. R. Co. v. Buchanan, — Del. —, 78 Atl. 776; *Delaware City, S. & P. S. B. Nav. Co. v. Reybold*, 8 Houst. (Del.) 203, 14 Atl. 847; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60-75, 36 L. ed. 71-80, 12 Sup. Ct. Rep. 356; *Aetna L. Ins. Co. v. Ward*, 140 U. S. 76-91, 35 L. ed. 371-376, 11 Sup. Ct. Rep. 720.

It is not the province of this court to determine whether a verdict was excessive.

New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60-75, 36 L. ed. 71-80, 12 Sup. Ct. Rep. 356.

Woolley, J., delivered the opinion of the court:

The errors charged to have been committed in the trial of this case by the court below are 28 in number, of which errors

assigned in specifications No. 21 to No. 28, inclusive, relate to the court's refusal to grant a motion for a new trial.

In the practice and policy of the law of this state relative to new trials, a motion for a new trial is a matter addressed to the legal discretion of the court (*Cannon v. Kinney*, 3 Harr. [Del.] 72, 73; *State use of Hizzard v. Layton*, 3 Harr. [Del.] 469, 480), and to the decision of the court upon such a motion, as to the decisions of the court generally upon rules to show cause, a writ of error will not lie (*Burton v. Philadelphia, W. & B. R. Co.* 4 Harr. [Del.] 252, 254; *Mitchell v. Woodward*, 2 Marv. [Del.] 311, 313, 43 Atl. 165; *Valley Paper Co. v. Smalley*, 2 Marv. [Del.] 289, 294, 295, 43 Atl. 176; *Ridings v. McMenamin*, 1 Penn. [Del.] 15, 39 Atl. 463; *Whitaker v. Barker*, 2 Harr. [Del.] 413, 416).

To the refusal of the court to grant a new trial, the record discloses no exception noted by the defendant below or allowed by the court below, nor does the defendant below, now the plaintiff in error, charge to the court below any abuse of its discretion or misconduct in rendering its decision against the motion, that might take the case out of the general rule against reviewing as error the decision of a trial court in a matter addressed purely to its legal discretion. Therefore, nothing that is assigned as error in the last 8 assignments of error, that is not also embraced in some preceding assignment of error, will be considered in this decision.

Charles Gatta was killed on the 28th day of June, 1907. This action was instituted by his widow on the 9th day of August, 1907, the original declaration was filed on the 8th day of August, 1908, and the amended declaration on the 21st day of January, 1910.

In the original declaration, the plaintiff averred that the deceased was an employee of the defendant company, charged the defendant company with the duties of a master, alleged breaches thereof, and sought to recover upon its liability therefor. In the amended declaration, the plaintiff averred that the deceased was an employee of the Pullman Company, charged the defendant company with the duties it owed a stranger, alleged breaches thereof, and sought to recover upon its liability for a violation of its duties in that relation.

It thus appears that while each declaration states a cause of action growing out of the same circumstances from which the deceased met his death, the material averments of the two declarations differ, and it also appears that the difference in point of law consists in the difference in the relations alleged by the two declarations to have existed between the deceased and the 47 L.R.A.(N.S.)

defendant, the corresponding difference in duty which the defendant is charged to have owed the deceased, and the consequent difference of the defendant's liability for breaches of that duty.

The amended declaration being the one exclusively relied upon at the trial, the defendant moved that the jury be instructed to render a verdict in its favor, upon the ground that the amended declaration presented a cause of action wholly new and wholly different from the one presented by the original declaration, that the amended declaration thus presenting a new cause of action was filed after the expiration of one year from the date upon which the injuries to the deceased were sustained, or at a time when an original action upon the cause of action therein stated would have been barred by the statute of limitations, and therefore recovery upon the cause of action stated by the amended declaration was likewise barred.

The act limiting actions for personal injuries relied upon in support of this motion provides that "no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained." Chapter 594, vol. 20, Laws of Delaware.

The refusal of the trial court to grant this motion is assigned as error and is here submitted for review.

The contention made by the defendant is a novel one in this jurisdiction, and is based upon decisions of the courts of certain other jurisdictions, which plainly hold that when a cause of action set forth in an amended pleading in a pending litigation is new, different, or distinct from that originally declared upon, the amended pleading is equivalent to the bringing of a new action, and the statute of limitations is not arrested by the institution of the suit, but runs against the new cause of action down to the time it is disclosed by the amended pleading. *Central of Georgia R. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134; *Mathoney v. Park Steel Co.* 217 Pa. 20, 66 Atl. 91; *Box v. Chicago, R. I. & P. R. Co.* 107 Iowa, 660, 78 N. W. 694; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *Wabash R. Co. v. Byrmer*, 214 Ill. 579, 73 N. E. 879; *Chicago City R. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Nelson v. First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707; *Fleming v. Anderson*, 39 Ind. App. 343, 76 N. E. 267; *Illinois C. R. Co. v. Campbell*, 170 Ill. 163, 49 N. E. 315; *Dobbs v. Pearl* (Sup.) 118 N. Y. Supp. 485; *Wasson v.*

Boland, 136 Mo. App. 622, 118 S. W. 663; *Re Spuyten Duyvil Road* (Sup.) 116 N. Y. Supp. 857; *Freeman v. Central R. Co.* 154 Ala. 619, 45 So. 898; *Union P. R. Co. v. Sweet*, 78 Kan. 243, 96 Pac. 657; *Lane v. Sayre Water Co.* 220 Pa. 599, 69 Atl. 1126; *Lane v. Cayuta Wheel & Foundry Co.* 220 Pa. 603, 69 Atl. 1127; *Hess v. Birmingham R. Light & P. Co.* 149 Ala. 499, 42 So. 595.

The merit of these decisions and their value as authority for a like ruling in this jurisdiction depend largely upon the statutes or policies of law of the jurisdictions in which they were rendered, and the bearing which such statutes or policies have upon those that maintain in this jurisdiction.

The methods by which actions at law are instituted in those American jurisdictions that derive their jurisprudence from the common law have as their original the method of commencing actions at common law. The common-law mode of commencing an action at law was originally by petition to the king, and later, to him, through his court of chancery, praying for leave to bring an action in one of his courts of law upon a cause of action specifically stated in the petition. When the prayer of the petition was allowed, there issued an original writ, which in form was a mandate issuing out of the court of chancery, in the King's name, directed to the sheriff of the county wherein the injury was committed or the wrong was done, containing a statement of the cause of complaint, and requiring him to demand the defendant either to satisfy the claim and do justice to the complainant, or else appear in one of the superior courts of law and answer the accusations made against him. •

The principal object of the original writ was to confer jurisdiction upon a court of law to hear the matter in controversy, for at common law no action could be maintained in any superior court without the sanction of the King's original writ. Its other object was to compel the appearance of the defendant. As this writ issued out of one court for the purpose of conferring jurisdiction upon another, obviously the writ could not be amended in the latter court. As the jurisdiction conferred by the writ upon the law court was limited to the trial of the specific cause of action stated in it, any subsequent statement of a cause of action different from the one stated in the writ was in excess of the jurisdiction conferred by the writ, and constituted a departure, and of course would not be allowed by amendment. Amendments of pleadings subsequent to the declaration at common law were liberally allowed both in point of

character and time (*Adler v. Chip*, 2 Burr. 756); but an amendment to a declaration was restricted to one that did not depart from the action stated in the writ, and then only when asked for before the end of the second term; for after that term the amendment was considered "a new declaration," and would not be allowed (*Aubeer v. Barker*, 1 Wils. 149; *Waters v. Bovell*, 1 Wils. 223; *Cope v. Marshall*, *Sayer*, 234).

In using the English method of commencing actions at law somewhat as a model, American jurisdictions rejected such of its features as were inconsistent with American institutions, and accepted such of them as were considered adaptable to the particular schemes or policies of the law of the several jurisdictions of which they were made a part. Some jurisdictions were impressed with the feature of the original writ which gave the defendant notice not only of the form of action, but of the particular cause of action to which he was summoned to respond, and in such jurisdictions actions at law are almost invariably begun by petitions, complaints, or notices upon which or after which process issues. In such jurisdictions the cause of action as well as the form of action is disclosed by the petition or complaint, and the process, whatever its form, commands the defendant to appear and respond to that particular cause of action. Such is the law in almost every jurisdiction from which authorities are cited by the defendant in support of its contention. These jurisdictions are Alabama, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, New York, and Pennsylvania.

There is an intimate relation between the law that provides methods of commencing actions and the law governing the amendment of actions, for upon the theory upon which actions are commenced depends largely the logic or policy of the theory upon which amendments are allowed. Thus, in the states of Georgia, Iowa, Kansas, Kentucky, Missouri, Nebraska, and New York, where the cause of action appears in the complaints, petitions, or process, the policy of the law is to restrict amendments to the very cause of action so stated, by providing by express statute for the allowance of such amendments only as "do not change substantially the claim or defense." or when they do not "add a new and distinct cause of action." Obviously, then, in these jurisdictions, any amendment that sets up a cause of action substantially different from the one to which the defendant was expressly summoned to respond would present a new or a different cause of action

from that first sued upon, and would either be refused, or, if allowed, would hazard the operation of the statute of limitations.

The case of *Sicard v. Davis*, 6 Pet. 124, 8 L. ed. 342, is seldom omitted in the citation of authorities in support of the contention that a new cause of action presented by amendment after the limitation of a statute is barred by the statute. This was an action in ejectment in which the plaintiff alleged a different demise and a new title by an amendment to the declaration, allowed at a time after the defendant had acquired a possessory title to the premises by operations of the statute of limitations. In that case, Chief Justice Marshall stated that limitations might be pleaded to the second allegation (that is, to the amendment to the declaration), though not to the first, because "the second count in the declaration, *being on a demise from a different party, asserting a different title*, is not distinguishable, so far as respects the bar of the act of limitations, from a new action;" and the court held that the case stated by the amendment was barred by the act of limitations intervening between the commencement of the action and the allowance of the amendment. This decision, however, when considered in connection with the particular form of action in which it was rendered, has little authoritative bearing upon the case under consideration, for an amended declaration in ejectment, setting up a different demise from a different party, and therefore asserting a different title, might readily be held bad in Delaware, not simply because the cause of action stated by it would be new, but because in our method of procedure in that form of action, the amendment would not be connected with or related to the parties to the suit without a corresponding amendment of parties, which is against the policy of our laws.

In Delaware an action of ejectment is commenced not by original or other writ, and in this respect it is an exception to the general rule, but by filing a declaration showing at large the premises of which the plaintiff alleges he was possessed by demise and from which he alleges to have been ejected. To this extent the commencement of the action resembles the mode generally pursued in some other jurisdictions. Service is made by delivering a copy of the declaration to the defendant, and to the case as stated in the declaration the defendant is summoned to respond. The common-law fiction of the action maintains in Delaware, and therefore the common-law rule maintains that the lessor of the plaintiff must have had the right of possession at the time of the demise mentioned in the declaration, which means of

necessity, at or before the commencement of the action. Obviously, then, an amendment to the declaration that sets up a new demise from a different party, asserting a different title from that declared upon in the original declaration, states much more than a new cause of action, in that it states a cause of action between new persons who are not parties to that suit, the nominal plaintiff in an action of ejectment being a fictitious person and the real plaintiff in the action being a fictitious lessor, and of course cannot be maintained without an amendment of parties.

The case of *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, was cited by the defendant as a controlling authority in support of its contention, because of the similarity of the defendant's liability under the pleadings in that case to the defendant's liability in the one under review, and the pronouncement of the law thereupon by the Supreme Court of the United States.

The plaintiff instituted in Missouri an action to recover for personal injuries sustained in Kansas, and after the removal of the case to a Federal court, the question of law under consideration was taken to the Supreme Court of the United States for determination. In the original pleading, the plaintiff alleged that his injuries were occasioned by the negligent act of an incompetent fellow servant, of whose incompetence the defendant had knowledge, and charged the defendant with a violation of its duty as a master to supply him with competent servants with whom to work. After the removal of the case to the Federal court, the plaintiff amended his petition, wholly omitting the charge of incompetence of his fellow servant and the defendant's knowledge thereof, and based his cause of action simply upon the negligent act of the same fellow servant, charging the defendant with liability therefor under a statute of Kansas, where the injury was inflicted, which gave a servant a right of action against a master for the negligence of a fellow servant, without regard to the element of incompetence.

Between the time of filing the original and amended petitions the statute of limitations of Missouri intervened. There were really presented two questions: First, whether the case as stated in the amended petition constituted a new cause of action, and if so, was it barred by the statute of limitations.

This case is an authority in point upon the question whether the amended petition restated the original cause of action or presented one entirely new, as the amended

pleading in that case deprived the defendant as a master, of the defense of the servant's assumption of risk, and charged it with a new liability under entirely different law, very much as was done by the amended declaration in the case under consideration. The court held that the amended petition stated a cause of action under the statute of Kansas that was in derogation of the general law of master and servant under which the plaintiff had declared in his original petition, and therefore constituted a departure and set up a new cause of action. With this conclusion we take no exception. But the court further held that because it was a departure from the original petition, and because it set up a new cause of action, the statute of limitations, as applied to the new cause of action, treated the action as commenced when the amendment was incorporated into the pleadings.

A careful reading of this case discloses that the Supreme Court reached this decision, if not by expressly construing the statutes of Missouri, then certainly by giving to them a consideration that is reflected in the decision, for the decision of the court in this case, like the decisions of the courts under like statutes in other jurisdictions, is in harmony with the policy of the law as declared in the jurisdiction in which the case arose.

In Missouri a civil action is begun by petition upon which a writ issues. Civil Procedure, chap. 21, art. 4, § 1756. To the cause of action presented by the petition, the defendant is summoned to respond, and it appears that to that cause of action alone is he required to answer. The petition presenting the cause of action, however, is susceptible of amendment, but amendment of the original petition is restricted by statute to such things as do "not change substantially the claim or defense" (Civil Procedure, chap. 21, art. 6, § 1848), which obviously means the claim as made by the original petition. The policy of the law of Missouri, therefore, and of a number of jurisdictions cited by the defendant where actions are begun by complaints or petitions, is to restrict the cause of action and the amendments thereof to the one stated in the original petition, and if another cause of action be stated by amendment, to subject the new cause of action to the operation of the statute of limitations.

Like other American jurisdictions, the state of Delaware, in providing a method for commencing actions at law, adopted some of the features of the original writ at common law and discarded others. When comparison is made with the methods 47 L.R.A. (N.S.)

adopted by other American jurisdictions, and particularly with the methods in the jurisdictions mentioned, it will be observed that many of the features of the common law proceeding which were rejected by this jurisdiction are the very ones which other jurisdictions have considered important enough to accept; and upon further examination it will be disclosed that in this and in other jurisdictions the principle and effect of amendments in actions at law are consistent with and controlled by the particular policies of law which were adopted by the several jurisdictions in determining their different methods of instituting actions.

Except in certain summary proceedings, an action at law is commenced in this state, not by petition or complaint, but by præcipe, which, for such a purpose, is a mandate to the prothonotary, directing him to issue process or a writ of a particular character in the action thereby instituted, commanding the sheriff to summon the defendant to appear and answer the plaintiff in a particular form of action. The features of this proceeding that distinguish it from the proceeding at common law and from proceedings in some of the jurisdictions that have been adverted to are that the action is thus begun upon the command of the plaintiff, and not upon his petition, the process issues of course, and not by leave, the form of action is stated in both the præcipe and the process, while the cause of action is stated in neither, and the purposes of the writ are to disclose to the court its jurisdiction in an action of that form, and to compel the appearance and answer of the defendant thereto.

As causes of action of many different characters may be embraced within one form of action, notably in the form of an action of trespass on the case, the defendant in an action at law instituted in Delaware is not informed of the nature of the plaintiff's complaint or of the character of his cause of action until, in the course of the proceeding, and pursuant to certain rules for pleading, the plaintiff files his declaration. Then and not until then, does he know to what he is summoned to respond.

Under the practice of the courts of this state, a plaintiff has a right to insert in his declaration any number of counts, having regard, of course, to the rule against vexatious pleading, provided that each count presents a separate and distinct cause of action, and that each cause of action so presented is appropriate to the form of action in which it is pleaded, and to each count, constituting as its name signifies, a

separate "tale" or complaint, the defendant must make separate answer.

In order to remove from the administration of justice the stigma that existed in early history of trying technical questions rather than merits, and deciding causes apart from the objects of the suit, our laws relating to amendments pursued a policy of great liberality and placed a large discretion in the court. The Constitution provides that "in civil causes, when pending, the superior court shall have the power, before judgment, of directing, upon such terms as it shall deem reasonable, amendments, impleadings, and legal proceedings so that by error in any of them, the determination of causes, according to their real merits, shall not be hindered." Article 4, § 24, of the Constitution of 1897.

Supplementing this declaration of principle, it is provided by statute that "in any civil cause pending before the superior court, the said court shall have power, at any time before judgment, to allow amendments either in form or substance, of any process, pleading, or proceeding, in such action, on such terms as shall be just and reasonable." Revised Code, chap. 112, § 11.

From this statement of the law, it appears that the only limitation in point of time that is placed upon an amendment in a pending action, within the discretion of the court, is judgment. Within that limitation, the court in its discretion may allow an amendment whenever it pleases. There is no suggestion of limitation of amendments such as may be imposed by a statute of limitations. In truth, the court, in promulgating rules for pleading, has wholly ignored the contemplation of such a limitation by providing that the plaintiff shall file his declaration on the second rule day after the return day of the writ. In an action for personal injuries, instituted just before the expiration of the year limited by the statute for such actions, the rule day for the plaintiff's declaration occurs after the expiration of the year limited by the statute for the action. If the statute runs to the statement of the cause of action, and is not arrested once and for all by the institution of the suit, then in such case the action is barred when the cause thereof is first stated by the original declaration just as effectually as by a subsequent statement in an amended declaration; and there would then be the anomaly of an action instituted within the year and therefore not affected by the statute of limitations, and the cause of action thereof stated in an original pleading after the year being barred by the statute.

It is therefore held that, in view of the character and purpose of original process

in actions at law in the state of Delaware, the operation of statutes limiting actions at law is arrested at the time when the action is brought, and does not extend to the time when the cause of action is stated, and that a cause of action that would have been good in law if stated in the original declaration will likewise be good if stated by amendment.

The remaining errors assigned by the plaintiff in error may be considered in groups, and when classified relate to the errors charged to the court in defining and in failing properly to define to the jury the duty the defendant owed the deceased to warn him against danger, and the duty the deceased owed himself to avoid danger, and in refusing to give the jury binding instructions to render a verdict for the defendant, upon the grounds, first, that the deceased was guilty of contributory negligence; second, that no act of negligence on the part of the defendant was shown; third, that the preponderance of the evidence was with the defendant; and fourth, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative.

At the trial of this case there was no dispute as to the character of the place in which the deceased met his death, nor of the lawfulness of the presence and character of work in which the defendant and the deceased were respectively engaged in that place. The deceased was a mechanic employed by the Pullman Company upon the repair of cars. The defendant was a railroad company engaged in moving and placing cars upon the tracks of the Pullman Company for repair. The place was the yard of the Pullman Company, connected with and forming a part of its car works, which was covered by a platform upon which were its private lines of tracks, running parallel with and adjacent to its shops. The tracks or lines of railway were not used for traffic or for the transportation of anything except the cars themselves, when being placed in position for the purpose of being altered, repaired, or renovated, or when being removed therefrom. In this respect the place was an open-air workshop; and when considered with reference to the care and caution required of all persons moving about it, different in no substantial way from an inclosed shop in which the same kind of work is done.

In a preceding review of an earlier trial of this case by the supreme court of this state (2 Boyce [Del.] —, 80 Atl. 617), this court announced as law, that there was imposed upon a railroad company a duty to give warning of the approach and move-

ment of its engines and trains to all persons put in danger thereby, and to give such a warning as, under the varied conditions of their operation, shall be timely and sufficient. With a particular reference to the testimony produced at the first trial, which in the main is the same that was presented in the trial now under review, the court further held that it was the duty of the railroad company in giving a warning that there was about to be danger upon a particular track, to give a warning not only to those who were present when the warning was given, but to those who were present when the danger came. It contemplated a warning to all who were put in peril. It was not limited to those who were at work within, upon, and under the cars upon the track, but extended to those who otherwise might lawfully come within the zone of the impending danger in ignorance of its existence and of their peril. Around this statement of the law revolved the controversy in the second trial below, the plaintiff below offering testimony to prove that the deceased could not have heard the first warning, for at the time it was given he was within the shops and out of hearing, that no warning was given subsequent to the first warning, that in the progress of his work and in the exercise of all the care and caution required of him in view of the character and location of his occupation, the deceased came from the shops and walked a distance of about a dozen feet directly to the opening between the two cars by which he was crushed without being then or theretofore warned that shifting was about to be done upon the track he was crossing, and without knowledge thereof from anything in the situation which he could have seen or in law would have been required to see; that while the engine was at the other end of the line of cars, it was outside of the yard, across the street; and if the deceased had looked, his vision would have been obstructed to a greater or less extent by the presence of a gate or fence dividing the yard from the street, and that even if he had seen the shifter standing outside of the yard, or heard its bell ring, there was nothing from such an observation to suggest it was about to do shifting in the yard, and to put him on his guard, and cause him to heed the instructions of a posted notice to employees not to "pass between the cars while cars are being shifted in the yard." As to the insufficiency of the warning, the plaintiff below produced witnesses who were working in, on, or under cars located upon the track where the injury occurred, two testified that they heard and obeyed the warning given from two to four minutes before

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the accident, but that after that warning, they heard no further warning, although they remained relatively in the same positions in which they were when they heard the first warning.

The defendant below, on the other hand, produced testimony that the first warning was given at a time from which it might be inferred that Gatta was in the yard and before he had gone into the shops, that the warning was given both by the call of trainmen and by ringing the bell of the shifter from the time it was first given down to the time that Gatta was killed, and that Gatta could or should have heard these warnings, that the shifter was not standing outside of the yard and beyond the street, as shown upon the defendant's own plot, but it was standing partly within the yard, so that Gatta, by looking, could have seen it, and in law should have been required to see it, and to have recognized the purpose and danger of its presence, and that he could have heard the bell and should have recognized it, without confusing it with the sound of other bells, and should have heeded the warning which it gave him.

In this state of the testimony, nearly all of which was conflicting and much of which was irreconcilable, the case was submitted to the jury under the usual instruction by the court relative to conflicting testimony, and out of this testimony, which was considered, and in parts accepted and rejected, we assume in the light of such an instruction, the jury evolved a verdict for the plaintiff.

Without reciting the testimony of the case to which the court has given consideration in reaching its conclusion, we consider it sufficient to state that when taken alone, the evidence produced on the part of the plaintiff was sufficient to justify the jury in finding that the injuries to the deceased were occasioned by the negligence of the defendant at a time when the deceased was in the exercise of a care and caution commensurate with the duties of his position and occupation, and that the charge of the court in those respects disclosed no errors either in what was included or omitted.

Opposed to the testimony for the plaintiff and to the inferences it justifies, however, is the testimony for the defendant, which is claimed to be of a weight so much greater and a quality so superior to that produced for the plaintiff, that in law the trial court was bound to instruct the jury to render a verdict for the defendant. From the refusal of the trial court either to grant a new trial or direct a verdict for the defendant, by assuming to determine for which party the testimony preponderated, spring the important errors charged

to the court below; namely, that a new trial should have been ordered or a verdict for the defendant should have been directed on the grounds, "third, that the preponderance of the evidence was with the defendant; and fourth, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative."

In that branch of the administration of justice in which the courts are called upon to perform the delicate function of directing, sustaining, and disturbing the verdicts of juries, without encroaching upon their separate function, courts have adopted for their governance, so far as practicable, certain well considered principles. In the policy of the law of this state, declared by the courts in numberless decisions, the jury is the sole judge of the facts of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury. While in jury trials the court may not determine issues of fact from the evidence, the court may, for certain purposes, determine the existence of evidence from which issues of fact may be determined by the jury. By inquiry into the evidence the court will not allow a verdict when the evidence is not sufficient in law to support it, nor will the court sustain a verdict when rendered against the evidence or upon insufficient evidence.

When the evidence in a case is admitted or not controverted, and when the law as applied to that evidence is productive of but one legal result, it becomes the duty of the court, in the administration of justice, to bind the jury to render a verdict accordingly. To do otherwise would simply entail a postponement of the proper decision of the case, by a retrial ordered on a motion for a new trial, in the event the jury found against the facts. Thus, when it appears by a verdict that admitted facts were ignored by the jury, or the instructions upon the law were disregarded, or a clear error of calculation was made, the court will set aside the verdict, or to avoid this, when possible, the court will direct the jury to render the only verdict that could legally be sustained. *Prettyman v. Waples*, 4 Harr. (Del.) 299, 302; *State use of Hazard v. Layton*, 3 Harr. (Del.) 469, 480, 481; *Beeson v. Elliott*, 1 Del. Ch. 368; *Waples v. Waples*, 1 Harr. (Del.) 394, note a; *Allen v. Miles*, 4 Harr. (Del.) 234; *Bailey v. England*, 1 Penn. (Del.) 12, 39 Atl. 455; *Kinney v. Short*, 2 Harr. (Del.) 357; *Taylor v. Moore*, 3 Harr. (Del.) 6, 7.

But when the case involves a contro-

verted question of fact in which the evidence is conflicting, and out of the conflict may be gathered sufficient evidence to support a verdict for either party, the issue of fact will be left severely to the jury, and the court will neither direct nor disturb the verdict upon the ground that it is against the evidence, though it would have drawn from the testimony a conclusion different from that drawn by the jury. *Burton v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 252, 254; *State v. Bralawski*, 2 Boyce (Del.) —, 84 Atl. 950. The absence or presence of conflicting testimony in a case is therefore a controlling consideration by which courts are governed in directing, sustaining, or overturning the verdicts of juries.

It is contended, however, that as the jury is instructed to find for the party with whom, in the maintenance of the issues, rests the preponderance of evidence, it is likewise the duty of the court, when that preponderance is disclosed at the trial, either to direct a verdict in accordance with it, or, after trial, to set the verdict aside, if the verdict be found against it. This, in the last analysis, would make the court the judge of the facts; and if the judgment of the jury upon the issue of fact were to be anticipated or reviewed by the judgment of the court upon the facts, then the function of the jury in determining issues of fact would cease to be exclusive and would become merely preliminary.

It is the province of the jury in the trial of civil cases to consider the whole volume of testimony, estimate and weigh its value, accept, reject, reconcile, and adjust its conflicting parts, and be controlled in the result by that part of the testimony which it finds to be of greater weight. As the jury is the exclusive judge of the evidence, it must in reason be the exclusive judge of what constitutes the preponderance of the evidence, and when that judgment is reached upon evidence sufficient to support a verdict, it should not be disturbed by the court. *Smithers v. Wilmington City R. Co.* 6 Penn. (Del.) 422, 425, 67 Atl. 167; *Someone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778; *Waller v. Wilmington City R. Co.* 5 Penn. (Del.) 374, 61 Atl. 874; *Reed v. Continental Ins. Co.* 6 Penn. (Del.) 204, 65 Atl. 569; *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376; *Lenkewicz v. Wilmington City R. Co.* 7 Penn. (Del.) 64, 74 Atl. 11.

As in the trial of this case there was sufficient evidence to justify the verdict rendered, the court finds no error committed by the trial court either in refusing to direct a different verdict or in refusing to disturb the one rendered.

Being required to estimate and weigh all

the testimony in a case in order to determine where the preponderance lies, juries are frequently required to consider testimony known as positive and negative testimony, and to give to it the peculiar weight and value accorded it by the law. At the trial of this case the court instructed the jury that "the jury in determining the value of testimony may, and often should, give greater weight to positive than to negative testimony, but all the testimony should be considered by the jury, and given such weight as in their judgment it is entitled." To this instruction the defendant below excepted and for error contends, that in view of the negative character of the testimony in proof of negligence and the positive character of the testimony offered to disprove negligence, the trial court should either have directed a verdict in its favor or set aside the verdict rendered against it, and should not have submitted the case to the jury upon the instruction given.

In the case of *Queen Anne's R. Co. v. Reed*, 5 Penn. (Del.) 226, 236, 119 Am. St. Rep. 301, 59 Atl. 860, this court recognized the general rule that positive or affirmative testimony is of greater weight than testimony merely negative; that is, the testimony of a credible witness that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place. 1 Wharton, Ev. § 415; Starkie, Ev. 867; Jones, Ev. § 901. The reason for the rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible for the witness who testifies affirmatively to remember what never existed. *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. ed. 644. Negative testimony may be attributed to lack of attention, inert mental operations, imperfect senses as well as to the faulty recollection of the witness; while, on the contrary, given under circumstances that disclose the witness to have been mentally alert, of perfect senses and excellent memory, and showing the opportunities of the witness for knowing and the attention he had given the matter concerning which he testifies, negative testimony may lose its negligible quality and outweigh positive testimony. *Greany v. Long Island R. Co.* 101 N. Y. 419, 5 N. E. 425; *Lighthouse v. Chicago, M. & St. P. R. Co.* 3 S. D. 518, 54 N. W. 320; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Stoddard v. Kelly*, 50 Ala. 452; *State v. Gates*, 20 Mo. 400; *Van Salvellergh v. Green Bay Traction Co.* 132 47 L.R.A.(N.S.)

Wis. 166, 111 N. W. 1120; *Stotler v. Chicago & A. R. Co.* 200 Mo. 107, 98 S. W. 509; *Pence v. Chicago, R. I. & P. R. Co.* 79 Iowa, 389, 44 N. W. 686; *Davis v. New York, N. H. & H. R. Co.* 159 Mass. 532, 34 N. E. 1070; *Eilert v. Green Bay & M. R. Co.* 48 Wis. 606, 4 N. W. 769; *Elkins v. Kenyon*, 34 Wis. 93; *Purnell v. Raleigh & G. R. Co.* 122 N. C. 832, 29 S. E. 953; *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181.

The courts in different jurisdictions have frequently recognized a qualification of the general rule that positive testimony is of greater weight than negative testimony. *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Innis v. State*, 42 Ga. 482; *Marshall Dental Mfg. Co. v. Harkenson*, 84 Iowa, 117, 50 N. W. 559; *Burnham v. Sherwood*, 56 Conn. 229, 14 Atl. 715; *Cotton v. Willmer & S. F. R. Co.* 99 Minn. 366, 8 L.R.A. (N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *LeCointe v. United States*, 7 App. D. C. 16; *McMahon v. McHabe*, 174 Mass. 320, 54 N. E. 854, 6 Am. Neg. Rep. 559; *State v. Lattin*, 19 Wash. 57, 52 Pac. 314.

The varying qualities of negative testimony under different conditions were recognized by this court in the case of *Queen Anne's R. Co. v. Reed*, in which the opinion of the court in *Menard v. Boston & M. R. Co.* 150 Mass. 386, 23 N. E. 214, was cited to illustrate its meaning. In that case the court said: "Ordinarily all that a witness can say, in such a case, when called to prove that a bell was rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

The rule of law that positive testimony is of greater weight than negative testimony, considered, of course, in connection with its exceptions and qualifications, is undisputed. We are now asked, however, to enlarge the rule and hold in substance that because a jury should ordinarily give to positive testimony greater weight than to negative testimony, the court, on motion for binding instructions or for a new trial, should see that the rule is enforced, and should examine into the character of the

testimony of the two classes, judge their relative values, determine whether the positive testimony outweighs and destroys the probative force of the negative testimony, and direct or overturn a verdict accordingly. In support of this contention these authorities are cited: *Seibert v. Erie R. Co.* 49 Barb. 583; *Lomer v. Meeker*, 25 N. Y. 363; *Culhane v. New York C. & H. R. R. Co.* 60 N. Y. 134; *Foley v. New York C. & H. R. R. Co.* 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631; *Keiser v. Lehigh Valley R. Co.* 212 Pa. 409, 108 Am. St. Rep. 872, 61 Atl. 903; *Lonzor v. Lehigh Valley R. Co.* 196 Pa. 610, 46 Atl. 937, 8 Am. Neg. Rep. 335; *Horandt v. Central R. Co.* 78 N. J. L. 190, 73 Atl. 94; *Holmes v. Pennsylvania R. Co.* 74 N. J. L. 469, 66 Atl. 412, 12 Ann. Cas. 1031; *Hubbard v. Boston & A. R. Co.* 159 Mass. 320, 34 N. E. 459; *Menard v. Boston & M. R. Co.* 159 Mass. 387, 23 N. E. 214; *Bohan v. Milwaukee, L. S. & W. R. Co.* 61 Wis. 391, 21 N. E. 241; *Horn v. Baltimore & O. R. Co.* 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 301; *Baltimore & O. R. Co. v. Baldwin*, 75 C. C. A. 211, 144 Fed. 53.

A close analysis of these authorities will disclose that in those cases in which there was negative testimony and verdicts were either directed or set aside, it was done not because the testimony was negative in quality, nor because the negative testimony was opposed by positive testimony, but because the negative testimony was in itself without probative force sufficient to support the verdicts.

Considering the rule in the light of these and other decisions, it is apparent that in a case where the issue on one side is supported solely by negative testimony, but by negative testimony of sufficient probative force, in the estimation of the court, to prove the issue, and there is opposed to it no testimony at all, no court would prevent or disturb a verdict based upon such testimony merely because of its negative character. And if the same negative testimony of the same probative force was opposed by positive testimony, a court would not take a case from the jury or overthrow its verdict simply because of the rule in favor of positive testimony, for the effect of that would be to deprive the rule of its recognized exceptions, and to hold that positive testimony outweighs negative testimony in every case. But when negative testimony is opposed by positive testimony, and the negative testimony, if unopposed, would in itself be insufficient to support the issue it is offered to prove, the court will direct or overturn a verdict, not by encroaching upon the exclusive function of the jury and weighing each class of tes-

timony, one against the other, but by performing its own exclusive function of determining, as in all cases, whether the evidence introduced in proof of the issue was sufficient to support a verdict.

Considered in this light, the rule that positive testimony outweighs negative testimony was not intended to come in conflict with the rule that the weight of the testimony, when conflicting, should be left to the jury (*Jones, Ev.* 901), but was designed as a rule of measurement for use by the jury; and when testimony, negative in quality, is submitted to the jury with the circumstances surrounding and corroborating it, to be weighed and valued according to this and other rules of evidence, and when in itself, it is of sufficient probative force to support a verdict, though opposed by positive testimony to which the jury may give a lesser weight, a verdict will neither be directed nor disturbed.

The opportunities of the witnesses who gave negative testimony in this case, to hear, comprehend, and remember a warning if one had been given when Gatta was within sound of such a warning, considered with relation to their positions, occupations, surroundings, and knowledge of the character of the impending danger, were such as to take their testimony entirely out of the class that is purely negative, and to justify the jury in giving it a weight upon which to predicate the verdict it rendered. The trial court therefore committed no error in refusing to direct a verdict or to disturb the verdict rendered because of the negative character of the testimony for the plaintiff.

The judgment and proceedings of the court below are in all respects affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

SYLVANUS A. NICOLOPOLE, Appt.,

v.

THOMAS B. LOVE.

(39 App. D. C. 343.)

Appeal — assignments of error — sufficiency.

1. Upon appeal from a judgment rendered on affidavits for possession and defense in a proceeding by a landlord to recover pos-

Note. — Effect of provision allowing lessor to terminate tenancy if he desires to build.

In order to avail himself of such a provision, the lessor must act in good faith. *Doe ex dem. Wilson v. Abel*, 2 Maule & S. 541; *Russell v. Coggins*, 8 Ves. Jr. 34; *Don-*

session of the leasehold, assignments of error, questioning the sufficiency of the affidavits sufficiently comply with a rule requiring an assignment of errors relied upon separately and specifically stated.

Landlord and tenant — termination of tenancy — tearing down to rebuild.

2. A lease authorizing the landlord to terminate the tenancy in the event that he shall "tear down to rebuild the building" does not authorize a termination to enable a subsequent lessee to tear down to rebuild.

(December 2, 1912.)

A PPEAL by defendant from a judgment of the Supreme Court in plaintiff's favor in a proceeding to recover possession of a leasehold. Reversed.

The facts are stated in the opinion.

ohue v. New York, 54 Misc. 415, 105 N. Y. Supp. 1069.

In *Russell v. Collins*, 8 Ves. Jr. 34, it was held that equity will not permit a lessor to proceed at law to recover the premises by virtue of a proviso in a lease to deliver possession if the premises should be wanted for building, where the lessor does not show the land to be actually wanted; and that it is not sufficient that he has entered into a treaty: otherwise, if he has entered into an agreement.

In *Donohue v. New York*, supra, it was held that the right reserved in a lease of water-front property by a city, by a provision to the effect that in case the board of docks should determine to proceed with the building of wharves in the district including the property leased, and it should be necessary for such purpose to terminate the interest of the tenant in the property, said lease should be terminated on written notice of a resolution of the board of docks to that effect, must be exercised in good faith and upon fair grounds; and that where the lessee had expended large sums in improvements, and the proposed plan of improvement of the water front was but tentative, and no attempt had been made to carry it out, and if commenced it would be many months before the necessity of any public improvement could require interference with the lessee, interference with his possession would be enjoined.

In *Hodgkins v. Price*, 137 Mass. 13, it was held that a provision in a twenty year lease that if the lessor should want the premises for the purpose of building any time after the expiration of fifteen years from the commencement of the lease, then, after reasonable notice, the lessee would give up the premises, does not give the lessor an absolute right to terminate the lease at the end of fifteen years, but only upon the condition that he might then want to rebuild; and therefore that a notice that at the expiration of 15 years the lessor will require the premises for the purpose of building will not protect him from the consequences of an unlawful ouster six years before, when, a fire having occurred, the

Messrs. C. C. Calhoun and J. Barrett Carter, for appellant:

Plaintiff's affidavit was insufficient.

Brooks v. Rogers, 99 Ala. 433, 12 So. 61; *Atkins v. Chilson*, 9 Met. 52; *Frazier v. Caruthers*, 44 Ill. App. 61; *Bloom v. Huyek*, 71 Hun, 252, 25 N. Y. Supp. 7; *Hogg v. Brooks*, L. R. 15 Q. B. Div. 256, 50 J. P. 118, 3 Eng. Rul. Cas. 556.

Leases are to be construed most strongly against the landlord and in favor of the tenant, and instruments are to be construed most strongly against the party drafting them.

Dann v. Spurrier, 3 Bos. & P. 399, 7 Revised Rep. 797, 7 Ves. 231, 15 Eng. Rul. Cas. 458; *Com. ex rel. McNeile v. Philadelphia County*, 3 Brewst. (Pa.) 537; *Schmohl*

lessor took possession and erected a new building.

In *Leppa v. Mackey*, 31 Minn. 75, 16 N. W. 470, it was held that the benefits of a provision in the lease qualifying the right to a renewal in case the lessor should wish the land for building purposes, were not personal to the lessor, but passed to the grantee of the reversion. The court said: "The only question in the case is as to the construction to be placed upon the terms of the condition. We seek to arrive at the intention of the contracting parties from a consideration of the terms in which their agreement is expressed. They are to be deemed to have understood that this covenant would be binding upon, and its performance might be enforced against, not only the then owner of the land, the lessor, but as well his heirs or grantees. In the light of this fact we cannot reasonably construe the contract either as expressing the intention that the right to a renewal of the lease, in the event of a sale of the property by the lessor, or in the event of his death, should be still dependent upon his election to use the land, nor that by such death or alienation, the substantial terms of the covenant should be so changed as to be no longer subject to any condition, and that the succeeding owner of the property should have no option, but must grant a renewal of the lease, although he might wish to build upon the land. We construe the clause as a condition inseparable from the covenant of which it is an integral part, and that it has the effect to reserve the grantee of the reversion the same right of election that his grantor, the plaintiff's lessor, had."

So, also, in *Liddy v. Kennedy*, L. R. 5 H. L. 134, 20 Week. Rep. 150, a provision that upon giving notice to the lessees of an intention to resume for building purposes the possession of any portion of the premises demised, it shall be lawful for the lessor, his heirs, or assigns to enter into such possession, was held not to be personal to the lessor.

Tenancy under a lease for five years, containing a clause by which the lessee agreed to give up the lease if the lessor should con-

v. Fiddick, 34 Ill. App. 190; Hilsendegen v. Hartz Clothing Co. 165 Mich. 255, 130 N. W. 646; 24 Cyc. 967; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Orient Mut. Ins. Co. v. Wright, 1 Wall. 456, 17 L. ed. 505; First Nat Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563.

Plaintiff is bound by the construction he placed upon the contract at the time it was signed.

Schmohl v. Fiddick, 34 Ill. App. 190; Barlow v. Scott, 24 N. Y. 40; Sweatmen's Appeal, 150 Pa. 369, 24 Atl. 617; Cadwalader v. United States Exp. Co. 147 Pa. 455, 23 Atl. 775.

Messrs. J. J. Darlington and W. C. Sullivan, for appellee:

Defendant's affidavit of defense failed

to deny the case made by plaintiff's affidavit.

Bailey v. District of Columbia, 9 App. D. C. 360; Chapman v. Natalie Anthracite Coal Co. 11 App. D. C. 386; Cropley v. Vogeler, 2 App. D. C. 28.

The true end of all construction, and the cardinal rule of interpretation, whether of statutes, wills, or contracts, is to ascertain the intention which the writing expresses, and, when that intention is ascertained, if it be not violative of some established rule of law, it must be enforced.

United States v. Fisher, 2 Cranch, C. C. 358, 2 L. ed. 304; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 99, 100, 21 L. ed. 64, 67; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 423, 50 L. ed. 251,

clude to build, is not strictly a tenancy at will, not being equally at the will of either party; but is a tenancy for years upon condition terminable upon reasonable notice. Shaw v. Hoffman, 25 Mich. 162.

Tenancy under a lease containing such a clause is not terminated by taking possession of part of the lot not leased for the purpose of building on it; nor is it notice to the lessee that the lessor intends to build on the leased portions. *Ibid.*

The actual taking and retention of possession and commencing to build upon the premises, although a trespass, is, from the time the lessee becomes aware of it, a clear notice to the lessee of the lessor's wish to terminate the tenancy and to have possession of the premises; and upon the question of notice should have the same effect as a formal notice given or request made at that time. *Ibid.*

That reasonable notice of an intention to build must be given, though not expressed in a lease containing a clause by which the lessee agreed to give up the lease if the lessor should conclude to build on the premises, is clearly implied both from the language used and from the nature of the provision. *Ibid.*

It is interesting to note, in connection with the case above reported, that in *Doe ex dem. Wilson v. Abel*, 2 Maule & S. 541, the lessor was permitted to recover possession under a proviso that she might terminate the lease upon notice should she be desirous at any time to build, although she had no intention of building at her own expense, but proposed to let the property upon a building lease.

The case of *Broadway & S. Ave. R. Co. v. Metzger*, 27 Abb. N. C. 160, 39 N. Y. S. R. 846, 15 N. Y. Supp. 662, is sufficiently set forth in *NICOLOPOLE v. LOVE*.

In *Cheshire Lines Committee v. Lewis*, 50 L. J. Q. B. N. S. 121, 44 L. T. N. S. 293, 45 J. P. 404, it appeared that one who had acquired certain premises on behalf of a railway company for the purpose of their being used as part of a site for a station, let them upon a weekly tenancy, and at the same time agreed in writing that the lessee

might have the premises "until the railway company require to pull them down." It was held that the railway company might terminate the tenancy where it required the premises for its own occupation, though the intention to pull them down had been abandoned.

Under a provision in a lease that in case the lessor shall, during the two months preceding the expiration of the lease, decide by notice given to the lessee in writing that the lessor will not, during the ensuing year, commence to build on the land on which are situated the premises demised, then at the election of the lessee evidenced in writing and served upon the lessor during such months, the lessee shall be entitled to a renewal of the lease for a year at the same rental, it is not a condition precedent to the existence of the lessee's option to renew that the lessor give notice in writing of his decision not to build; but it is competent for the lessee to waive this character of notice, and to act on knowledge otherwise obtained of the existence of the fact of which he was entitled to be informed in writing. Such intention is sufficiently evinced by the execution of a lease to another party. *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. 553, affirming 91 Ill. App. 500.

In *Doe ex dem. Wilson v. Abel*, *supra*, where land was leased for a term of years with a covenant by the lessee that if the lessor or person entitled to the freehold or inheritance should be desirous at any time during the term to take all or any part of the land demised for building thereon, and for yards and gardens to such buildings, it should be lawful for the lessor or her assigns, or person entitled as aforesaid, to enter and come into and upon all or any part or parts of the said land to make such buildings as she or they should think proper, and generally to do all such acts as should be requisite and necessary in any such case without any interruption by the lessee, provided that the lessor should give at least six months' notice of such intention, and should allow an abatement of the rental in proportion to the quantity of land taken,—it was held that the proviso was

255, 26 Sup. Ct. Rep. 69; *Re Cahn*, 27 App. D. C. 173; *Sand Filtration Corp. v. Cowardin*, 213 U. S. 380, 364, 53 L. ed. 833, 835, 29 Sup. Ct. Rep. 509; *Prentice v. Duluth Storage & Forwarding Co.* 7 C. C. A. 293, 19 U. S. App. 100, 58 Fed. 437; *United States Fidelity & G. Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 144; *Ward v. Foley*, 72 C. C. A. 140, 141 Fed. 364; *Mauran v. Bullus*, 16 Pet. 528, 10 L. ed. 1056; *Pressed Steel Car Co. v. Eastern R. Co.* 121 Fed. 609; *A Leschen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co.* 35 L.R.A.(N.S.) 1, 97 C. C. A. 465, 173 Fed. 855; *American Bonding Co. v. Pueblo Invest. Co.* 9 L.R.A.(N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 Ann. Cas. 357; *O'Brien v. Miller*, 168 U. S. 287, 297, 42 L. ed. 469, 473, 18 Sup. Ct. Rep. 140; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *Collins v. New Hampshire*, 171 U. S. 30, 34, 43 L. ed. 60, 61, 18 Sup. Ct. Rep. 768; *Mellen v. Ford*, 28 Fed. 639; *Interstate Drainage & Invest. Co. v. Freeborn County*, 85 C. C. A. 532, 158 Fed. 270; *United States v. Hogg*, 50 C. C. A. 608, 112 Fed. 909.

Van Orsdel, J., delivered the opinion of the court:

This is a landlord and tenant proceeding, begun in the municipal court of the District of Columbia, where a judgment was entered in favor of appellee, Thomas B. Love, plaintiff below. Appeal was taken by defendant, Sylvanus A. Nicolopole, appellant here, to

the supreme court of the District. An affidavit of merit, as required by rule 19 of the court, was filed by plaintiff, to which defendant replied by an affidavit of defense. On motion of plaintiff judgment was entered for plaintiff upon the insufficiency of defendant's affidavit of defense. From the judgment appeal was taken to this court.

It appears that on October 1, 1910, plaintiff leased to defendant premises known as the "first floor store" at 1427 Pennsylvania avenue Northwest, in this city, for the term of three years. The lease contained the following provision: "The parties hereto expressly agree that in the event the party of the first part shall sell or convey the property hereby leased to a grantee who shall not be willing to allow the said party of the second part to retain the premises hereby demised to the full end of the term hereby created, or shall tear down to rebuild the building in which the said premises hereby leased are, during the term of this lease, that he, the said party of the first part, shall give the party of the second part sixty days' written notice to vacate, which notice shall be served by leaving a copy of the same upon the said demised premises, and at the expiration of the said sixty days this lease shall be at an end as fully as if made in express terms to expire at that time; and the said party of the first part, his heirs, and assigns, shall be entitled to the possession of said demised premises without any other or further demand or notice; and the party of the second part

not merely that the lessor might come upon the land in order to build upon it, but that she might terminate the lease for the purpose of building; as a contrary construction would require the lessor to give a fresh six months' notice for every piece of land as it might come into use in the progress of the building, and as it would in such case be difficult to give effect to the proviso with respect to the abatement of rent.

A case which, while not within the scope of this note, since it does not involve a condition as to building, may, nevertheless, be of interest in connection with the case reported, is *Werlein v. Janssen*, 112 La. 31, 36 So. 216, where it was held that under a provision in a lease giving the lessee a privilege, at the expiration of the lease, of renewal in the event that the lessor did not wish to occupy the premises for her own purposes, it was not essential to the existence of the lessor's right of declining to enter into a renewal of the lease that her intended use of the property should have been an immediate use, nor that her intended use should have been a use exclusively to herself. The court said: "Plaintiff was not restricted as to the particular use to which she would apply the property. She was under no obligation to use it exclusively for herself. The fact 47 L.R.A.(N.S.)

that she proposed to form a partnership with other parties, and that the premises should be occupied by that partnership in conducting its business therein, would not take from that use its character of being a use for her own purposes. We do not think it was essential for plaintiff's intended use of the property to have been an immediate use. It was a use such as a lease of the property to the defendant for three years would have cut off."

But in *Woodland Cemetery Co. v. Carvill*, 9 Leg. Int. 98, as digested in *Pepper & Lewis's Digest*, col. 17,954, where a lease by a cemetery company provided for six months' notice to quit when the company should have occasion for part of the mansion house, it was held, reversing the lower court, that the words should be construed to mean that the tenant should have the house until it might be needed by the lessor for some reasonable and proper purpose pertaining to its business, and that the company could not recover without proving that it needed the part of the house in dispute for some purpose connected with the general object of the cemetery. *Black, Ch. J.*, said: "It will hardly be thought that the lease authorized them [the lessors] to turn out the present tenant merely to make room for another."

E. S. O.

will promptly vacate and surrender the same; and the party of the second part shall pay the rent proportioned to the time of such surrender of the said premises."

More than a year after the execution of the lease, plaintiff leased the premises in question lot number 5, in square number 225, in the city of Washington, improved by buildings numbered 1423, 1425, and 1427 Pennsylvania avenue Northwest, to Childs Company, a corporation of the state of New York. This agreement contained the following provision: "That upon the commencement of the aforesaid term, the party of the second part will tear down the building upon the said premises and rebuild the same by erecting a building of one or more stories at a cost of not less than twenty-five thousand dollars (\$25,000); to be constructed and to look equally as well as the building at No. 36 West Thirty-fourth street, in the city of New York, without necessarily resembling the said building in general detail; and the said party of the second part will protect, save harmless, and keep indemnified, any and all loss, cost, damage, and expense mechanics' liens, claims of materialmen, laborers, contractors, subcontractors, and any and all other claimants, including counsel fees, in any manner connected with, concerned in, or growing out of the erection or construction of the building so to be erected as aforesaid or the rebuilding thereof as hereinafter provided."

Plaintiff's affidavit, after setting forth the foregoing contracts, recites the giving of due notice to quit in accordance with the terms of the lease, and alleges that defendant's tenancy and estate in the demised premises have been determined and have expired, and plaintiff is therefore entitled to judgment for possession. Defendant in his affidavit admits the execution of the leases, but denies the right of plaintiff to possession, and sets up a conversation between himself and plaintiff at the time of its execution as to the meaning of the clause in their lease under which it is sought to evict him, alleging "that there were only two conditions upon which he could be required thereunder to vacate said premises, which were in case there was a change of title to some other owner who should be unwilling for him to remain on the premises, or in case the plaintiff himself should tear down to rebuild said building," but that plaintiff assured him "that he had no idea of tearing down the building to rebuild within the said three years, and that in case he should tear down to rebuild, upon the completion of the building on the premises, he would let defendant occupy such part thereof as might be required for his busi-

ness for the remainder of the full term. . . . Defendant says that he was led to believe, and now believes, from the said statements made by plaintiff concerning the provisions contained in said lease, that they relate solely and entirely to the owner of the premises, and do not relate to, and were not intended to be for the advantage of, any subsequent tenant or tenants of the owner."

The assignments of error are as follows: "(1) In holding the affidavit of plaintiff, filed on March 14, 1912, sufficient under rule 19 of the supreme court of the District of Columbia to entitle plaintiff to judgment for possession, and in rendering judgment for plaintiff for possession. (2) In holding the affidavit of defendant filed on March 25, 1912, an insufficient defense to plaintiff's affidavit under rule 19 of the supreme court of the District of Columbia, and denying defendant's right to trial by jury. (3) In granting plaintiff's motion for judgment, filed April 4, 1912. (4) In not overruling plaintiff's motion for judgment, filed April 4, 1912, and in not entering judgment for the defendant."

Counsel for plaintiff filed a motion to dismiss the appeal on the ground that there is no specific assignment of any error relied upon, and that errors are not assigned according to the rules of this court. The rule referred to provides: "There shall be filed in the court below, and the same shall be included in the transcript of record, an assignment of errors relied upon by appellant separately and specifically stated." Rule 5, § 8.

This rule is in effect the same as rule 11 of the United States circuit courts of appeal. In a number of cases the sufficiency of similar assignments have been upheld. *Atchison, T. & S. F. R. Co. v. Meyers*, 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443; *Leslie v. Standard Sewing Mach. Co.* 39 C. C. A. 314, 98 Fed. 827. The only question here presented is the action of the court in rendering judgment upon the affidavits of plaintiff and defendant, whereby defendant was deprived of a trial by jury. These questions are fully preserved for review by the first and second assignments of error, the third and fourth assignments of error being mere surplusage, and, as such, to be disregarded. While the rule is intended to require the specific statement of each error of the court below relied upon for reversal, it is equally intended to operate in the interest of brevity and clearness, and not as an avenue for the insertion of either argument or redundant matter. For these reasons the motion to dismiss is denied.

Coming to the case on its merits, we do

not regard the lease difficult of interpretation. Two rights were reserved to the plaintiff, under either of which he could terminate the lease, first, in case he should sell or convey the property to another who should elect not to continue the tenancy of defendant; and, second, in case he should tear down to rebuild the building occupied by defendant, in which event he should give defendant sixty days' notice. Plaintiff relies solely upon his right to terminate the lease on the second condition. Hence we are relieved from the task of determining the effect of the first condition. The contract was personal between plaintiff and defendant, and must be construed to operate as such so long as the title to the property remained in the plaintiff. The language used in the contract is somewhat ambiguous. It will be noted that plaintiff cannot give the notice to oust defendant upon a mere desire to tear down to rebuild, but he can only recover possession for the purpose of tearing down to rebuild. Much space has been covered in the briefs of counsel on this distinction, but we are disposed to take the common-sense view of what the parties intended by the provision. It clearly means, when plaintiff in good faith desired to tear down to rebuild the premises, he could get possession in the manner provided in the contract. The difficulty, however, is that it is not plaintiff who proposes to tear down to rebuild. It is a new tenant, with whom defendant has no privity, and who was not within the contemplation of the parties when the contract was made. Change of ownership was contemplated and provided for, but the rebuilding by any person other than plaintiff was not contemplated or within the knowledge of defendant. The most that can be accorded the language of the contract is a possible desire on the part of plaintiff to regain possession for the purpose of rebuilding. That, however, is not what he proposes to do. He has leased the property to Childs Company for twenty-five years, not in its reconstructed condition, but in its present condition, as it is now occupied by defendant. Childs Company agrees to put in a new building on the premises, not as the agent of plaintiff, but as his tenant, and in part payment of the rental therefor. Plaintiff is not desiring possession to enable him to rebuild, but to enable him to put into effect his lease with Childs Company, in order that it may rebuild for its own use. The possession here sought by plaintiff is not for himself, but for Childs Company.

Closely analogous to the present case is *Broadway & S. Ave. R. Co. v. Metzger*, 27 Abb. N. C. 160, 15 N. Y. Supp. 662, where the court, considering a similar situation, said: 47 L.R.A. (N.S.)

"The lease dated November 4, 1889, was made by McCreery, as lessor, and respondents, as lessees, and demised the premises for one year, from February 1, 1890, to February 1, 1891, and contained the following provision: 'And the said tenants have the privilege of remaining for one year more, viz., from February 1, 1891, to February 1, 1892, provided the owner does not desire possession of the premises for building purposes.' When the lease was entered into, McCreery was the owner of the premises therein described, and it does not appear that at that time the lessees were aware of any contemplated change of ownership, or of any project of building upon the premises by persons other than the owner. The only reasonable interpretation, therefore, which could be given the language quoted, is that it comprehended a possible desire on the part of McCreery to resume possession for the purpose of erecting buildings, then remotely contemplated by him. This is its plain and obvious import, the sense in which it is most favorable to the lessees, and therefore the sense which must be held to control. *Lowber v. Le Roy*, 2 Sandf. 202; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *White v. Hoyt*, 73 N. Y. 505; *Johnson v. Hathorn*, 2 Abb. App. Dec. 469. McCreery's desire to gain possession, not for himself, but for a third person, as his subsequent lessee, who has covenanted to erect buildings which, upon the expiration of his lease, are to revert to the lessor, cannot be regarded as having been in the contemplation of the parties at the time when the lease between McCreery and the respondents was entered into, except upon a distorted process of reasoning, and is not within the operation of the clause above mentioned. That McCreery did not desire possession for himself to enable him to carry out his own building projects was made conclusively apparent upon the trial, from the lease introduced in evidence, by which he granted a leasehold estate therein to the appellant for the term of forty-two years, commencing immediately upon the expiration of the term originally demised to the respondents, thus depriving himself of the right to claim possession; and from the further fact that the negotiations for that lease commenced in September, 1890, by which is manifested an absence of desire to resume possession."

In the case at bar plaintiff prepared the lease, and, though the language used in reserving to him the right to terminate the lease, for the purpose of rebuilding is somewhat ambiguous, it will most reasonably admit of the interpretation we have given

it, especially in the light of the rule that where a contract will admit of two constructions, either of which is reasonable, the one most favorable to the grantee must be adopted, on the principle that a man's grant shall be construed most strongly against himself. *Com. ex rel. McNeile v. Philadelphia County, 3 Brewst. (Pa.) 537; Schmoel v. Fiddick, 34 Ill. App. 190; Hilsendegen v. Hartz Clothing Co. 165 Mich. 255, 130 N. W. 646.*

The judgment is reversed, with costs, and the cause remanded with directions to enter judgment for defendant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

MORRIS ROSENTHAL.

(211 Mass. 50, 97 N. E. 609.)

Criminal law — separate indictments — one trial.

One may be tried at one time upon two separate indictments, one charging abduc-

Note. — Consolidated trial upon several indictments against the same defendant.

The earlier cases on this question are collected in the note to *Lucas v. State, 3 L.R.A.(N.S.) 412.*

The distinction between the consolidation of indictments and the trial of indictments at the same time has not always been maintained. That there is a distinction, at least in procedure, is shown in *Betts v. United States, 65 C. C. A. 452, 132 Fed. 228*, where upon the trial of indictments together, the defendant was held entitled to three peremptory challenges for each indictment, while in *Emanuel v. United States, 116 C. C. A. 137, 196 Fed. 317*, where there was a consolidation, the defendant was held entitled only to three peremptory challenges in all.

It will be noticed that the doctrine of *Com. v. Bickum, 153 Mass. 386, 26 N. E. 1003*, referred to in the earlier note is very materially limited by *Com. v. Rosenthal*.

The majority of Federal cases have been decided under § 1024 of the Federal statute relating to consolidation of indictments, which is set forth in the earlier note. Under this statute, indictments charging the use of the mails to defraud, which describe the same scheme in somewhat different language, may be consolidated. *Marshall v. United States, 117 C. C. A. 65, 197 Fed. 511. Certiorari denied in 226 U. S. 607, 57 L. ed. 379, 33 Sup. Ct. Rep. 112.*

Such indictments may be consolidated, although the offenses charged therein may not 47 L.R.A.(N.S.)

tion and the other adultery with the girl abducted since the several offenses would be proved by substantially the same evidence, or evidence connected with a single line of conduct or growing out of essentially one transaction.

(February 26, 1912.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of an indictment charging him with adultery and abduction. Overruled.

Defendant was indicted in two counts for adultery with each of two girls, and by another indictment in two counts for abduction of the same girls. The presiding justice ordered both indictments to be tried together. Defendant was found guilty under the indictment for adultery, and not guilty of abduction.

Mr. E. Greenhood for defendant.

Mr. John J. Higgins, for the Commonwealth:

It was within the discretion of the court to order a joint trial of the two indictments.

Com. v. Seeley, 167 Mass. 163, 45 N. E. 91; Com. v. Malone, 114 Mass. 295; Com. v. Sullivan, 104 Mass. 552.

have been committed within the time limited by statute for offenses which may be joined in one indictment. *Booth v. United States, 83 C. C. A. 552, 154 Fed. 836.* See *Brown v. United States, infra*, where indictments were tried together.

But in *Bass v. United States, 20 App. D. C. 232*, the right to consolidate indictments was denied where the offenses charged in the separate indictments did not all occur within a certain period of time as required by statute for the joinder of counts in a single indictment.

And consolidation of indictments may be had, although the aggregate offenses are more in number than can be joined in one indictment under the provisions of the statute. *Booth v. United States, supra.*

Under this statute indictments against five named defendants under the statute for using the mails to defraud may be consolidated with an indictment for conspiracy under another section of the statute, charging a conspiracy for the commission of the substantive offenses set forth in the other indictments against the defendants named in such other indictments, together with divers persons unknown to the jury. *Emanuel v. United States, supra.*

It has been held that indictments charging the use of the mails to defraud, and differing only in respect to some minor details, may, independently of any statute upon the subject, be tried together to avoid unnecessary delay and expense if the defendant is not deprived of any right, by way of challenge or otherwise, to which he would have been entitled if the indictments

The general character of the punishment inflicted, and not its quantity, is the vital consideration.

Josalyn v. Com. 6 Met. 236.

While the indictments are for two separate offenses, each offense would be proved by substantially the same evidence, and in the absence of any objection or exception on this point, it may be assumed that no evidence prejudicial to the defendant was introduced, and that the defendant preferred to rest on the exception to the order that the two cases be tried together.

Com. v. Seeley, 167 Mass. 163, 45 N. E. 91.

Even where parties have been jointly indicted the fact that there was evidence which was competent against one or more of the defendants, but was not competent against other defendants, did not require that the trials should be separated.

Com. v. Bingham, 158 Mass. 169, 33 N.

had been tried separately. *Brown v. United States*, 74 C. C. A. 214, 143 Fed. 60. *Certiorari* denied in 202 U. S. 620, 50 L. ed. 1174, 26 Sup. Ct. Rep. 765. In the course of the opinion the court states that the indictments indicated that the schemes to defraud were devised on the same day, that they were almost identical, that the work of carrying them into effect was begun shortly after they were devised, and that the letters set forth were all mailed at the same post-office within fourteen months thereafter, that the offenses appear to be so closely connected in respect to time, place, and subject-matter as to justify the belief that proof of those charged in one indictment would almost necessarily bear upon those charged in the others.

And this is true although the offenses in the separate indictments cover a period greater than that allowed for offenses to be charged in a single indictment. *Brown v. United States*, 74 C. C. A. 214, 143 Fed. 60. See *Booth v. United States*, *supra*, where indictments were consolidated.

Indictments against the president of a national bank, charging him with misapplication and abstraction of the funds of the bank, making false entries in the books of the bank and false entries in the reports to the Comptroller of the Currency,—acts which are of the same character and degree,—may be consolidated and tried together under § 1024 of the Revised Statute of the United States. *Norton v. United States*, 205 Fed. 593.

So, indictments charging the defendant with having aided and abetted different persons in securing false naturalization certificates for the purpose of registering as voters may be consolidated. *Dolan v. United States*, 69 C. C. A. 274, 133 Fed. 440.

And separate indictments charging the defendant with having caused illegal entries to be made upon the public lands by different persons were held properly consolidated for trial in *Olson v. United States*, 67 C. C. 47 L.R.A. (N.S.)

E. 341; Com. v. Miller, 150 Mass. 69, 22 N. E. 434.

The fact that the defendant's right of challenge was affected by a joint trial was not sufficient reason to order a separate trial.

Com. v. James, 99 Mass. 438.

A judge may in a proper case, in his discretion, order the joint trial of two or more indictments.

Cummins v. People, 4 Colo. App. 71, 34 Pac. 734; *State v. Watts*, 82 N. C. 656; *State v. Lee*, 114 N. C. 844, 19 S. E. 375.

Rugg, Ch. J., delivered the opinion of the court:

It is well settled that a defendant may be charged with divers and distinct offenses, whether felonies or misdemeanors, of a kindred nature, and liable to punishments of the same general character, by several counts in the same indictment or complaint.

A. 21, 133 Fed. 849, but it appears that in this case, at the close of the evidence, all of the indictments except one were dismissed on motion of the United States attorney.

Under this statute, indictments charging the illegal appropriation of money of the United States intended for harbor improvements may be consolidated. *United States v. Greene*, 146 Fed. 781.

And separate indictments charging a violation of the same statute relating to the inclosure of public lands, the same being offenses which could have been embraced in one indictment, are properly consolidated. *Krause v. United States*, 78 C. C. A. 642, 147 Fed. 442.

The clause, "which may be properly joined," found in this statute, vests in the trial court a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding the same would be permitted by one or more of the clauses mentioned in the first part of the statute, and does not confine the causes which may be joined to those which may be properly joined at common law. *Dolan v. United States*, *supra*.

There may be a consolidation although there are several defendants. *Emanuel v. United States*, *supra*.

Under the Colorado statute referred to in the earlier note, an information based upon a statute charging one with breaking ore from certain mines with intent to steal, and with removing ore from the same premises with intent to defraud, may be consolidated with an information based upon another statutory provision charging the accused with the larceny of certain ore and with buying and receiving it from some unknown thief, knowing it to have been stolen. It is stated to be conceded that the subject-matter of the offenses in each of the counts of the respective indictments is the same. That is to say, the ore described in each count is identical, and it also appears that the owner of the ore in each case is the

Com. v. Mullen, 150 Mass. 394, 23 N. E. 51; *Castro v. Reg.* 6 App. Cas. 229, 50 L. J. Q. B. N. S. 497, 44 L. T. N. S. 350, 29 Week. Rep. 669, 14 Cox, C. C. 546, 45 J. P. 452. It has been decided, also, that two persons separately indicted for the same offense may be tried together. *Com. v. Seeley*, 167 Mass. 163, 45 N. E. 91. It was held in *Com. v. Bickum*, 153 Mass. 386, 26 N. E. 1003, that a defendant, against his objection, could not be tried at one time upon two separate complaints charging two distinct crimes committed at different times. To this same effect see *McClellan v. State*, 32 Ark. 609. None of these decisions quite reach the point presented by the case at bar. Broadly stated, that point is whether two indictments founded upon substantially one transaction provable largely by the same evidence can be tried together against one defendant. Concretely, it is whether a defendant, against his protest, may be

tried at one time upon two separate indictments, one charging abduction of a girl between seventeen and nineteen years of age, for the purpose of unlawful sexual intercourse (Rev. Laws, chap. 212, § 2, as amended by Stat. 1910, chap. 424, § 1), and the other charging adultery with the same girl.

Each of the offenses named is a felony, being punishable by imprisonment in the state prison. Rev. Laws, chap. 215, § 1. The general nature of the two offenses is the same: namely, unlawful sexual relations. The enticing away of the girl from home or elsewhere by a married man is but a preliminary step in the accomplishment of the ultimate design. The evidence which would support the two charges would be similar in character. The mode of trial is the same. The circumstances that the statute of limitations is less as to abduction, and a greater burden of evidence is required

same, and it is charged that each offense was committed at the same time and place; and, although different offenses are charged, the conceded facts are such that the accused could not be guilty of more than one, that the punishment for each offense charged was identical, therefore they belong to the same class of crime and were properly consolidated. *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228.

An indictment charging one with engaging and assisting in operating and managing a house of prostitution may be consolidated for the purposes of trial with one charging the defendant with the living on and being supported in part by money realized from prostitution, where the indictments grow out of the same or connected transactions, under a subsequent statute of this state similar to the former one, authorizing the consolidation of indictments where there are several charges for the same act or transaction, or for one or more acts or transactions connected together, or for one or more acts or transactions for the same class of crimes or offenses. *Trozzo v. People*, 51 Colo. 323, 117 Pac. 150. It is stated that the crimes charged were for the violation of the same section of the statute, they were for acts and transactions of the same class of crimes, and, as disclosed by the record, for acts and transactions connected, done, and performed at the same time and place, the facts were intermingled, and this brought them within the provisions of the statute.

Information charging the killing of two persons as a part of the same transaction, and done at the same time and place, may be consolidated under the Colorado statute referred to in *Trozzo v. People*, supra. *Harris v. People*, — Colo. —, 135 Pac. 785.

A trial upon an original bill and a new bill in which the charge is set forth more explicitly is stated to be allowable in *State v. Lee*, 114 N. C. 844, 19 S. E. 376. 47 L.R.A. (N.S.)

A constitutional provision guarantying to one accused of crime the right to a speedy public trial by an impartial jury does not prevent the trial of one upon an original and amended information; the original information charging him with persuading a female to enter a house of prostitution for the purpose of practising prostitution, and the amended information charging that the accused procured the person named in the first count and another as the female inmates of another house of prostitution. The defendant in this case went to trial without objection, and made no motion at any time to require the prosecutor to elect between the original and amended information. *People v. Jacobson*, 247 Ill. 394, 93 N. E. 417.

In *Ashley v. State*, 3 Ala. App. 84, 57 So. 1027, there was an agreement between the counsel for a defendant who was indicted on five indictments charging offenses growing out of and connected with the burglary of railroad freight cars in the same train, and the solicitor for the state, that the indictments might all be tried at the same time and that one trial might stand for all. There seems to have been a trial on but one of the indictments, and, upon a conviction, error was predicated upon the trial. The existence of the other indictments was held to be no error prejudicial to the defendant, even if they were for the same offense.

The consolidation of indictments is within the sound discretion of the trial court, and the exercise of this discretion will not be interfered with except in cases of abuse or manifest injustice. *Lemon v. United States*, 90 C. C. A. 617, 164 Fed. 953.

Upon the trial of consolidated indictments it is not the duty of the trial court, upon its appearing that two separate offenses are being proved, to order the trial separate of his own motion. *Quinn v. People*, 32 Colo. 135, 75 Pac. 396. W. A. E.

for conviction of it (Rev. Laws, chap. 212, § 7), do not differentiate the two crimes in that respect. Nor do the facts that an unmarried man might be found guilty of one offense while only a married man could commit the other upon the allegation of the indictment, or that an element of fraud might enter into one, and not into the other, crime, constitute vital differences. The two offenses might have been joined by several counts on one indictment. In the case at bar the offense, whatever it might be found to be, grew out of the same acts. The same evidence would be required in substance to prove each crime, although less would suffice to convict of one than the other. Where the essential elements of the conduct, which may constitute two distinct crimes, are the same and to be proved in large part by the same evidence, and where the indictment might have been drawn legally so as to include both crimes, no right of the defendant secured to him by the law as matter of right is violated by compelling a joint trial of both indictments in the exercise of a sound judicial discretion.

The rule of *Com. v. Bickum*, 153 Mass. 386, 26 N. E. 1003, does not prevail generally. *State v. Johnson*, 50 N. C. (5 Jones, L.) 221; *State v. Watts*, 82 N. C. 656; and *Withers v. Com.* 5 Serg. & R. 59, are referred to in that opinion. See also *State v. Lee*, 114 N. C. 844, 19 S. E. 375. The contrary practice is established by statute in some jurisdictions. *Williams v. United States*, 168 U. S. 382-390, 42 L. ed. 509-512, 18 Sup. Ct. Rep. 92; *Short v. People*, 27 Colo. 175, 60 Pac. 350. In *Logan v. United States*, 144 U. S. 283, 36 L. ed. 429, 12 Sup. Ct. Rep. 617, decided after *Com. v. Bickum*, it was said by Mr. Justice Gray at page 296 of 144 U. S. that different indictments "might perhaps have been ordered, in the discretion of the court, to be tried together independently of any statute upon the subject. See *Ex parte Yarbrough*, 110 U. S. 651, 655, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152; *United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700." In *Brown v. United States*, 74 C. C. A. 214, 220, 221, 143 Fed. 60, 66, 67, it was said by Judge Van Devanter that the indictments "were . . . tried together as separate indictments to avoid unnecessary delay and expense in the interest of both the government and the defendants. . . . The court was invested with a discretion to direct that the indictments be thus tried together independently of any statute upon the subject." In *Cummins v. People*, 4 Colo. App. 71, 74, 34 Pac. 734, 735, it was said that a statute authorizing the trial at the same time of two or more indictments 47 L.R.A.(N.S.)

charging connected or kindred offenses was "but an embodiment of a well-established principle of the common law." See also *People v. Jacobson*, 247 Ill. 394, 397, 93 N. E. 417.

The logic of *Com. v. Bickum*, 153 Mass. 386, 26 N. E. 1003, did not obtain in *Com. v. Miller*, 150 Mass. 69, 22 N. E. 434, where two, jointly complained of in the district court in two counts with having received different stolen goods at different times, one being found guilty on both counts and the other acquitted on the first and found guilty on the second count, on the appeal of both separate trials, were refused in the superior court, although the result was that two defendants were tried together, one charged with the two distinct offenses and the other with one offense only. An inexorable application of the logic of *Com. v. Bickum*, supra, might include this case. But this court has refused to approve its logic in cases where substantial justice does not require it, and where no substantive right of a defendant has been invaded. In *Com. v. Seeley*, 167 Mass. 163, 45 N. E. 91, although no precedent therefor was found, it was held that two persons separately indicted for an offense committed jointly might be tried together. The incident under inquiry was made there the basis of trial, rather than the number of indictments. That principle is controlling in the present case, where the indictments were founded upon what was in substance a single criminal course of conduct.

Without impairing the authority of *Com. v. Bickum*, as to cases exactly covered by it, we are not inclined to extend its doctrine. Not infrequently it may be uncertain at the time of action by the grand jury precisely what crime a defendant has committed. Larceny, embezzlement, and obtaining property by false pretenses are closely interwoven, and the distinctions between them not infrequently involve extreme technicality. Before the adoption of the act simplifying criminal pleading, miscarriages of justice have resulted from mistakes in perceiving the differences between them. See *Com. v. King*, 202 Mass. 379, 388, 88 N. E. 454; *Com. v. Althouse*, 207 Mass. 32, 46, 31 L.R.A.(N.S.) 999, 93 N. E. 202. Some difficulties in this regard perhaps may survive. Other illustrations might be given to show the perplexity of determining in advance of trial the exact crime which the evidence may prove, although acts committed may be reasonably certain. No sound reason can be given why several indictments charging different crimes arising out of a single chain of circumstances should not be tried together. Where several offenses might have been

joined in one indictment, and would be proved by substantially the same evidence, or evidence connected with a single line of conduct, and grow out of what is essentially one transaction, and where it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial, simply because separate indictments had been found for each offense. The interests of the public and the rights of the defendant will be better subserved in general by permitting as matter of law a single trial under such conditions, leaving it to the sound discretion of the trial court to order separate trials when the rights of either the commonwealth or of the defendant appear to require it. There is nothing in the case at bar to indicate that such discretion was not exercised wisely. All the justices are agreed in this result, but a minority prefer to reach it by overruling *Com. v. Bickum*, *supra*.

Exceptions overruled.

MICHIGAN SUPREME COURT.

JOSEPH DUCRE

v.

SPARROW-KROLL LUMBER COMPANY,
Impleaded, etc., Appt.

(168 Mich. 49, 133 N. W. 938.)

Master and servant — assault on person in store — liability of master.

A storekeeper is not liable for a wilful and intentional assault by his clerk upon an intoxicated person, who had wandered

into the store and had been annoying customers, after he had ceased doing so and was standing quietly by the stove, although it appears to have been made in connection with an attempt to eject him from the store.

(December 29, 1911.)

APPEAL by defendant Sparrow-Kroll Lumber Company from a judgment of the Circuit Court for Houghton County in plaintiff's favor in an action brought to recover damages for injuries alleged to have been caused by an assault by defendant's servant. Reversed.

The facts are stated in the opinion.

Mr. Allen F. Rees, for appellant:

Defendant was not liable for the assault upon plaintiff.

Towanda Coal Co. v. Heeman, 86 Pa. 418; Wiltse v. State Road Bridge Co. 63 Mich. 639, 30 N. W. 370; Snyder v. Hannibal & St. J. R. Co. 60 Mo. 413; Jones v. St. Louis, N. & P. Packet Co. 43 Mo. App. 398; 26 Cyc. 1539; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222; Wood v. Detroit City Street R. Co. 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124; Moore v. Sanborne, 2 Mich. 520, 59 Am. Dec. 209; Johanson v. Pioneer Fuel Co. 72 Minn. 405, 75 N. W. 719, 4 Am. Neg. Rep. 409; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306, 18 Am. Neg. Rep. 289; Lynch v. Florida, C. & P. R. Co. 113 Ga. 1105, 54 L.R.A. 810, 39 S. E. 411, 10 Am. Neg. Rep. 257; Vanderbilt v. Richmond Turnp. Co. 2 N. Y. 479, 51 Am. Dec. 315; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Pittsburg, A. & M. Pass. R. Co. v. Donahue, 70 Pa. 119.

Note. — Liability of master other than carrier for wrongful acts of servant in ejecting person from premises.

As to liability of carriers for wrongful act of servant in ejecting persons from premises, see Index to L.R.A. Notes under title, "Carriers," §§ 31-35.

As to the liability of master for arrest or false imprisonment by servant employed as detective, policeman, or watchman, see notes to *Milton v. Missouri P. R. Co.* 4 L.R.A.(N.S.) 282, and *Conchin v. El Paso & S. W. R. Co.* 28 L.R.A.(N.S.) 88.

As to liability of innkeeper or restaurant keeper for assault by his servant upon a patron, see note to *Chase v. Knabel*, 12 L.R.A.(N.S.) 1155.

Upon the question of inference of employee's authority to expel trespassers from practice of doing so, see note to *Dierkes v. Hauxhurst Land Co.* 34 L.R.A.(N.S.) 603.

Upon the general question of the master's civil liability for wrongful or negligent act of his servant or agent toward one who has no claim upon the master by reason of a 47 L.R.A.(N.S.)

contract, see note to *Ritchie v. Waller*, 27 L.R.A. 161.

The general rule followed by the great majority of the courts is that a master is liable for the wrongful acts of a servant in ejecting persons from the master's premises, where such acts are performed within the actual or apparent scope of his authority, although the servant cannot be expressly charged with the duty of ejecting intruders or trespassers, and the wrongful act may have been expressly forbidden.

Thus, in *Letts v. Hoboken R. Warehouse & S. S. Connecting Co.* 70 N. J. L. 358, 57 Atl. 392, it was held that authority given by the master to his servant to eject trespassers from the former's premises charges the master with liability for the act of the servant in using excessive or inappropriate force in removing one who is a trespasser; and this is so even if the use of any but reasonable and necessary force is expressly prohibited.

And in *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383, it was held that where it appeared that

Mr. E. F. LeGendre, with Mr. P. H. O'Brien, for appellee:

The company was liable in damages to the plaintiff.

Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 391, 55 Am. St. Rep. 522, 18 So. 922; *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L.R.A.(N.S.) 475, 93 S. W. 598; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; 26 Cyc. 1533; *Peck v. Michigan C. R. Co.* 57 Mich. 3, 23 N. W. 466; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L.R.A. 221, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360; *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 395,

27 L.R.A. 202, 43 Am. St. Rep. 38, 27 S. W. 492; *Schulte v. Holliday*, 54 Mich. 73, 19 N. W. 752; *Smaltz v. Boyce*, 109 Mich. 383, 69 N. W. 21; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471, 6 Am. Neg. Rep. 369; *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474, 19 Am. Neg. Rep. 445; *Greene v. New York, O. & W. R. Co.* 102 App. Div. 322, 92 N. Y. Supp. 424; *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 24; *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304; *Baltimore Consol. R. Co. v. Pierce*, 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940, 6 Am. Neg. Rep. 539; *Illinois C. R. Co. v. Murphy*, 123 Ky. 787, 11 L.R.A.(N.S.) 356, 97 S. W. 729; *Burroughs v.*

the gate keeper of an agricultural society was authorized to preserve order, and eject those who were not rightfully upon the fair grounds, and the duty of judging when one was disorderly or wrongfully upon the grounds was committed to him, the agricultural society would be held liable for the result if, in the exercise of such judgment committed to the gate keeper, he wrongfully ejected a person from the grounds, or if a fancied violation of some rule of demeanor so excited his anger that he inflicted a malicious injury in attempting to enforce its observance.

A property owner is liable for the act of his servant in shooting at a poacher on his property if the act was within the general scope of his employment, and done with a view to the furtherance of the master's business, although it was wilful, wanton, or reckless; and whether it was within the scope of his employment was a question for the jury. *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474, 19 Am. Neg. Rep. 445.

So, the court may rule that a care taker was acting for his employer when he cast off the moorings of a vessel lying at the wharf, where he stated at the time that he was so acting, and there is no evidence to the contrary; notwithstanding it also appears that, when he informed the owner of the vessel that the property owner did not allow boats to tie up at the wharf, the vessel owner swore at him, called him an opprobrious name, and threatened him. *Ploof v. Putnam*, 83 Vt. 252, 26 L.R.A.(N.S.) 261, 138 Am. St. Rep. 1085, 75 Atl. 277.

And in *Texas & N. O. R. Co. v. Parsons*, 102 Tex. 157, 132 Am. St. Rep. 857, 113 S. W. 914, affirming — *Tex. Civ. App.* —, 109 S. W. 240, it was held that a railroad company was liable for injuries caused by a deputy sheriff who was in its employ, in shooting at a man whom he believed to be one of a number of trespassers whom he was putting off the premises, where his purpose was to make the man return to the group that he was putting off.

While in *Canfield v. Chicago, R. I. & P. R. Co.* 59 Mo. App. 354, a railroad company was 47 L.R.A.(N.S.)

held liable for an assault upon a striking employee while the latter was in a private telegraph office of the railroad company endeavoring to induce the operator to strike. where the assault was committed by a man employed by the company for the purpose of preventing persons from talking to the company's employees, after he had ordered the plaintiff to leave the office, and the latter simply stood still and said nothing.

A keeper of a penitentiary who puts a "trustee" convict in charge of a piece of real estate with authority to put off trespassers is liable for an assault committed by the convict upon persons found trespassing upon the property, even if the act was contrary to express orders, and although as between themselves the relationship of master and servant did not exist between the keeper and the convict. *Ward v. Young*, 42 Ark. 542.

In *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. 331, it was held that where the bar-keeper of a saloon forcibly ejected therefrom a person while he was in an intoxicated and helpless condition, in a careless and reckless manner, so as to cause a fracture of his leg, the proprietor of the saloon is liable in damages to the person so injured. To the same effect was the decision in *Merrill v. Coates*, 101 Minn. 43, 111 N. W. 836.

In *Priester v. Augley*, 5 Rich. L. 44, it was held that a father who sent his son armed with a gun to drive a negro out of his sugarcane patch was liable for the acts of his son in shooting the negro while executing his father's commands.

In *Barden v. Felch*, 109 Mass. 154, where there was a contest between the plaintiff and the defendant as to the ownership of certain land, and there was an alleged assault upon the plaintiff by the defendant while upon such land, the court sustained an instruction to the effect that if the defendant was in the wrong, and was maintaining his entry by force and employing his servant to do so, he would be liable for the acts of his servant while so engaged, although the servant used more force than he was authorized by the master to do.

Eastman, 101 Mich. 426, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817; Moreland v. Durocher, 121 Mich. 401, 80 N. W. 284; Robinson v. Chicago & A. R. Co. 135 Mich. 258, 97 N. W. 689, 15 Am. Neg. Rep. 341; 26 Cyc. 1158; 20 Am. & Eng. Enc. Law, 169; Lucas v. Michigan C. R. Co. 98 Mich. 1, 39 Am. St. Rep. 517, 56 N. W. 1039; Johnson v. Detroit, Y. & A. A. R. Co. 130 Mich. 453, 90 N. W. 274; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479; Fitzsimmons v. Milwaukee, L. S. & W. R. Co. 98 Mich. 259, 57 N. W. 127; 1 Thomp. Neg. p. 521; Geraty v. Stern, 30 Hun, 426; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331; Hewett v. Swift, 3 Allen, 420; Milner v. Great Northern R. Co. 50 L. T. N. S. 367;

Wade v. Thayer, 40 Cal. 578; Swinarton v. LeBoutillier, 31 Abb. N. C. 281, 28 N. Y. Supp. 53; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400; Beilke v. Carroll, 51 Wash. 395, 22 L.R.A.(N.S.) 527, 130 Am. St. Rep. 1103, 98 Pac. 1119; Chase v. Knabel, 46 Wash. 484, 12 L.R.A.(N.S.) 1155, 90 Pac. 642; Morris Hotel Co. v. Henley, 145 Ala. 678, 40 So. 52; Goodwin v. Greenwood, 16 Okla. 489, 85 Pac. 1115; Hyman v. Tilton, 208 Pa. 641, 57 Atl. 1124; Barden v. Felch, 109 Mass. 154; Merrill v. Coates, 101 Minn. 43, 111 N. W. 836; Baker v. Kinsey, 38 Cal. 631, 99 Am. Dec. 438; Eckert v. St. Louis Transfer Co. 2 Mo. App. 36; Ward v. Young, 42 Ark. 553; Rogahn v. Moore Mfg. & Foundry Co. 79 Wis. 573, 48 N. W. 669; Stone v. Hills, 45 Conn. 47, 29

One who employs a watchman for his property, and authorizes him to carry fire-arms and use them whenever, in his judgment, it seems necessary or advisable for him to do so, cannot be absolved from liability for such use merely because the injured person was not on, but near, the property when shot, where the watchman judged that he was doing or attempting wrong to the property, and that it was necessary to fire at him to protect it. *Robards v. P. Bannon Sewer Pipe Co.* 130 Ky. 380, 18 L.R.A.(N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429.

In *Fields v. Lancaster Cotton Mills*, 77 S. C. 546, 11 L.R.A.(N.S.) 822, 122 Am. St. Rep. 593, 58 S. E. 608, it was held that a mill owner who intrusts his superintendent with authority to employ methods to prevent interference with the operatives in the mill is liable for the act of the superintendent and overseers in throwing into a reservoir one who comes upon the property to entice away operatives.

A foreman employed by a corporation with authority to hire and discharge employees has implied authority to eject forcibly a discharged employee who refused to leave the premises when ordered, and the master is liable for injuries caused to such discharged employee by an excess of force used by the foreman in his zeal, misjudgment, or passion. *Rogahn v. Moon Mfg. & Foundry Co.* 79 Wis. 573, 48 N. W. 669.

A railroad company is liable for the injury caused by a watchman employed to lower and raise the gates over a highway, in throwing a cinder at some boys who climbed upon the gates and, because of their weight, prevented the gates from rising. *Hammond v. Grand Trunk R. Co.* 9 Ont. L. Rep. 64.

In the two cases following, a judgment for the plaintiff was reversed, but the circumstances were such that the cases cannot be considered as being in conflict with the cases set out above:

In *Montgomery v. Sartirano*, 16 App. Div. 96, 44 N. Y. Supp. 1066, 2 Am. Neg. Rep. 758, it was held that where the porter of a lodging house was alleged to have com-

mitted an assault in ejecting an intoxicated man from the premises, it was error to refuse to charge that the lodging-house keepers were "not liable for the acts of their agent or servant not done within the scope of his authority or course of his employment." The court said: "If the act of the servant is done in the master's business, and acting in the general scope of his authority, then the master is liable, even though the servant abuses his authority and violates the instruction of the master. If the act committed by the servant is a wilful, wanton wrong, done not in the performance of his duty to his master, but outside of his master's business, the master is not liable. The porter testified that the plaintiff called him vile names, and also that he did not push the plaintiff. The jury might have found that the plaintiff did call the porter names, and yet disbelieved the porter when he said that he did not push the plaintiff. In such case it would have been for the jury to say whether the pushing of the plaintiff was done, in the service of the master, to eject the plaintiff, or was the wholly wanton act of the porter, angered at the insult given him."

In *Collins v. Butler*, 179 N. Y. 160, 71 N. E. 746, 17 Am. Neg. Rep. 106, it was held error on the part of the trial court to instruct the jury that the act of a clerk in pushing the plaintiff out of the store after her refusal to go upon his request was an unlawful interference of the clerk with the plaintiff's person, and was in law an assault; that the clerk acted in doing this within the scope of his duty and employment, and his acts could be imputed to the defendant, and that the only question for the jury was one of damages or compensation. The court said: "When a party is sued for an assault and battery committed by his servant upon another, the liability must depend either upon proof of some express direction or authority of the master, or upon facts and circumstances from which a direction or authority of the master may be inferred, and that inference must be drawn by the jury as one of fact. This is the case of a clerk in a store, alleged to

Am. Rep. 635; *Ritchie v. Waller*, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A.(N.S.) 486, 23 S. E. 327; *Dickson v. Waldron*, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *McDonald v. Franchere Bros.* 102 Iowa, 496, 71 N. W. 427.

McAlvay, J., delivered the opinion of the court:

Plaintiff brought suit against both defendants to recover for injuries alleged to have been caused to him by an assault committed upon him by Charles Struthers, who was an employee of defendant company. Defendant company was engaged in lumbering operations at Kenton, Michigan,

have committed an assault upon a customer; and the question is, Was he acting within the scope of his employment? We are not dealing with the case of a railroad conductor, or other agent of a corporation vested with discretion in emergencies."

A good cause of action is stated by a complaint which alleges that a railway station agent had been furnished with a revolver for the purpose of protecting the premises from intruders, and that such agent wrongfully and negligently shot the plaintiff, who was upon the premises for a wilful purpose. *Blakely v. Greer*, 28 Ohio C. C. 33.

That the servant of the owner of a wharf was acting within the scope of his employment in casting off a vessel moored there is sufficiently alleged in a declaration for damages for injuries thereby caused, by allegations that the wharf was in charge of the servant, and that defendant, by his servant, wilfully and designedly, negligently, carelessly, and wrongfully unmoored the vessel. *Plouf v. Putnam*, 81 Vt. 471, 20 L.R.A.(N.S.) 152, 130 Am. St. Rep. 1072, 71 Atl. 188, 15 Ann. Cas. 1151.

But a complaint alleging that the defendant's servant "who was at the time watching and guarding defendant's lumber yard, and had charge thereof," assaulted and beat the plaintiff, does not sufficiently allege that he was acting within the scope of his employment at the time of the alleged assault. *McCann v. Tillinghast*, 140 Mass. 327, 5 N. E. 164.

In a number of cases the court expressly states that the liability of the master is dependent upon the fact that the act was not committed by the servant in furtherance of ends purely personal to the servant himself.

Thus, in *Schmidt v. Vanderveer*, 110 App. Div. 758, 97 N. Y. Supp. 441, it was held that a master is liable for the acts of his servant employed to keep off trespassers, in assaulting another, if the acts are committed in the course of his duty, even though the assault was wanton and vindictive; but the master would not be liable if the assault was committed solely as an independent

and in connection with its business conducted a general store at that place. The general manager of defendant company in charge of all its business was William Kroll. The defendant Charles B. Kroll was the manager of the store. Charles Struthers was a clerk in this store, employed to sell goods and wait upon customers. On the day plaintiff was hurt, he came to the store of defendant company in a state of intoxication, and began to be familiar with a woman who was present with her little child, putting his hand upon her shoulder and talking to her. He used profane language in the presence of women, and, it is claimed, he also used obscene language which is unprintable. This conduct continued for some time while plaintiff was

and disconnected act of revenge on the part of the servant.

So, the owner of an island is responsible for the result of the act of his care taker, in casting off the moorings of a vessel which had sought refuge at the wharf in a storm, although he was not expressly instructed to do so; and it is immaterial whether the act was done carelessly or wilfully, if it was not done to serve some purpose of the care taker alone. *Plouf v. Putnam*, 83 Vt. 252, 26 L.R.A.(N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277.

The proprietor of a restaurant is liable for unnecessary violence used by his servants in ejecting a patron therefrom, if they were acting within the scope of their duty to protect lady patrons from insult, but not if they were actuated by personal ill-will, jealousy, hatred, or other ill feelings. *Chase v. Knabel*, 46 Wash. 484, 12 L.R.A.(N.S.) 1155, 90 Pac. 642.

In *Texas & N. O. R. Co. v. Parsons*, 102 Tex. 157, 132 Am. St. Rep. 857, 113 S. W. 914, affirming — *Tex. Civ. App.* —, 109 S. W. 240, where a railroad company was held liable for the shooting of a man upon its premises by a deputy sheriff in its employ. the court calls special attention to the fact that it was the deputy's purpose in shooting to make the injured man join a group of trespassers whom he had under control and was engaged in ejecting from the premises; consequently the act was done in furtherance of the master's business.

Generally the master is not liable where the assault or other injury occurs at a time when the trespassers or intruders are leaving the premises or retreating from the servant.

Thus, a master is not liable for injuries caused by an armed watchman employed to guard the premises and keep the peace, who fired upon an intruder as he was retreating. *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537.

So, the mere employment of a watchman to guard property does not authorize him to shoot a person who has entered the property to get warm, and who, under the watchman's order to leave the property, is

walking around in the store. He was not in the store as a customer or by invitation. He claims on the trial he was there to get a job for a friend. After a time the clerk, Struthers, as plaintiff claims, ordered him to go out, and put his hand on his arm, and plaintiff, having become quiet, was standing by the stove, when the clerk suddenly attacked him with a hammer, knocking him down. He was then put out a side door. About half an hour later, he went to a doctor's office, and was then so intoxicated that the doctor did not wish to do anything with him that morning. The blow plaintiff received fractured his skull. This was treated by the doctor on the following day. He was under the doctor's care for four months, and was then discharged.

In both counts of his declaration, plaintiff charges that defendant Charles B. Kroll, as manager of the store, and the clerk, Struthers, both acting for defendant company, committed this assault, and that Charles B. Kroll directed Struthers to use the hammer upon plaintiff. In both counts plaintiff bases his claim upon the participation in the assault of the manager of the store. Struthers was not made a party defendant.

The jury returned a verdict in favor of the plaintiff and against defendant Sparrow-Kroll Company only.

It will not be necessary to consider all of the errors relied upon by defendant company, which has brought the case to this court for review. The verdict of the jury

running away therefrom, so as to render the employer liable for the act. *Robards v. P. Bannon Sewer Pipe Co.* 130 Ky. 380, 18 L.R.A.(N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429.

Where a servant is authorized to keep trespassers out of a park, the master is liable for injuries caused by his throwing stones at intruders while in the performance of such duty. *Alton R. & Illuminating Co. v. Cox*, 84 Ill. App. 202. This seems a rather extreme case, for it appears that the intruders were on their way out, when the stone was thrown. But the court says: "At this time the evidence shows that the parties were on their way out of the park, and Kemp was with them, and immediately thereafter the stones were thrown which hit appellee. It seems impossible to separate the acts of the parties as to time. The words and acts seem to have been immediately connected as one thing. . . . That Kemp's object was to get appellee and his party out of the park as soon as possible, and by any possible means, is apparent from his evidence; and what he did was not on account of any matter personal to himself that we are able to discover from the evidence, but it was done in the performance of his duty, as he understood it in his excited state of mind."

Upon the question whether an assault growing out of a quarrel commenced while the employee was acting within the scope of his employment may be regarded as the personal act of the employee for which the employer is not liable, see note to *New Elerslie Fishing Club v. Stewart*, 9 L.R.A.(N.S.) 475.

And in *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737, it was held that a railroad company was liable for the death of a trespasser upon a bridge, caused by a watchman charged with the duty of keeping trespassers off the bridge, who struck the deceased twice with a billy after he had turned back as the watchman directed him to, and who, after chasing him for some distance on the bridge, shot him. This decision seems to be squarely opposed to the *Golden and Robards Cases* cited supra. 47 L.R.A.(N.S.)

In the cases cited below it was held that the master was not liable for the injuries or assault under the circumstances stated.

Thus in *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383, it was held that if a person assaulted the gate keeper of an agricultural society first, and the latter undertook to defend himself, and while so engaged inflicted the injury complained of, it would exclude the imputation of authority from the society, because it would show that the gate keeper was acting for himself, and not for the society, at the time.

So, in *Letts v. Hoboken R. Warehouse & S. S. Connecting Co.* 70 N. J. L. 358, 57 Atl. 392, the court said: "The mere fact that a servant of the defendant made an attack upon a citizen while the latter was passing along the public highway does not render the defendant responsible. Such an act is, ordinarily, entirely outside the scope of a servant's employment, and responsibility is not made to appear merely by an allegation that the servant, in making such an attack, was acting within the scope of his employment."

And in *Biggins v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 110 S. W. 561, it was held that a master is not liable for injuries to a third person whom his servant was ejecting from the premises, where the injuries were caused by the accidental discharge of a pistol in the servant's hands, and it was alleged that the servant committed an assault and battery upon such third person.

A person employed to watch the personal property of a company stored upon a wharf belonging to another will not be deemed to be acting within the line of his duty if he shall shoot a person trespassing upon the realty, because that person refuses to go off the premises, or to halt, or to throw up his hands, at his command. *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472. The court said: "If the person shot had the personal property, or some of it, in his possession, and refused to surrender it, or if he was in the act of taking it, and refused to desist when com-

has eliminated any consideration of the connection of the manager of the store, Charles B. Kroll, with the assault, or any liability of the appellant by reason of his conduct. The appellant can therefore be liable only because of imputed responsibility.

In order to make defendant company liable for the assault upon plaintiff, it must be held that it was committed by Struthers acting as clerk of defendant company, and within the scope of his employment. If the testimony of plaintiff and his principal witness, Connor, is true, then the assault on the part of Struthers with the hammer was wanton, wilful, and intentional, and no other conclusion can be drawn from all of the evidence in the case.

Under such circumstances, can this court hold that Struthers was acting within the scope of his employment, express or implied?

In determining the question of the liability of the master for the torts of his servant, committed while in his employment, the line appears to be drawn by the authorities between those acts negligently or unskillfully performed, and those done by the servant in a wanton violation of law.

In an early case this court held: "To render the doctrine of *respondeat superior* applicable, the injury must arise in course of the execution of some service, lawful in itself, but negligently or unskillfully performed; for a wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone answerable. The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large. His liability depends upon the nature of the employment, the occupation of the person employed, and the control or authority of the employer over the

person employed, as well as over the manner of the execution of the employment, and also upon the occasion and nature of the injury." *Moore v. Sanborne*, 2 Mich. at page 530, 59 Am. Dec. 209. In a later case this court reaffirmed this doctrine. Mr. Chief Justice Campbell, speaking for the court, said: "The acts complained of were done in the regular course of their employment, and not by wilful wrong. In such cases the master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and that he is constructively present, at them all. There are many cases of wilful misconduct for which an employer will not be liable, because in such cases the wrongdoers may be regarded as having renounced his service to that extent. . . . But where the act is not wilful, and is done in the regular course of the employment, there is quite generally a distinct liability resting on the grounds of an implied agency." *Smith v. Webster*, 23 Mich. at page 299.

Later, in a case where plaintiff, a foot passenger, sued for injuries, caused by a boy, who was a servant of defendant, driving a horse over him, Mr. Justice Cooley, speaking for this court, said: "The defense then requested the court to charge that the liability of the master does not ensue when the servant has intentionally or recklessly stepped aside from his employment to commit a tort, which the master neither directed in fact, nor could be supposed from the nature of the employment to have authorized or expected the servant to do. This instruction the judge refused to give, but instructed the jury instead that if the boy 'drove in a careless and reckless manner he would be acting within the scope of his master's employment; but that if he wantonly, wilfully, and intentionally run over the plaintiff he would not be

manded so to do, and he was shot by the servant, even though the shooting were wanton and wilful, the master might nevertheless be liable. But that is not this case. There is no proof in this case that the plaintiff, or those with him, were interfering in any way with the property of the defendant. They were simply upon the wharf to boil some coffee; and the servant of the defendant, without excuse or explanation, while they were engaged in gathering wood for this purpose, or while they were in the act of running away, shot and injured the plaintiff. It is difficult to see how such shooting can in any way be distinguished from the shooting by any stranger who might have happened to be on the wharf and tried to drive the men therefrom."

The following quotation from *Belt R. Co. v. Banicki*, 102 Ill. App. 642, sufficiently sets out the facts and holding of the case: "The 47 L.R.A. (N.S.)

mere employment of a watchman to guard property and keep away trespassers does not involve an authority to shoot trespassers; and authority for such shooting cannot be presumed. In the present case there was no evidence either of authority to shoot or that the defendant knew that the watchman carried firearms. The shooting of a trespasser who is actually leaving the premises is not within the general or implied authority of a mere watchman."

In an early English decision it was held that where the master directed his servant to remove a chimney sweep who was making a disturbance in the house, the master was not liable for the excess of force used. *Pidgeon v. Legge*, 5 Week. Rep. 649. This decision is certainly contrary in principle to the various American decisions heretofore cited.

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acting within the scope of his master's authority. But if he carelessly, unintentionally, and accidentally run over the plaintiff, then the plaintiff should recover.' This instruction was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible." *Cleveland v. Newson*, 45 Mich. 62, 7 N. W. 222. While the facts were not identical with those in the instant case, the principle of law involved is the same.

A few authorities are cited where the courts have, in applying the doctrine of *respondet superior*, held the employer liable for wilful and malicious acts by an employee, on the ground that they were within the scope of his employment. Such extreme views have never been entertained by this court.

The case of *Zart v. Singer Sewing Mach. Co.* 162 Mich. 387, 127 N. W. 272, was a case of trespass *vi et armis*, brought against defendant and a local manager of its business in Detroit, for an assault committed while the said manager of defendant and an employee of defendant were forcibly taking a sewing machine from plaintiff's home. That he was the managing salesman of defendant, and so dealt with plaintiff in making the sale of the sewing machine to her, signing his name as such to the receipt for part payment, was undisputed. His authority in that business seems to have been plenary. He went to her home in that capacity to take the machine away from her. Although defendant company denied that the machine was its property, and it received no benefit from the sale, it was held that a question of fact was presented whether he was acting within the scope of his authority or for his personal benefit. The court, among other things, charged the jury: "The defendant, Singer Sewing Machine Company, is not liable, unless you find that it actually owned the machine sold by Brandau to plaintiff." The jury must have found this fact against defendant company. This court, speaking through Mr. Justice Stone, said: "We are of opinion that the case and the charge fall within the doctrine of the case of *Canton v. Grinnell*, 138 Mich. 590, 101 N. W. 811."

This last case cited is another case of trespass *vi et armis*, where a claimed assault was committed by the agents of defendant while removing a piano from plaintiff's residence. Mr. Justice Montgomery, speaking for the court, said: "The jury were instructed that the defendants would be only liable for those acts which were committed by the two truckmen in doing those things necessary in getting the piano. 47 L.R.A. (N.S.)

This instruction sufficiently guarded defendants' rights,"—and cited as sustaining that proposition *Smith v. Webster*, *supra*.

The decisions in both these recent cases rest upon the authority of the doctrine laid down in *Smith v. Webster*, *supra*, which brings all of these cases within the cases of *Moore v. Sanborne* and *Cleveland v. Newsom*, relied upon in this opinion as declaratory of the law in the instant case. In this state our court has never departed from the rule laid down in *Cleveland v. Newsom*, *supra*, and has not adopted the modern rule, so called, which is invoked, and which goes to an extreme which this court is not willing to follow.

The violent and unexplainable assault of the man Struthers upon the plaintiff cannot be defined as recklessness, which is only a high degree of negligence. It was a wanton, wilful, and intentional injury, committed without regard to consequences, and within a narrow margin of having resulted in the crime of manslaughter. Under the circumstances presented by this record, such act cannot be held to have been committed by this man while in the performance of duties for defendant within the scope of his employment; and our conclusion is that, as a matter of law, no liability attached to the appellant, and the court was in error in not so charging the jury, as requested. It follows that other questions raised need no discussion.

The judgment of the Circuit Court, for the reasons pointed out in this opinion, is reversed, and no new trial is granted.

Moore, Brooke, and Stone, JJ., concurred.

Blair, J.:

I concur upon the ground that it is not within the scope of a clerk's employment to eject disorderly persons from his employer's store.

Petition for rehearing denied.

NORTH DAKOTA SUPREME COURT.

E. GALEHOUSE, Resp't.,

v.

MINNEAPOLIS, ST. PAUL, & SAULT
STE. MARIE RAILWAY COMPANY,
Appt.

(22 N. D. 615, 135 N. W. 189.)

Writ — indorsement — stamp — evidence.

1. An indorsement stamped by means of a Headnotes by BRUCE, J.

Note. — The status of one as a passenger as affected by the time elapsing before the

rubber stamp on the back of a summons and complaint, of the words "In the sheriff's office, Dec. 2, 1908, John J. Lee, Sheriff, Ward County," under § 2503 of the Codes of 1905, which makes it the duty of the sheriff to indorse "upon all notices and processes received by him for service, the year, month, day, hour, and minute of reception," and under § 7317 of the Code, which provides that "the presumption that official duty has been regularly performed is satisfactory if uncontradicted," will be deemed satisfactory evidence of the facts therein contained, and that the summons and complaint were delivered to the sheriff for service upon the day stated, in the absence of satisfactory proof to the contrary.

Carrier — passenger — sending telegram.

2. A person is not a passenger and entitled to consideration and protection as such who, after waiting all day in a station for a train and discovering that he will be unable to reach his destination in time for the accomplishment of the purpose of his journey, leaves the station and goes to a hotel for supper, and then returns to such station for the purpose of sending a telegram announcing the fact that he will be unable to make the journey, and that it is his intention not to attempt to do so.

Master — assault by employee — care taker.

3. The mere fact that an employee is authorized to preserve order upon the premises of his employer does not make an assault committed by him upon a patron of his employer an act done within the scope of his authority for which his employer will be liable, when the evidence shows that the assault made was not made for the purpose of preserving order or ejecting such person from the premises in pursuance of such authority.

Same — telegraph company — complaint by patron — assault — liability.

4. When there is a conflict in the evidence, but the testimony of the plaintiff's witnesses, if believed, would justify the jury in finding that a common carrier of telegraphic messages neglected to promptly deliver a death message to the plaintiff, so that plaintiff was unable to take a train by which he could have reached the home of the deceased in time for the funeral, and the plaintiff, after waiting all day in the station for a later train, and then finding

that he would be unable to reach his destination in time, went to the telegraph office to send a message announcing the fact, and, on being informed that the wires were down and such message could not be sent, complained because of the failure of the company to deliver the message promptly in the morning, and, on account of such protest, was assaulted by the telegraph operator, the common carrier of telegraphic messages may be held responsible for such assault and liable in damages therefor.

Same — provocation.

5. If, however, after going to the depot for the purpose of sending the message, and after being informed that such message could not be sent on account of the fact that the wires were down, the jury had found that plaintiff had not merely complained of the failure to deliver the message in the morning, but had called the employee a liar, or used other approbrious language which incited the employee to make the assault, so that the assault was the result of the irritation occasioned by the use of such language, and not of the mere fact of the making of the complaint, the employer would not be liable in damages therefor. "One may not by his acts spoil an instrument and then sue the manager because the performer does not make good music."

Telegraph company — duty to patron.

6. A person who goes to a telegraph office to send a message, or to make a complaint as to the failure to deliver the same, is not a trespasser or licensee, but a customer or patron, and is entitled to treatment and protection as such.

Appeal — defect in record — presumption.

7. Where the evidence is in conflict, and the record shows that the trial court instructed the jury, but omits entirely to include such instructions, it will be presumed on appeal that such instructions were correct, and properly presented the law and the issues to the jury.

(February 17, 1912.)

APPPEAL by defendant from a judgment of the District Court for Ward County in plaintiff's favor in an action brought to recover damages for an alleged assault committed by defendant's employee on plaintiff. Affirmed.

train leaves is discussed in the note to *Kidwell v. Chesapeake & O. R. Co.* 43 L.R.A. (N.S.) 999.

As to whether an assault growing out of a quarrel commenced while an employee is acting within the scope of his employment may be regarded as a personal act of the employee for which the employer is not liable, see note to *New Ellerslie Fishing Club v. Stewart*, 9 L.R.A. (N.S.) 475. And see also in this connection the note to *Blomness v. Puget Sound Electric R. Co.* 47 L.R.A. (N.S.)

17 L.R.A. (N.S.) 764, on the liability of a railroad or street railway for assault by an employee on passenger outside of car or train. Generally as to liability for assaults on passengers, see notes in 32 L.R.A. (N.S.) 1201 and 40 L.R.A. (N.S.) 1070.

Generally as to the liability of a master other than carrier for wrongful acts of servant in ejecting person from premises, see note to *Ducre v. Sparrow-Kroll Lumber Co.* ante, 959.

Statement by Bruce, J.:

This is an action to recover damages for an alleged assault upon the plaintiff by one Clarence Holiday, an employee of the defendant, at its station in the city of Donnybrook. The complaint alleges that the defendant is a common carrier of passengers and freight, and of telegraph messages for hire and profit; that during the month of December, 1906, the plaintiff was in the passenger depot of the defendant company at Donnybrook as a passenger and for the purpose of doing business in a lawful way with said defendant as a common carrier of passengers and telegrams, and that while so engaged, and while attempting to send a telegram over the telegraph line operated by the defendant in connection with its line of railway, he was assaulted by the said Holiday, "who was then and there the servant, employee, and agent of the said defendant, acting within the scope of his employment, duty, and authority as such servant, employee, and agent of the defendant." The answer admits that the defendant is a railway company, but denies the other allegations of the complaint. It also alleges that if any assault was committed it was on account of the fact that the plaintiff made the first assault, and that the assault complained of was made in self-defense. It further pleads the two-year statute of limitations. The defendant and appellant maintains that the summons and complaint were not filed until December 12, 1908, and, if this be the fact, the statute of limitations ran against the action. It is claimed by the plaintiff, however, that the summons and complaint were delivered to the sheriff of Ward county for service on the 2d day of December, 1908. There is no evidence upon the point except the papers themselves. On the back of the summons and complaint there is stamped, by means of a rubber stamp, the words, "In sheriff's office, Dec. 2, 1908, John J. Lee, Sheriff, Ward county," and no other evidence but such indorsement was offered as to the date of the commencement of the action, plaintiff's attorney testifying merely that on his way home from his office—he did not recollect the date—he handed the summons and complaint to the deputy sheriff, and that he stamped it there with a rubber-stamp machine; that "he changed it before he put the stamp on;" that he "monkeyed with it, and put the stamp on there. How he changed it I don't know;" that he turned it either back or forward. There is some evidence, also, that this method of indorsing the date of receipt is the present custom of the office, but this evidence was objected to, and probably with reason, as 47 L.R.A.(N.S.)

it did not date back to the time of the transaction.

As far as the assault is concerned, and the reasons therefor, it is undisputed that at 2 o'clock in the morning a telegram addressed to the plaintiff was received by the defendant, announcing the death of the plaintiff's stepmother, and that the said telegram was not delivered until 9 o'clock; that the night train was late, and, had the message been delivered promptly, plaintiff could have taken such train and attended the funeral; that in the afternoon he went to the depot of the defendant, intending to take the second train, but, after waiting around an hour or two, found that he could not possibly reach his destination in time, so left the depot and went to a hotel for supper, and after supper returned to the railway station for the purpose of sending messages to his relatives that he could not come; that the station agent, Hough, gave him some blanks, but told him that he could not accept the telegrams, as the wires were down. So far there is little or no conflict in the testimony, and it was after this point that the dispute occurs. According to the plaintiff's testimony, which is corroborated by the witness McCarthy, he then asked the station agent, Hough, why the message in the morning had not been delivered to him so that he could have caught the east-bound train, and that at this point one Holiday (the night operator, who was in the office and behind Hough) spoke up and said, "I did not know where you lived, and, damn you, I would not have delivered the message if I had. I will show you about delivering messages,"—and that said Holiday then rushed out of the office and assaulted the plaintiff. The witness McCarthy adds testimony to the effect that Holiday said, "We have had just about enough of you around here, coming down here trying to bulldoze the whole crowd, and I will show you," and that he then rushed into the waiting room and made the assault, first unlocking the door of the office which intervened. The witness Holiday testified, on the other hand, that when Galehouse came into the office Holiday was probably at the instrument; that he was exchanging work until late at night; that Galehouse asked why that message had not been delivered when it was received; that Holiday probably said nothing at first, until Galehouse began to talk over the agent to him; wanted to know why he had not delivered that message; that he (Holiday) told him (Galehouse) that he did not know where he lived, and, further, that he could not get off at that time; that he believed Galehouse used some abusive language at that time; that he asked why he did not

deliver the message and he (Holiday) said, "I don't know where you live, and what about it even though I did not deliver the message?" and that Galehouse then told him to come outside and he would show him what about it; that he then rushed outside and unlocked the intervening door, and that immediately he got into the outer office Galehouse struck him, and the combat began. Holiday also testifies that it was his duty to keep order in the station, but from his evidence it is quite clear that in making the assault, if any, he was acting from personal motives, and not with any desire to preserve order in the building or eject the plaintiff for that purpose. It indeed appears to be quite evident from the testimony that he either went into the outer office because challenged so to do by the plaintiff, or because he was angry and wanted to give vent to his individual and personal spite. There is nothing in the evidence to show that the plaintiff was ordered to leave the building, or rebuked in any way by the agent, Hough, for making a disturbance, nor that the police authorities were called upon, either before or during or after the fracas. There is also no evidence tending to show that the agent, Hough, actively tried to prevent or terminate the engagement. The parties were separated, if at all, by the witness McCarthy, who came into the building with the plaintiff. The agent, Hough, testifies that Galehouse called Holiday a liar, and that the lie was passed back and forth; that Galehouse invited Holiday to come out; that at that time he decided to interfere; that Holiday was very quick and went out; that he could not remember whether the door was open or shut, but that he reached it before he did and went out, and that as he was passing out of the door Galehouse struck him; that he, Hough, went back into the office and picked up the lantern, and that he heard quite a commotion out in the waiting room, and that he afterwards was told that Galehouse was knocked down; "I did not see, but when I got out there they were both on their feet and were going around, and it was pretty fast and exceeded all my expectations;" that there was no light in the outer room, and that it was merely lighted by the light which shone from the window of the inner office. The testimony of Hough and Holiday is corroborated to a greater or less degree by that of two other employees of the company.

On the trial, the defendant and appellant objected to the introduction of any evidence under the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the 47 L.R.A.(N.S.)

record did not show that the action was commenced within the period limited by law. It also, at the conclusion of its testimony, moved the court to dismiss the action on the ground that the plaintiff had failed to establish the agency of Holiday; the fact that the telegraph company was any portion of the defendant; that the action had been brought within the statutory time; and that the assault was committed within the course of duty of the said Holiday as an employee of the company. These motions were overruled, and a motion was made to direct a verdict for the defendant on the same grounds. This motion was also overruled. A verdict was rendered in favor of the plaintiff and respondent for the sum of \$300, and judgment entered thereon. A motion for a new trial was then made and overruled, and defendant appeals.

Messrs. Palda, Aaker, & Greene for appellant.

Mr. F. B. Lambert, for respondent:

It is not necessary, in order to create the condition of passenger and carrier, that the supposed passenger should have bought his ticket or boarded the train at the time of the injury, but that he is on that portion of the property which is used for the accommodation of the passengers, and that he is there for the purpose of taking passage at a reasonable hour.

Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; *Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Grimes v. Pennsylvania Co.* 36 Fed. 72, 7 Am. Neg. Cas. 631; *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935; 3 Thomp. Neg. § 2644; *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90, 8 Am. Neg. Cas. 191; 4 Elliott, Railroads, 2d ed. § 1579; *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327.

The fact that a trespasser is a wrongdoer does not, however, justify malicious, wanton, and wilful maltreatment of him.

3 Elliott, Railroads, § 1253.

If defendant's employee used more force than necessary, or was guilty of making an unprovoked assault, the company is liable to the party injured, for the reason that such acts were within the scope of his employment and in the line of his duties.

3 Elliott, Railroads, § 1265; *Sharp v. Erie R. Co.* 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Cas. 443; *Texas & P. R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A.

316, 32 S. E. 399; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; *Johnson v. Chicago, R. I. & P. R. Co.* 58 Iowa, 348, 12 N. W. 329; *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383; *Dickson v. Waldron*, 135 Ind. 524, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Geraty v. Stearn*, 30 Hun, 426; *O'Connell v. Samuel*, 81 Hun, 357, 30 N. Y. Supp. 889; *Richberger v. American Exp. Co.* 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922.

Bruce, J., delivered the opinion of the court:

The first point to be considered is whether the statute of limitations ran against the action in question. The presumption of law is that a public officer does and will do his duty. Section 2503 of the Code of 1905 makes it the duty of the sheriff to "indorse upon all notices and process received by him for service, the year, month, day, hour, and minute of reception, and issue therefor to the person delivering it, on payment of his fee, a certificate showing the names of the parties, title of paper, and time of reception." Section 6795 of the Revised Codes provides that "an attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this chapter when the summons is delivered, with the intent that it shall be actually served, to the sheriff," while § 7317 of the Code provides that the presumption that official duty has been regularly performed is satisfactory if uncontradicted. In 25 Cyc. 1424, it is stated: "It will be presumed that the indorsement on a complaint of a certificate showing the date of filing, when made by the clerk of the court, is correct," while in the case of *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393, where the filing marks of the complaint showed that the action was commenced within the statutory period, but the appearance docket indicated that it had been commenced one day later and no evidence was introduced to show the true date, the court held that "the court will presume as against the statute of limitations, where these dates disagree and no showing is made of the true date, that the certificate of the complaint shows the true date. It is presumed that an officer does his duty and that his proceedings are regular." There seems in this case to be no evidence which even tends to disprove the contention that the summons and complaint were delivered to the sheriff for service upon the date stamped thereon, and it is clear from the authorities and from our statute that an action is com-

menced, so far as the statute of limitations is concerned, when the writ is filled out and delivered to the proper officer, with the bona fide intent to have it served at once, and not at the time that the actual service is made. *Ewell v. Chicago & N. W. R. Co.* (C. C.) 29 Fed. 57; *Evans v. Galloway*, 20 Ind. 479; *Hampe v. Schaffer*, 76 Iowa, 563, 41 N. W. 315; *Johnson v. Farwell*, 7 Me. 370, 22 Am. Dec. 203; *McCracken v. Richardson*, 46 N. J. L. 50; *Davis v. Duffie*, 18 Abb. Pr. 360; *Riley v. Riley*, 141 N. Y. 409, 36 N. E. 398, reversing 64 Hun, 496, 19 N. Y. Supp. 522; *Goldenburg v. Murphy*, 108 U. S. 162, 27 L. ed. 686, 2 Sup. Ct. Rep. 388. We do not think that the action was barred by the statute of limitations.

When we pass on to the merits of the case, we find a sharp conflict in the evidence as to who was the aggressor in, and the reasons for, the physical controversy. We can find nowhere in the record the charge of the court to the jury, though the record shows that a charge was given. In its absence, we must conclude that all questions were properly submitted to the jury, and, since a verdict was rendered for the plaintiff, we must conclude that these questions were resolved by the jury in favor of the plaintiff. The only questions, then, for us to consider are whether the plaintiff was a passenger, and, if a passenger, whether the railway company was liable to him for the assault or, if not a passenger, whether the company, as a telegraph company in the transaction of the business of such, was responsible for the assault of its servant, Holiday, upon him.

We are clearly of the opinion that the plaintiff in this case was not a passenger at the time of the altercation, and that his right of recovery, if any, cannot be based upon that theory. His own evidence conclusively shows that he had no intention of taking a train that night, and that he was not, at the time of the altercation, upon the premises of the company, either for the purposes of taking a train or after having alighted from one. A passenger has been defined to be "one not a servant of the carrier who, by the consent of the carrier, express or implied, is being transported in the vehicle of the carrier from place to place, or who is at a station of the carrier with the intention of at once, or as soon as possible, entering upon such relation." *Van Zile, Bailm. & Carr.* § 594. There is no question that "a person who goes into the station of a carrier with the bona fide intention of becoming a passenger is entitled to the privileges and to the rights of a passenger, at least so far as the safety of his person from abuse or assault, or defects in the station platforms, etc., is con-

cerned." Van Zile, Bailm. & Carr. § 596, and cases cited. It is also probably true that the relationship continues while the traveler is on the premises of the carrier, even after he has alighted from the vehicle, for a period of time reasonably necessary to enable him to leave the premises. Van Zile, Bailm. & Carr. § 605, and cases cited. We can find, however, no authority to support the proposition that it continues for any longer period.

But the evidence shows, and counsel for appellant admits, that the defendant was, at any rate, engaged in the business of a telegraph company, and in such capacity was dealing with the plaintiff at the time of the assault. The evidence is clear that it took and transmitted messages, and that it was for the purpose of sending messages that the plaintiff was upon the premises at the time of the alleged assault. It is also clear that it was while discussing the defendant's failure to deliver the message received by the company in the morning, and directed to the plaintiff, that the controversy occurred. Plaintiff was not a trespasser, nor was he merely a licensee. He was on the premises of the company or in their telegraph office on business connected with the business of the company as a telegraph company, and at its implied invitation. He was there as a customer or patron, and not as a licensee or as a trespasser. It is undisputed that the company, for some reason or other, had failed to promptly deliver to him a death message in the morning. It is also undisputed that plaintiff went to the telegraph office in the evening for the purpose of sending some other messages, and that while there, and after being told that such other messages could not be sent, he asked why the message in the morning had not been delivered to him, and that it was in discussing this matter that the controversy arose.

There is, it is true, a conflict in the testimony as to who was the aggressor, but there is certainly enough evidence in the record to justify the jury in finding the facts for the plaintiff; at least it is a mere question of the credibility of the witnesses. It is also undisputed that the message, which was addressed to the plaintiff and received in the morning, was in relation to the death of a relative; that on account of the failure to deliver it he was unable to attend the funeral, and it was not unreasonable for him to ask for an explanation in the premises.

Of course, if, as the witness Holiday testifies, the plaintiff dared him to come out into the other part of the office and settle the matter, or if the plaintiff himself intentionally provoked the assault, the company

should not be held liable, but these matters have been decided by the jury, and we cannot interfere with their decision.

It is of course well established that the doctrine of *respondet superior* does not, as a rule, apply where the tortious acts of the servant are not done in the course of his employment, but from personal malice. To use the language of Judge Cooley: "The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed from the nature of his employment, to have authorized . . . the servant to do." Cooley, Torts, 2d ed. p. 627. This general rule, however, has been generally stated in cases where the main transaction in furtherance of which the tort was committed was not within the actual or apparent scope of authority. The learned judge illustrates this point as follows: "So, if the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor which he has stepped aside from his employment to commit; the other is a trespass committed in the course of his employment in the execution of orders of the master as given, and apparently has the sanction of the master and contemplates the furtherance of his interest." See Cooley, Torts, 2d ed. p. 628. The rule, in its entirety, is perhaps as well stated in the editor's note following Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 770, 792, as anywhere else: "Where an agent," the editor says, "steps aside from the performance of the business for which he was employed by his principal, and embarks upon a matter of his own, the principal is not liable for the consequences of the agent's act while so engaged. If, while engaged in executing the employment of his principal, he so conducts himself, whether negligently or maliciously, as to injure another, his principal will be liable. If, however, he forsakes such employment, and, purely for his own benefit or to gratify some personal hate, does an act unconnected with the service of his principal, the latter is not responsible for its consequences. The agent may immediately after the commission of the act resume the performance of the duties of his agency, and, in the commission of the tort may have employed the instrumentalities furnished by the principal for the

proper performance of his duties. As to the act itself, however, the doctrine of *respondent superior* is inapplicable, and no liability therefor can attach to the principal." The question in the case at bar is whether the agent, Holiday, at the time of committing the tort in question, was connected or unconnected with the service of his principal.

There is absolutely nothing in the contention of the respondent that Holiday committed the assault while attempting to preserve order in the depot and while acting in the capacity of a policeman. The only evidence which in any way tends to prove this contention is the statement of Holiday that it was his duty to preserve such order, but all the facts of the case, and his own admissions, conclusively show that he went out "to fix the plaintiff or let the plaintiff fix him," and that his main purpose was to satisfy his own anger and resentment, and not to preserve order, and the interests of his employer was the last consideration which actuated him. If we sustain the judgment in the case then it cannot be upon the theory that the plaintiff was a passenger, or that he was ill treated while the defendant's agent was seeking to preserve order, or that the agent was really acting with the interests of his employer in mind, though overzealously, but upon a theory which is more general and universal.

It would seem from the facts that the case comes clearly within the rule laid down in *Dickson v. Waldron*, 135 Ind. 507, 24 L.R.A. 483 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1 where a patron of a theater was assaulted by the ticket agent in a controversy arising out of a claimed shortage in change. In this case a ticket had been sold to the plaintiff, and he afterwards went back to the ticket office, claiming that short change had been given to him. The court held that, though the assault was committed in excess of the authority of the agent, it was still committed while he was acting as ticket agent, and as the result of a controversy arising out of the discharge of his duties. The assault in the case at bar was certainly committed in a controversy arising out of a transaction of the company, and while the plaintiff was asking questions which he had a perfect right to ask the agent in relation to such business. In the *Dickson* Case, above cited, the court said that "the trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket seller and the doorkeeper acted within the business of their employment, maintaining that side of the controversy which was their master's interest." So, too, the *Dickson* Case is authority for another proposition which 47 L.R.A. (N.S.)

also seems applicable to the case at bar and sound in principle, and that is that there is a difference between a licensee and a patron, and that a patron is entitled to a consideration which perhaps, need not always be accorded to a licensee. "But common carriers, innkeepers, merchants, and managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping," says the court in the *Dickson* Case, "owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them." See also *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546 42 Am. Rep. 33; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504.

The case of *Richberger v. American Exp. Co.* 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922, is very much in point. In it plaintiff has been made to pay an overcharge by a local express agent, and took the matter up with the general superintendent, who stated that the matter would be arranged. Later he went to the local express office to transact some other business, when the local agent in charge informed him that he desired to refund the overcharge to him, and then and there returned such overcharge. He, at the time, however, required the plaintiff to sign a receipt for the same, and immediately on the reception of the receipt, and while the plaintiff was in the office of the company, cursed and insulted and otherwise maltreated him. The Mississippi court sustained an action against the express company, and stated that the true test of liability was "not whether the tort was committed in pursuance of orders from the master, or against orders, whether the master ratified it or not, whether the tort was wilful and malicious or not, but whether, and solely whether, the act constituting the tort was done in the master's business." In answer to the suggestion that the rule of strict liability as laid down in the case of *Craker v. Chicago & N. W. R. Co.* supra, only applied to carriers of passengers on account of the fact that the passengers were more or less within their power and control, the Mississippi court said: "Doubtless there is a difference in the extent of the application of the principle as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties, respectively; but the principle applies to both. An express company

does not transport passengers, and cannot be made liable as a carrier of passengers might for wilful torts committed by its agents on passengers in their transportation; but it keeps offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens; and in its dealing with its customers in its offices, in its business, it is bound, in Judge Story's language, 'for respectful treatment and for decency of demeanor.' It is impossible to say on the allegations of this declaration that the tort committed immediately upon the delivery of the receipt to the agent, and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt, and immediately upon its delivery, and because of the demand of his rights in that matter, and while plaintiff was in appellee's office to transact and transacting this very business. What was said and done thus immediately upon the delivery of the receipt was part of the *res gestæ*. As well said by Judge Thompson in his Commentaries on Corporations (§ 6299, page 4928): 'In this view, even under the modern doctrine, the acts and declarations of the servant or agent, tending to show his state of mind at the time of the act complained of, would be admissible in evidence as part of the *res gestæ*.' The court then concludes by saying: "We close this opinion with the words of the same great judge [Andrews, J.] in the same case [Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 134, 21 Am. Rep. 597], to show here a case of liability: 'The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion, aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.'"

Another case that seems equally in point is that of Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565. In it the plaintiff purchased a railroad ticket from the defendant. At the time of such purchase, he requested the agent to check his baggage for the train next going to Augusta, upon which he intended, himself, to embark, and which was due in a few min-

utes; this the agent refused, and plaintiff was compelled to miss the train. After the train had passed, and desiring to avoid further trouble and delay, he again requested the agent to check his baggage for the next morning's train, stating to the agent that he had been badly treated about his baggage and would not soon forget it, or words to that effect, when the agent, without provocation and without notice or warning, made a malicious and violent assault upon him. The court reversed a verdict for the plaintiff because of an instruction in regard to sneering remarks, etc., and for which there was no foundation in the evidence. On the main questions of the case, however, it said: "We do not think Richmond was a 'passenger' when he returned to the railroad station the last time on the day he claims to have been unlawfully assaulted and beaten by the company's agent. He had no purpose of taking a train that day, having decided to resume his journey on the following morning. However, he undoubtedly had the right to go to the station for the purpose of looking after his baggage, and arranging to have it checked or safely stored until the next day. If he went there to attend to his business and conducted himself properly, he was entitled to respectful treatment from the agent; and if the latter, under these circumstances, unlawfully assaulted and beat him, it was his right to hold the company responsible in damages. The law on this subject is too well settled to require the citation of authority. It may, in this connection, be proper to add, however, that, even if Richmond went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent upon him to treat the agent with the same respect due him by the agent. Therefore, if, instead of so doing, he, without provocation, used insulting or opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible. In other words, if Richmond, by his own improper behavior, unfitted the agent from exercising the care and prudence which were essential to the performing in a proper manner his duty to the company and to the plaintiff, the latter should not complain. The case would then stand somewhat like that of Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, in which Judge Bleckley remarked that 'the plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the [company's servant] was out of tune.' If, however, the truth be that Richmond went to the station, not really for the purpose

of transacting any legitimate business with the agent, but simply to upbraid or reproach him because of a real or supposed grievance occurring at an earlier hour of the day, and a difficulty then arose between these men, it was one in which the company had no concern whatever, and should be treated as any other fight occurring between ordinary citizens."

It would seem, indeed, as if the true rule was contained in the cases last cited; and the test is whether, while dealing with the agent and in a manner that he is authorized or invited to deal with him in, the assault occurred, or whether it was entirely outside of the transaction, although arising out of the transaction, or was provoked by him so as to degenerate into a personal difficulty, rather than one between him and the employer. Sending a telegram, asking for change, or complaining because of a delayed telegram, is a transaction with the employer rather than with the agent, and, unless the discussion turns into personal vituperation, the employer is the person concerned. If, in the case at bar, the testimony of defendant's witnesses is to be believed, and the jury had found that the assault occurred either because the plaintiff called the witness Holiday a liar, or challenged him to come out and settle the issues with him, the company would not have been in any way liable, and the reasoning of the case of Johanson v. Pioneer Fuel Co. 72 Minn. 405, 75 N. W. 719, would have applied. The conflict, in fact, would have been a personal one, and the result of a personal dispute and personal vituperation. If, on the other hand, the testimony of the plaintiff and his witness McCarthy is the testimony which is to be credited, the action can be maintained. The jury evidently resolved the doubt in favor of the plaintiff, and we cannot well interfere with their decision.

There can be no doubt that the weight of authority is to the effect that an employer will not be liable for the torts of his servants committed entirely outside of the scope of their authority and duty, and from malicious and personal purposes. There are also numerous authorities which explain the holding of the case of Craker v. Chicago & N. W. R. Co. *supra*, and the cases which follow it, upon the theory that in the case of the railway company the passenger is under the exclusive control and power, and at the mercy, of the employees of the company. There are few authorities, however, which hold that the employer should not be held liable for an assault committed without authority but upon a person while he is dealing with the employee in a matter which is in the

scope of the authority of the agent. We do not, indeed, believe that the *dicta* in the case of Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, is good law, which states that "a person has the right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment, but if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor; or, if one on lawful business should knock at the door of any private house, and, on asking the servant who answered the call, for permission to see the master, the servant should assault and beat him, would the master be responsible? Clearly in all such cases the lawfulness of the party's conduct, and the fact that the injuries were received while he was properly dealing with the servant as servant, would not suffice to bind the master unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant." We, indeed, believe the statement to be only a half truth, and the question is as to whether the assault is committed while discussing, or in relation to, a matter with which the person assaulted has a right to deal with and discuss with the agent. There can be no question that if the occasion of the assault is something entirely extraneous to the subject of the visit or the interview, and extraneous to the subject-matter concerning which the agent has express or implied authority, that the master will not be liable; but to go any further is hardly warranted by the decisions or by sound public policy. If the assault arises out of a purely personal matter, the employer should not be liable, but if it arises out of a dispute in regard to the business of the principal, which the third party is justified in transacting with the agent, the matter is entirely different. Daniel v. Petersburg, R. Co. 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327. Plaintiff in this case had a right to send his message and reasonably to inquire why the message in the morning had not been delivered. The mere fact that he made the inquiry and the complaint before is not controlling. In the evening he found that not only could he not take his train, but that he could not send his message on account of the wires being down. It was but reasonable and natural for him to complain of the supposed neglect in the

morning, if for no other purpose than to induce the employees of the telegraph company to use every means to aid him in the present juncture. We are not sure, it is true, that his complaint was reasonable in form. There is a sharp conflict of the evidence on this proposition, but as to this matter we believe, that the verdict of the jury is conclusive, and we must assume, in the absence of any instructions in the record, that the instructions properly covered the questions in controversy. To say that one cannot make a complaint at a telegraph office but at the risk of a personal assault, for which the assailant alone will be liable, and that, when hearing such complaint, the agent is not acting for his employer, is to extend the rule of the cases altogether too far.

The judgment of the District Court is affirmed.

Burke, J., having presided on the trial in the court below, did not participate.

NEW MEXICO SUPREME COURT.

W. M. WOODY et al.

v.

DENVER & RIO GRANDE RAILROAD COMPANY.

(— N. M. —, 132 Pac. 250.)

Railroad — duty to furnish telegraph facilities.

1. While a railway company, under the Constitution, may be required to provide

Headnotes by ROBERTS, Ch. J.

Note. — Duty of railroad company to install telegraph or telephone in its station.

As to power to require carrier to keep agent at station, see note to Seward v. Denver & R. G. R. Co. 46 L.R.A. (N.S.) 242.

The question as to cases arising between telephone companies and railroad companies, or between telegraph companies and railroad companies, is not included.

The matter of the duty of a railroad company to install telegraph or telephone in its station may be divided into two questions: (1) Whether such installation may be required for general commercial purposes, and (2) whether it may be required for the transaction of the railroad company's own business.

For general commercial purposes.

The only authorities found on the subject hold that a railroad company not engaged in the telegraph business for commercial purposes is not required to main-

tain and maintain "adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express," and can, upon a proper showing, be required to maintain a telegraph station and agent for the accommodation of passengers and for receiving and delivering freight and express, it cannot, independent of its duties as a common carrier, be required to furnish telegraph facilities so that the public may commercially derive conveniences therefrom.

Same — public regulation — notice.

2. A railroad company is entitled to notice, in advance of a hearing, stating definitely the order which the state corporation commission is proposing to make, and the reasons therefor, so that it will be enabled to produce and present before the commission its evidence, if any it has, showing the unreasonableness or injustice of the proposed order.

Appeal — order of public service commission — review.

3. This court can determine the reasonableness and lawfulness of an order made by the commission only upon the evidence adduced before the commission, and here presented by the record. Where the commission has failed to develop evidence showing the cost of furnishing a facility ordered for the accommodation of passengers and for receiving and delivering freight and express, the court cannot determine such questions, and will not enforce the order.

(May 9, 1913.)

REMOVAL by the state corporation commission for the opinion of the Supreme Court of a proceeding in which defendant failed to comply with an order of the commission with respect to the maintenance of

tain a telegraph station for commercial purposes.

Thus, in *Atchison, T. & F. S. R. Co. v. State*, 23 Okla. 231, 100 Pac. 16, 18 Ann. Cas. 102, it was held that an order of the corporation commission requiring a railroad company to maintain a telegraph station for commercial purposes, when it was shown that the railroad company was not engaged in the telegraph business for commercial purposes, but only for the transaction of its business as a transportation company, was erroneous. The court bases its decision in part on an opinion of the railroad commission of Wisconsin, as to which it says: "In the case of *People's Teleph. Co. v. Eastern R. Co. of Minnesota et al.* (decided by the railroad commission of Wisconsin on October 12, A. D. 1908), the commission in its opinion said: 'The only telephone facilities that must be furnished by a railroad are such as are necessary to a proper discharge of its duties as a common carrier. With the transaction of its own affairs with its employees or others, when acting in its private capacity,

adequate facilities at a certain station on its road. Order not enforced.

Statement by Roberts, Ch. J.:

On July 15, 1912, the state corporation commission, upon an informal complaint filed with the commission by W. M. Woody and other residents of Taos county, New Mexico, made an order for a hearing, which order was as follows:

"Informal complaint having been pre-

the public is not concerned. In all such matters it possesses the same rights and enjoys the same privileges that are accorded to private corporations and individuals. The regulation of the public service of such a corporation does not extend to or include the management of its purely private affairs. The distinction between the acts of a public service corporation when acting in its public capacity, and those when acting in its private capacity, is often lost sight of, and as a result, not infrequently, erroneous conclusions are reached as to the scope of laws designed to regulate such corporations.' Following the rule laid down by the Wisconsin commission, the only telegraph facilities that a railway company must furnish are such as are necessary to a proper discharge of its duties as a common carrier, for the moving of trains, etc."

The same view is now taken in *WOODY v. DENVER & R. G. R. CO.*

For the transaction of the railroad company's own business.

So far as the decisions have gone, the question whether it is the duty of a railroad company to install telegraph or telephone for the transaction of its own business depends upon the facts of the particular case.

In *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210, 21 L.R.A. (N.S.) 908, 100 Pac. 11, it was held that a corporation commission had power to require a railroad company to install and maintain a telephone at a certain station for the use of its agent in answering inquiries of the public for which telephones are usually used, as a telephone was a facility and convenience within the state Constitution authorizing the commission to require railroad companies "to establish and maintain all such public services, facilities, and conveniences as may be reasonable and just." The particular fact in this case was that by the telephone the citizens of a town 6 miles from the station would be able to find out when freight had arrived and whether passenger trains were on time, etc.

And here, again, the Oklahoma court bases its decision in part on the opinion of the railroad commission of Wisconsin in the aforesaid case of *People's Teleph. Co. v. Eastern R. Co. of Minnesota*, wherein it seems to have been held that the convenience of shippers and passengers required further

sent to this commission by and on behalf of parties residing at and in the vicinity of Barranca, a station on the line of railway operated by the said the Denver & Rio Grande Railroad Company within the state of New Mexico, to the effect that said company had failed to maintain at said station adequate facilities for the accommodation of passengers and for receiving and delivering freight and express, and that said company was not maintaining an agent at

telephone facilities on the part of the railroad company.

And in *Atchison, T. & S. F. R. Co. v. State*, supra, the court said: "It may be that under certain circumstances it would be proper for the commission to require the railway company to maintain a telegraph station at a certain point in the operation of its business as a transportation company, where there would be no commercial business whatever."

But in general a railroad company will not be required to install a telegraph in its station for the transaction of its business, unless such is necessary on account of safety to human life, or unless in general the amount of business is such as not to involve the railroad company in loss by the installation of said telegraph. *Chicago, R. I. & P. R. Co. v. State*, 24 Okla. 370, 24 L.R.A. (N.S.) 393, 103 Pac. 617.

Thus, a railroad company will not be required to maintain a telegraph operator at its station for the purpose of bulletining its trains, etc., when it is shown that the maintenance of such an operator will increase the expense substantially, and it is not shown what the passenger and freight receipts are (*Kansas City Southern R. Co. v. State*, 27 Okla. 806, 117 Pac. 207); nor will it be required to install a telegraph in its station simply for the purpose of bulletining its trains for the convenience of passengers, where it does not appear that the increased expense is justified by the passenger traffic, and the installation is not requested at all on the ground of the freight traffic. *St. Louis & S. F. R. Co. v. Newell*, 25 Okla. 502, 106 Pac. 818.

See also the *obiter* remarks in *Atchison, T. & S. F. R. Co. v. State*, supra.

In *Seward v. Denver & R. G. R. Co.* — N. M. —, 46 L.R.A. (N.S.) 242, 131 Pac. 980, where the state commission had ordered the railroad company to maintain at its station some adequate means of communication for the purpose of obtaining information as to the running of trains, whether by telegraph or telephone being left to the discretion of the company, it was held that there could not be any such order in so far as the telegraph was concerned, when it appeared that the receipts did not justify the expense; nor could there be an affirmance of the order as to a telephone, in the absence of evidence as to the cost of the telephone; but there were other matters in the case which required a reversal of the order of the commission. B. B. B.

said station, to the great detriment of the complainants; the commission having made a personal examination into the matter, and it appearing to this commission that conditions are such as to require a more thorough investigation:

"It is hereby ordered that a hearing on the matter set out in said complaint be held at the office of the state corporation commission, at Santa Fé, New Mexico, commencing at the hour of 10 o'clock A. M., on the 30th day of July, 1912, at which time and place the said complainants will be heard in support of the allegations of their complaint, and the said railway company will be heard in rebuttal thereto.

"The parties in interest will be notified accordingly.

"Done at the office of the state corporation commission at Santa Fé, New Mexico, on the 15th day of July, 1912."

The following notice of hearing was served on the railroad company, viz.:

"You are hereby notified that there will be a public hearing before the state corporation commission on the 30th day of July, 1912, at the hour of 10 o'clock A. M., at the office of said commission, in the city of Santa Fé, New Mexico, at which time testimony will be heard in matters relative to informal complaint filed by W. M. Woody et al., to the effect that the said the Denver & Rio Grande Railroad Company has failed to maintain adequate station facilities for the accommodation of passengers and for receiving and delivering freight and express at its station of Barranca, a station on its line of railway within the state of New Mexico, and that said company is failing to maintain an agent at said station through whom the patrons of said railroad may transact business with said railroad company.

"A copy of the order of the state corporation commission for this hearing is hereto attached."

On the day fixed, the cause was heard, and thereafter the commission made the following order:

"It is therefore ordered by the commission that the Denver & Rio Grande Railroad Company install an agent who shall be a telegraph operator at its station of Barranca, whose duties shall be to care for the freight received and forwarded at this station, and to furnish information to the traveling public relative to the movement of trains, and to provide suitable quarters and comforts for passengers waiting on trains at this station; and to take necessary train orders concerning the movements of trains, both passenger and freight, for the district between Embudo and Servilleta, the two points next adjacent in either direction at 47 L.R.A.(N.S.)

which telegraph operators are now maintained by the defendant company; and to receive and forward such telegrams as may be offered by the general public.

"The commission further orders that defendant company shall provide the necessary wire connections for this service, and to provide suitable accommodations within the depot station for the comfort and protection of passengers, and the proper handling of freight."

The railroad company failing to comply with the order within the time limited by the Constitution, the cause was removed to this court by the commission.

Mr. F. W. Clancy, Attorney General, for complainants.

Messrs. E. N. Clark, R. G. Lucas, and Renahan & Wright, for defendant:

The provision of the order requiring the defendant to maintain a telegraph operator whose duty it shall be to receive and forward such telegrams as may be offered by the general public is unconstitutional, unreasonable, unjust, confiscatory, and deprives defendant of its property without due process of law, and takes its property without compensation.

Atchison, T. & S. F. R. Co. v. State, 23 Okla. 231, 100 Pac. 16, 18 Ann. Cas. 102; Chicago, R. I. & P. R. Co. v. State, 24 Okla. 370, 24 L.R.A.(N.S.) 393, 103 Pac. 617; Roller v. Holly, 176 U. S. 407, 44 L. ed. 524, 20 Sup. Ct. Rep. 410; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 64 Fed. 723, 5 Inter. Com. Rep. 146.

In the absence of information showing what would be the cost of installing a telegraph service and maintaining an operator, the court cannot say that the order is reasonable, and it should not be enforced.

Chicago & A. R. Co. v. People, 152 Ill. 230, 26 L.R.A. 224, 38 N. E. 562; Chicago, R. I. & P. R. Co. v. State, 24 Okla. 370, 24 L.R.A.(N.S.) 393, 103 Pac. 617; Atchison, T. & S. F. R. Co. v. State, 27 Okla. 565, 112 Pac. 1010; State ex rel. Northern P. R. Co. v. Railroad Comrs. 62 Wash. 193, 113 Pac. 252; St. Louis & S. F. R. Co. v. Newell, 25 Okla. 502, 106 Pac. 818; State ex rel. Railroad & Warehouse Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510; Missouri, K. & T. R. Co. v. Witcher, 25 Okla. 586, 106 Pac. 852; State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; Kansas City Southern R. Co. v. State, 27 Okla. 806, 117 Pac. 207.

The provision of the order with reference to passenger accommodations is incomplete, indefinite, and uncertain. The order should not be enforced.

Spelling, Inj. & Extr. Rem. § 1384; Pri-

vett v. Pressley, 62 Ind. 491; Ross v. Butler, 57 Hun, 110, 10 N. Y. Supp. 444.

The requirement of a telegraph operator to furnish information as to the running of trains is unreasonable.

Chester v. Connecticut Valley R. Co. 41 Conn. 348; St. Louis South Western R. Co. v. Lewis, 91 Ark. 348, 121 S. W. 268; Railroad Commission v. St. Louis Southern R. Co. 98 Tex. 67, 80 S. W. 1141; People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Missouri, K. & T. R. Co. v. Colburn, 90 Tex. 230, 38 S. W. 153; Atchison, T. & S. F. R. Co. v. State, 27 Okla. 565, 112 Pac. 1010.

The order of the commission is not self-executing.

People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 353, affirmed in 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

This court passes on the merits of the case *de novo*, and forms its independent judgment with regard thereto.

Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 4 Inters. Com. Rep. 323, 50 Fed. 295; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 332, 56 Fed. 925, affirmed in 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 942, affirmed in 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. Rep. 766.

This court can enforce the order only in its entirety, or decline to enforce it. It cannot modify this order or make a new one.

33 Cyc. 53; 23 Am. & Eng. Enc. Law, 2d ed. 656; Gulf, C. & S. F. R. Co. v. State, 23 Okla. 524, 101 Pac. 258; State ex rel. Ellis v. Atlantic Coast Line R. Co. 51 Fla. 578, 40 So. 875; Bacon v. Boston & M. R. Co. 83 Vt. 421, 76 Atl. 128; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 5 Inters. Com. Rep. 146, 64 Fed. 723; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 942, affirmed in 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. Rep. 766; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 249; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 805; Little Rock & M. R. Co. v. East Tennessee, V. & G. R. 47 L.R.A. (N.S.)

Co. 4 Inters. Com. Rep. 261, 47 Fed. 772; Central Trust Co. v. Richmond, N. I. & B. R. Co. 54 Fed. 723.

The findings of fact of the commission are not made evidence, and are of no effect.

Atchison, T. & S. F. R. Co. v. State, 27 Okla. 520, 117 Pac. 330; State ex rel. Great Northern R. Co. v. Railroad Comrs. 60 Wash. 218, 110 Pac. 1075; State ex rel. Ives v. Kansas City R. Co. 47 Kan. 497, 28 Pac. 208; Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343, affirmed in 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

The commission is an administrative board with only such limited power as has been conferred upon it.

State ex rel. Railroad Comrs. v. Louisville & N. R. Co. 57 Fla. 526, 49 So. 39; 23 Am. & Eng. Enc. Law, 2d ed. 394, 653; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028; Libby v. Canadian P. R. Co. 82 Vt. 316, 73 Atl. 593; Chester v. Connecticut Valley R. Co. 41 Conn. 348; Bonham Railroad Comrs. v. Columbia & G. R. Co. 26 S. C. 353, 2 S. E. 127; State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 60 Fla. 465, 54 So. 394; Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; People ex rel. New York, N. H. & H. R. Co. v. Willcox, 200 N. Y. 423, 94 N. E. 212.

Railroads are private property and within the protection of constitutional guarantees.

State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 118, 119, 52 L. ed. 705, 712, 713, 28 Sup. Ct. Rep. 493; Atlantic Coast Line R. Co. v. North Carolina Corp. Comrs. 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028.

Lawful regulation in the interest of the public welfare, not arbitrary control, is the extent of the governmental authority.

Atchison, T. & S. F. R. Co. v. State, 27 Okla. 565, 112 Pac. 1010; State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 60 Fla. 465, 54 So. 394; State v. Alabama & V. R. Co. 68 Miss. 653, 9 So. 469.

An order of the commission need not be

confiscatory in its character and effect in order to be unreasonable and unlawful.

Atchison, T. & S. F. R. Co. v. State, 23 Okla. 510, 101 Pac. 262; *Railroad Comrs. v. Houston & T. C. R. Co.* 90 Tex. 340, 38 S. W. 750; *Henshell v. J. L. Gates Land Co.* 146 Wis. 146, 131 N. W. 423.

The provision of the Constitution prohibiting the further reception of evidence by this court is in violation of the 14th Amendment to the Constitution of the United States.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 457, 461, 33 L. ed. 970, 980, 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Cooley, Const. Lim.* 7th ed. p. 426; *Columbia Valley Trust Co. v. Smith*, 58 Or. 6, 107 Pac. 465; *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Howard v. Moot*, 64 N. Y. 262; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Petersilie v. McLauchlin*, 80 Kan. 176, 101 Pac. 1014; *Ex parte Young*, 209 U. S. 123, 147, 126 L. ed. 714, 723, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Re Lambert*, 134 Cal. 626, 55 L.R.A. 856, 86 Am. St. Rep. 296, 66 Pac. 851; *Re Grout*, 105 App. Div. 98, 93 N. Y. Supp. 711; *McNamara v. McNamara*, 86 Neb. 631, 27 L.R.A. (N.S.) 1062, 126 N. W. 94, 21 Ann. Cas. 451; *Hubbard v. Hubbard*, 77 Vt. 73, 67 L.R.A. 969, 107 Am. St. Rep. 749, 58 Atl. 969, 2 Ann. Cas. 315; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Ames v. Union P. R. Co.* 64 Fed. 165; *Modern Loan Co. v. Police Ct.* 12 Cal. App. 582, 108 Pac. 56; *McCulloch v. Maryland*, 4 Wheat, 316, 4 L. ed. 579; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *Dewell v. Sny Island Levee Drainage Dist.* 232 Ill. 215, 83 N. E. 811; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

Roberts, Ch. J., delivered the opinion of the court:

In the case of *Seward v. Denver & R. G. R. Co.* — N. M. —, 46 L.R.A. (N.S.) 242, 131 Pac. 980, this court, at the present term, in an opinion not yet officially published, settled many of the questions presented by the record. Points discussed by 47 L.R.A. (N.S.)

counsel in this case, not arising in the former case, necessary to be determined now, may be briefly stated as follows: (1) The order now under consideration required the defendant to maintain a telegraph operator whose duty it should be to receive and forward such telegrams as might be offered by the general public, thereby compelling the defendant to engage in the commercial telegraph business. The evidence failed to show that the defendant company was engaged in the commercial telegraph business, and the question presented is as to whether or not the commission had the power to order the company to engage therein. (2) The notice of hearing served upon the railroad company informed the defendant company that the commission was proposing to investigate the question as to whether or not the said company maintained adequate facilities at the station of Barranca for the accommodation of passengers and for receiving and delivering freight and express, and the further question as to whether said company should be required to maintain an agent at said station through whom the patrons of the road could transact business with the company. It will be observed that no mention was made in the notice or order for the hearing, of the fact that the commission would investigate the question as to whether or not an agent and telegraph facilities were necessary and required for the safety of the traveling public and the employees of the road, in the operation of defendant's trains. The question presented is as to the power of the commission to make an order broader in its scope than the notice served upon the company. In other words, has the company to be affected the right to be advised in advance as to the extent of the relief asked and the basis upon which a proposed order is to be made? The question of safety being eliminated, (3) Is the order made by the commission reasonable and lawful, and should it be enforced by the court in the absence of any evidence showing the cost of the facilities required to be furnished by the commission?

Discussing the questions in the order presented:

1. There is no evidence in the record tending to show that the railroad company is engaged in the commercial telegraph business. While it is true that the railway company may be required to provide and maintain "adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express," and might, upon a proper showing, be required to maintain a telegraph station and agent for the accommodation of passengers

and for receiving and delivering freight and express, it could not, independent of its duties as a common carrier, be required to furnish telegraph facilities so that the public might commercially derive convenience therefrom. This same question was before the supreme court of Oklahoma in the case of *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 231, 100 Pac. 16, 18 Ann. Cas. 102. The syllabus of the case states the question presented and decided, tersely as follows:

"1. A railway company engaged as a common carrier in the transportation business is not required to install and maintain telegraph stations to receive and transmit messages for commercial purposes, independent of its business as such common carrier."

"2. A railway company is required to furnish all necessary equipment and facilities for the discharge of its duties as a common carrier; but when such are not reasonable and necessary for such purpose, it is not, independent of its duties as a common carrier, to be required to furnish them, that the public may commercially derive convenience therefrom."

To the same effect is the case of *Chicago, R. I. & P. R. Co. v. State*, 24 Okla. 370, 24 L.R.A.(N.S.) 393, 103 Pac. 617.

This order imposed upon the defendant an obligation outside of its charter duties. Commercial telegrams are sent and received for purely private purposes. The railroad has no interest therein, and is in no manner benefited thereby, and the railroad company cannot be required to install and maintain telegraph facilities at a station unless such facilities are reasonably necessary on account of the safety and expedition of the train service, either freight or passenger, or of the convenience to be afforded to the public by the railway company in the conduct of its freight or passenger service. The order cannot be sustained upon the assumption that an arrangement exists between the railroad company and a commercial telegraph company by which such commercial telegraph company will pay practically all of the salary of the operator. There is no showing in the record as to what the expense of maintaining such an operator would be, or that there is any such arrangement between the railroad and telegraph companies. Were there such an arrangement, nevertheless, this order would be unenforceable. The telegraph company is not a party to this case; it has never been given the hearing provided by § 8 of article 11 of the Constitution; it has never had its day in court. A party is entitled to some notice before he can be deprived of his liberty or property.

2. In discussing the second proposition 47 L.R.A.(N.S.)

this court held in the case of *Seward v. Denver & R. G. R. Co.* supra, that the company to be affected by a proposed order was entitled to notice as to the order which the commission was proposing to make, so that it should have the opportunity to present before the commission evidence to show that the proposed order was unreasonable or unlawful; that it was the duty of both parties to present before the commission all the evidence in the case, so that, when the cause is removed to the supreme court, the court can determine from the evidence the question of the reasonableness and justness of the order. It must be manifest that the railroad company is entitled, in advance, to know with reasonable certainty the order which the commission is proposing to make, and the reasons therefor. The order in the present case served upon the defendant company advised it that the commission was proposing to require certain facilities "for the accommodation of passengers and for receiving and delivering freight and express," and also to require said company to maintain an agent at the station of Barranca, through whom the patrons of said railway company could transact business with the company. Upon the trial of the case, two of the witnesses for the complainants incidentally stated that Barranca was located at the summit of a 4 per cent grade on the railway, and that it was a dangerous place in the operation of trains. Admitting, without deciding, that the commission had the power to require a telegraph agent to be maintained where it was shown to be necessary for the safety of passengers and employees in the operation of trains, still we think that the railroad company was entitled to notice in advance that the commission was proposing to base its order upon such fact. Here the railway company was only advised that such facilities were to be required for the accommodation of passengers, and naturally would only prepare to combat such contention. Having no intimation or knowledge that such facilities were to be demanded for the safety of the train service, naturally it would not prepare or have witnesses to prove that such facilities were not required for such purpose. If the commission had the power to make an order for such facilities, because of their requirement for the safety in the operation of trains, the question of expense would not be involved. On the other hand, where such facilities are required or demanded for the accommodation of passengers and the patrons of the road, the question of expense necessarily enters into the question. In this case the railroad company had no notice prior to the hearing, or indeed no suggestion was

made upon the hearing, to the effect that the commission was proposing to make an order based upon the necessity of such facilities from the standpoint of safety in the operation of trains. It is apparent, however, from the findings of fact made by the commission, that it based the order made, in part at least, upon the necessity of such facilities for the safety of passengers and employees in the operation of the road.

3. The question of safety in the operation of trains therefore being eliminated from consideration, because not included in the notice to the railroad company, the question arises as to whether or not the order made is reasonable and lawful, and one which this court should enforce. The evidence in the case shows that the passenger and freight receipts for the year 1911 at this station amounted to a total sum of \$5,279.86, but there is no evidence whatever to show the cost to the company of furnishing the facilities ordered. This court can determine the reasonableness and lawfulness of an order made by the commission only upon the evidence adduced before the commission, and presented to this court by the record. It is the duty of the commission to develop such evidence as will show that the order made by it is reasonable and lawful.

For the reasons stated the court must refuse to enforce the order made by the Commission, and the cause is remanded to the Corporation Commission for further proceedings, should it so elect, in accordance with this opinion.

• **Hanna and Parker, JJ., concur.**

TENNESSEE SUPREME COURT.

W. E. STANSBURY et al.

v.

M. F. EMBREY et al., Pliffs. in Certiorari.

(— Tenn. —, 158 S. W. 991.)

Bills and notes — payable at bank — tender to bank — effect.

1. Failure by the holder of a note payable at any bank in a specified city, who has left the state taking the note with him, to specify a place of payment upon request

Note. — Sufficiency of tender of payment to prevent acceleration of maturity of entire debt.

The right to prevent foreclosure of a mortgage on real property for default in payment of interest or taxes, by payment or tender of same before commencement of action, is treated in a note to Fleming v. Franing, 22 L.R.A.(N.S.) 360. 47 L.R.A.(N.S.)

after the note has matured, but before he has elected to declare maturity of the entire debt of which such note was a part, which he was entitled to do on default in payment, entitles the maker to deposit the funds in the bank in such city where the holder has his account, and thereby defeats the right to declare the forfeiture.

Same — election as to place of payment.

2. Failure of the holder of a note payable at any bank in a specified city, to designate a place of payment upon request, entitles the maker to select the bank where he will make tender, and notify the holder of his choice.

(June 13, 1913.)

CERTIORARI to the Court of Civil Appeals to review a decree affirming a decree of the Shelby County Chancery Court overruling a demurrer to a bill filed to enjoin defendants from foreclosing a trust deed. Affirmed.

The facts are stated in the opinion.

Mr. G. J. McSpadden, for plaintiffs in certiorari:

Payment to the bank was not a payment to Mr. Embrey.

Griswold v. Davis, 125 Tenn. 229, 141 S. W. 205; King v. Fleece, 7 Heisk. 273; Day v. Boyd, 6 Heisk. 458; Stewart v. Donnelly, 4 Yerg. 177; Ward v. Smith, 7 Wall. 447, 19 L. ed. 207; Cheney v. Libby, 134 U. S. 82, 33 L. ed. 824, 10 Sup. Ct. Rep. 498; Adams v. Hackensack Improv. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Bartel v. Brown, 104 Wis. 493, 80 N. W. 801; Winkelmann v. Brickert, 102 Wis. 50, 78 N. W. 164; Bank of Montreal v. Ingerson, 105 Iowa, 361, 75 N. W. 351; Hills v. Place, 48 N. Y. 521, 8 Am. Rep. 568; Williamsport Gas Co. v. Pinkerton, 95 Pa. 62; Wood v. Merchants' Sav. Loan & T. Co. 41 Ill. 267; St. Paul Nat. Bank v. Cannon, 46 Minn. 99, 24 Am. St. Rep. 189, 48 N. W. 526; Caldwell v. Evans, 5 Bush, 380. 96 Am. Dec. 358; Trowbridge v. Ross, 105 Mich. 600, 63 N. W. 534; Joy v. Vance, 104 Mich. 99, 62 N. W. 140; Glatt v. Fortman, 120 Ind. 385, 22 N. E. 300; King v. Finch, 60 Ind. 420; Englert v. White, 92 Iowa, 97, 60 N. W. 224; Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; Mutual Ben. L. Ins. Co. v. Miles. 81 Fed. 35; Ilgenfritz v. Mutual Ben. L. Ins.

Instalment of principal.

In Sykes v. Arne, — Cal. —, 47 Pac. 868, which was an action to foreclose a chattel mortgage containing a provision that if the mortgagor should fail to make any payment provided for in the notes, the mortgagee might foreclose for the entire debt, it was held that a tender of the amount overdue on one of the notes before the mortgagee exer-

Co. 81 Fed. 27; *Te Poel v. Shutt*, 57 Neb. 599, 78 N. W. 288; *Roberson v. Clevenger*, 111 Mo. App. 624, 86 S. W. 512.

The money must be actually offered in payment of the debt before such offer can constitute a valid legal tender of payment.

38 Cyc. 142-144; *Farnsworth v. Howard*, 1 Coldw. 216; *Ewing v. Sugg*, 12 Lea, 375; *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123, 13 S. W. 123; *Cross v. Sells*, 1 Heisk. 83.

In order to make his payment to the bank good,—if it was good in any particular,—it was necessary for Stansbury to pay this \$64 for taxes. He did not do so. Therefore, there was no tender.

38 Cyc. 137, 138; *Farnsworth v. Howard*, *Alloway v. Nashville*, and *Cross v. Sells*, *supra*.

cised her option to declare the whole debt due was sufficient to prevent acceleration of the maturity of the debt, and a judgment for the plaintiff for only the amount overdue, without costs, was affirmed, with \$100 damages to defendant on the ground that the prosecution of the appeal was vexatious.

In *Kerbaugh v. Nugent*, 48 Ind. App. 43, 95 N. E. 336, where the mortgagor was a depositor at the bank where one of several notes secured was made payable, and informed the bank that so much of his deposit as was necessary was to be applied to pay the note with interest, and the payment was prevented by failure of the mortgagee to present the note for payment with interest, with intent and purpose of causing a default, in order to render all of the notes due, it was held that equity would not enforce the accelerating provision.

But tender after commencement of the action to foreclose for the entire debt, of the payment on the principal which was in default, with interest and taxable costs, is insufficient. *Rosche v. Kosmowski*, 61 App. Div. 23, 70 N. Y. Supp. 216.

In *Tyler v. Hinton*, 42 U. C. Q. R. 228, which was an action on a mortgage providing for acceleration of the entire debt upon default in the payment of any instalment, it was held that a general order of the court of chancery providing that "where a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property, for default in the payment of interest or an instalment of the principal, any defendant may move to dismiss the bill upon paying into court the amount then due for principal, interest, and costs," applied to a contract containing an acceleration provision, although at the time the order was promulgated an entire debt could be foreclosed upon default in a payment without an acceleration provision. See *Knisell v. Brunet*, *infra*, in which a similar statutory provision receives a different construction.

Interest.

For other cases as to the place and requisites of tender of interest which will pre- 47 L.R.A.(N.S.)

Mr. Henry Craft, for defendants in certiorari:

Embrey, in his letter, refused to accept the amount of the past-due indebtedness when it was offered. This technically relieved Stansbury from any obligation to make tender.

Pearson v. Douglass, 1 Baxt. 161; *Memphis City Bank v. Smith*, 110 Tenn. 355, 75 S. W. 1065.

Stansbury's offer to pay the whole amount due into court would be sufficient to entitle him to the relief sought.

Lee v. Security Bank & T. Co. 124 Tenn. 582, 139 S. W. 690.

Embrey being absent, what Stansbury did was an ample substitute for actual payment to him, and prevents Embrey from taking advantage of his absence.

vent acceleration of maturity of a mortgage under the interest clause, see *Weyand v. Park Terrace Co.* 36 L.R.A.(N.S.) 308, and the note thereto.

Where the mortgagee made reasonable effort to find the mortgagee to pay interest when due, and the mortgagee knew of its efforts and purposely failed to inform it where she could be found, there was no default which would mature the entire debt. *Foerst v. Masonic Hall Asso.* — Cal. —, 31 Pac. 903.

Tender and payment into court, after suit for foreclosure is commenced, of a payment of interest, where the default was due to inability of the mortgagor, by reasonable effort, to locate the mortgagee to make payment, is sufficient to prevent foreclosure in equity. *Isaacs v. Baldwin*, 105 N. Y. Supp. 38, affirming 114 App. Div. 903, 100 N. Y. Supp. 1122.

In *Clark v. Paddock*, — Idaho —, 46 L.R.A.(N.S.) 475, 132 Pac. 795, where a note provided that upon default in payment of interest, the whole sum should become immediately due, and the mortgage securing it provided that upon such default the whole sum should become due at the option of the holder, both were construed together to mean that the exercise of the option of the holder was necessary to mature the debt, and therefore tender of the past-due interest before the exercise of the holder's option was held sufficient to prevent acceleration of the maturity of the debt.

In *Broderick v. Smith*, 26 Barb. 539, tender of interest past due, with interest thereon, was held on equitable grounds sufficient to prevent the foreclosure of a purchase money mortgage, where the mortgagor's failure to pay the interest was due to failure of the mortgagee to notify him of the discharge of a judgment lien against the property, or to request payment of the interest, from which the mortgagor inferred that the lien was not discharged, and that the mortgagee did not intend to insist on payment of the interest until it was.

But equity will not prevent the foreclosure of a mortgage for the entire debt

Southworth v. Smith, 7 Cush. 391; Lehman v. Collins, 69 Ala. 127; O'Keefe's Succession, 12 La. Ann. 246; Raines v. Jones, 4 Humph. 490; Simonson v. Lauck, 105 App. Div. 82, 93 N. Y. Supp. 965.

Williams, J., delivered the opinion of the court:

The bill of complaint was filed to enjoin the defendants from foreclosing a trust deed; a demurrer was interposed by defendants and overruled by the chancellor; an appeal was granted, in the exercise of the court's discretion, and the cause heard by the court of civil appeals, which affirmed the chancellor's decree. The cause is before this court for review on certiorari.

On August 1, 1907, defendant Embrey conveyed to Hal Mitchell, colored, a tract of land in the state of Arkansas for a consideration of \$12,000, no part of which was paid in cash. Twelve \$1,000 notes were executed by the vendee, all made payable "at any bank in Memphis," the first maturing December 15, 1907, and the others on the 15th of each succeeding December until the last was paid. Mitchell at the same time executed a trust deed conveying the land to defendants Bartons, as trustees, to secure the payment of these purchase money notes; and, taking possession, Mitchell paid the notes maturing December 15, 1907, and December 15, 1908, but failed to pay in full the December 15, 1909, note. At the date of the filing of the bill (Novem-

ber 18, 1912) \$94.15 of that note remained unpaid, and the notes maturing in 1910 and 1911 were in default as to payment; the total amount thus due at the time being, approximately, \$2,900.

The trust deed contained a provision that if default occurred in the payment of any of the notes, then all of the indebtedness, at the election of the holder of the notes, should become due for the purpose of foreclosing the lien of the trust deed.

On October 24, 1912, Mitchell conveyed the land to complainant Stansbury for \$2,000 cash and the assumption by Stansbury of the payment of the indebtedness due and to fall due; and on the 31st of October Stansbury sought Embrey for the purpose of paying him the amount then past due on the series of notes. Finding that Embrey was absent from Memphis, on a visit to Virginia, he wired Embrey at his temporary address, giving information of his purchase of Mitchell, his desire to pay the past-due notes and stop interest, and asking authority for making payment to the Bartons, trustees. On November 1st Stansbury received a reply from Embrey: "I will be home about fifteen proximo."

This reply not being satisfactory to Stansbury, he, on the same day, wrote Embrey a letter in which, after acknowledging receipt of the quoted telegram, he expressed his willingness to pay the amount referred to, to anyone in Memphis whom Embrey might name, or to send to Embrey in Vir-

under an interest acceleration clause, merely because plaintiff neglected to pay the interest when due, owing to her lack of familiarity with business usage. Ferris v. Ferris, 28 Barb. 29, distinguishing Broderick v. Smith, *supra*.

In Adams v. Rutherford, 13 Or. 78, 8 Pac. 896, the court refused to enforce a mere technical default in the payment of interest whereby the entire debt became due, when it appeared that the mortgagor made reasonable effort to pay the interest when due, and that the mortgagee was anxious to have a default occur, and the money was actually sent to her before suit was commenced.

In Atkinson v. Walton, 162 Pa. 219, 29 Atl. 893, it was held that a tender by a second mortgagee after purchase under foreclosure of the second mortgage, of interest as to which the mortgagor was in default on the first mortgage, was not sufficient to prevent foreclosure for the entire debt, in the absence of averment that the mortgagee was out of the city, or had left the country, or had concealed himself, to avoid a tender when the interest became due, or of any other fact which would excuse payment.

Tender of interest after notice from the mortgagee's agent of election to declare the whole amount due is insufficient. Hothorn v. Louis, 52 App. Div. 218, 65 N. Y. Supp. 47 L.R.A. (N.S.)

155, affirmed without opinion in 170 N. Y. 576, 62 N. E. 1096.

And no subsequent payment of a part or all of the amount in default would render a note not due, under a provision that default in the payment of any interest, dues, or fines for a period of three months should render the note immediately due and collectable. Stephens v. Huntington & D. Bldg. Loan & Sav. Asso. 76 Ind. 109.

In Knisell v. Brunet, 60 Wash. 610, 111 Pac. 894, it was held that a statutory provision that "whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or instalment of the principal, and there are other instalments not due, if the defendant pay into the court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any instalment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue," did not apply when, under a provision in the mortgage for maturity of the entire debt upon default in payment of interest, the mortgagee had elected to declare the debt due and insti-

ginia a certified check for same, and waiving a delivery of the paper until Embrey's return to Memphis. Not receiving a reply, on November 6th Stansbury went to the bank in Memphis where Embrey kept his bank account, and deposited therein to Embrey's credit the full amount due on the then matured notes, and promptly notified, and had the bank to notify, Embrey of this fact.

Embrey had not, up to this time, exercised his option to declare the entire indebtedness due; but on November 9th he wrote Stansbury declining to accept the deposit, and saying that he was also notifying the bank. Complaining of Stansbury's trading with Mitchell without consultation with him (Embrey), he proceeded: "I therefore elect to declare the entire land debt due November 15, 1912, and notify you that if not paid on or before that date I will advertise sale of the land under the trust deed."

The rule was laid down in *Lee v. Security Bank & T. Co.* 124 Tenn. 582, 139 S. W. 690, that in order to prevent the acceleration of the maturity of that part of a total indebtedness not matured at the time, a tender of the portion matured under the contract's terms is sufficient, if made after default but before the creditor has exercised his option to declare the entire indebtedness due.

The position taken by complainant Stansbury in the bill of complaint, and on appeal, is that Embrey was obligated, on notice

to him of Stansbury's readiness to pay, to make some suitable arrangement by which the notes could be paid in Memphis, failure and refusal to do which entitled Stansbury to pay the money into bank under the place of payment clause embodied in the several notes, "at any bank in Memphis."

It is replied, on the part of Embrey, that the deposit in bank did not constitute a payment.

The rule of law is clearly to the effect that making a note payable at bank—any bank or a particular bank—does not avail to make the bank the agent of the owner of the note to receive payment; the note itself not being lodged by him with the bank. *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 824, 825, 10 Sup. Ct. Rep. 498; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Adams v. Hackensack Improv. Commission*, 44 N. J. L. 638, 43 Am. Rep. 406; 7 Cyc. 1035. The principle is the same as that announced in our recent case of *Griswold v. Davis*, 125 Tenn. 229, 141 S. W. 205.

It is then insisted by defendant Embrey that, since the deposit did not constitute a payment, it also failed of being a tender; that a tender cannot be made to a person who is not authorized to receive payment, and that payment and tender hang by the same thread, so that when one falls the other falls. In this there is a failure to distinguish. The making of a note payable

tuted an action to foreclose; and a tender thereafter was ineffective to prevent foreclosure.

In *José Realty Co. v. Pavlicevich*, 164 Cal. 613, 130 Pac. 15, it is held that a statute providing that if an instrument is payable at a specified place, and the debtor is able and willing to pay it at maturity, such willingness and ability are equivalent to an offer of payment on his part, is not complied with by a mere passive ability and willingness to pay, but there must be an ability to pay manifested by providing funds at the place of payment in the hands of some person there present who is authorized to pay them on the debt, and is willing to do so. Therefore, the mere fact that a person at the office where the interest on a note was made payable had money enough to pay the interest at any time, had it been demanded, without a showing that it had been placed there by the debtor or any other person for the purpose of paying the interest, or that the person having sufficient funds was willing to pay them out on the interest, or had been authorized or instructed to do so, or had intended to do so, if it had been demanded, was insufficient to amount to an offer to pay, so as to prevent the mortgagee from declaring the whole debt due for default in the payment of the interest.

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Taxes.

Payment of taxes after exercise of the option to declare the whole debt due is insufficient. *Plummer v. Park*, 62 Neb. 665, 87 N. W. 534.

In *Germania L. Ins. Co. v. Potter*, 124 App. Div. 814, 100 N. Y. Supp. 435, reversing 57 Misc. 204, 107 N. Y. Supp. 912, where the mortgagor relied upon a tenant to pay the taxes when due, and he failed to do so, and the mortgagee immediately took advantage of the default to pay the taxes and declare the whole debt due, and commenced foreclosure proceedings, whereupon the mortgagor tendered to it the amount of the taxes with interest and accrued costs, the court refused to permit foreclosure, on the ground that to do so would be unconscionable.

See also *Fleming v. Franing*, 22 Okla. 644, 22 L.R.A. (N.S.) 360, 132 Am. St. Rep. 658, 98 Pac. 961, holding that a provision for maturity of the entire debt at the option of the mortgagee upon failure of the mortgagor to pay the taxes before they became delinquent did not entitle the mortgagee to foreclose for a default and subsequent sale for taxes, when the taxes and all penalties and interest had been paid and the mortgagee notified thereof before suit.

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at a named bank entitles the maker to resort to that bank to tender payment; and if the note be not there, the tender avails, nevertheless, to arrest the running of interest, to save a right, or to prevent a forfeiture. *Cheney v. Libby*, supra; *Cheney v. Bilby*, 20 C. C. A. 291, 36 U. S. App. 720, 74 Fed. 52; 22 Cyc. 1555; 38 Cyc. 151, 152.

But it is argued in behalf of Embrey that this rule as to tender only has application on a note's due date, and that in the present case all three of the notes in default had been so for long periods that there rested no duty on the holder to keep them in bank, or have them there on the date when it happened to suit the debtor to tender payment, and that a tender thus long after default should not be held to be of binding force on the creditor, who in this instance was absent from the state (carrying the notes with him), without any purpose to evade or defeat tender to him in person.

This case must turn, in our opinion, on the effect of Embrey's absence and the duty resting on him to leave, or provide on request of the debtor, a place for payment.

The general rule is that if a creditor is thus absent, and the debtor does all in his power to make a tender on the due date, the creditor cannot afterwards object that no tender was made. The debtor is not required to follow the creditor out of the state there to make tender. 28 Am. & Eng. Enc. Law, 2d ed. 10, 23; 22 Cyc. 1554.

In *Southworth v. Smith*, 7 Cush. 391, it was held that if A, the purchaser of real estate at a sale on execution, when B, a purchaser of the debtor's right to redeem, attempts to make a tender of the money due, is absent from home by necessity and without any intention to evade a tender, and in consequence of such absence, and by the use of due diligence, B is unable to find A, or any person authorized to act in his behalf, and is therefore prevented from making the tender seasonably, no forfeiture of the estate is thereby incurred, provided B was prepared to make tender, and it was not necessary that B should leave the money where A could control it.

In *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168, a case involving the acceleration of mortgage notes, it was held that where, by the terms of a contract, the principal becomes due at the option of the obligee in case the interest remains unpaid for thirty days, in case no place of payment is specified, if the obligee is absent from the state at the termination of the thirty days, the debtor is not obliged to follow him, but readiness to pay within the state in that case will be as effectual as actual payment to save from acceleration.

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It is urged, however, that these two cases are to be distinguished from the one at bar by the fact that in each the tender was, it is claimed, before a default had been made, while here it followed default. But in *Southworth v. Smith*, the effort to tender was within a period of redemption allowed by law, following a default, and in *Hale v. Patton*, the tender was within a contract period of grace following default. Here the right to be preserved was one allowed so to be by law at any time before exercise by the holder of his option to accelerate.

When Stansbury located Embrey in Virginia, acquainted him with his desire to pay the past-due notes, and requested that a mode of payment be suggested or provided, he did all that any rule of law could reasonably require of him. After that his deposit of the funds in the bank used as depository by Embrey should operate to defeat the after attempt of Embrey to declare the entire indebtedness mature and to foreclose the trust deed.

The notes were made payable at "any bank in Memphis," which provision, it seems, gave the debtor or maker the right, for tender and payment purposes, to call on the holder of the notes to make his election at what bank he would receive payment, or else, on failure, to make his (the debtor's) own election, and give notice to the holder. *Brickett, D. & Co. v. Spaulding*, 33 Vt. 109; *Barrett v. Eller*, 51 N. C. (6 Jones L.) 550.

When Embrey declined to name any other place or person to receive the proffered payment, we hold that the tender was properly made to the bank, and that thereafter there was no right in Embrey to declare the entire debt mature. We consider that the rule thus declared best comports with the convenience and safety of business men, to whom, when diligent, the law should point a mode of warding off foreclosures by debt payment.

The writ of certiorari disallowed; decree of the Court of Civil Appeals affirmed.

UNITED STATES SUPREME COURT.

GEORGE McDERMOTT, Plff. in Err.,

v.

STATE OF WISCONSIN.

T. H. GRADY, Plff. in Err.,

v.

SAME.

(228 U. S. 115, 57 L. ed. 754, 33 Sup. Ct. Rep. 431.)

Pure food law — adulteration — misbranding — package.

1. The word "package," or its equivalent

expression, as used by Congress in the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), §§ 7 and 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, refers to the immediate container of the article which is intended for consumption by the public, and not simply to the outside wrapping or box containing the packages intended to be purchased by the consumer.

Commerce — in adulterated or misbranded food — power of Congress.

2. Construing the word "package" or its equivalent expression as used by Congress in the food and drugs act of June 30, 1906, §§ 7, 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, as referring to the immediate container of the article which is

intended for consumption by the public, and not simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, does not render the statute invalid as in excess of the power of Congress over interstate commerce.

Same — conflicting state and Federal regulations — adulterated or misbranded foods.

3. Permitting a sale of cans of a mixture of glucose and refiner's syrup shipped into the state only when the labels prescribed by Wis. Laws 1907, chap. 557, governing the sales of food products, are substituted for those affixed in an honest attempt to comply with the food and drugs act of June 30, 1906, is an unlawful attempt by the state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal stat-

Note. — Interstate commerce: state regulations as affected by Federal pure food law.

Generally as to validity of police regulations as to branding or labeling articles of commerce, see the note to *Alcorn Cotton Oil Co. v. State*, 40 L.R.A.(N.S.) 875.

Only a few of the cases concerning the United States Pure Food Law of 1906 relate to its effect on state regulations.

It may be said in preface to these cases that this law is a proper regulation of interstate commerce (*Shawnee Milling Co. v. Temple*, 179 Fed. 517; *United States v. 420 Sacks of Flour*, 180 Fed. 518; *United States v. 74 Cases of Grape Juice*, 181 Fed. 629; see also the note to *Alcorn Cotton Oil Co. v. State*, 40 L.R.A.(N.S.) 875).

So, in *United States v. Sweet Valley Wine Co.* 208 Fed. 85, the court said: "The constitutionality of this act is so generally conceded and so well established that the demurrer on that ground has not been seriously pressed to our consideration, and will not be further entertained."

In this connection it may be noted that there is no invalidity in the provision of the pure food law that one guaranteeing that an article sold is not adulterated or misbranded within the meaning of the act shall be himself liable to prosecution; for, although at the time the guaranty was given the food may not have entered into interstate commerce, this provision of the law is in aid of the regulation of such commerce. *United States v. Charles L. Heinle Specialty Co.* 175 Fed. 299.

Effect of state regulations when inconsistent with the act.

It will be seen that in *McDERMOTT v. WISCONSIN* the state regulation held invalid was contradictory of the Federal pure food law.

On similar grounds in part was the decision in *State v. Peet*, 80 Vt. 449, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998, 68 Atl. 661, where a state statute prohibiting the keeping of calves under four weeks of age for purposes of shipment out of the state was held invalid as contrary to the Federal 47 L.R.A.(N.S.)

act (inasmuch as the Secretary of Agriculture, under the authority of the act, had ordered that calves under three weeks of age should be condemned, and this was held to be a recognition that carcasses of calves over three weeks of age were proper articles of commerce). But the court seems to place its judgment particularly on the point that a state law relating to the keeping for shipment out of the state of unwholesome meats was invalid as relating to a matter exclusively within the commercial power of Congress.

Matters not covered by the United States act.

State regulations of matters not covered by the United States act are not invalidated by it.

Thus, state statutes requiring disclosure of ingredients have been sustained in several cases: *Savage v. Scovell*, 171 Fed. 566; *Savage v. Jones*, 225 U. S. 531, 56 L. ed. 1193, 32 Sup. Ct. Rep. 715 (holding that the United States act did not render invalid the statute of Indiana requiring the disclosure of ingredients contained in concentrated commercial feeding stuffs offered for sale in the state, and to provide for their inspection and analysis); *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1107, 32 Sup. Ct. Rep. 784 (where there came in question the statute of Iowa, requiring that the package or container of concentrated commercial feeding stuff should have printed on the outside thereof, among other things, the name and percentage of the diluents or bases).

In *Savage v. Scovell*, supra, the court said: "The two laws do not cover the same territory. The Federal law simply covers the subject of adulteration and misbranding. The state law has nothing to do with either. It has to do with the subject of disclosing the ingredients of the articles covered by it. Its policy is to compel a statement of ingredients so that purchasers thereof in Kentucky may know exactly what they are buying. There may be no adulteration of misbranding, i. e., no viola-

ute which have accrued both to the government and the shipper, and to impair the effect of a Federal law which has been enacted under the constitutional power of Congress over the subject.

Same — in adulterated or misbranded foods — power of Congress — original packages — state regulation.

4. Congress having, by the food and drugs act of June 30, 1906, made adulterated and misbranded articles contraband of interstate commerce, could, in order to make the legislation effective, authorize, as it did in § 10 of that act, seizures for confiscation and condemnation so long as the articles remained unsold, whether in the original packages or not; and such means of enforcement may not be thwarted by state legislation, like Wis. Laws 1907, chap. 557, under which cans of a mixture of glucose and refiner's syrup which have been removed from the boxes in which they were shipped in interstate commerce, and are held upon the shelves of the importers for sale, must bear only the labels required by the state law, to the exclusion of those affixed conformably to the Federal law.

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tion of the Federal law, and yet there may be a violation of the state law in not disclosing ingredients."

In *Savage v. Jones*, *supra*, the court said: "It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances, where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article 'for the purposes of this act' shall be deemed to be misbranded if the package or label bear any statement, design, or device regarding it or the ingredients or substances it contains, which shall be false or misleading (§ 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8).

"Congress has thus limited the scope of its prohibitions. It has not included that at 47 L.R.A. (N.S.)

ERROR to the Supreme Court of Wisconsin to review judgments affirming judgments of the Circuit Court for Dane County convicting defendants of violating the pure food law in cases removed to that court after conviction in the municipal court. Reversed.

The facts are stated in the opinion.

Mr. H. O. Fairchild, for plaintiffs in error:

Assuming a conflict between the state statute and the food and drugs act, the state statute, if inoperative and void as to interstate commerce, must be held void as to intrastate commerce also, and therefore wholly inoperative and void as to both the defendants, whether their acts complained of constituted interstate or intrastate traffic.

United States v. Ju Toy, 198 U. S. 253, 262, 263, 49 L. ed. 1040, 1043, 1044, 25 Sup. Ct. Rep. 644; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 497, 498, 509, 52 L. ed. 297, 308, 309, 313, 28 Sup. Ct. Rep. 141; *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 529,

which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding' (§ 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions."

It was also held in the *Wright Case*, *supra*, where there was a certain payment required in lieu of an inspection charge, that if it was claimed that this payment discriminated against one doing a small business, the dealer who complained must show that he was thereby injured, it being alleged in the case in effect that the person in question was a large dealer.

530, 51 L. ed. 298, 304, 305, 27 Sup. Ct. Rep. 153; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 98, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; *International Text Book Co. v. Pigg*, 217 U. S. 91, 112, 113, 54 L. ed. 678, 687, 688, 27 L.R.A.(N.S.) 498, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *State v. Chicago, M. & St. P. R. Co.* 136 Wis. 417, 19 L.R.A.(N.S.) 326, 117 N. W. 686; *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 357, 64 N. W. 999; *Huber v. Martin*, 127 Wis. 445, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400.

In the absence of congressional legislation, the right to import a lawful article of commerce from one state to another continues until a sale (by the importer) in the original unbroken package in which the article is introduced into the state.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757;

—immature fruit.

In *Silgh v. Kirkwood*, — Fla. —, 61 So. 185, it was held that the United States act did not invalidate the Florida statute which made it unlawful to sell, deliver, etc., any citrus fruits which were immature or otherwise unfit for consumption, or for anyone to receive such fruits under contract, etc. The court said as to the United States pure food act: "By the 6th subdivision of § 7 of the last-named act, the prohibitions against vegetable substances, which, as we interpret it, would include citrus fruit, is that if it is whole or in part filthy, decomposed, or putrid, then it is debarred as a subject of commerce. Green or immature fruit may be as deleterious to health as the same fruit in an overripe or decomposed state. The act of Congress debars the latter, but says nothing as to the former, thus leaving the field of deleterious immaturity of fruit open to be dealt with by the states."

Effect of violation of act on status of intoxicating liquors.

It has been held that intoxicating liquors adulterated or misbranded, under the act, may be seized by a state while they are in the hands of an interstate carrier. *State v. Intoxicating Liquors*, 104 Me. 502, 71 Atl. 758; *State v. Intoxicating Liquors*, 106 Me. 135, 76 Atl. 286.

The theory of these cases is that by the pure food law Congress has in effect enacted that adulterated or misbranded liquors shall not be lawful articles of commerce between the states or with foreign nations; that as to such liquors, the statute removes the Federal barrier to the operation of the police power of the state, and having been brought into the state in violation of the act of Congress, they become subject to the 47 L.R.A.(N.S.)

Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 475, 109 Am. St. Rep. 961, 102 N. W. 888; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 125, 34 L. ed. 123, 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 361, 47 L. ed. 492, 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 522, 48 L. ed. 538, 547, 24 Sup. Ct. Rep. 365; *American Exp. Co. v. Iowa*, 196 U. S. 133, 142, 49 L. ed. 417, 421, 25 Sup. Ct. Rep. 182; *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The branding which accords with the standards of the food and drugs act at the time of its introduction into interstate commerce continues a legal branding until after sale by the importer in the original

laws of the state the moment they come within its limits. The court said (104 Me. 505): "The claimant urges that only the United States can enforce the act of Congress; that the act does not confer upon the states the power to seize and confiscate such liquors. This process is not to enforce the act of Congress, but only to enforce the laws of the state. The proceeding is not under the act of Congress, but under the statutes of the state. Granting that the act of Congress does not confer any new power upon the state, it removes the Federal barriers to the exercise of the powers conferred upon the state by its own people."

The question of the "packages."

While it is not intended to enter into the question of the meaning of "original" or "unbroken packages," the reader will see that in *McDERMOTT v. WISCONSIN* it is held that the United States statute applies so long as the imported articles remain unsold in the hands of the importer, whether the original packages have been broken or not.

It was held in *Re Agnew*, 89 Neb. 306, 35 L.R.A.(N.S.) 836, 131 N. W. 817, Ann. Cas. 1912 C, 876, that where bundles of crackers had been imported into a state from another state and after reaching the state they were sold in smaller packages, that they became subject to the laws of the state, the United States act of 1906 not extending to such a situation.

And in *St. Louis v. Wortman*, 213 Mo. 131, 112 S. W. 520, the court stated that the transaction was changed from interstate commerce to intrastate commerce, if the original packages of interstate shipments of dairy products were broken, and sales made in different packages within the state.

B. B. B.

package,—the article being retained by the importer in such package.

Heyman v. Southern R. Co. 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 137, 51 L. ed. 987, 992, 27 Sup. Ct. Rep. 606.

An article declared by Congress to be a lawful subject of interstate commerce cannot be declared otherwise, by state courts or legislatures, whatever the character of the article may be.

Leisy v. Hardin, 135 U. S. 110, 125, 34 L. ed. 132, 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lottery Case* (*Champion v. Ames*) 188 U. S. 381, 47 L. ed. 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 581.

The entire statute is void. Because of this fact there is no law which can be enforced in any of its parts. The situation is as though no statute had ever been passed. It has no validity for any purpose, or to any extent, or as to any person.

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 497, 498, 509, 52 L. ed. 308, 309, 314, 28 Sup. Ct. Rep. 141; *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 517, 51 L. ed. 298, 299, 27 Sup. Ct. Rep. 153; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; *Huntington v. Worthen*, 120 U. S. 97, 101, 102, 30 L. ed. 588-590, 7 Sup. Ct. Rep. 469; *Norton v. Shelby County*, 118 U. S. 429, 442, 444, 30 L. ed. 178, 186, 187, 6 Sup. Ct. Rep. 1121; *Re Rahrer*, 10 L.R.A. 444, 43 Fed. 556; *State v. Redmon*, 134 Wis. 101, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *State v. Paige*, 78 Vt. 280, 62 Atl. 1017, 6 Ann. Cas. 725; *Cooley*, Const. Lim. 7th ed. p. 259; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 644, 55 L. ed. 890, 894, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Congress may declare that the package of food put up by the manufacturer or wholesaler for delivery to the consumer—such dealer being the importer—shall, for the purpose of so protecting the consumer, be deemed the original unbroken package of interstate commerce, which is made the subject of its regulations.

Re Spickler, 10 L.R.A. 446, 43 Fed. 657; *Re Rahrer*, 140 U. S. 545, 562, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; *Swift & Co. v. United States*, 196 U. S. 375, 400, 49 L. ed. 518, 526, 25 Sup. Ct. Rep. 276; *United States v. Green*, 137 Fed. 189; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rear-* 47 L.R.A.(N.S.)

ick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

The facts that the words, "original unbroken package," are used in the food and drugs act is not decisive that they are to be construed to mean the same as similar words when used by the courts in laying down the original package rule. The food and drugs act itself defines the meaning of the words, and resort must be had to that act, its history, and its evident purpose, to ascertain their true meaning.

McKee v. United States, 184 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; *Kentucky Bd. of Pharmacy v. Cassidy*, 115 Ky. 690, 74 S. W. 732.

There is no doubt of the power of the state, in the absence of congressional regulation covering the same subject, to exclude from, or to regulate the reception into and the sale in, the state, of food products falsely or deceptively branded.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Crossman v. Lurman*, 192 U. S. 189, 199, 200, 48 L. ed. 401, 405, 406, 24 Sup. Ct. Rep. 234; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

But there must be deception or misleading of the public by such branding to justify the exercise of the public power in such cases.

People v. Hawkins, 157 N. Y. 8, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Allegeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Redmon*, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 238, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18.

The mere fact that the public is led by the use of the name "corn syrup" to buy the article, when it would not buy it if labeled to contain "glucose," does not give the state any right to require the use of the word "glucose," instead of "corn syrup," but quite the contrary.

State v. Hanson, 118 Minn. 85, 40 L.R.A.(N.S.) 865, 136 N. W. 414; *Forster v. Scott*, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; *Davis v. Cleveland, C. C. & St. L. R. Co.* 146 Fed. 412.

Prescribing such an obnoxious branding is unreasonable and prejudicial to sale, and therefore invalid.

Freund, Pol. Power, §§ 50, 51; People v. Hawkins, 157 N. Y. 18, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097, 192 U. S. 189, 195, 199, 200, 48 L. ed. 401, 403, 405, 406, 24 Sup. Ct. Rep. 234; State v. Hanson, 118 Minn. 85, 40 L.R.A.(N.S.) 865, 136 N. W. 414.

It is the evident intent of the food and drugs act that a label such as that act authorizes, and which the container of an article of food bears when it enters interstate commerce, shall remain in such container until it is sold by the importer in such container.

United States v. 65 Casks Liquid Extracts, 170 Fed. 449; United States v. Green, 137 Fed. 179.

Congress would have the power, if necessary or convenient to accomplish the beneficial purposes of the food and drug act, even to incidentally regulate intrastate commerce.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 330, 13 Ann. Cas. 893; Shepard v. Northern P. R. Co. 184 Fed. 795.

Messrs. John M. Olin, L. H. Bancroft, Attorney General, Harry L. Butler, William R. Curkeet, and Burr W. Jones, for the State:

An article ceases to be the subject of interstate commerce, and becomes subject to the police power of the state (at least in the absence of congressional action otherwise indicating), when the original package in which it is usually and in good faith shipped, has been received and broken by the importer, or when he had made the first sale thereof, in the original package so received.

Cook v. Marshall County, 196 U. S. 261, 40 L. ed. 471, 25 Sup. Ct. Rep. 233; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888.

Congressional regulation does not exclude state regulation except so far as the former, lawfully exercised, conflicts with the latter.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; State v. Chicago, M. & St. P. R. Co. 136 Wis. 416, 19 L.R.A. 47 L.R.A.(N.S.)

(N.S.) 326, 117 N. W. 686; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 624, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Gulf, C. & S. F. R. Co. v. Hefty, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Western U. Tele. Co. v. James, 162 U. S. 650, 654, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Savage v. Scovell, 171 Fed. 566; Northern P. R. Co. v. Washington, 222 U. S. 370, 379, 56 L. ed. 237, 240, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 442, 56 L. ed. 257, 262, 32 Sup. Ct. Rep. 140; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The terms "original, unbroken package" as used in §§ 2 and 10 of the act, and "unbroken package" as used in § 3 of the act, had, prior to its adoption, been judicially treated as synonymous.

Low v. Austin, 13 Wall. 29, 20 L. ed. 517; United States v. Fox, Deady, 579, Fed. Cas. No. 15,155.

An original package, within the meaning of the food and drugs act, is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner.

Thornton, Food & Drugs, p. 971.

The foregoing was the judicially accepted definition of "original package," "original, unbroken package," and "unbroken package," at the time of the adoption of the act.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Low v. Austin, supra; Cook v. Pennsylvania, 97 U. S. 506, 24 L. ed. 1015; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Guckenheimer v. Sellers, 81 Fed. 997; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Re Harmon, 43 Fed. 372; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 759; State ex rel. Gelpi v. Board of Assessors, 46 La. Ann. 145, 49 Am. St. Rep. 318, 15 So. 10; Com. use of Philadelphia County v. Schollenberger, 156 Pa. 201, 22 L.R.A. 155, 36 Am. St. Rep. 32, 4 Inters. Com. Rep. 488, 27 Atl. 30; Thorn-

ton, *Food & Drugs*, 1912, pp. 143, 150-177; *United States v. Fox, Deady*, 579, *Fed. Cas. No. 15,155*.

The object of the law is to keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in unbroken, original packages.

Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The Federal act in question is not to be construed as displacing state authority to regulate the adulteration or branding of foods which have been shipped from without the state, and thereby become subject to the Federal law, but which have been removed from the original package of shipment.

Armour & Co. v. State Dairy & Food Comr. (*Armour & Co. v. Bird*) 159 Mich. 1, 25 L.R.A.(N.S.) 616, 123 N. W. 580; *Savage v. Scovell*, 171 Fed. 566.

The regulation of the internal affairs of a state by Congress is as unconstitutional as is the direct attempt by a state to regulate interstate commerce.

Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Geer v. Connecticut*, 161 U. S. 519, 531, 40 L. ed. 793, 797, 18 Sup. Ct. Rep. 600; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 210, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; *The Daniel Ball*, 10 Wall. 557, 564, 19 L. ed. 999, 1001; *United States v. De Witt*, 9 Wall. 41, 19 L. ed. 593; *Gibbons v. Ogden*, 9 Wheat. 1, 186, 6 L. ed. 23, 67; *License Cases*, 5 How. 504, 574, 12 L. ed. 256, 287; *Keller v. United States*, 213 U. S. 139, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; *Re Agnew*, 89 Neb. 306, 35 L.R.A.(N.S.) 836, 131 N. W. 819, Ann. Cas. 1912 C, 676.

The state laws assume jurisdiction over the article only after the United States law has ceased to operate. Beyond this point it is no concern of the United States what the individual states may do in the enactment of laws for the regulation of the sale, within their borders, of food products.

Armour & Co. v. State Dairy & Food Comr. (*Armour & Co. v. Bird*) 159 Mich. 1, 25 L.R.A.(N.S.) 616, 123 N. W. 580. 47 L.R.A.(N.S.)

The act in question falls clearly within the police power of the state, and as such should be sustained. It is only when the bounds of reason have been so clearly exceeded as to violate some constitutional prohibition, express or implied, that the court has any power to interfere with the exercise of this legislative power.

State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 227, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

Mr. Justice Day delivered the opinion of the court:

The plaintiffs in error, George McDermott and T. H. Grady, were severally convicted in the circuit court of Dane county, in the state of Wisconsin, upon complaints made against them by an assistant dairy and food commissioner of that state, for the violation of a statute of Wisconsin relating to the sale of certain articles and for the protection of the public health. The convictions were affirmed by the decision of the supreme court of Wisconsin. 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The complaint against McDermott charged that on March 2, 1908, at Oregon, in Dane county, he "did unlawfully have in his possession with intent to sell, and did offer and expose for sale and did sell, a certain article, product, compound, and mixture composed of more than 75 per cent glucose and less than 25 per cent of cane syrup, said cane syrup being then and there mixed with said glucose, and that the can containing said compound and mixture was then and there unlawfully branded and labeled 'Karo Corn Syrup,' and was then and there further unlawfully branded and labeled, '10 per cent Cane Syrup, 90 per cent Corn Syrup,' contrary to the statute in such case made and provided." As to Grady, the complaint was similar to that against McDermott, except that the label designated the mixture as "Karo Corn Syrup with Cane Flavor," and added "Corn Syrup, 85 per cent." The statute of Wisconsin for the violation of which plaintiffs in error were convicted is found in Laws of Wisconsin for 1907, at page 646, being chapter 557, and the pertinent parts of it are as follows:

"Section 1. . . . No person, . . . by himself . . . or agent . . . shall sell, offer, or expose for sale, or have in his possession with intent to sell, any syrup, maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail, or other original container, containing the same, be distinctly branded or labeled so as to plain-

ly show the true name of each and all of the ingredients composing such mixture, as follows:

"Third. In case such mixture shall contain glucose in a proportion exceeding 75 per cent by weight, it shall be labeled and sold as 'Glucose flavored with Maple Syrup,' 'Glucose flavored with Sugar-cane Syrup,' . . . 'Glucose flavored with Refiners' Syrup,' . . . as the case may be. The labels . . . shall bear the name and address of the manufacturer or dealer. . . . In all mixtures in which glucose is used in the proportion of more than 75 per cent by weight, the name of the syrup or molasses which is mixed with the glucose for flavoring purposes, and the words showing that said syrup or molasses is used as a flavoring, as provided in this section, shall be printed on the label of each container of such mixture. . . . The mixture or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharin substance; . . . nor shall any of the aforesaid glucose, syrups, molasses, or mixtures contain any substance injurious to health, nor any other article or substance otherwise prohibited by law in articles of food."

The facts are that the plaintiffs in error were retail merchants in Oregon, Dane county, Wisconsin; that before the filing of the complaints against them each had bought for himself for resale as such merchant from wholesale grocers in Chicago, and had received by rail from that city, 12 half-gallon tin cans or pails of the articles designated in the complaints, each shipment being made in wooden boxes containing the cans, and that when the goods were received at their stores the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them, as was customary in such cases. From their nature, the articles thus canned and offered to be sold, instead of being labeled as they were, if labeled in accordance with the state law, should have been branded with the words "Glucose flavored with Refiners' Syrup," and, as the statute provides that the mixtures or syrups offered for sale shall have upon them no designation or brand which represents or contains the name of a saccharin substance other than that required by the state law, the labels upon the cans must be removed if the state authority is recognized.

Plaintiffs in error contend that the cans were labeled in accordance with the food 47 L.R.A. (N.S.)

and drugs act passed by Congress, June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), and that that fact is evidenced by the decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, made under the claimed authority of that act, which is as follows:

Washington, D. C. February 13, 1908.

We have each given careful consideration to the labeling, under the pure food law, of the thick, viscous syrup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose, and dextrin. In our opinion it is lawful to label this syrup as corn syrup, and if to the corn syrup there is added a small percentage of refiner's syrup, a product of cane, the mixture in our judgment is not misbranded if labeled "corn syrup with cane flavor."

George B. Cortelyou,
Secretary of the Treasury.

James Wilson,
Secretary of Agriculture.

Oscar H. Straus,
Secretary of Commerce and Labor.

And it is insisted that the Federal food and drugs act, passed under the authority of the Constitution, has taken possession of this field or regulation, and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. The case presents, among other questions, the constitutional question whether the state act, in permitting the sale of this article only when labeled according to the state law, is open to the objection just indicated.

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution, it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *M'Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L. ed. 579, 605; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Hipolite Egg Co.*

v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281.

The food and drugs act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs, and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress, that this act must be considered and construed. *Hipolite Egg Co. v. United States*, supra.

Section 2 of the act provides that "the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia . . . of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia . . . any such articles so adulterated or misbranded within the meaning of this act, . . . shall be guilty of a misdemeanor, and for such offense be fined," etc. The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished, is such as is *adulterated or misbranded within the meaning of the act*. What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined.

According to the terms of § 7 drugs are "adulterated" where, if they are sold under a name recognized in the United States Pharmacopœia, and differ from the standard of strength therein laid down, the standard of strength, etc., is not plainly stated upon the bottle, box, or other container; and food is "adulterated" where it contains an added poisonous or other added deleterious ingredient which may render it injurious; except that, where directions are printed on the covering or the package for the necessary removal of such preservative, the provisions of the act shall apply only when the food is ready for consumption. Turning to § 8, we find that the term "misbranded," as used in the statute, shall apply to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which is false

or misleading in any particular, and to any food or drug product which is falsely branded as to the state, etc., in which it was manufactured; and in the case of drugs it is provided that, if the contents of the package as originally put up shall have been removed in whole or in part, and other contents placed in such package, or, if the package fail to bear a statement on the label as required, the drugs shall be deemed misbranded; and as to food, if it shall be labeled or branded so as to deceive or mislead a purchaser, or purport to be a foreign product when not so, or, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package; or, if the package fail to bear a statement on the label as required, or, if in package form and the contents are stated in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package; or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character,—the food shall be deemed misbranded. That the word "package," or its equivalent expression, as used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word "package" as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the terms "original unbroken package," as used in the 2d and 10th sections, and "unbroken package" in the 3d section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent

the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts. *Re Wilson*, 168 Fed. 566; *Nave-McCord Mercantile Co. v. United States*, 104 C. C. A. 486, 182 Fed. 46; *United States v. American Druggists' Syndicate*, 186 Fed. 387; *United States v. 10 Barrels of Vinegar*, 186 Fed. 400; *Van Bremen v. United States*, 113 C. C. A. 296, 192 Fed. 904; *United States v. 75 Boxes of Alleged Pepper*, 198 Fed. 934.

While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress. While this is true, it is equally well settled that the state may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169; *Savage v. 47 L.R.A. (N.S.)*

Jones, 225 U. S. 533, 56 L. ed. 1194, 32 Sup. Ct. Rep. 715.

Having in view the interpretation we have given the food and drugs act, and applying the doctrine just stated to the instant cases, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce, the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretaries had the power, under the food and drugs act, to make the regulation set out above, is not now before us. It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by § 2 provision is made for the enforcement of the act by criminal prosecution, and by § 10 by proceedings *in rem*. Whether the labels complied with the Federal law was not for the state to determine. This was a matter provided for by the act of Congress, and to be determined as therein indicated by proper proceedings in the Federal courts.

The label upon the unsold article is, in the one case, the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by Federal authority; if the label is false or misleading within the meaning of the act, his goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, the goods being unsold, as a condition of their legitimate sale within the state, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharin substance, as to the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the Federal law, and for the determination of the correctness of which Congress has provided efficient means, shall be removed from the packages before the first sale by the importer. In this connection it might

be noted that, as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one state, and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the state the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject.

To require the removal or destruction, before the goods are sold, of the evidence which Congress has by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions in this court. The term "original package" had its origin in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441):

"When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, 47 L.R.A. (N.S.)

and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the state authority where the sovereign power of the nation or state is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority, it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce, and delivered to the consignee, and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the state may be asserted. Some of the cases in which this doctrine has been considered will be found in the margin.† In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual, in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when § 2 has been violated, the Federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

† *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Rhodes v. Iowa*, 170 U. S. 412, 424, 42 L. ed. 1088, 1095, 18 Sup. Ct. Rep. 664; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 19 et seq., 43 L. ed. 49, 56, 18 Sup. Ct. Rep. 757; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519, et seq., 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Heyman v. Southern R. Co.* 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; *Savage v. Jones*, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 200, 57 L. ed. 184, 187, 33 Sup. Ct. Rep. 44.

Congress, having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the sections regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make efficient regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose for which the act was intended.

The doctrine of original package had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of the interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the efficient exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and 47 L.R.A. (N.S.)

it follows that the judgments of the state court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the state must be reversed, and the cases are remanded to the state court for further proceedings not inconsistent with this opinion.

WEST VIRGINIA SUPREME COURT OF APPEALS.

E. W. BROWN, Exr., etc., of Anna H. Brown, Deceased, App't.,

v.

CHARLES L. BROWN, Late Exr., etc., of Anna H. Brown, Deceased, et al.

(— W. Va. —, 78 S. E. 1040.)

Courts — jurisdiction — amount in controversy.

1. Upon an inquiry as to whether the amount involved in a pecuniary controversy is sufficient to confer appellate jurisdiction, the amount of the claim asserted on the one side and denied on the other, not the validity thereof, is the criterion, unless the claim is obviously pretentious and made merely to confer jurisdiction.

Executor — survivor — status.

2. One of two or more coexecutors, who has given a new bond and retained his position after the resignation of the others, has

Headnotes by POFFENBARGER, P.

Note. — Right of continuing or surviving executor or administrator against former coexecutor or coadministrator or latter's representatives.

The holding in *BROWN v. BROWN* is based upon the analogy between an administrator *de bonis non* and an administrator who continues after his coadministrator has resigned, and so far as the questions before the court are concerned, the two classes of administrators were treated as if they were identical.

The reason why cases of the one class are precedents, if they are precedents, for cases of the other class, however, is to be found in the history of the development of the law, rather than in similarity of the cases. Under the common law and the earlier English statutes an administrator or executor who made any change whatever in the property of the estate—*e. g.*, converting it into cash or securities, or mingling cash with his own so that it became indistinguishable therefrom, etc.,—and died before distribution, was guilty of a *devastavit*, but since it was in the nature of a tort the right of action therefor died with the person committing it. Tucke's Case, 3 Leon. 241; Browne v. Collins, 1 Vent. 292; Wheatley v. Lane, 1 Wms' Saund. 219d, note. But stat-

the status of an administrator *de bonis non administratis*, and can sue his former associate only for legally unadministered assets remaining in his hands, or in respect to transactions between themselves. He cannot maintain a bill to surcharge and falsify *ex parte* settlements made by the retired executor, nor charge him as for a devastavit.

Same — administration — what constitutes.

3. Property converted or altered by an executor or administrator from the state or condition in which the testate or intestate left it is regarded in law and equity as having been administered, even though such conversion or alteration be an appropriation of the property by the personal representative to his own use or amount to a devastavit.

Same — effect of statute.

4. The limitation upon the rights and powers of administrators *de bonis non* here mentioned has not been abrogated nor changed by the provisions of § 1 of chapter 118 or §§ 25 to 32 of chapter 87 of Code 1906.

(June 24, 1913.)

ute 30 Car. II. chap. 7 (explained and made perpetual by 4 & 5 Wm. & M. chap. 24, § 12), provided that the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. *Wheatley v. Lane*, 1 Wms' Saund. 219d, note.

The persons entitled to the fund were the persons to whom the right of action for a devastavit had been granted under the earlier statutes, hence the statute was construed as permitting only the same persons to maintain the action after the death of the one committing the tort. In discussing this question, the court, in *Potts v. Smith*, 3 Rawle, 368, 24 Am. Dec. 359, said: "Now to whom would their testator or intestate have been liable if living? to the creditors, or the legatees or distributors if you please, but certainly not to the administrator *de bonis non*, because there was no such person in being."

And in discussing the same question with reference to surviving executors or administrators, the court, in *Bowen v. Miller*, 3 Clark (Pa.) 328, said: "As a general principle, it is true, that if there be several executors or administrators, they are regarded as one person, having a joint and entire interest in the effects of the testator or intestate, which is incapable of being divided; and in case of death, such interest shall vest in the survivor, without any new grant. *Williams*, Exrs. 591, 592. But this is the case only where one of the executors dies before the joint tenancy is severed, by a division of the effects of the testator, or a reduction to possession and a conversion of 47 L.R.A. (N.S.)

A PPEAL by plaintiff from a decree of the Circuit Court for Pleasants County sustaining demurrers to and dismissing a bill filed to surcharge and falsify the accounts of defendant and to recover money alleged to be due and owing from him as late executor of the will of Anna H. Brown, deceased. Affirmed.

The facts are stated in the opinion.

Mr. William Beard for appellant:

Mr. Charles L. Brown, *in propria persona*:

The court of appeals has no jurisdiction of this case.

Brightwell v. Bare, 52 W. Va. 375, 44 S. E. 160; *Fleshman v. Fleshman*, 34 W. Va. 346, 12 S. E. 713; *Love v. Pickens*, 26 W. Va. 341; *Neal v. Van Winkle*, 24 W. Va. 404; *Rymer v. Hawkins*, 18 W. Va. 309; *Hewitt's Appeal*, 58 Conn. 226, 20 Atl. 453; *Dickerson's Appeal*, 55 Conn. 223, 10 Atl. 194, 15 Atl. 99; *Andress v. Andress*, 46 N. J. Eq. 528, 22 Atl. 124; *Lawless v. Reagan*, 128 Mass. 592; *Woodward v. Spear*, 10 Vt. 420; *Hemmenway v. Corey*, 16 Vt. 225; 2 Enc. Pl. & Pr. 162; *Culpeper*

them; for, even in cases where executors are entitled to the residue after payment of debts and legacies, survivorship only obtains as to such of the testator's personal estate as was not reduced to possession and divided before the death of the coexecutor. *Balwyn v. Johnson*, 3 Bro. Ch. 455; *Griffiths v. Hamilton*, 12 Ves. Jr. 298; *Williams*, Exrs. 697, 698."

It will be seen that the case before the court in *Brown v. Brown* is much closer in analogy to the case of a surviving executor than it is to that of an administrator *de bonis non* in which the power of coexecutors is not involved. And see *Re M'Williams*, infra, where it was held that a statute extending the powers of administrators *de bonis non* did not extend the powers of surviving executors, in this respect.

The question as to what assets pass, under the common law as well as under the statutes of the different states, to the administrator *de bonis non*, including his right to maintain an action against his predecessor, was considered in note to *Hodge v. Hodge*, 40 L.R.A. 33, and is not within the scope of the present note; and the question as to the right of coexecutors and coadministrators to maintain actions or proceedings against each other was covered in note to *Cheever v. Ellis*, 11 L.R.A. (N.S.) 296, § XIII, b. The scope of the present note is limited to cases where the one whose liability is involved had died, resigned, or been removed after acceptance of the trust, and the action was by the surviving or continuing executor or administrator.

In *Bowen v. Miller*, 3 Clark (Pa.) 326, it was held that "the rule is, that whatever remains in specie and unconverted belongs to the surviving executor or administrator *de bonis non*, but that which is changed or

County v. Gorrell, 20 Gatt. 484; Yarish v. Cedar Rapids, I. F. & N. W. R. Co. 72 Iowa, 556, 34 N. W. 417; Louisville, N. A. & C. R. Co. v. Jackson, 64 Ind. 398; 3 Cyc. 189; Yahey v. Leich, 37 Ind. App. 393, 76 N. E. 926; Gabby v. Primley, — Kan. App. —, 52 Pac. 907; Norwood v. Wimby, 104 La. 645, 29 So. 311; Doullut v. Smith, 117 La. 491, 41 So. 913; Valley Turnp. Co. v. Moore, 100 Va. 702, 42 S. E. 675; Parker v. Latey, 12 Wall. 390, 20 L. ed. 404; Gray v. Blanchard, 97 U. S. 564, 24 L. ed. 1108; New Orleans Bkg. Asso. v. New Orleans Mut. L. Ins. Asso. 102 U. S. 121, 26 L. ed. 45; Parker v. Morrill, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14; Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192; Wells v. Wilkins, 116 U. S. 393, 29 L. ed. 671, 6 Sup. Ct. Rep. 601; Hunt v. Blackburn, 127 U. S. 774, 32 L. ed. 323, 8 Sup. Ct. Rep. 1395; Aspinwall v. Barrickman, 29 W. Va. 508, 2 S. E. 795; Gray v. Haish, 2 Kan. App. 145, 43 Pac. 293; United States v. Hill, 123 U. S. 681, 31 L. ed. 275, 8 Sup. Ct. Rep. 308; Wees v. Elbon, 61 W. Va.

387, 56 S. E. 611; Welch Lumber Co. v. Pagetown Lumber Co. 69 W. Va. 282, 71 S. E. 282.

Administration accounts shall be taken to be correct except so far as the same may, in a suit in proper time, be surcharged and falsified.

Code chap. 87, § 21; Leavell v. Smith, 99 Va. 374, 38 S. E. 202; Anderson v. Fox, 2 Hem. & M. 245; Dabney v. Green, 4 Hen. & M. 110, 4 Am. Dec. 503; Bank of United States v. Carington, 7 Leigh, 571; Wimbish v. Rawlins, 76 Va. 48; Robinett v. Robinett, 92 Va. 124, 22 S. E. 856.

Appellant's bills deal only with "those items surcharged and falsified." "In other respects the account stands firm."

Windon v. Stewart, 48 W. Va. 488, 37 S. E. 603; Dearing v. Selvey, 50 W. Va. 4, 40 S. E. 478; Leake v. Leake, 75 Va. 792; Green v. Thompson, 84 Va. 376, 5 S. E. 507; Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817; Peale v. Hickie, 9 Gratt. 445; Corbin v. Mills, 19 Gratt. 438; Peters v. Neville, 26 Gratt. 549; Cole v. Cole, 28

appropriated goes to the personal representative of the deceased executor or administrator."

And the rule stated in *Bowen v. Miller*, supra, was approved, in *Re McWilliams*, 3 Clark (Pa.) 321, and applied as to surviving executors, notwithstanding the Pennsylvania act of 24th February, 1834, giving to administrators *de bonis non* the right to recover and receive from the personal representatives of a deceased executor or administrator converted assets, on the ground that the statute does not extend to surviving executors.

And the same rule, refusing the right of action for converted assets to surviving executors, was also applied in *Lawrence v. Lawrence*, Litt. Sel. Cas. (Ky.) 123; *Rorke v. McConville*, 4 Redf. 291 (this decision seems to be based upon the ground that circuity of action is avoided); *Lawrence v. Lawrence*, 3 Barb. Ch. 71.

And it was held in *Montgomery v. Black*, 4 Harr. & McH. 391, that executors could not recover, by replevin from the representative of their deceased coexecutor, property belonging to the estate.

And in the following cases the action was allowed where the assets were considered unconverted and unadministered: *State use of Burton v. Tunnell*, 5 Harr. (Del.) 182; *Davis v. Thorn*, 6 Tex. 482. And in the cases cited, infra, the rule was applied under varying circumstances.

Where both coexecutors are dead the executor of the one dying later may recover from the executor of the other a bond belonging to the estate of the first testator, as unadministered assets. *Lancaster v. McBryde*, 27 N. C. (5 Ired. L.) 421.

And in *Stiver v. Stiver*, 8 Ohio, 217, it was said: "That a bill for an account may be 47 L.R.A. (N.S.)

sustained between executors, or between a surviving executor and the representative of a deceased executor, is a plain consequence of their relation as joint tenants."

In *Hendricks v. Thornton*, 45 Ala. 299, it was held that an executor can maintain a suit at law against one who was his coexecutor, but who had been removed before the commencement of the suit, to recover the purchase money of property bought by the latter executor, at a joint sale made by them, the payment of which became due before his removal. The court apparently regarded the money due as unadministered assets.

In *Chew's Appeal*, 3 Grant, Cas. 294, it was held that in equity the continuing executors could demand the enforcement of a decree previously entered against one who had been their coexecutor but had been removed.

It was held in *Price v. Brown*, 10 Abb. N. C. 67, 60 How. Pr. 511, that a suit in equity by the surviving executor may be maintained against the foreign executor of the deceased coexecutor to compel him to account, to the extent of the assets in his hands, for the misconduct and breach of trust of the deceased coexecutor, who was the foreign executor's testator.

And where one executor lends to his coexecutor money belonging to the estate, taking a bond therefor payable to the lender as executor, but reciting that the same is borrowed for the individual use of the borrower, the executor of the lender may maintain an action against the borrower, on the bond, without showing that he or his testator has ever paid the amount thereof over to any other representative of the estate. *Alston v. Jackson*, 26 N. C. (4 Ired. L.) 49. The basis of the holding was

Gratt 365; *Simmons v. Simmons*, 33 Gratt. 451.

The county court was without jurisdiction to discharge J. H. Brown, coexecutor.

Mayer v. Adams, 27 W. Va. 245; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Evans v. Johnson*, 39 W. Va. 299, 23 L.R.A. 737, 45 Am. St. Rep. 912, 19 S. E. 623; *Wandling v. Straw*, 25 W. Va. 692; 1 *Cooley*, Const. Lim. 406; *Yates v. Taylor County*, Ct. 47 W. Va. 381, 35 S. E. 24, 12 Enc. Pl. & Pr. 176; *Sutherland*, Stat. Constr. § 391; *Re Beekman St.* 20 Johns. 269; *Wight v. Warner*, 1 Dougl. (Mich.) 384; *Risewick v. Davis*, 19 Md. 82; *Given v. Simpson*, 5 Me. 303; *Morse v. Presby*, 25 N. H. 302; *Buck v. Dowley*, 16 Gray, 555; *Bennett v. Treat*, 41 Me. 227; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221; *Kansas City*, St. J. & C. B. R. Co. v. Campbell, 62 Mo. 585; *Shivers v. Wilson*, 5 Harr. & J. 130, 9 Am. Dec. 497; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Geter v. Tobacco Inspection Comrs.* 1 Bay, 354, 1 Am. Dec. 621; *People ex rel. Johnson v. Whitneys' Point*, 102 N. Y. 81, 6 N. E. 895; *Earthman v. Jones*, 2 Yerg. 484; *Gallatian v. Cunningham*, 8 Cow. 370; *Morgan v. Hazlehurst Lodge*, 53 Miss. 667; *Risewick v. Davis*, 19 Md. 82; *Ball v. Lastinger*, 71 Ga. 678; *Spence v. McGowan*, 53 Tex. 30; *Anness v. Providence*, 13 R. I. 17; *Dibrell v. Dandridge*, 51 Miss. 55, 12 Enc. Pl. & Pr. 120; *Shank v. Ravenswood*, 43 W. Va. 246, 27 S. E. 223; *State v. Moore*, 67 W. Va.

559, 68 S. E. 177; *Mason v. Tuttle*, 75 Va. 105; *Chesterfield County v. Hall*, 80 Va. 321; *Richardson v. Seever*, 84 Va. 259, 4 S. E. 712; *Western U. Teleg. Co. v. Bright*, 90 Va. 778, 20 S. E. 146; *Pitzer v. Logan*, 85 Va. 374, 7 S. E. 385; *Callan v. Bransford*, 86 Va. 538, 10 S. E. 317; *County Court v. Brammer*, 68 W. Va. 26, 69 S. E. 450; *Evans v. Johnson*, 39 W. Va. 306, 23 L.R.A. 737, 45 Am. St. Rep. 912, 19 S. E. 623; 19 Enc. Pl. & Pr. 110.

The Jackson county circuit court was without jurisdiction to make the decree of November 8, 1899.

Lilly v. Claypool, 59 W. Va. 130, 53 S. E. 22; *Cooley*, Const. Lim. 499; *Ambler v. Leach*, 15 W. Va. 683; *Yates v. Taylor County Ct.* 47 W. Va. 376, 35 S. E. 24; *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154; *Hedges v. Dixon County*, 150 U. S. 192, 37 L. ed. 1048, 14 Sup. Ct. Rep. 71.

Said decree is not final, but "without prejudice as to any party."

Carberry v. West Virginia & P. R. Co. 44 W. Va. 265, 28 S. E. 694, 16 Cyc. 469; *Sprinkle v. Duty*, 54 W. Va. 559, 46 S. E. 557; *House v. Mullen*, 22 Wall. 46, 22 L. ed. 839.

The decree was void.

2 *Beach*, Eq. Pr. § 790; *Keneweg Co. v. Schilansky*, 47 W. Va. 278, 34 S. E. 773; *Hunter v. Strider*, 41 W. Va. 321, 23 S. E.

that the estate of the lender was liable for the amount, and his executor should be allowed to use the means provided for indemnification.

In *Moffit v. Moffit*, 36 N. C. (1 Ired. Eq.) 124, it was held that an administrator may compel an accounting in equity by the personal representatives of a deceased coadministrator, where it appears that there has been no settlement between them, but there had been a final joint settlement of the estate, in which it appeared that the deceased coadministrator had received credit for moneys which belonged to complainant.

And it has been held that the administrator of an executor should be required to turn over to the surviving executor who had been coexecutor with defendant's intestate, bank stock, even though the stock had been bequeathed to defendant's intestate in remainder after the death of another who was yet living. *Re Aymar*, 5 Dem. 428.

The surviving executor, as against the representative of his deceased coexecutor, is entitled to the trust property; and if he is insolvent or otherwise not qualified for his position of trust, the right to have him removed or compel him to give additional security is in the persons entitled to the fund, and not in the representative of his deceased coexecutor. *Shook v. Shook*, 19 Barb. 653.
47 L.R.A. (N.S.)

Where judgment was recovered against coexecutors, and paid wholly out of the personal estate of one of them after his decease, his administrators, in order to maintain an action against the other deceased coexecutor's estate, must show what part of the assets defendant's intestate had collected and held unadministered at the time of his death. *Conner v. McIlvaine*, 4 Del. Ch. 30.

In a few cases it has been held that the surviving executor or administrator should present a claim to the representatives of his deceased coexecutor when their accounts are being settled. *Re Smith*, 108 Cal. 115, 40 Pac. 1037; *Hanbest's Estate*, 3 W. N. C. 520.

And in *Wise v. Murphy*, 5 Redf. 365, where one executor named in the will qualified at the death of the other person named as coexecutor, it was held to be his duty to collect all of the fund in the hands of the deceased executor's representatives that was required to pay the legacies; and where the deceased executor had wrongfully disposed of a \$2,000 legacy, but kept intact the \$10,000 necessary for the payment of another legacy, the surviving executor did not discharge his whole duty by receiving the \$10,000 and paying it out where it belonged, so that he was held liable to the legatee for the \$2,000. J. W. M.

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closed, he filed his petition in the county court of Jackson county on the 9th day of February, 1899, under the provisions of § 1 of chapter 118 of the Code, praying to be permitted to resign. On this petition a summons or rule was issued, requiring all interested parties to appear at the April term of the court and show cause, if any they could, why he should not be permitted to resign. At that term, it appeared that he had submitted his accounts to one of the commissioners of the court, and the hearing of the matter was continued until the completion of the report. On the 24th day of May, 1899, an order was entered reciting completion and filing of the report and certain exceptions thereto by E. W. Brown, one of the executors, for failure to show from what source two items charged in the account, one for \$1,228.48 and the other for \$3,000.48, had been derived. In response to this, C. L. Brown tendered and filed his affidavit, showing on what accounts the money had been collected, whereupon the court overruled the exception and approved and confirmed the report. The order then recites that C. L. Brown had fully settled his account according to law and accounted for all funds and assets in his hands, administered as well as unadministered, and accepted his resignation, to become effective on the appointment and qualification of his successor. This having been done and a new and additional bond required of the remaining executors in the penalty of \$40,000, Joseph H. Brown tendered and filed a paper, stating his desire not to serve longer as one of the executors. Thereupon a rule was awarded against him and E. W. Brown to show cause, at the next term of the court, why they should not be required to execute a new and additional bond as executors. On the 15th day of August, 1899, E. W. Brown tendered the required bond, which the court approved. The order approving it also accepted the previously tendered resignation of Joseph H. Brown, and he and Charles L. Brown were ordered to "turn over and deliver to the said Ephraim W. Brown, sole executor of Anna H. Brown, deceased, all the property and assets belonging to the estate of Anna H. Brown, deceased."

The three settlements, as made up by the commissioner and confirmed by the court, show a partial administration of the estate amounting to something more than \$24,000, and E. W. Brown, as sole executor of the will, receipted to Charles L. Brown and Joseph H. Brown, at late executors thereof, for certain notes and other securities, unadministered assets, amounting to several thousand dollars. This receipt bears date November 8, 1899, and recites the exist-

ence of real estate, constituting part of the assets, appraised at \$6,000. These assets were delivered over in obedience to the decree of the circuit court of Jackson county, made some time in the year 1899, in a suit brought by Ephraim W. Brown, as sole executor of the will, against C. L. Brown and J. H. Brown, as late executors thereof. In that suit the proceedings in the county court relating to the resignation of Charles L. Brown and J. H. Brown, and the giving of a new bond by Ephraim W. Brown, were exhibited, and, upon consideration thereof, the court was of opinion that the defendants and each of them had been discharged as such executors, and E. W. Brown was the sole executor of the will and entitled to the assets of the estate, and the order so recited. Accordingly, it was adjudged, ordered, and decreed that the defendants turn over to the said plaintiff, E. W. Brown, as sole executor of the estate of Anna H. Brown, deceased, all assets of the estate remaining in their hands to be administered, without any specification of such assets, and that the suit be dismissed without prejudice to any party as to any proceedings they might thereafter desire to take in relation to any of the matters concerning said estate or the administration thereof.

Deeming the order of the county court ineffectual to terminate the powers of Joseph H. Brown as executor, because of noncompliance with the requirements of § 1 of chapter 118 of the Code, he not having filed his petition and given notice and made the settlements thereby required, and the decree just referred to as inconclusive as to the status of Joseph H. Brown, because of the reservation or saving clause embodied therein, pleas in abatement to the original and first amended bill setting up the nonjoinder of Joseph H. Brown as plaintiff, and, Ephraim W. Brown having been made a party defendant as late executor, misjoinder as to him was also set up in abatement. Other matters of abatement pleaded relate to process and service thereof. Some of these pleas, particularly the latter, were sustained by orders entered in the circuit court of Jackson county. The others were sustained by the circuit court of Pleasants county, to which the cause was removed on account of the disqualification of the judge of the circuit court of Jackson county as to the particular case.

The second amended bill was filed in the circuit court of Pleasants county, making Joseph H. Brown a party defendant as executor, he having refused to join in the bill as plaintiff. To this bill, pleas in abatement set up the failure to join Joseph H. Brown as plaintiff, and also irregularities as

to process, all of which pleas as to the second amended bill were rejected. C. L. Brown and Joseph H. Brown then interposed their several demurrers to the second amended bill, both of which were sustained and the bill dismissed.

In support of a motion to dismiss the appeal, the brief contains a calculation and argument, based upon the facts set forth in the bill and exhibits, the purpose of which is to show the amount involved is below the appellate jurisdiction of this court, not more than \$100. The bill alleges the appraised value of the estate to have been \$31,523.07 in 1896, and makes the three *ex parte* settlements exhibits, showing disbursements which, together with the assets turned over by C. L. Brown to E. W. Brown, exceed the amount of the appraisement by something over \$4,000, after deducting from the disbursements all items described in the bill as improper credits. In this way, the appellee endeavored to show, upon the facts set forth in the bill itself, that he has accounted for considerably more money than is alleged to have gone into his hands, and that there is in fact nothing due from him. This position is untenable for the following reasons: The bill charges misappropriation of the proceeds of railroad bonds amounting to several thousand dollars as well as some other items. These sums, if assets at all, may be administered assets, within the meaning of the law, and the plaintiff may not be entitled to recover them, but the bill nevertheless claims them. Conceding them to be administered assets or wasted assets, for which there was at common law liability only to the beneficiaries of the will, right in the succeeding executor to demand them from his predecessor is predicated upon the statute, which, it is argued, has changed the rule at common law in this respect. Among the assets turned over to the plaintiff, there is a note executed by C. L. Brown payable to the executors of the will of Anna H. Brown for the sum of \$3,000. Although the bill contains no specific prayer for a decree for the amount of this note, it is argued that such relief may be had under the prayer for general relief. These contentions and claims on behalf of the plaintiff in error may not be well founded as regards the merits of the bill, but they are sufficient to create a controversy which involves much more than the jurisdictional amount.

Fairly construed, the bill charges the defendant as for a devastavit in the capacity of executor. In so far as the assets sought by it have been disposed of, they are administered assets. Such of them as are alleged to have been converted by the defendant

to his own use are regarded in law as administered. They do not remain in his hands actually or constructively in the state in which he found them as executor. In other words, their character has been changed, and he does not admit that they belong to the estate. If there is a liability, or, if the acts complained of amount to a devastavit, the liability is not one for unadministered assets. *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *McCreery v. First Nat. Bank*, 55 W. Va. 663, 47 S. E. 890; *Gottberg v. United States Nat. Bank*, 26 Abb. N. C. 50, 13 N. Y. Supp. 841; *Jones v. Clark*, 25 Gratt. 642; *Hartson v. Elden*, 58 N. J. Eq. 478, 44 Atl. 156. Such assets are not recoverable by an administrator *de bonis non*. They do not in any sense belong to his administration, but to the former or preceding one. He is not in any sense liable for them, unless they actually come into his hands, nor has he any right to recover them. *McCreery v. First Nat. Bank*, 55 W. Va. 663, 47 S. E. 890; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163, 9 Sup. Ct. Rep. 730. This proposition is so well settled as to require neither discussion nor citation of authority. Right of action as to them is in the legatees or other beneficiaries of the will.

But it is said E. W. Brown is not an administrator *de bonis non*, and that he holds his title under the original appointment, no change having been made therein except to require a new bond of him. Technically he may not be an administrator *de bonis non*, but on principle, he must be treated and regarded as standing in the same situation. So far as the estate has been disposed of by C. L. Brown as executor, it has been administered, and the residue remains unadministered. This works as complete a severance as if C. L. Brown had been sole executor and had resigned, or, being a co-executor, had died. If one of two or more coexecutors, acting singly and alone, disposes of any portion of the estate, his act is as complete, full, and effectual as if his companions had joined in it. *Williams*, Exrs. §§ 818, 819. The conclusion stated in *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163, 9 Sup. Ct. Rep. 730, and the Georgia statute construed in that case, simply declares the logical results of common-law principles, and the statute may be regarded as merely declaratory of the common law.

This rule is not changed by the provisions of § 1 of chapter 118 of the Code. That statute deals merely with the matter of resignation and conditions requisite thereto. The account is not taken as the basis of a decree or judgment; for the court is not authorized to enter any decree or

pronounce any judgment, or enter any order as the basis for a decree or judgment. The statute merely prescribes what the administrator must do as a condition to the acceptance of his resignation. It does not authorize an acceptance of the resignation until the order has been complied with. If the fiduciary fails, after having made the settlement and disclosed what remains due to the estate, to turn it over to such person as the court may order, the resignation cannot be accepted, he remains liable on his bond and in respect to his administration. This conclusion involves nothing more than the reading of the statute in the light of its purpose.

Sections 25 and 32 and others of chapter 87 have no relation to the subject. They deal with the settlements of fiduciaries without any reference to resignation, removal, or succession. When an existing fiduciary has made his settlement, and it appears that anything is due from him, the court may order it paid to the persons entitled thereto, and any person interested may bring a suit in chancery in the circuit court of the county to compel compliance with the order. This creates no new interest or rights. An administrator *de bonis non* has no interest in, or title to assets administered, in the legal sense, of the preceding administrator or executor. He is not a person interested within the meaning of the statute.

The observation of Judge Snyder in *Gilmer v. Baker*, 24 W. Va. 72, to the effect that the common-law rule as to the rights of an administrator *de bonis non* is subject to certain modifications and exceptions in courts of equity, is not to be taken as going to the extent of abolishing the rule. What is meant by the observation is very clearly shown by the opinion in the following terms: "The right and duty of the administrator *de bonis non* to administer the fund now in question was determined by the appellate court on the appeal of Hopkins. The court in its mandate directed a part of this fund to be paid over to said administrator to be administered by him." The statute adverted to by him in a later portion of the opinion is substantially embodied in § 24 of chapter 87 of the Code. Its purpose is to enable a personal representative who has resigned or been removed, or the personal representative of a deceased executor or administrator, to discharge himself by the payment to the administrator *de bonis non*, if he sees fit to do so, or if any person interested desires it to be done; but the provisions of this statute extend only to securities for money, loaned or invested, standing in the name of a deceased fiduciary, or one whose powers 47 L.R.A.(N.S.)

have been revoked, and not yet transferred to his successor. It confers upon the successor no right to surcharge and falsify the accounts of his predecessor, or demand administered assets.

If the plaintiff has any right to recover the amount due on the \$3,000 note, hereinbefore referred to, the remedy at law is both available and fully adequate. Although executed at a time when C. L. Brown, E. W. Brown, and Joseph H. Brown were coexecutors, it is not payable to them by name, but to the executors of the estate of Anna H. Brown generally. Being admitted assets of the estate, since it was turned over as part thereof by C. L. Brown to E. W. Brown, and C. L. Brown being no longer an executor of the will, it would not be necessary for him to join as plaintiff in an action thereon. This is the clear result of the assumption that the note was part of the assets of the estate. If it is not, and is merely the evidence of a misappropriation, or devastavit on the part of C. L. Brown, as is intimated in the bill, then there is no right of recovery at all in the plaintiff. These observations are not to be taken as expressing any decision as to the status of the fund represented by said note, but only as saying the allegations respecting it are not sufficient to sustain the bill.

These conclusions, respecting the demurrers to the second amended bill, render it unnecessary to enter upon any inquiry as to the correctness of the rulings upon the pleas in abatement.

For the reasons stated, the decree complained of will be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ATLAS MANUFACTURING COMPANY
et al., Appts.,

v.

ORMUND G. SMITH et al.

(122 C. C. A. 568, 204 Fed. 398.)

Trademark — periodical — application to moving picture — infringement.

1. A registration as a trademark of a name applied to a periodical devoted to the publication of a series of stories does not prevent the application of the name to mov-

Note. — Use of tradename or trademark on articles other than those to which it is applied by the owner.

This note is supplemental to a note in 30 L.R.A.(N.S.) 167.

In addition to the cases referred to in the foregoing note, many of the later cases

ing picture plays which deal with adventures similar to those of the hero of the published series, who bears the name applied to the periodical.

Unfair trade — moving picture play — name of periodical.

2. The doctrine of unfair trade does not apply to prevent the application to a moving picture play of a name which has been applied for a long series of years by the publisher of a periodical series of stories, to the pamphlet containing such stories, although the incidents of the play are similar in character to those depicted in the periodical, if they are not based on the published stories.

(Hook, Circuit Judge, dissents.)

(March 26, 1913.)

also sustain the doctrine therein stated, that in general the owner of a trademark or tradename will be protected therein as against the use thereof by others upon articles which in their general characteristics, construction, or use are so closely allied with the product to which the owner applies the same, as to render it probable, or at least possible, that the general public may be deceived thereby as to the manufacturer or producer of the article.

Thus, in *Layton Pure Food Co. v. Church & D. Co.* 32 L.R.A. (N.S.) 274, baking powder and baking soda are held to be so nearly similar in their characteristics and use as to render it unfair competition for a company to manufacture baking powder and apply to it the same name as that used by another company to designate baking soda.

The use of a tradename by a corporation engaged in the business of manufacturing knit sweaters will be enjoined where it is substantially similar to a tradename previously acquired and used by another company manufacturing knit underwear, since both parties are manufacturing goods of the same general character or class. *Northwestern Knitting Co. v. Garon*, 112 Minn. 321, 128 N. W. 288.

In *Munn & Co. v. Americana Co.* — N. J. Eq. —, 88 Atl. 330, the doctrine is asserted that, in assuming a name in which to carry on its business of publication, a corporation has no right to adopt a name which prima facie, and without explanation, would fairly and reasonably indicate to a person of average and ordinary intelligence dealing with it, that the work was the publication of another. And the doctrine is applied in this case to the extent of holding that a publisher of an encyclopedia name "Americana" cannot lawfully use, as the name of the publisher thereof, the designation "the Scientific American, Compiling Department," where the name "Scientific American" has long been used to designate a publication devoted to scientific matters, and the use of a similar name to designate a company publishing an encyclopedia occasions confusion and induces a belief upon the part of the public that the work is published by the company whose name is simulated, and imposes upon the latter company the burden of constantly answering or repelling communications to them by the general public based upon this assumption and belief.

A PPEAL by defendants from a decree of the District Court of the United States for the Eastern District of Missouri in complainants' favor in a suit to enjoin defendants from using the name "Nick Carter" in any connection or form. Reversed.

The facts are stated in the opinion.

Argued before Hook and Smith, Circuit Judges, and Van Valkenburgh, District Judge.

Messrs. Nelson Thomas and James L. Hopkins, for appellants:

As to trademarks registered under the act of 1905, the jurisdiction of the circuit courts of appeals is final.

Hutchinson, P. & Co. v. Loewy, 217 U. S. 457, 460, 54 L. ed. 838, 839, 30 Sup. Ct. Rep. 613.

Compare with *Ridgway Co. v. Amalgamated Press*, 29 Rep. Pat. Cas. 130, 28 Times L. R. 149, holding that, although there is a monthly periodical named "Everybody's Magazine," the use of the term "Everybody's Weekly" to designate a paper published weekly will not be restrained, although the two periodicals circulate in the same section of the country, the court stating that it is not likely that the two papers will compete with one another.

It has been asserted that no one will be prevented from using a generic term in connection with the conduct of his business as a tradename, or part of a corporate or firm name, so long as said use is confined to a fair and legitimate purpose. It is only when the use of such term in connection with or as a part of a tradename is calculated to bring about unfair competition in business, that a court will enjoin its use. It is not enough that the use of such generic term may possibly produce confusion, or result in bringing about unfair competition, but, to warrant the court's interference, it must reasonably appear that such will be the result. In the application of this doctrine, an insurance company using the name "Travelers' Insurance Company" as its corporate name is denied the right to enjoin the use by a company manufacturing machines for the sale of daily accident insurance, of the name "The Travelers' Insurance Machine Company." *Travelers' Ins. Mach. Co. v. Travelers' Ins. Co.* 142 Ky. 523, 134 S. W. 877, judgment modified in 143 Ky. 216, 136 S. W. 154.

A case of interest upon the point presented in *ATLAS MFG. CO. v. SMITH* is *Glaser v. St. Elmo Co.* 175 Fed. 276, holding that where a copyright of a novel has expired, any person may write a play based thereon, and may use the title of the novel to designate the play, provided he gives plain notice as to the authorship of the play;

As to the charge of unfair competition, the jurisdiction depends solely upon diversity of citizenship, and the decree of this court is final.

Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 457, 55 L. ed. 536, 542, 31 Sup. Ct. Rep. 456.

Since *Hutchinson, P. & Co. v. Loewy*, supra, the Supreme Court has entertained appeals, as before, in cases based on trademarks registered under the act of March 3, 1881, but never in cases based on registrations under the act of 1905.

Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456; *Baglin v. Cusenier Co.* 221 U. S. 580, 587, 55 L. ed. 863, 867, 31 Sup. Ct. Rep. 669.

Mr. Leonard J. Langbein, with Mr. Hugh K. Wagner, for appellees:

The principles of the trademark law and the law forbidding unfair competition in business apply to books, magazines, newspapers, and the like.

Oxford University v. Wilmore-Andrews Pub. Co. 101 Fed. 443; *G. & C. Merriam Co.*

v. Straus, 136 Fed. 479; *Ogilvie v. G. & C. Merriam Co.* 149 Fed. 858; *Merriam v. Holloway Pub. Co.* 43 Fed. 450; *Merriam v. Texas Siftings Pub. Co.* 49 Fed. 944; *Merriam v. Famous Shoe & Clothing Co.* 47 Fed. 411; *Social Register Asso. v. Howard*, 60 Fed. 270; *Harper & Bros. v. Lare*, 43 C. C. A. 182, 103 Fed. 203, 93 Fed. 989, 30 C. C. A. 376, 57 U. S. App. 279, 86 Fed. 481. 84 Fed. 222, 224; *Kipling v. G. P. Putnam's Sons*, 65 L.R.A. 873, 57 C. C. A. 295, 120 Fed. 631; *Estes v. Worthington*, 24 Blatchf. 371, 31 Fed. 154; *Estes v. Leslie*, 23 Blatchf. 476, 27 Fed. 22; *Estes v. Williams*, 22 Blatchf. 364, 21 Fed. 189; *Browne, Trademarks*, § 116; *Gannett v. Rupert*, 62 C. C. A. 594, 127 Fed. 962; *New York Herald Co. v. Star Co.* 146 Fed. 204; *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459; *Forney v. Engineering News & Pub. Co.* 32 N. Y. S. R. 1122, 10 N. Y. Supp. 814; *Bradbury v. Beeton*, 21 L. T. N. S. 323, 39 L. J. Ch. N. S. 57, 18 Week. Rep. 33; *Osgood v. Allen*. Holmes, 185, Fed. Cas. No. 10,603; *Stokes v. Allen*, 56 Hun, 526, 9 N. Y. Supp. 846; *Longman v. Tripp*, 2 Bos. & P. N. R. 67;

and that a purchaser of dramatic rights who uses the name to designate a play based upon the novel is not entitled to restrain the use of the same name to designate a different play, although based upon the plot and incidents of the novel, where the writer of the latter play clearly indicates the authorship.

It has been held that it is morally wrong for a person to proclaim or even intimate that his goods are manufactured by some other and well-known concern, yet this does not give rise to a private right of action, unless the property rights of that concern are interfered with, and the use by a new company, to designate an ice cream of its manufacture, of a name similar to that long used by another company to designate its product, "condensed milk," although with fraudulent intent to induce a belief on the part of the public that its ice cream is made by the condensed milk company, unless it appears that the property rights of the latter company are jeopardized thereby, does not entitle it to enjoin such use, since the manufacture of commercial ice cream does not come into competition with the manufacture of condensed milk, and in the absence of competition, rights cannot be asserted as accruing from the secondary meaning of a trademark or tradename, for the phrase "unfair competition" presupposes competition of some sort, and in the absence of competition the doctrine cannot be invoked. *Borden Ice Cream Co. v. Borden's Condensed Milk Co.* 121 C. C. A. 200, 201 Fed. 510.

The manufacturer of a medicinal preparation, applying thereto the name "Listerine," is not entitled to restrain the use of the word "Listerated" by another company to 47 L.R.A.(N.S.)

designate a tooth powder. *Lambert Pharmaceutical Co. v. J. Palmer & Son*, 2 D. L. R. 358, Rap. Jud. Quebec, 21 B. R. 451.

Persons practising dentistry under a certain name are not entitled to restrain the use of the same name by an incorporated company engaged in the manufacture of dental goods. *Longenecker v. Longenecker Bros.* 140 N. Y. Supp. 403.

A manufacturer of polish for boots, etc., who has designated the product by the term "Nugget" with the device of a nugget under it, which has been registered as a trademark therefor, cannot complain of the use of the same word with a similar device by another manufacturer to designate rubber heels. *Nugget Polish Co. v. Harboro Rubber Co.* 29 Rep. Pat. Cas. 133, cited in *Law Rep. Current Index*, 1912, p. 418.

A telegraph company is not entitled to restrain the use of a simulation of its envelop with the word "telegram" printed thereon, by a manufacturing company advertising specialties, which makes use of the envelop for the purpose of drawing attention to the contents of the envelop, and of securing from the addressee immediate attention thereto, since the telegraph company is not affected in any of its property rights, and the device is not calculated to deceive in the substantial sense in which that term is used with reference to unfair competition, since at most it is calculated to produce a momentary deception of such trivial character that any serious action based upon it prejudicial to the complainant would not be a natural and probable consequence of the deception. *Postal Teleg. Cable Co. v. Livermore & K. Co.* 188 Fed. 696.

A. G. S.

Ex parte Foss, 2 DeG. & J. 230, 27 L. J. Bankr. N. S. 17, 4 Jur. N. S. 522, 6 Week. Rep. 417; *Kelly v. Hutton*, L. R. 3 Ch. 708, 37 L. J. Ch. N. S. 917, 19 L. T. N. S. 228, 16 Week. Rep. 1182; *Investor Pub. Co. v. Dobinson*, 82 Fed. 56, 72 Fed. 603; *Snowden v. Noah*, Hopk. Ch. 351, 14 Am. Dec. 547; *Stephens v. De Conto*, 7 Robt. 343; *Dayton v. Wilkes*, 17 How. Pr. 510; *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321; *American Grocer Pub. Asso. v. Grocer Pub. Co.* 25 Hun, 398; *Clement v. Maddick*, 5 Jur. N. S. 592, 1 Giff. 98; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Bell v. Locke*, 8 Paige, 75, 34 Am. Dec. 371; *Duniway Pub. Co. v. Northwestern Printing & Pub. Co.* 11 Or. 322, 8 Pac. 283; *Browne, Trademarks*, 2d ed. §§ 546, 552; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328; *Price & S. Trade-mark Cases*, p. 153; *Hogg v. Kirby*, 8 Ves. Jr. 215, 7 Revised Rep. 30; *Longman v. Winchester*, 16 Ves. Jr. 269; *Edmonds & Benbow, Seton*, 3d ed. 905; *Re Edinburgh Correspondent Newspaper*, 1 Sc. Sess. Cas. 1st series, 147; *Cox, Manuel of Trade Cases*, No. 34; *Spottiswoode v. Clark*, 10 Jur. 1043, 2 Phill. Ch. 154, 1 Coop. t. Cott. 254.

The good will of a newspaper is protectible.

Metropolitan Nat. Bank v. St. Louis Dispatch Co. 149 U. S. 436, 446, 37 L. ed. 799, 802, 13 Sup. Ct. Rep. 944; *Dayton v. Wilkes*, 17 How. Pr. 510; *Gannert v. Rupert*, 62 C. C. A. 594, 127 Fed. 963; *Clemens v. Belford*, 11 Biss. 459, 14 Fed. 728; *Byron v. Johnston*, 2 Meriv. 29, 18 Revised Rep. 135; *Halstead v. Houston*, 111 Fed. 376; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328; *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459.

Infringement threatened by advertisements should be enjoined.

G. & C. Merriam Co. v. United Dictionary Co. 76 C. C. A. 470, 146 Fed. 359; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 99; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188.

The fact that complainants' stories are not the highest class of literature does not debar them from relief by the courts.

Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 251, 47 L. ed. 460, 462, 23 Sup. Ct. Rep. 298; *Henderson v. Tompkins*, 60 Fed. 763; *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459; *Munro v. Tousey*, 129 N. Y. 38, 14 L.R.A. 245, 29 N. E. 9; *Ogilvie v. Getts*, — Pa. —, June 12, 1912.

If a merchant's goods, by the fact of long use of a particular known trademark, have become known under the name of the object as a tradename, the symbol of which has been used as a trademark, a rival will be 47 L.R.A. (N.S.)

enjoined from selling a similar article of merchandise, either under that name, or with any device or symbol which will cause his goods to be known by the same name.

Seixo v. Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357; *Johnson & Johnson v. Bauer & Black*, 27 C. C. A. 374, 53 U. S. App. 437, 82 Fed. 662.

Registration is the best evidence of intention to adopt a trademark.

Hesseltine, Trademarks, p. 29; *Thaddeus Davids Co. v. Davids*, 190 Fed. 285.

Van Valkenburgh, District Judge, delivered the opinion of the court:

Appellees, complainants below, are citizens of the state of New York, and are the members of a copartnership known and styled as *Street & Smith*. This firm is engaged in the business of publishing detective stories characterized by the general name of "Nick Carter." Its publications are issued weekly and consist, exclusive of cover, of 32 pages 11 by 8 inches in size. Of these pages, 26 are devoted to a detective story complete in itself; 5 pages to space-filling items under the heading, "News of All Nations;" and 1 page to advertising other publications issued by the same firm. The cover is in colors and presents in order the serial number, date, price, general title "Nick Carter," the specific title of the detective story, as "The Red Button," contained in that issue, and an illustration characteristic of the story, or depicting some incident in it. Slight modifications of interior make-up have since been made, but this description applies to complainants' exhibit, filed with their bill July 1, 1912. The function of the weekly issue is the publication of the single detective story contained therein. A different story under a distinct title is published each week. These stories are complete in themselves. The only connection between them is that the detective character, Nick Carter, is the central figure in each. April 19, 1910, complainants registered the name "Nick Carter" as a trademark for "a weekly publication devoted to fiction," alleging that it had been used in their business and that of their predecessors since March 30, 1885.

The appellant *Atlas Manufacturing Company* is a Missouri corporation domiciled in the city of St. Louis. Its business includes the manufacture and sale of moving picture films. Appellant *Crawford* is its president. In January or February, 1912, said *Atlas Manufacturing Company* employed certain persons, named, respectively, *Wolcott* and *Hamilton*, to write a *scenario* or memorandum of the series of events in a detective story. This story was then acted

with appropriate stage setting and the performance photographed in sequence. From these photographs a film was prepared, and it is the purpose of appellants to sell, rent, or lease this film to such persons as may desire to display it in moving picture theaters. As advertised the story presents "Nick Carter, the Great American Detective, Solving the \$100,000 Jewel Mystery." It appropriates neither title, plot, nor situations of any story published by complainants. The name "Nick Carter" is used, and a detective story is portrayed. The name of the appellant corporation, as manufacturer, is displayed upon the screen. Complainants, claiming the "exclusive right to make, sell, print, publish, and display to the public detective stories marked with the name and trademark 'Nick Carter,' and called and known by the tradename 'Nick Carter,'" filed their bill of complaint July 1, 1912, to restrain defendants from using this name in any connection or form. A preliminary injunction was granted, and defendants appealed. Complainants have taken out no copyright upon any of their publications. Therefore no rights arising under the copyright law are presented for determination. The property rights asserted are based (1) upon registered trademark; (2) upon long-established tradename.

The trademark registered is "Nick Carter." The law authorizing such registration provides that the applicant shall specify "the class of merchandise and the particular description of goods comprised in such class to which the trademark is appropriated, . . . a description of the trademark itself," and "a statement of the mode in which same is applied and affixed to goods. . . ." Act Feb. 20, 1905, 33 Stat. at L. chap. 592, p. 724, U. S. Comp. Stat. Supp. 1911, p. 1459. In compliance with this requirement, complainants particularly describe their so-called goods as "a weekly periodical devoted to fiction." To entitle this publication to protection under the trademark granted, it must conform to the description filed: it must be a periodical. In *Smith v. Hitchcock*, 226 U. S. 53, 57 L. ed. 119, 33 Sup. Ct. Rep. 6, decided November 18, 1912, the Supreme Court held that the "Tip Top Weekly," issued by these same complainants, and practically identical in structure with the "Nick Carter" publication, is not a periodical, but a book.

Literary property in a book cannot be protected by trademark, nor otherwise than by copyright. *Black v. Ehrich* (C. C.) 44 Fed. 793; *Browne*, Trademarks, §§ 116, 117. This is conceded by complainants' counsel in brief and argument; but it is claimed that whether the publication be regarded 47 L.R.A. (N.S.)

as a periodical or a book the trademark protects it in its character as goods or merchandise. It is therefore well to determine the exact nature of the "merchandise" to which the trademark applies. This must be the publication, as such, whether book or periodical. It is the form, not the contents. "Nick Carter" is not the name of the specific story, as, in this case, "The Red Button." None of the individual stories, as such, are covered by the mark. To publish a little booklet entitled "The Red Button," distinct in size, form, and dress, not bearing the imprint "Nick Carter," would not infringe this technical trademark. Conceding to this registered mark its broadest application, it can at most protect only against something in the nature of a periodical publication of the same class.

No exercise of imagination, however fertile, can transform defendants' film or its intermittent exhibitions into anything resembling a periodical publication.

Complainants' chief reliance would seem to be upon the claim asserted in their bill that they have possessed for many years, and still possess, the exclusive right to make, sell, print, publish, and display to the public detective stories called and known by the tradename "Nick Carter." This is a direct appeal to the law affecting unfair competition in trade. Because they have long published detective stories associated with this name and character, they now assert the exclusive right to construct and make public in any manner whatsoever all detective stories involving the name and character of Nick Carter. It is the individual story as an article of merchandise, and not the form of publication, for which protection is thus invoked. In the language of the brief, "the sole question in this case for the court to decide is whether or not a moving picture film is of the same class of goods as a printed book." The claim advanced is ingenious and decidedly comprehensive in its scope.

We agree with counsel that "the fact that appellees' [complainants'] stories are not the highest class of literature does not bar complainants from relief by the courts." In other words, this fact does not take from the stories their essential character as literature in the eyes of the law. They are subjects of copyright. And this leads us to inquire what complainants' standing would be under the law of copyrights? The author of a literary work or composition has, by common law, the exclusive right to the first publication of it. He has no exclusive right to multiply or control the subsequent issues of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the

exclusion of others is the creature of statute. This is the right secured by the copyright laws of the different governments. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

"Neither the author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work; but any other person can, with impunity, adopt it and apply it to any other book, or to any trade commodity, provided he does not use it as a false token to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated. If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trademark, there would be no necessity for copyright laws." *Black v. Ehrich*, supra.

So the copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired; and on the expiration of the copyright of a novel any person may use the plot for a play, copy or publish it, or make any other use of it he sees fit. In such case, where one writes and copyrights a play based on a novel, and bearing the same title as the novel, he cannot prevent another from giving the same name to an entirely different play which has been constructed from that novel. *Glaser v. St. Elmo Co.* (C. C.) 175 Fed. 276. The right to use a copyrighted name upon the expiration of the copyright becomes public property, subject to the limitation that the right be so exercised as not to deceive members of the public and lead them to believe that they are buying the particular thing which was produced under the copyright. *G. & C. Merriam Co. v. Ogilvie* (C. C. A.) 16 L.R.A. (N.S.) 549, 88 C. C. A. 596, 159 Fed. 638, 14 Ann. Cas. 796.

Original § 4952, U. S. Rev. Stat. provided that "authors may reserve the right to dramatize or to translate their own works." Unless this reservation was made, the public was free to make such use of them. By act of March 3, 1891, chap. 565, 26 Stat. at L. 1107, U. S. Comp. Stat. 1901, p. 3406, it was provided that "authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." This made such exclusive right an integral part of the copyright itself. Under this section, so amended, the Supreme Court has held that an exhibition of a series of photographs of persons and things, arranged on films as moving pictures, and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work, and the person producing the

films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the copyright of the author. *Kalem Co. v. Harper Bros.* 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285. Nevertheless, it is held that the owner of the copyright of a novel is not entitled to protection against the use of that name in connection with a dramatic composition which does not present any scenes, plot, or dialogue imitated or adapted from the novel; it being the name in connection with the novel, and not the name alone, which the copyright protects. *Harper v. Ranous* (C. C.) 67 Fed. 904. If the copyright has expired, or none has been taken out, neither the rights and privileges conferred, nor the limitations and obligations imposed, by that law are present, because, apart from the statute, none exist.

Complainants do not rely upon copyright. The name "Nick Carter" is not the title of any story, nor the name of author or publisher. But complainants insist that we shall consider their books, not from the literary standpoint, but as merchandise, and cite numerous cases recognizing that the principles of trademark law, and the law forbidding unfair competition in business, may, under certain conditions, apply to books, magazines, periodicals, and newspapers. That they may and do apply to magazines, periodicals, and newspapers, as such, we have already seen; to books the application is more limited. The cases cited reveal that protection is accorded in connection with specific kinds of books, such as Bibles, dictionaries, and works of a like nature, where the name has so long been used to designate the production as to have become identified with such particular publications as denoting their origin, and where the use of such name by another publisher, having no connection with the place or name, can have no purpose except to deceive purchasers. *Oxford University v. Wilmore-Andrews Pub. Co.* (C. C.) 101 Fed. 443; *G. & C. Merriam Co. v. Straus* (C. C.) 136 Fed. 477; *Ogilvie v. G. & C. Merriam Co.* (C. C.) 149 Fed. 858; *Merriam v. Holloway Pub. Co.* (C. C.) 43 Fed. 450; *Merriam v. Texas Siftings Pub. Co.* (C. C.) 49 Fed. 944; *Merriam v. Famous Shoe & Clothing Co.* (C. C.) 47 Fed. 411. In instances where the same method of selection, illustration, and style of binding, as well as name on the cover, have been taken, the form of publication is the feature of critical importance. *Estes v. Williams* (C. C.) 22 Blatchf. 364, 21 Fed. 189; *Estes v. Leslie* (C. C.) 23 Blatchf. 476, 27 Fed. 22; *Estes v. Worthington* (C. C.) 24 Blatchf. 371, 31 Fed. 154. In all cases the courts have been careful to limit the

doctrine announced to the special circumstances, and have coupled it with a restatement of well-known principles. Thus, in *G. & C. Merriam Co. v. Straus* (C. C.) 136 Fed. 477, Judge Wallace said: "It is proper, however, to say that the bill is in part an attempt to protect the literary property in the dictionaries, which became *publici juris* upon the expiration of the copyrights. This attempt must prove futile."

In *Ogilvie v. G. & C. Merriam Co.* (C. C.) 149 Fed. 858, it is pointed out that this public right cannot be taken away or abridged on any theory of trademark or unfair competition, which is only another way of seeking to perpetuate the monopoly secured by the copyright. Similar views are expressed in *Merriam v. Texas Siftings Pub. Co.* (C. C.) 49 Fed. 944, and *Merriam v. Famous Shoe & Clothing Co.* (C. C.) 47 Fed. 411. In *G. & C. Merriam Co. v. Ogilvie* (C. C. A.) 16 L.R.A.(N.S.) 549, 88 C. C. A. 596, 159 Fed. 638, 14 Ann. Cas. 796, the court of appeals for the first circuit used language still more explicit: "The name 'Webster' having been copyrighted by the Merriams, they were protected in its use under a statutory right during an expressed term of years. The protection, therefore, in that respect, came by virtue of the copyright, rather than by virtue of its use in publication and trade. The statutory monopoly having expired under statutory limitation, the word 'Webster,' used in connection with a dictionary, became public property, and any relief granted upon the idea of title or proprietorship in the tradename of 'Webster' would necessarily involve an unwarrantable continuance of the statutory monopoly secured by the copyright."

The important principle involved is, perhaps, most pointedly stated by Mr. Justice Miller in *Merriam v. Holloway Pub. Co.* (C. C.) 43 Fed. 450. He says: "I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired may continue that monopoly indefinitely, under the pretense that it is protected by a trademark, or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright for any of his writings or works, he impliedly agrees that at the expiration of that copyright such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The 47 L.R.A.(N.S.)

law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that after the monopoly has expired the public shall be entitled ever afterwards to the unrestricted use of the book. . . . I will say this, however, that the contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

In the *Chatterbox Cases* (*Estes v. Williams* (C. C.) 23 Blatchf. 364, 21 Fed. 189; *Estes v. Leslie* (C. C.) 23 Blatchf. 476, 27 Fed. 22; and *Estes v. Worthington* (C. C.) 24 Blatchf. 371, 31 Fed. 154) emphasis is laid chiefly upon similarity of form. In *Estes v. Williams*, *supra*, it was said: "There is no question but that the defendants have the right to reprint the compositions and illustrations contained in these books, including the titles of the several pieces and pictures. . . . That does not settle the question as to the right claimed here. There is work in these publications aside from the ideas and conceptions. Johnston was not the writer of the articles, nor the designer of the pictures composing the books, but he brought them out in this form. The name indicates this work. The defendants, by putting this name to their work in bringing out the same style of book, indicate that their work is his. This renders his work less remunerative, and, while continued, is a continuing injury which it is the peculiar province of a court of equity to prevent."

In *Kalem Co. v. Harper Bros.* 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285, it was suggested by counsel that to extend the copyright to a case of reproducing scenes from *Ben Hur* by means of moving pictures was to extend it to the ideas as distinguished from the words in which those ideas are clothed. Mr. Justice Holmes said: "But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate, and well-known form of production."

It may be conceded that the law relating to unfair trade has a threefold object: First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader, who is

taking his competitor's business away by unfair means; third, to protect the public from deception. *Gulden v. Chance* (C. C. A.) 105 C. C. A. 10, 182 Fed. 303. That to sustain a charge of infringement, the owner of a trademark must have used it on the same class, but not necessarily on the same species, of goods as the alleged infringer. *Layton Pure Food Co. v. Church & D. Co.* (C. C. A.) 32 L.R.A.(N.S.) 274, 104 C. C. A. 475, 182 Fed. 35. Of course, defendants' firm bears no resemblance to complainants' books. No one would buy the one in the belief that he was getting the other. It is the display that constitutes the infringement, if there is one; and in such case the producer of the film is responsible equally with the exhibitor. *Kalem Co. v. Harper Bros.* supra. We do not think a moving picture show is of the same class as a written book. One belongs to the field of literature; the other to the domain of theatricals. Originally, there was no legal connection between the written novel and a dramatization based upon its characters and incidents. The connection was made by statute in derogation of the common law. In the absence of copyright, the situation is as if no such connection had ever been made. We are unwilling, indirectly, to extend to writings a protection beyond that conferred by statute. Congress created a specific form of monopoly for literary property in this country, and made it subject to express limitations. It is for Congress to say whether these limitations should be relaxed.

Neither trademark nor tradename can afford protection to detective stories, as such, whether published or still unborn, and much less where neither title nor composition is pirated, and but a single common character is used. The suggestion involves an attempt to make a monopoly of ideas, instead of confining the application of the law to "a particular cognate and well-known form of production."

Moving pictures and dramatizations are cognate forms of production. When copyright was extended to the latter, it necessarily included the former; but, in the absence of copyright, no such relation exists between either of these forms and the written book. It is not thought that the public will be deceived into belief that it is seeing a reproduction of one of complainants' stories when it witnesses that displayed from defendants' film. But if so, it is no more deceived than when it reads a book of the same name as one theretofore published, but unprotected. It may be that the defendants are profiting by the use of a name made distinctive by complainants, but this is true of one who sell a brand

of cigars named after a famous book or a famous personage. In the absence of some positive legal right in complainants, these are conditions for which equity cannot undertake to create a remedy. The decree below must therefore be reversed and the case remanded, with directions that the preliminary injunction be dissolved and the bill dismissed for want of equity. *Mast. F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Castner v. Coffman*, 178 U. S. 168, 44 L. ed. 1021, 20 Sup. Ct. Rep. 842.

It is so ordered.

Hook, Circuit Judge, dissenting:

My objection to the above conclusion can be expressed in a sentence: The defendants are engaged in appropriating the fruits of complainants' current endeavors, and are deceiving the public.

Dismissed by the Supreme Court of the United States, December 1, 1913, 231 U. S. 348, 58 L. ed. —, 34 Sup. Ct. Rep. 73.

GEORGIA SUPREME COURT.

O. A. STEVENS et al., Plffs. in Err.,
v.

MRS. MATTIE STEADMAN.

(— Ga. —, 79 S. E. 564.)

Case — suicide — demand of resignation.

The court erred in refusing to sustain a general demurrer to the petition in this case, which was an action brought by a widow against the defendants to recover damages for the tortious homicide of her husband, it being alleged that the defendants, in pursuance of a conspiracy to bring about the death of the plaintiff's husband, had written a letter calling upon the decedent to resign his official position in a corporation of which he was vice president, and advising him not to inquire into the reasons for the demand; that, owing to the nervous condition of the decedent and his

Headnote by BECK, J.

Note. — Civil liability for causing suicide.

No case has been found where it has been endeavored to hold one civilly liable who had either counseled or aided one in committing suicide. Nor has any other case been found where the facts are similar to those in the principal case. The basis of the court's opinion in holding that the writer of the letter referred to in the principal case was not the proximate cause of the suicide appears to be that the court would not be warranted in determining that

impaired mental and physical condition, this letter, which was delivered to and read by him, had the effect of causing him to take a portion of some narcotic or drug which caused his death, and that the defendants intended and knew that the letter should produce this effect and bring about the death of the decedent.

(October 4, 1913.)

ERROR to the Superior Court for Madison County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of her husband which was alleged to have been caused by defendants' wrongful act. Reversed.

Statement by Beck, J.:

Mrs. Mattie Steadman, for herself and in behalf of her three minor children, brought an action against O. A. Stevens and nine other defendants, for the alleged wrongful homicide of G. M. Steadman. So much of the petition as needs now to be considered was to the following effect: G. M. Steadman, hereinafter referred to

as the decedent, was the husband of Mrs. Mattie Steadman, and the father of the three minor children. He and the defendants were stockholders of the Tiller-Glenn Company, a domestic corporation doing an extensive and lucrative business. He was vice president and assistant general manager of the corporation, and owned ten shares of its capital stock, which, by reason of his efficient management of the affairs of the corporation, had about doubled in value since he became a stockholder. He "was naturally of a very nervous, excitable temperament." About two years prior to the time hereinafter referred to, "he had an attack of fever, which left his kidneys affected, and causing him thereafter to suffer more or less with dyspepsia, and occasional attacks of neuralgia, which tended at times to augment his said nervous disposition, and rendered him more easily influenced and depressed by unjust criticism, or other improper action or conduct of others towards him;" and "each and all of these facts were well known to said defendants." O. A. Stevens, one of

the author of the letter had in mind the suicide of the addressee, and intimated that a different question would be presented were that a fact.

It has been held that where injuries resulting from the negligence of a third person have produced insanity which led to the suicide of the person injured, the one guilty of the negligence is not civilly responsible for the suicide. *Brown v. American Steel & Wire Co.* 43 Ind. App. 560, 88 N. E. 80; *Daniels v. New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070. The basis of the decision in such cases being that the suicide is such a new and independent agency as does not come within and complete a line of causation from the accident to the death. In the *Scheffer* Case, an action for causing the death of one who, having been injured in a railroad collision, subsequently became deranged and committed suicide, the court said that the suicide was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide; and each of these are casual or unexpected causes, intervening between the act which injured him and his death.

Where a suicide is caused by the use of intoxicating liquors, it seems that an action will lie under a civil damage act against one who sold the liquors to such

person, to recover damages for the loss of maintenance and support. *Blatz v. Rohrbach*, 42 Hun, 402; *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89; *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 Ann. Cas. 1125; *Garrigan v. Thompson*, — S. D. —, 101 N. W. 1135; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150.

And it is not necessary to inquire whether the suicide was the natural, reasonable, or probable consequence of the defendant's act. It is enough if the act was committed, while intoxicated, in whole or in part, by liquor sold by the defendant, and if by reason thereof the plaintiff's means of support were affected to his injury. *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

Nor is it material that the one who commits suicide was sober at the time, if the sale of intoxicating liquors results in his suicide and was the proximate cause of the same. *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 Ann. Cas. 1125; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150.

And as a sale to a minor or an intoxicated person is illegal, no notice to the party selling is required. *Palmer v. Schurz*, supra.

And a married woman is authorized to recover the damages sustained by her children, although she may not be entitled to recover damages for herself, under a statute which provides that it shall be legal for any married woman to institute and maintain in her own name a suit on a liquor dealer's bond for all damages sustained by her or by her children on account of such traffic, the money thus collected to be paid over for the use of herself and children. *Ibid.*

J. H. B.

the defendants, was bookkeeper for the corporation, and had held such position for many years. He was related by blood or marriage to all of the other defendants. He "had a grudge against" the decedent, and, "for the purpose of humiliating [him] and driving him out of said business, and that he, O. A. Stevens, could finally get rid of [decedent] and get him out of his way, and dispose of him finally, and that they [the defendants] might thereafter buy in the stock of [decedent] at a greatly reduced value after [decedent] was dead and finally disposed of, as it was intended he should be thereby, conceived the idea of bringing unjust, unfounded, and mysterious charges against [decedent], well knowing the disastrous and probably fatal result that the same would have on and to [decedent], owing to his very nervous temperament and state of health." And the other defendants, "likewise well knowing the said facts, conspired and confederated with the said O. A. Stevens to bring about said end. With this end in view, and well knowing the disastrous and fatal results that would be caused thereby to [decedent] on account of his nervous temperament and state of health, which was well known to them, the said O. A. Stevens, and other defendants conspiring and confederating with him, prepared and had served on [decedent] a paper which contained vague and mysterious and unfounded charges, and threatened that if he did not turn over his keys to the president without question, and resign his position in said company, and sever his connection therewith immediately, it would be worse for himself and his family, and that they would at once have him discharged from said company and driven from the business, and thus publicly humiliate and mortify him, said paper being signed by each and all of the defendants; and also having added a clause containing an oath to the effect that they would not mention their reasons to any except the members of said firm; said oath clause being likewise signed by each and all of the defendants."

A copy of the paper was attached to the petition, to meet a special demurrer, and was as follows:

To G. M. Steadman,
Carlton, Ga.

We, the undersigned members of the firm of Tiller-Glenn Co., respectfully ask that you resign your position immediately upon presentation of this notice. Unless same is done, we will at once discontinue your services any longer. We would ask that you not inquire into the details for
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reasons: First, because it will be best for you and your family; second, because it will be best for our firm; third, because we know you will not try to force your service on us when we did not want it, and are not satisfied with it, and won't have it. You will be at liberty to hold onto your stock in said firm or corporation, or to sell, as you desire. We are willing to let our friendship and sociality remain as before. We do not propose to mention our reason for this to anyone except the signed members of this notice, which appears below, unless we are forced to in order to protect our business; this we make oath to below. This is only a business matter with us, and have caused us considerable trouble for several months. We will all sell out before we will accept your service any longer. If you will buy all of us, then we will get out. You will exercise good judgment to resign at once, deliver your keys to the president without any questions whatever. We sincerely wish for you all the good luck that a young man might have, and that your relations towards us and ours towards you may be pleasant. We request the secretary and treasurer to keep copy of this notice and to enter same into the minute book of said firm. Witness our hands and seals this 7th day of September, 1911.

Signed by the defendants.

Now come the above-signed members of the firm of Tiller-Glenn Co., who on oath say that they will not mention their reasons to anyone except the members of said firm, unless the said G. M. Steadman begin saying some unpleasant things about said firm, trying to damage said firm in any way.

Signed, sworn to, and subscribed by the defendants.

The paper was delivered to the decedent by one of the stockholders on Saturday night, September 9, 1911, after he had left the store and the business for the week had been closed. Decedent, as the defendants knew, had a number of business engagements with the customers of the corporation on the following Monday. "The time, place, and manner of thus imposing on [him] these unjust and mysterious charges and threats, and which it was stated would not be explained or discussed with him, and which he was not to attempt to discuss with them, or any of them, or to investigate under said mysterious and dire threats, was further calculated, as was well known to defendants and intended by them, to throw [decedent] into a high state of nervous excitement, to un-

balance him, and to cause his reason to become dethroned, and in such unbalanced and uncontrolled condition to take his own life in order to be rid of the nameless horrors by which they had surrounded him, and from which, it would seem to him in his said unbalanced condition, which was produced by their illegal and criminal conduct, there was no other escape from." He had ever been an upright and honest official of the corporation, and had faithfully discharged his duties as such, and defendants had no just cause of complaint against him; and the first intimation he had that defendants had anything against him, or any desire or intent to injure him, was the delivery to him of the paper containing the unfounded and mysterious threats and charges against him. He "was greatly mortified, and rendered very nervous and excited," by reading the paper, and "begged and implored the deliverer of said paper to inform him what the said defendants had against him, and with what did they seek to charge him, and why did they threaten publicly to disclose him, as aforesaid, and without any just cause whatever." The bearer of the paper declined to give him any information on the subject, by reason of his promise to the other defendants not to do so. The natural result of said conduct on the part of the defendants, "and as was known and contemplated by the defendants that it would be, owing to his nervous temperament and state of health, [decedent] was rendered very nervous and excited, could not sleep, and could not eat, and was in a state of great despondency and despair all day Sunday, owing to said mysterious charges and direful threats." Late Sunday afternoon he found another of the defendants, and endeavored to ascertain from him the same information he had sought from the other defendant, but with like failure to do so. He was thus rendered more nervous and excited, and became very despondent. The making of such mysterious charges and threats against him, and the refusal of the defendants to inform him of their nature, so that he could explain and refute them, and "owing to his nervous temperament and condition of health, which was well known to him, caused him to become unbalanced, and his reason to be dethroned, and while in such condition to take a large amount of morphine or other narcotic, hoping thereby, in his unbalanced and unreasoning condition, to escape from the horrors of said nameless charges and threats and the public disgrace threatened by them. From which said large dose of narcotic he died on the following Monday morning, his death being due and chargeable to the il-

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legal and criminal conduct of the said defendants, as aforesaid, and the natural and almost inevitable result of the illegal and criminal conduct of said conspirators, and in their contemplation in signing and sending said paper, and in making said charges and threats to him." The plaintiff "charges that the said conduct of said O. A. Stevens and the other defendants who conspired with him, as hereinbefore stated, was a criminal conspiracy, resulting in the death of her husband, as was in contemplation of and intended by the said O. A. Stevens with the other defendants conspired and confederated, as hereinbefore stated, and that each and all of them are liable to her therefor." The defendants demurred to the petition, on the grounds, that it set forth no cause of action, in that the injury complained of was not actionable, that the damages claimed were too remote to be recoverable, and that the charges made were not the proximate cause of the injury complained of. The demurrer was overruled, and the defendants excepted.

Messrs. Worley & Nall, for plaintiffs in error:

No defendant shall be held liable for consequences which are not the natural and reasonable results of his act, and that might not have been foreseen and expected.

Derry v. Flitner, 118 Mass. 131; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 204, 51 N. E. 657, 5 Am. Neg. Rep. 15; Mack v. South Bound R. Co. 52 S. C. 323, 40 L.R.A. 685, 68 Am. St. Rep. 913, 29 S. E. 905; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 513, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Sloane v. Southern California R. Co. 111 Cal. 668, 32 L.R.A. 197, 44 Pac. 320, 8 Am. Neg. Cas. 76; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557.

Mental anguish arising from a different source is not actionable, because not natural or probable.

Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Chicago v. McLean, 133 Ill. 148, 8 L.R.A. 766, 24 N. E. 527; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Boggeas v. Chesapeake & O. R. Co. 37 W. Va. 297, 23 L.R.A. 777, 16 S. E. 525, 7 Am. Neg. Cas. 134.

Unless the terror, alarm, anxiety, and disturbance of mind be accompanied with physical injury, there can be no recovery.

Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Atlantic Coast Line R. Co. v. Daniels, 8 Ga.

App. 775, 70 S. E. 203; *Central of Georgia R. Co. v. White*, 135 Ga. 524, 69 S. E. 818; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Giddens v. Western U. Teleg. Co.* 111 Ga. 824, 35 S. E. 638.

An intervening cause defeats recovery unless such intervening cause be the natural result.

Atlantic Coast Line R. Co. v. Daniels, 8 Ga. App. 775, 70 S. E. 203; *Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443; *Southern Transp. Co. v. Harper*, 118 Ga. 676, 45 S. E. 458, 15 Am. Neg. Rep. 274; *Southern R. Co. v. Webb*, 116 Ga. 152, 59 L.R.A. 109, 42 S. E. 395, 12 Am. Neg. Rep. 232; *Sparta Oil Mill v. Russell*, 6 Ga. App. 293, 65 S. E. 37; *Rucker v. Athens Mfg. Co.* 54 Ga. 84; *Perry v. Central R. Co.* 66 Ga. 746; *Perry v. Macon Consol. Street R. Co.* 101 Ga. 407, 29 S. E. 304, 3 Am. Neg. Rep. 755; *Coleman v. Wrightsville & T. R. Co.* 114 Ga. 386, 40 S. E. 247.

Messrs. Paul Brown, J. F. L. Bond, John J. Strickland, and Roy M. Strickland also for plaintiffs in error.

Messrs. John E. Gordon, B. T. Mosley, E. K. Lumpkin, and E. K. Lumpkin, Jr., for defendant in error:

One who wilfully and intentionally kills or causes the death of another, and without a good reason or cause, is liable, both criminally and civilly, therefore, no matter what the means employed by him to accomplish such may be.

Central of Georgia R. & Bkg. Co. v. Denson, 84 Ga. 783, 11 S. E. 1039; *Southern R. Co. v. Chatman*, 124 Ga. 1036, 6 L.R.A.(N.S.) 283, 53 S. E. 692, 4 Ann. Cas. 675; *Rome R. Co. v. Barnett*, 94 Ga. 447, 20 S. E. 355; *Western & A. R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547; *Holston v. Southern R. Co.* 116 Ga. 658, 43 S. E. 29; *Crawford v. Southern R. Co.* 106 Ga. 872, 33 S. E. 826, 6 Am. Neg. Rep. 459; *Brunswick & W. R. Co. v. Bostwick*, 100 Ga. 96, 27 S. E. 725; *Western & A. R. Co. v. Bass*, 104 Ga. 390, 30 S. E. 874; *Central of Georgia R. Co. v. Moore*, 5 Ga. App. 565, 63 S. E. 642, 21 Am. Neg. Rep. 65; *Higgins v. Southern R. Co.* 98 Ga. 751, 25 S. E. 837; *Daniels v. Perkins Logging Co.* 9 Ga. App. 845, 72 S. E. 438; *Pye v. Gillis*, 9 Ga. App. 725, 72 S. E. 190; *Shearm. & Redf. Neg.* ¶¶ 64, 100, 483; *Forrest v. Georgia R. & Bkg. Co.* 128 Ga. 77, 57 S. E. 98; *Savannah, F. & W. R. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187, 30 S. E. 378, 4 Am. Neg. Rep. 253; *Anderson v. Southern R. Co.* 107 Ga. 509, 33 S. E. 644; *Primus v. Macon R. & Light Co.* 126 Ga. 667, 55 S. E. 924; *Western & A. R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547; *Charleston & 47 L.R.A.(N.S.)*

W. C. R. Co. v. Johnson, 1 Ga. App. 441, 57 S. E. 1064; *Batson v. Higginbotham*, 7 Ga. App. 839, 68 S. E. 455; *Thomp. Neg.* ¶ 208; *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216; *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558; *Brownback v. Frailey*, 78 Ill. App. 262; *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Yoakum v. Kroeger*, — Tex. Civ. App. —, 27 S. W. 953; *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274, 3 Am. Neg. Cas. 330; *Illinois C. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645; *Barbee v. Reese*, 60 Miss. 906; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653; *Oliver v. La Valle*, 36 Wis. 596; *Davenport v. Russell*, 5 Day, 145; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Cheeves v. Lanielly*, 80 Ga. 114, 4 S. E. 902; *Gaskins v. Atlanta*, 73 Ga. 746; *Bigelow, Torts*, pp. 311-316; *Life Asso. of America v. Waller*, 57 Ga. 533.

Beck, J., delivered the opinion of the court:

Evidently, from the allegations in the petition in this case, the plaintiff seeks to show a cause of action arising out of the tortious homicide of her husband. We do not think that, when all the allegations are considered, it is made to appear that the defendants committed any tortious act which has any causal relation to the death of the plaintiff's husband. However odious such a conspiracy as that charged upon the part of the defendants may have been, and however reprehensible their conduct, the resulting product of the alleged conspiracy was not a crime under the Code of Georgia. It was a letter which subsequently went into the hands of the plaintiff's husband, and after the reception of it he took an overdose of some narcotic or drug, from the effects of which death ensued. But we do not think that it can be charged, so as to withstand a general demurrer, that the letter which was written to and received by the decedent was the cause of the unfortunate man's act in taking the drug. We say that such a fact cannot be so charged as to withstand a general demurrer. Of course, such a charge can be put into words, and the words can be made a part of the petition, and they may be so formulated as to make a clear, distinct statement alleged to be a fact; the idea at the time of stating it, in the mind of the pleader, may be called a fact,

and may be so stated that it could be said of it that it was well pleaded, and therefore that the rule that all facts well pleaded should be taken as true should be applied. But it is not unusual that, when some statement which is insisted upon as a statement of fact is contrary to natural law and universal experience, it is held to be demurrable. For instance, in the case of *Southern R. Co. v. Covenia*, 100 Ga. 46, 40 L.R.A. 253, 62 Am. St. Rep. 312, 29 S. E. 219, where it was alleged that a child one year eight months and ten days old was capable of rendering services to its parent of the value of \$2 per month, it was held as a matter of law that a child of the tender years alleged was without earning capacity. And so in this case, when it is charged that the letter alleged to have been written by the defendants would, when read by the decedent, naturally result in a certain state of mind upon the part of the decedent, and that this "was known" by the defendants, we are prepared to hold that this was not such a statement of fact as will withstand a demurrer. What is termed fact is, after all, in such cases merely a conclusion of the pleader, though it is set forth as fact and put in the place of a fact among other facts joined together in laying the foundation of the plaintiff's case. While the state of mind produced in the decedent, and as a result of which it is charged that he took the fatal potion, may be to some extent traceable to the reading of the letter, it cannot be said to be the legal and natural result of the act of the defendants. It must be borne in mind that there was nothing said in the letter which could bring the writers of it within the category of those who advise or counsel one to commit a specific act or to take a certain line of conduct looking to the termination of the life of the one counseled, as in those decisions dealing with cases of persons advising, aiding, or abetting another to commit suicide, and holding that the one so advising or abetting may be convicted of murder, whether he be absent or present at the time of the suicide. The writers of the letter now under consideration, which it is charged had such direful consequences, did not advise or counsel the plaintiff's husband to take a drug or narcotic, nor did they advise or counsel him to commit suicide. If they had advised him to commit suicide, and he had then taken the drug with suicidal intent, the case of the defendants might have fallen within the class of cases above referred to. 47 L.R.A. (N.S.)

But the plaintiff in this case, in the absence of any word or statement in the letter showing the intent of the writers thereof, charged that they did it with the intent to produce a certain mental effect, and that they knew what effect it would have. It is true that juries are called upon frequently to say what intention existed in the minds of a person in performing certain acts, but that is where the person whose intention was sought had performed some act the natural result of which could be foreseen. Whoever uses a gun and shoots another, inflicting a wound from which death results, is presumed to have intended the death of the one who is shot. But in such a case there is a natural causal connection between the shooting and the death, and the one who does the act is presumed to have intended the natural consequences thereof. But we do not think it can be said that anyone could know that the effect of a letter containing a request for the person to whom it was addressed to resign from a certain position, and advising him to make no inquiry as to the reasons for the demand, would be to cause him to adopt any particular line of conduct, whether the person receiving the letter was sane or insane. If the defendants in this case were guilty of the tortious homicide of the decedent, they were guilty of murder, because the homicide was committed with the circumstances all indicating malice aforethought. But does anyone believe for an instant that the defendants should be held to be guilty of murder under the statutes of Georgia, under the facts alleged in this petition, as in the case of one who aids and abets and counsels a suicide, where suicide upon the part of the one advised and counseled follows? Suppose that a grand jury should return an indictment charging A with the offense of murder, for that A, being the son of B, who was a wealthy man, did, for the purpose of causing his father's death, knowing that the latter was of a nervous and excitable temperament, and that he loved his son even in excess of the usual measure of paternal affection, and that it would break his heart should the son commit any act that was dishonorable or which exposed the son to public hatred or contempt, had written a letter to his father, threatening at once to begin a career of notorious shamelessness and, knowing that this letter would cause such a shock to the father as to result in his immediate death, had caused it to be delivered into the hands of his father, with intent that

it should cause the father's death, and that the father upon reading it had immediately died of a broken heart, and that all this was done with malice aforethought, contrary to the laws, etc. Would this court hold for an instant, in case the judge of the trial court should overrule a demurrer to such an indictment, that the judgment should be permitted to stand, for that all facts well pleaded are admitted, and that the facts here pleaded show a wrongful and malicious homicide? We think that this question answers itself, and answers it in the negative, and that the supposed case, legally viewed, is a close parallel to the case under consideration. I do not think that it could be successfully charged, so as to uphold an indictment, that A illegally and wrongfully pursued a course of conduct which was calculated to break the heart of B; that the breaking of the heart of B was the known and natural consequence of A's conduct; that B's heart did break as the result of A's conduct; that B then and there died; and that A had pursued that course of conduct with malice aforethought, intending to break B's heart; and that he was guilty of murder. Mere positiveness of the terms alleging the psychological results which we have set forth above would not prevent the court from holding, upon demurrer, that the results charged could not have been the known and natural results of the acts charged against the accused, although it might be different if it were charged that A had advised B to kill himself by shooting himself with a pistol or by taking poison. For there the accused would have been counseling and advising the commission of a physical act which it might be said would naturally and probably have tended to produce certain results. We are of the opinion that, in the present state of our knowledge concerning the laws governing the operation of the mind, it cannot be asserted that any particular state of mind would naturally result on the part of a person who received a communication from another person, or that the communication would have the effect of causing the person receiving it to perform any certain physical act, in the absence of suggestion, advice, or counsel that he should do that particular act.

Judgment reversed.

All the Justices concur, except Lumpkin, J., disqualified.

Fish, Ch. J., and Hill, J., concur in the judgment.
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ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. GEORGE J. SMITH, Appt.,
v.

D. L. BRAUCHER et al.

(258 Ill. 604, 101 N. E. 944.)

Charity — right of people to protect.

1. The people may prosecute a suit to prevent dissipation of the funds of an incorporated religious society, which constituted a public charity, without making all members of the society parties to the proceeding.

Same — church.

2. The maintenance of a church for the teaching and preaching of religious doctrines is a public charity.

Same — abandonment of church — application *cy prés*.

3. The court cannot, upon the abandonment of the use of church property purchased by funds donated by members of the society, and its attempted sale by the surviving members of the congregation, require the application of the proceeds *cy prés*, if no other organization or society exists which has the same purpose and religious belief as the society to which the property belonged.

(April 19, 1913.)

Note. — Disposition of property of church upon its dissolution.

For the general subject of enforcement of general bequest for charity or religion, see the notes to Hadley v. Forsee, 14 L.R.A. (N.S.) 49, and Buchanan v. Kennard, 37 L.R.A.(N.S.) 993.

The question of disposition of property upon a schism or division in a religious society is excluded, as it is treated in the notes to Mack v. Kime, 24 L.R.A.(N.S.) 692, and Ramsey v. Hicks, 30 L.R.A.(N.S.) 666. Cases of consolidation are excluded (see Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018), as are also the question of reverter to grantor, matters resting upon statute, and the special rights of pew owners. As to the disposition of church property which has escheated to the government, see Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792, 140 U. S. 665, 35 L. ed. 592, 11 Sup. Ct. Rep. 884, 150 U. S. 145, 37 L. ed. 1033, 14 Sup. Ct. Rep. 44, reversing 8 Utah, 310, 31 Pac. 436. As to the rights of pewholders, see the note to Aylward v. O'Brien, 22 L.R.A. 206. As to enjoining control of, use of, or interference with, church property, see the note to Duesel v. Proch, 3 L.R.A.(N.S.) 854.

Division among members.

For effect of statute providing for use of church property by both parties in case of

A PPEAL by relator from a decree of the Circuit Court for Logan County dismissing a bill filed to set aside a sale of real estate alleged to have been held as a charitable trust or to execute *cy près* the trust in the church property. Affirmed.

The facts are stated in the opinion.

Messrs. Kerr & Kerr, for appellant:

The church building and ground constituted a public trust for charitable uses, and the people, suing by the special state's attorney, have a title to maintain an action to prevent a breach of trust, or to restore the trust fund after it has been diverted.

Brunnenmeyer v. Buhre, 32 Ill. 183; Heuser v. Harris, 42 Ill. 425; Andrews v. Andrews, 110 Ill. 223; Alden v. St. Peter's Parish, 158 Ill. 631, 30 L.R.A. 232, 42 N. E.

392; Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; Taylor v. Keep, 2 Ill. App. 368; 5 Am. & Eng. Enc. Law, 925, 2 Perry, Tr. chap. 23, §§ 701, 707, 728, 730, 732, 733, 744, 746; 2 Story, Eq. Jur. 1163-1165, 1167; Jackson v. Phillips, 14 Allen, 539; Scott v. Stipe, 12 Ind. 74; Gaas v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446; Sears v. Atty. Gen. 193 Mass. 551, 79 N. E. 772, 9 Ann. Cas. 1200; Dexter v. Gardner, 7 Allen, 243; Minns v. Billings, 183 Mass. 126, 5 L.R.A. (N.S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593; Atty. Gen. v. Pearson, 7 Sim. 290; Chase v. Dickey, 212 Mass. 555, 99 N. E. 410; Drummond v. Atty. Gen. 2 H. L. Cas. 837, 14 Jur. 137; Hinckley v. Thatcher, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840.

a schism or division in the society, see note to Poynter v. Phelps, 24 L.R.A. (N.S.) 729.

No case has been found in which the court has approved the division of the funds of a church among the individual members upon its dissolution.

In *Re New South Meeting-House*, 13 Allen, 497, the court, in refusing a petition to dissolve a religious corporation and divide its property among its members, said: "Whether, in any state of facts, it would be reasonable or consistent with the principles by which a court of equity is governed to pass a decree that property held in trust by a corporation for pious and religious uses should be converted to the private use and profit of its members, we need not now determine."

In *Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc.* 212 Mass. 198, 98 N. E. 1045, Ann. Cas. 1913 C, 472, a case without the scope of this note, the court said: "It has been held that the majority of a corporation cannot sell church property and divide it among the members against the protest of a minority. The power of the court to authorize a sale for such a purpose is doubtful, and certainly would not be exercised except in an extraordinary case."

So, while it is not intended to consider the question of the rights of pew owners, it may be noted that it has been held that the court has no power to grant an application for the sale of church property, and direct its division among the pewholders, under a statute authorizing the court to order the sale of real estate of a religious corporation, "and to direct the application of the moneys arising therefrom, by the corporation, to such uses as the same corporation, with the consent and approbation of the court, shall conceive to be most for the interest of the society to which the real estate so sold did belong." The court said: "The trustees had no authority to distribute the property of the society among its individual members, or any class of them. Their duty was to preserve and administer it in the promotion of the purposes for which the corporation was created. 47 L.R.A. (N.S.)

The court could not, according to the statute, approve of a plan for any application of the moneys arising upon a sale, except one which was considered to be for the interest of the society, as an association which was to continue organized for the purposes of its creation." *Wheaton v. Gates*, 18 N. Y. 395.

Where a church was incorporated by special act, with a duration of twenty years, it was held that, upon the expiration of that time, the property became vested in the members of such church; but the question of division of the property did not arise in the case. *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316.

The doctrine of *cy près*.

The doctrine of *cy près* is often peculiarly applicable in disposing of the property of a dissolved church.

Thus, where property was given to the pastor and deacons of two churches of the same denomination, "the division and enjoyment thereof to be in peace and harmony between the said churches," upon one of the churches ceasing to exist, the fund of this church, under the doctrine of *cy près*, was directed to be paid to the pastor and deacons of the other church, which had been founded by the aid of the dissolved church and had many of the former members of that church. *Osgood v. Rogers*, 186 Mass. 238, 71 N. E. 306.

In *Goode v. McPherson*, 51 Mo. 126, where lots were conveyed to certain persons as trustees for the Methodist Episcopal Church South, and the members of such church, in trust, to erect a church building to be used as a place of worship, to be subject to the rules and regulations of said Church South, a house of worship was erected on the lots, but later it was torn down and the material sold. It was held that the court would take judicial notice that a very large and extensive ecclesiastical body of citizens exist in this country, known as the Methodist Episcopal Church South, and that their church property, and other property devoted to charitable purposes belonging to

Moneys raised for buying the land and erecting a church are presumed to be for religious purposes, and where there are numerous contributors to the fund, the declaration of one of the contributors long acted upon will be taken *prima facie* as a declaration of the purposes of the trust.

2 Perry, Tr. § 733; Atty. Gen. v. Clapham, 4 De G. M. & G. 591, 3 Eq. Rep. 702, 24 L. J. Ch. N. S. 177, 1 Jur. N. S. 505, 3 Week. Rep. 158; Re New South Meeting-House, 13 Allen, 497; Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521; Happy v. Morton, 33 Ill. 398; Atty. Gen. v. Pearson, 7 Sim. 290.

When the purposes for which a charitable trust is created fails, the court will

devise a scheme for carrying forward the purpose of the trust fund *cy près*.

2 Perry, Tr. 725, 728; Heuser v. Harris, 42 Ill. 425; Jackson v. Phillips, 14 Allen, 539; Atty. Gen. v. Harrison, 101 Mass. 223; Atty. Gen. v. Clapham, 4 De G. M. & G. 626, 3 Eq. Rep. 702, 24 L. J. Ch. N. S. 177, 1 Jur. N. S. 505, 3 Week. Rep. 158; Atty. Gen. v. Berryman, 1 Dick. 168; Atty. Gen. v. Ironmongers' Co. 1 Craig & Ph. 208, 10 L. J. Ch. N. S. 201, 5 Jur. 356; Atty. Gen. v. Coopers' Co. 3 Beav. 29, 4 Jur. 572; 2 Story, Eq. Jur. 1165, 1176; Brown v. Meeting Street Baptist Soc. 9 R. I. 177; Sanderson v. White, 18 Pick. 328, 29 Am. Dec. 501; Osgood v. Rogers, 186 Mass. 238, 71 N. E. 306.

The public policy of our state has favored

them, were held in the names of trustees under deeds similar to the one under consideration, and that the purposes of the donor being the spread of the Gospel through the instrumentality of such Church, the heirs of the donor could not recover it.

The disposition by the court to an allied purpose, of the general fund of a church, would seem to be sustainable purely under the doctrine of *cy près*, as thus devoting the fund to a purpose as nearly allied as possible to that contemplated by the donors. And such would seem to be the effect of the case next cited, although it occurred in New York, where at that time (1878) the doctrine of *cy près* did not exist. It may be, however, that the court had in mind the principle that a trust will not be allowed to fail for want of a trustee, but such principle would seem to be inapplicable to the case. In Re Congregational Church, 6 Abb. N. C. 308, on the dissolution of a Congressional church corporation in a certain village, it was held that its surplus funds, derived from interest on legacies which it was to receive so long as it withheld communion and fellowship from all who upheld slavery or the use of intoxicants, etc., should be paid over to the American Congregational Union of New York as most in harmony with what the contributors would have expected had they foreseen the event, rather than to a new Congressional society in the village, organized partly for the purpose of receiving such surplus, or to a local Reformed Dutch Church with which most of the members of the dissolved church had affiliated, such Dutch Church not refusing fellowship to those using intoxicants.

It will be observed that in PEOPLE EX REL. SMITH v. BRAUCHER the case was dismissed, as there was no closely allied purpose for the exercise of the *cy près* doctrine, and the court not having authority to exercise the prerogative power of a sovereign.

Construction of language of gift.

Some of the cases are apparently decided on the construction of the language of a
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gift, and in such cases it would not seem necessary to invoke the doctrine of *cy près*.

In Re Immanuel Presby. Church, 112 La. 348, 36 So. 408, where there had been a bequest to "the several incorporated religious associations" (of a city) "propagating the teaching of religion according to the form of government and book of discipline of the Presbyterian Church," "to the end that the poor of said respective churches may be cared for," and after the fund was distributed among such associations one of them was dissolved, it was held that the remnant of the fund in the hands of such association should be delivered to the remaining associations.

Miscellaneous.

It may be noted that it has been held that the removal of a religious society to a new site, and renting the old site for its benefit, is not equivalent to losing "its visibility and ceasing to exist," within the terms of the deed by which the old site had been conveyed to trustees for it, even though such removal and renting was a breach of trust. Hügeli v. Pauli, 26 Ont. L. Rep. 94.

In Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385, it was held that a trustee-grantee was entitled to ejectment against the grantor's executor after the *cestui que trust*, a congregation, had ceased to hold services for fourteen or fifteen years, the deed of trust being of property to the Protestant Episcopal Church of a diocese for the consideration of \$10, "as well as the desire she, the said party of the first part, has for the encouragement and promotion of the interests of the Protestant Episcopal Church. . . . To have and to hold . . . in trust, nevertheless, for the use and benefit of . . . [a certain named religious congregation] its successors and assigns." The court said: "The trust was not limited to a particular corporation or organized church, so as to fail or terminate if such church or corporation became inactive. It appears that the congregation or mission has not been active for some years. But a

the building of churches, and has been zealous in protecting property dedicated to religious uses and trusts.

First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. 887; Adams v. First M. E. Church, 251 Ill. 268, 96 N. E. 253.

The state is interested in all public or charitable trusts or funds, and it can sue by the attorney general or state's attorney to correct breaches of trusts and perversion of trust funds.

2 Story, Eq. Jur. 1191, 1191a; Atty. Gen. v. Berryman, 1 Dick. 168; Atty. Gen. v. Ironmongers' Co. 1 Craig & Ph. 208, 10 L. J. Ch. N. S. 201, 5 Jur. 356, 2 Beav. 313; Harvard College v. Society for Promoting Theological Education, 3 Gray, 280; Atty. Gen. v. Old South Soc. 13 Allen, 474; Atty. Gen. v. Newberry Library, 150 Ill. 229, 37 N. E. 236; Barbour, Parties, 468, 661; Story, Eq. Pl. 222; Tudor, Charities & Mortmain, 161; 2 Perry, Tr. 732, 733, 744; Atty. Gen. v. Garrison, 101 Mass. 223; Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491.

The special state's attorney had all the power of the attorney general in instituting this proceeding.

Chicago, R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790; Mills v. Newberry, 112 Ill. 123, 54 Am. Rep. 213, 1 N. E. 156; Hunt v. Chicago & D. R. Co. 20 Ill. App. 282.

Members and trustees of a going church have no personal interest in the church property.

Adams v. First M. E. Church, 251 Ill. 268, 96 N. E. 253; Re New South Meeting-House, 13 Allen, 497; Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446.

The proviso in a statute requiring the net proceeds of a sale to be used for church or religious purposes is a denial of the right to sell church property and divide the money among the members or alleged members.

sluggish or dormant congregation is not beyond the possibility of being awakened to ecclesiastical activity; nor is it impossible that there may be a successor."

Where a church society dissolved, and the majority took some of the personal property for the use of a church they had formed in a neighboring town, it was held that this was a perversion of the charity, but that the minority could not replevy the property, as the old society was dissolved, and the remedy, if any, must be in equity. *McRoberts v. Moudy*, 19 Mo. App. 26.

In *Gumbert's Appeal*, 110 Pa. 496, 1 Atl. 437, where for a nominal consideration property was conveyed to two church societies of different denominations, the deed stating that they were "to have and to hold said piece of land for the only use and

First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. 887.

Messrs. Humphrey & Anderson and King & Miller, for appellees:

A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature.

Crerar v. Williams, 145 Ill. 643, 21 L.R.A. 454, 34 N. E. 467; *Re Graves*, 242 Ill. 217, 89 N. E. 978; *Atty. Gen. v. Federal Street Meeting-House*, 3 Gray, 50; *Old South Soc. v. Crocker*, 119 Mass. 22, 20 Am. Rep. 299; 1 *Bouvier's Law Dict.* 223; 1 *Rapalje's Dict.* 198.

Where the subject of a trust is a contract, not a gift, the use will not be a charity, and where the gift is for the benefit of particular individuals, and not for an indefinite number, it is not a charity.

3 Am. & Eng. Enc. Law, 133; *Perry, Tr.* § 710; *Russell v. Allen*, 107 U. S. 172, 27 L. ed. 400, 2 Sup. Ct. Rep. 327; *Old South Soc. v. Crocker*, 119 Mass. 23, 20 Am. Rep. 299.

Unless a charity is involved, the attorney general is not a proper party.

Atty. Gen. v. Hewer, 2 Vern. 387; *Atty. Gen. v. Soule*, 28 Mich. 153; *State v. Elliston*, 4 Baxt. 99; *Perry, Tr.* § 732.

A person cannot properly sue for wrongs that do not affect him.

15 Enc. Pl. & Pr. 468; *Dix v. Mercantile Ins. Co.* 22 Ill. 272; *Larned v. Carpenter*, 65 Ill. 543; *Baxter v. Baxter*, 43 N. J. Eq. 82, 10 Atl. 814; *Clark v. Evangelical Soc.* 12 Gray, 17.

Corporations aggregate have at common law an incidental right to alienate their property unless some positive law exists to the contrary.

Angell & A. Priv. Corp. chap. 5, § 187;

purpose of a church and churchyard and burying place and for supplies of the Gospel, against me, . . . my heirs, and assigns forever, except the rights of privileges above mentioned, whereto said piece of land is appropriated only," and a church was erected and later abandoned, but part of the property continued to be used for burial purposes, it seems to be held that part of those who had relatives or friends buried there could not convey the property to a new cemetery corporation formed by themselves, as against others who had relatives or friends buried there.

Miller v. Riddle, 227 Ill. 53, 118 Am. St. Rep. 261, 81 N. E. 48, is sufficiently dealt with in *PEOPLE EX REL. SMITH v. BRANCHER*. B. B. B.

2 Kent, Com. 281; Colchester v. Lowten, 1 Ves. & B. 226, 12 Revised Rep. 216.

It is against the public policy of this state to allow corporations to hold real estate beyond what is necessary for the transaction of the business or specific corporate purposes of such corporations.

First M. E. Church v. Dixon, 178 Ill. 271, 52 N. E. 887.

In this state the property belongs to the congregation so long as the corporation exists, and when it ceases to exist the property belongs to the donors or their heirs.

Dubs v. Egli, 167 Ill. 514, 47 N. E. 766; Brunnenmeyer v. Buhre, 32 Ill. 183; Calkins v. Cheney, 92 Ill. 477.

A charter of a corporation is a contract, and cannot be changed by the legislature (and this holds true of a statute, except as to the power retained by the legislature to amend), under the Constitution of the United States.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

Upon the incorporation of a voluntary religious society the title to the property owned by the society vests in the corporation.

Hurd's Rev. Stat. chap. 32, § 41; Dubs v. Egli, supra; Zion Church v. Mensch, 178 Ill. 225, 52 N. E. 858.

The property of a religious corporation may be sold and transferred when directed by the congregation, church, or society, etc.

Hurd's Rev. Stat. chap. 32, § 43; Zion Church v. Mensch, 178 Ill. 225, 52 N. E. 858; Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018.

A religious society or corporation may be dissolved by abandonment, and when so dissolved the title to the property, after the payment of debts, reverts to the donors or their heirs.

Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927; Miller v. Riddle, 227 Ill. 53, 118 Am. St. Rep. 261, 81 N. E. 48; Presbyterian Church v. Venable, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836.

In suits in chancery all persons who are legally or equitably interested in the subject-matter and the result of the suit must be made parties.

39 Cyc. 608, 613, 614; Green v. Grant, 143 Ill. 61, 18 L.R.A. 381, 32 N. E. 369.

In suits involving title to church property the members are necessary parties.

Dubs v. Egli, 167 Ill. 514, 47 N. E. 766.

Cartwright, J., delivered the opinion of the court:

George J. Smith, special state's attorney of Logan county, filed the bill in this case in the circuit court of said county in the name of the people, asking the court to set 47 L.R.A. (N.S.)

aside a sale of real estate, alleged to have been held as a charitable trust by the First Universalist Society of Lincoln, to George D. Corwine, Jr., or if the sale should be held valid, the trustees should be required to account for the proceeds, and, if it was found impracticable to longer continue the trust under the control of the said society, a scheme should be devised to execute it *cy près*. The society, and its trustees, and the parties claiming title under the sale, were made defendants. The bill was answered, and the issues were referred to a special master in chancery, who took the evidence and reported his conclusions that the First Universalist Society of Lincoln was an independent corporation not affiliated with the general Universalist organization or Universalist Church, and that there was no evidence as to how the money with which the property was purchased was accumulated. His legal conclusions were that the proceeds of the sale were not impressed with any trust, and the people of the state of Illinois had no interest in them. The court heard the cause on exceptions to the report, overruled the exceptions, and made findings that the sale was ordered at a regular meeting of the members of the society, that the people had no interest which would entitle them to prosecute the suit, and that the members of the society who were not parties were necessary parties to the suit. The bill was dismissed and an appeal taken.

The First Universalist Society of Lincoln was formed as early as the year 1867. The society adopted a constitution, which stated its objects and the basis of the religious faith of its members, and provided that any person, by assenting to the confession of faith, might be elected to membership by a majority of votes at any meeting of the society or of the board of trustees. Four lots in the city of Lincoln were purchased for \$800, which was raised by donations. A church building was erected on the lots with funds raised in the same manner, and was dedicated on September 11, 1867. A parsonage for the residence of the minister was also erected on the property in 1873, and on May 1st of that year the lots were conveyed to the trustees of the First Universalist Society of Lincoln. On April 16, 1883, trustees were elected and a certificate of incorporation was filed for record on April 23, 1883, so that the society then became incorporated under the statute. On August 1, 1887, the property had practically ceased to be used for the purposes of the society, and the church was then rented for a business college, with a reservation in the lease that religious services might be held in the

church. The parsonage was afterward rented for a residence. Since 1887 the property has been occupied for secular purposes, and has not been devoted to the uses for which it was acquired or for which the church and parsonage were built. It was never assessed for taxes until 1895, when it was put on the tax list, and the trustees paid taxes until 1898, when religious services were held in the building one Sunday evening. The representation was then made by the trustees to the board of review that the property was church property, and the board of review struck it from the tax list, after which it was not assessed nor taxed. On May 10, 1906, the trustees voted to sell the property for \$12,000. On October 2, 1906, the price was reduced to \$8,000. There was some question about the conveyance to the trustees, and the legal title was quieted by a decree in the circuit court in 1907, in pursuance of a bill filed by the trustees against the heirs of the grantors. By that decree the court found that the trustees held the legal title in trust for the use and benefit of the First Universalist Society of Lincoln, a religious corporation. On April 3, 1909, George D. Corwine, Jr., made a proposition to buy the property for \$7,000. A meeting was held on May 29, 1909, at which six persons were present, and thirteen others, living in ten different states, from Massachusetts to California, were represented by proxies. Those who were present or represented were the only living persons who had formerly been members of the decadent society. A resolution was adopted authorizing the sale of the property and a division of the proceeds equally among nineteen persons. There had been practically no use of the property for the uses of the society or for religious purposes for more than twenty years, during which it had been rented, and what became of the rents does not appear.

By the decree the court found that the people of the state of Illinois were not entitled to prosecute the suit, and that all the members of the society were necessary parties. We are unable to concur in these findings.

Courts of equity have jurisdiction to prevent a misuse or an abuse of charitable trusts (*Happy v. Morton*, 33 Ill. 398), and a gift for the support of churches or to pay the expense of teaching or preaching religious doctrines is a gift for a charitable use. It is universal that the public are not only admitted and churches are open to everybody, but all are invited and urged to attend. A gift for the promotion of public worship is therefore a public charity. *Andrews v. Andrews*, 110 Ill. 223; *Alden v. St. Peter's Parish*, 158 Ill. 631, 30 L.R.A. 47 L.R.A. (N.S.)

232, 42 N. E. 392; *Hoeffer v. Cloghan*, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527.

The attorney general or a state's attorney representing the public is charged with the duty of preventing a breach of a trust for a public charity, or to restore a trust fund after it has been diverted. *Atty. Gen. v. Illinois Agri. College*, 85 Ill. 516; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Atty. Gen. v. Newberry Library*, 150 Ill. 229, 37 N. E. 236. The earlier decisions of the supreme court of Massachusetts relied upon by appellees as holding that this was not a public charity were overruled in *Osgood v. Rogers*, 186 Mass. 238, 71 N. E. 306; *Sears v. Atty. Gen.* 193 Mass. 551, 79 N. E. 772, 9 Ann. Cas. 1200; and *Chase v. Dickey*, 212 Mass. 555, 99 N. E. 410. The special state's attorney had a right to file the bill.

When the members of an unincorporated religious society organize as a corporation under the general law, the rights and interests of the individual members in the property are thereby transferred to the corporation. The title to church property is in the corporation, and neither the trustees nor members have any beneficial ownership or personal or private interest in the property. *Happy v. Morton*, supra; *Adams v. First M. E. Church*, 251 Ill. 268, 96 N. E. 253. The First Universalist Society of Lincoln being a corporation, it was not necessary to make the members parties.

The purposes declared by the constitution of the First Universalist Society of Lincoln, and the use of the property for such purposes, had long been abandoned when the sale was made, and it is impossible to apply the property to the specific uses so declared and for which the church and parsonage were built. If the property could still be devoted to such uses, a court of equity would interfere, at the suit of a minority of the members, to prevent a perversion of the trust and to apply the property to its uses; but that cannot be done, and every living person who was a member has joined in disposing of the property.

The law is that upon the dissolution of a charitable corporation the title to its property reverts to the original donor or his heirs (*Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927), but here the property was not given to the society, but was purchased with donations of money from individuals. In *Miller v. Riddle*, 227 Ill. 53, 118 Am. St. Rep. 261, 81 N. E. 48, where religious services had been abandoned for about fifteen years and all meetings of the society had ceased, it was held that the society might be regarded as dissolved and the trust fund reverted to the heirs of the

donor, although there were still in the vicinity eight women and three men who had been members of the church. However, we need not consider any question concerning the right to the proceeds of the sale, unless they can be lawfully devoted to some public charity other than that represented by the First Universalist Society, which has abandoned the trust.

In the case of a charitable trust, if the plan of the donors cannot be carried out as made, but can be carried out in substance, a court of equity will execute the trust *cy près*. The *cy près* doctrine is illustrated by the case of *Mason v. Bloomington Library Asso.* 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603, where a new association could be substituted for the purpose of carrying the trust into execution, and in other similar cases. The doctrine is that it is immaterial that the intention of the donor cannot be carried into exact execution, if it can be done substantially according to the original intention.

While that is the rule, we do not have nor exercise the prerogative powers exercised by the courts in the early English cases, where the courts selected uses not corresponding with the intention of the donor, nor carrying out his intention. In this case it does not appear, by the bill or otherwise, that there is any object so nearly answering the general purpose of the donors to the purchase of the lots and the erection of the church and parsonage for the promotion of the particular tenets and principles stated in the constitution of the society as would enable us to apply the fund under the *cy près* doctrine. No other church organization or religious society or charity is suggested as adopting the same principles or religious beliefs as this independent Universalist society. When a complainant alleges that a trustee has abandoned the execution of a charitable trust, and asks a court to provide for its execution *cy près*, the bill ought also to allege the existence of some society, corporation, or agency through which it can be done, or propose some plan which will substantially effectuate the intent of the donors. That was not done in this case. An application of the fund to any other charitable use than a religious one would not be in accordance with the intentions of those who made donations to the society, so that application of the fund would necessarily be limited to some public religious charity. To give the fund to some religious organization or church inculcating religious beliefs differing from those of the Universalist society would not be carrying out the intentions of the donors; and, as there appears to be no feasible method of applying

the fund to a public charity in accordance with the intention of those who contributed to it, the court was powerless to grant relief.

The decree is affirmed.

Petition for rehearing denied June 5, 1913.

KENTUCKY COURT OF APPEALS.

EAST TENNESSEE TELEPHONE COMPANY, Appt.,
v.

SARAH PARSONS.
(Two Cases.)

(154 Ky. 801, 159 S. W. 584.)

Highway — telephone wire — frightening horse — liability.

A telephone company which has the right to maintain its line along a highway is not liable for injury caused by frightening the horse of a traveler by bright new coils of wire temporarily placed between the traveled part of the highway and the fence, to be used in stringing a new line on its poles, although they remain where placed for several days before the accident occurs.

(September 25, 1913.)

APPEALS by defendant from a judgment of the Circuit Court for Mercer County in plaintiff's favor and from a judgment dismissing its petition for a new trial, in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. First judgment reversed. Second judgment affirmed.

The facts are stated in the opinion.

Mr. E. H. Gaither, for appellant:

Defendant was in the legitimate use of the highway.

Cumberland Teleph. & Teleg. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955.

And in the performance of a duty required by law.

Delaware & A. Teleg. & Teleph. Co. v. Delaware, 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677; State ex rel. American U. Teleg. Co. v. Bell Teleph. Co. 36 Ohio St. 296, 38

Note. — As to the liability of a public service company for frightening horses by construction apparatus in street, see note to *Simonds v. Maine Teleph. & Teleg. Co.* 28 L.R.A.(N.S.) 942.

No case other than EAST TENNESSEE TELEPH. CO. v. PARSONS has passed on this identical question since the preparation of the note referred to.

Many other questions arising from injuries due to frightening horses are treated

Am. Rep. 583; *People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co.* 19 Abb. N. C. 466; *State ex rel. Gwynn v. Citizens' Teleph. Co.* 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1088.

Being in the legitimate use of the highway, and in the performance of a duty imposed upon it by law, the defendant is not responsible for plaintiff's accident.

Simonds v. Maine Teleph. & Teleg. Co. 104 Me. 440, 28 L.R.A. (N.S.) 942, 72 Atl. 175; *Farrell v. Oldtown*, 69 Me. 72; *Winship v. Enfield*, 42 N. H. 197; *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407; *Thompson v. Dodge*, 58 Minn. 555, 28 L.R.A. 608, 49 Am. St. Rep. 533, 60 N. W. 545, 12 Am. Neg. Cas. 181; *Steiner v. Philadelphia Traction Co.* 134 Pa. 199, 19 Atl. 491; *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048; *McCord v. Ossining*, 10 N. Y. S. R. 407; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873; *Macdonald v. Yarmouth Twp.* 29 Ont. Rep. 259; *Lane Bros. Co. v. Barnard*, 111 Va. 680, 31 L.R.A. (N.S.) 1209, 69 S. E. 969; *Norfolk & W. R. Co. v. Gee*, 104 Va. 806, 3 L.R.A. (N.S.) 111, 52 S. E. 572; *Davis v. Thompson*, 134 Mo. App. 13, 114 S. W. 550; *Elam v. Mt. Sterling*, 132 Ky. 657, 20 L.R.A. (N.S.) 512, 117 S. W. 250; *Southwestern Teleg. & Teleph. Co. v. Doolittle*, — Tex. Civ. App. —, 138 S. W. 415.

The coil of wire was not such an object as was reasonably calculated to frighten a horse.

Piollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496; *Nichols v. Athens*, 66 Me. 402; *Cushing v. Bedford*, 125 Mass. 526; *Cook*

v. Montague, 115 Mass. 571; *Bemis v. Arlington*, 114 Mass. 507; *Kingsbury v. Dedham*, 13 Allen, 186, 90 Am. Dec. 191; *Keith v. Easton*, 2 Allen, 552; *Berg v. Auburn*, 140 Wis. 492, 122 N. W. 1041.

Mr. C. E. Rankin for appellee.

Carroll, J., delivered the opinion of the court:

The horse drawing the vehicle in which the appellee, Mrs. Sarah Parsons was riding on one of the public roads of Mercer county, became suddenly frightened at coils of telephone wire lying on the ground in the right of way, but outside of the traveled part of the road, and, turning sharply around, upset the vehicle. When the vehicle was overturned, Mrs. Parsons, who was thrown out, received severe injuries, and to recover damages therefor, brought suit against the telephone company, which resulted in a verdict in her favor for a substantial sum.

One of these appeals is prosecuted by the company to obtain a reversal of the judgment against it, and the other appeal is prosecuted from a judgment of the Mercer circuit court dismissing a petition of the telephone company, in which it sought a new trial in the negligence case upon the ground of newly discovered evidence. As we have reached the conclusion that the judgment in the negligence case must be reversed, it will not be necessary to again refer to the suit seeking a new trial, except to say that the petition did not state sufficient reasons to authorize the granting of a new trial, and therefore the judgment of the lower court dismissing it was correct.

There is no substantial issue made by the evidence in the negligence case, and the facts may be briefly stated as follows: The horse drawing the vehicle was an ordinary gentle

in notes referred to in the Index to L.R.A. Notes, title "Horses."

Attention is called also to the case of *Bromley v. Langhorne*, 144 Ky. 761, 139 S. W. 949, where a driver whose horse became frightened in passing near where a steam shovel was in operation subsequently attempted to pass the place, and, upon his horse becoming frightened, turned him over to a stranger to hold and went to those operating the shovel and requested them to cease operations until he got by. The shovel started up on his return to his horse, and the horse became frightened and injured himself by coming in contact with the cars attached to the shovel. The court left it to the jury to say whether the plaintiff had been guilty of contributory negligence in his management of the horse, and held, further, that if the defendants knew that the horse was frightened, or by the exercise of ordinary care could have known the same in time to have prevented injuring

him, it was their duty to use reasonable care to prevent the injury by stopping the shovel and the train, and if they had such knowledge and failed to stop the shovel and the train, they were liable. The action in this case was against the contractors who were operating the shovel and the railroad company.

See also the case of *Chandler v. Illinois C. R. Co.* 43 L.R.A. (N.S.) 113, and reference note appended thereto, in which a railroad company whose section men were engaged in removing decayed ties from the roadbed and throwing them down the embankment upon which the track was laid, into a depression between the track and an adjoining highway, was held not liable for injury due to the frightening of a horse passing on the highway, by a tie thrown into the depression in the usual and customary manner, the work not being calculated to frighten horses of ordinary gentleness.

W. A. E.

horse, and at least two or three times shortly before the day on which the accident occurred had been driven by the telephone wire at which it scared, without being frightened by it. The telephone company owned and operated a telephone line along the road on which Mrs. Parsons was traveling; the poles being in the right of way, but outside of the traveled part of the road. Desiring to put in a new line, it distributed along the road coils of wire to be used in erecting this line. The wire at which the horse frightened consisted of two coils placed one on top of the other; each of the coils being about 3 inches high, both of them together being about 6 inches in height, and the diameter of the coils being probably 24 inches. The wire was new and bright colored, such as is usually used by telephone companies, and the coils were located some 2 or 3 feet outside of the traveled way of the road, but on the right of way of the road, and between the traveled part and the fence on the line between the road and the adjoining landowner, and had been there several days before the accident. When the wire was distributed along the line, the company commenced to put up the string in which it was to be used, and the work, although in progress, had not reached the point where the accident occurred, and hence this wire had not been moved from the place it was first put.

We may assume, as there is no issue to the contrary, that the telephone company had the legal right to erect its poles and wires on the right of way of this road, and this right, of course, included the right to maintain the telephone lines in repair, and to string new lines of wire on its poles, and to distribute wire along the road for this purpose. We may further assume that the horse being driven to the vehicle was a reasonably gentle horse, and that Mrs. Parsons was not guilty of any negligence that contributed to her injury.

With these facts assumed, as they may well be from the evidence, it is the contention of counsel for Mrs. Parsons that it was a question for the jury to say whether the wire, located as it was, was such an obstruction in the highway as was ordinarily calculated to frighten a reasonably gentle horse, and that when the jury was properly instructed, as it was, that, if "they believed from the evidence that the coils of telephone wire described in the evidence were placed or left on the right of way of the turnpike at the time and place mentioned in the evidence, and allowed to remain an unreasonable length of time, and that said coils of wire so placed and left were ordinarily calculated to frighten and make unmanage-

able a reasonably gentle horse when driven along said pike by one exercising ordinary care, and while plaintiff was being driven along said pike in a surrey drawn by a reasonably gentle horse, said horse became frightened at said coils of wire so placed and left, and thus became unmanageable, causing said horse to turn suddenly around and overturn said surrey, thereby throwing plaintiff out upon the ground and stones so as to injure her, the law is for the plaintiff, and you will so find," the court should not interfere with the finding upon the question of fact submitted in the instructions.

On the other hand, the argument in behalf of the telephone company is that, in placing and leaving these coils of telephone wire in the manner and under the circumstances stated, the company was not guilty of actionable negligence, although they may have frightened a reasonably gentle horse, and therefore the jury should have been directed to return a verdict in its favor.

Upon the facts shown by the record, there are two questions presented for our consideration. First, did the placing of the wire in the manner and for the purpose stated constitute a nuisance or an obstruction of the highway, within the meaning of the rule of law that holds persons liable for placing or maintaining a nuisance or obstruction in a highway? Second, if the placing of the wire as indicated was not a nuisance or obstruction, did the fact that it was permitted to remain there for several days have the effect of converting what was originally a lawful act into an unlawful one?

There is no disagreement in the authorities that all parts of a public road are set apart for public use, and that it is actionable negligence to unlawfully or without right place any nuisance or obstruction in a highway that interferes with its use by the public, or that results in injury to any traveler rightfully using the road. It is also well settled that an unlawful or unauthorized obstruction or nuisance on the right of way of a public road, although it may be outside the traveled part of the road, and so located as not to interfere with ordinary travel, may be the basis of an action, if it is calculated to frighten a reasonably gentle horse. There is, however, quite a difference between the liability for placing or maintaining a nuisance or obstruction in the traveled part of the road, and placing or maintaining it outside of the traveled part, but on the right of way, as it is not permissible for persons not authorized so to do to place any sort of obstacle in the traveled part of a road that will obstruct

or interfere with its use, while in many instances it is entirely legitimate to place and permit to remain on the side of the road outside of the traveled part objects which, if placed in the traveled part, would constitute an obstruction. For example, abutting property owners and others who have acquired the right to do so may place and maintain for temporary and even permanent purposes many objects and things on the right of way outside of the traveled part of the road, free from liability for obstructing the highway.

It is further manifest that there should be a marked distinction between the rights and liabilities of those who have the right to use the right of way outside of the traveled part for the purpose of placing temporary or permanent objects or obstructions therein, and those who have not the right to obstruct in any manner or for any time any part of the road. It also follows that the right to the use of the right of way for purposes other than travel carries with it the right to do many things that a trespasser, or what might be called an intruder, would not have the right to do, and, in determining whether or not an object or thing placed in the right of way may be the subject of an action for damages, it is always important to find out whether it was put there by a person having the right to do so, or by a trespasser or intruder. For example, a farmer desiring to build a fence might safely put on the right of way outside of the traveled part the material he intended to use in erecting the fence, and so an abutting property owner might, without liability, place on the right of way so as not to obstruct the traveled part of the road material to be used in the erection of a building. Likewise telegraph, telephone, electric light, and other public service corporations that have secured the right to do so, may place poles, wires, tool boxes, and other implements necessary in the construction or repair of their work, on the right of way in such a manner as not to interfere with travel. Indeed, it is scarcely possible to travel any of the principal roads in the state without seeing frequently on the side of the road in the right of way material and implements being used or intended to be used by abutting property owners or public service corporations. Nor does the mere fact that many, or perhaps all, of the things so placed in the right of way, may be calculated to frighten reasonably gentle horses, create any liability on the part of the persons so placing them, if the act is otherwise free from negligence.

It may therefore be said that whether liability attaches to a person who places objects and things on the side of a road

depends largely upon whether or not he had the right to do so, rather than on the character or shape or kind of object that was placed, as a person who had the right to do so might, with complete freedom from liability, put an object or thing on the side of the road which, if put there by a person not having the right, would be a nuisance.

It is also very evident, and would seem to necessarily follow from what we have said, that the sole fact that an object on the side of the road is calculated to frighten a reasonably gentle horse is not the standard by which the liability of the party placing it is to be measured, in an action by the person who was injured by the fright of the horse. A rule like this would subject to continual apprehension and liability abutting owners and others having the right to place objects on the side of the road, as it is a well-known fact that reasonably gentle horses at times become greatly frightened at objects that they see and pass without notice or fear day after day.

It is also manifest that it would not do to say that, merely because there was something new or unusual about the appearance of an object placed on the side of the road by some person having the right to do so, it should be treated as likely to frighten a gentle horse, and that the party placing it subjected himself to liability merely because of the newness or novelty of the thing. Modern inventions and discoveries are daily bringing into practical use many new implements and devices and many new kinds of material, and people are not to be subjected to liability merely because, in the conduct of their business, they use new and unusual things.

It is now a matter of common occurrence to see large bales of bright fencing wire, intended to be used by farmers in the erection of right of way fences, along the side of public roads, but because a horse might become frightened at a bale of wire, when he would pass unnoticed a pile of fence rails, furnishes no reason why the farmer using the wire should be subjected to greater liability than the farmer using the fence rails, and so the liability of the owner of an automobile or a motorcycle who leaves it standing by the side of the road should not be greater than the liability of the man who leaves a buggy or a wagon by the side of the road, although one vehicle might frighten horses much more than the other.

This line of reasoning, which we think sound, leads us to the conclusion that the telephone company, having, as it did, the right to erect its poles and string its wires along the right of way, did not incur any liability in placing, as it did, the coils of wire. This wire, although new and bright,

and in the right of way of the road, was the kind of wire commonly used by telephone companies, and there was nothing in the size or appearance of these coils to attract unusual attention.

To say that a telephone company in the erection of a new line must be subjected to liability because, in the progress of its work, it finds it indispensable to have coils of wire and other implements and material on the side of the road that may frighten reasonably gentle horses, would be to virtually deny telephone companies the right to carry on, in the ordinary way, their business, or else subject them to unreasonable expense and inconvenience in protecting every tool or implement or other thing that might at some time frighten some person's horse.

It is true, as argued by counsel for Mrs. Parsons, that the general rule in cases like this is that it is for the jury to say whether the thing complained of was calculated to frighten a reasonably gentle horse; but this does not mean that every time a horse becomes frightened at some object rightfully placed on the side of the road, the question must be left to the jury, or that, in every case in which the jury find that the object was calculated to frighten a reasonably gentle horse, the judgment must stand. It is only the right of the jury to pass on questions like this, when there is reasonable ground for difference of opinion, under all the circumstances, whether the object was lawfully or unlawfully placed where it was, and was of such size, shape, or appearance as would be reasonably calculated to frighten a horse. A horse might become frightened at any kind of a tool or implement of the simplest kind placed on the side of the road by a person having the right to so place and use it. It is a matter of common knowledge on the part of every person familiar with reasonably gentle horses, and especially old family horses, that they are likely to take fright at any time or place at the most trivial and unexpected things. Many of them scare every time they go by piles of rock on the side of the road, although they pass them day after day for months; they will at times scare at pieces of paper, planks, ponies, hogs, cattle, and other things that they see and associate with day after day, so that no person can tell what a horse will or will not take fright at, and therefore it would be out of the question to say that everything that a horse might scare at would furnish the basis of an action for damages.

In *Simonds v. Maine Teleph. & Teleg. Co.* 47 L.R.A.(N.S.)

104 Me. 440, 28 L.R.A.(N.S.) 942, 72 Atl. 175, the telephone company, in constructing its line, placed in the street near the sidewalk reels of lead pipe, 3 feet in length, and 4 feet in diameter, that frightened a horse being driven by. In holding that the company was not liable, the court said: "Having the right to erect and maintain its poles and string on them its wires and cables where it did in the street, the company had the concomitant right to use suitable appliances therefor, and in reasonably needful places. For the work of stringing on the poles the wires and lead pipes inclosing them, some kind of a reel was appropriate and needful, and it needed to be in the street in the line of the poles. There is no suggestion in the evidence that any other kind of a reel, larger, smaller, or of different shape or color, would have been less likely to frighten horses, or that it could have been so located as to be still serviceable and less startling to horses. . . . The reel and the lead pipe being otherwise lawfully where and when they were in the street, the mere fact that they were likely to frighten horses unaccustomed to them did not make their presence there unlawful. The consequences of the fright must therefore remain where they fell."

In *Lane Bros. Co. v. Barnard*, 111 Va. 680, 31 L.R.A.(N.S.) 1209, 69 S. E. 969, a horse became frightened at an engine being operated in the road by a person who had the right to operate it, and, in holding the owner of the engine not liable to the person injured by the fright of the horse, the court said: "Though machinery and the noises made in operating it are of such a character as to frighten horses, this alone does not impose a liability; therefore the defendant in this case, being in lawful occupation of the road with its machinery, and using it for a lawful purpose, was not responsible for the appearance of the machinery, nor for the noise or other occurrences usual in its operation. Injury alone is not sufficient to support an action arising from the alleged negligence of the defendant. There must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself, he cannot be made liable in damages for the resulting injury, unless he does the act at a time or in a manner or under circumstances which will render him chargeable with a want of proper regard for the rights of others."

Other instructive cases generally supporting the principles announced are *Elam v. Mt. Sterling*, 132 Ky. 657, 20 L.R.A.(N.S.)

512, 117 S. W. 250; Cincinnati R. Co. v. Com. 80 Ky. 137; Piolet v. Simmers, 106 Pa. 95, 51 Am. Rep. 487; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Loberg v. Amherst, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048; Kingsbury v. Dedham, 13 Allen, 188, 90 Am. Dec. 191; Lynn v. Hooper, 93 Me. 46, 47 L.R.A. 752, 44 Atl. 127, 6 Am. Neg. Rep. 535.

Did the fact that the wire was left at the place where it was put for several days convert into an actionable wrong that which was lawful in its origin? We think not. As stated, the evidence shows that work had been commenced in stringing the wire in connection with which the coils in question were to be used, but had not progressed to the point where this wire was located. Of course, these two small coils of wire could have been easily and conveniently moved and replaced at any time, or immediately before being used; but, considering the size of these coils of wire, it cannot fairly be said that the mere fact that they were permitted to remain on the side of the road for the time mentioned created a liability that, except for this, would not have existed. There was nothing in the appearance or size of these coils of wire that would cause a person of reasonable prudence to anticipate that they would frighten horses. Of course, what is a reasonable time in matters like this must depend largely on the nature and quality of the thing, and on how long it has been permitted to remain where it was put, and the right of the person to locate it; but when a telephone company, in stringing its wires, places, as it has the right to do, small coils of wire along the road, to be used as the work progresses, of such a size, nature, and quality as not to make it actionable negligence to place them by the side of the road, it would be extending beyond all reasonable limits the doctrine of liability to say that, because the wire was left a day or a week longer than it might have been, the company is liable, when it would not have been if it had used the wire on the day or the day following the day it was placed there.

Upon the whole case we are of the opinion that the jury should have been directed to find a verdict for the telephone company, and, if there is another trial, and the evidence is in substance as it was on the last trial, the court will so instruct the jury.

The judgment in the damage case is reversed for proceedings in conformity with this opinion, and the judgment in the case seeking a new trial is affirmed.

47 L.R.A. (N.S.)

MISSISSIPPI SUPREME COURT.

R. M. ADAMS, Admr., etc., of T. B. Wier, Deceased, et al., Appts.,
v.

MRS. MINNIE YANCEY et al.

(— Miss. —, 62 So. 229.)

Descent — share of grandchild — deduction of father's debts.

Uncollectable debts due by a son who died in the lifetime of his father, to the latter, must be deducted in determining the amount which the son's children are entitled to take in the father's estate as representatives of the son.

(June 9, 1913.)

Note. — Descent and distribution: deduction of indebtedness owing to remote ancestor by predeceased immediate ancestors.

The reported cases which have considered the question under annotation show a decided conflict of opinion, and the weight of judicial opinion is opposed to *ADAMS v. YANCEY*. The question, according to the decisions, would seem to resolve itself into whether one becomes an heir by substitution or by representation, where the immediate ancestor has predeceased the remote ancestor; or in other words, do statutes which provide for succession in case of the death of an immediate ancestor cast the inheritance directly upon the heir, or does the heir inherit simply as his representative, and therefore become subject to such immediate ancestor's debts to the intestate's estate? There is another question which is really involved in the decisions, though perhaps not brought out, and that is, where a statute provides that, in the distribution of the intestate's estate, the heir shall take by representation, whether "representation" intends to do more than to indicate the fractional part to be taken, and not the ultimate share. Cases which sustain the decision in *ADAMS v. YANCEY* would seem to indicate that they would hold that such a statute should be interpreted as meaning that the ultimate share to be taken was indicated. And while some of the cases which oppose the decision in *ADAMS v. YANCEY* do not expressly state such to be a fact, they would seem to have interpreted such statutes as indicating merely the fractional part to which such heir would be entitled, and not as indicating the ultimate share after any debts which an immediate ancestor may have owed to the estate of the intestate have been deducted.

In *Earnest v. Earnest*, 5 Rawle. 213, which was a contest between five children and three grandchildren, children of a deceased child of intestate, the statute under consideration by the court provided that such grandchildren would inherit such share only as would have descended to the parent were

APPEAL by the administrator et al. from a decree of the Chancery Court for Tippah County holding exceptants entitled to a distributive share in the estate of T. B. Wier, deceased. Reversed.

T. B. Wier died intestate leaving four daughters and six children of his son, who had died about two years before. A final account was filed by R. M. Adams, the administrator of the estate of T. B. Wier, showing as part of the assets of the estate a note executed by the son some time prior to his death, in favor of the father, which was not paid, the amount of which and interest exceeded the distributive share of the son or his heirs; and asking that he be allowed to offset the claim of the heirs in their grandfather's estate with

the note due to the said estate from their father.

Mr. Thomas E. Pegram, for appellants:

The language of the statute, namely, "the share of the deceased parent," means that portion of the estate which such parent would have been entitled to had he been living at the time the property descended.

1 Cooley's Bl. Com. 4th ed. 607, 608; 24 Am. & Eng. Enc. Law, 378, 379; Scott v. Terry, 37 Miss. 65.

If R. A. Wier had been living at the time of the death of his father, T. B. Wier, the former's share in his father's estate, had he sought to participate therein, would have been chargeable with and

he living. The court said that the grandchildren took *per stirpes*, that is, not in their own right, but by representation, and so held that they must take the share which descended to them with all the burden with which it would have been charged had the parent been living.

At about the same time as the decision in the Earnest Case, it was held in Ilgenfritz's Appeal, 5 Watts, 25, that the grandchildren of an intestate take their share in the estate without deduction of their father's debts to the estate, where he dies before such intestate. The court stated that the grandchildren of an intestate take, by substitution, not through, but paramount to, their parents; that the law designates them as persons to take a title derived, not from the parent, but immediately from the intestate; that the property never was in the parent; consequently they did not inherit from him what he had not, and further said that if the administrators could come upon the fund in their hands as the representatives of the parent's creditor, it is obvious that all his other creditors might do the same,—a consequence not to be pretended.

This decision, as can be seen, was not in harmony with the Earnest Case, and was in effect overruled by later Pennsylvania decisions, and is included here because it is referred to in the succeeding Pennsylvania cases which follow the Earnest Case, as authority.

Thus, in M'Conkey v. M'Conkey, 9 Watts, 352, which held that, under the statute of 1833, upon the distribution of an intestate's estate a grandchild shall be charged with the indebtedness of its father to the intestate's estate, it was said: "Ilgenfritz's Appeal was decided without adverting to the statute of 1833, which declares that 'the issue of such deceased child, grandchild, or other descendant shall take by representation of their parents respectively such share only as would have descended to such parents, had they been living at the death of the intestate.' On this principle of representation, and not of substitution, had been decided Earnest v. Earnest, and the over-
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sight in Ilgenfritz's Appeal is one for which it is difficult to account. It is very plain that the construction put upon the statute in the present case is the proper one."

And in Hughes's Appeal, 57 Pa. 179, in holding that grandchildren take in the distribution of their grandfather's estate subject to such debts of their father to the intestate as were recoverable when the estate descended, the court said: "We are asked in this case to disaffirm the doctrine of M'Conkey v. M'Conkey, . . . and return to that of Ilgenfritz's Appeal. But we think the question is not now open upon original grounds [as] the case of Ilgenfritz itself overlooked the decision in Earnest v. Earnest. . . . We must take it now as settled beyond recall until the legislature chooses to alter the rule, that grandchildren whose father died before their grandfather, the intestate, take, not paramount to their father, but through him by representation, such estate only as he would have taken, had he survived the intestate."

The above Pennsylvania cases were criticized in Powers v. Morrison, *infra*, and it was said of the Hughes Case, *supra*, that the decision seems to have been rather upon the ground that the law had been settled than that the question had been correctly determined.

In Martin v. Martin, 56 Ohio St. 333, 46 N. E. 981, a contest between brothers and sisters of intestate, and children of a deceased brother, the intestate having left no widow or issue, it was held that the children of the predeceased brother took in a representative character, and subject to deduction of their father's debts to the intestate's estate. The statute governing this question provides: "If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate, of the whole blood, and their legal representatives." The court stated that the children, not being of the next of kin to the intestate, were entitled to share in the estate only by favor of the last clause of the paragraph, which admits them as legal representatives of their deceased father, who, if he had sur-

burdened by the amount due on the note in question.

Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559; 14 Cyc. 121 notes; 18 Cyc. 681 notes; *Norfleet v. Callicott*, 90 Miss. 221, 43 So. 616; *Hughes's Appeal*, 57 Pa. 179; *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630; *Head v. Spier*, 66 Kan. 386, 71 Pac. 834.

No property could justly descend to R. A. Wier, or his representatives or his assigns, until his debt to the estate was paid. If this is a set-off, it is certainly an equitable set-off.

34 Cyc. 724; *Hall v. Waddell*, 78 Miss. 16, 27 So. 936, 28 So. 831.

Messrs. Spight & Street for appellees.

vived, would have been of the next of kin. That it was admitted that if the father had survived the intestate, and had brought suit for the distributive share now demanded by his children, his debts could have been deducted, and so, from the representative character in which the children were admitted to participate with their uncles and aunts, it resulted that they participated subject to the burdens which the law would have imposed upon their principal.

And in *Head v. Spier*, 66 Kan. 386, 71 Pac. 833, a contest between the administrator of an intestate who died leaving no widow or issue, and grandchildren of a brother of the intestate, who at the time of his death was indebted to the intestate, it was contended that, upon the death of the intestate, his property descended at once and immediately to his then living heirs, and that they were not liable for any debts that their grandfather was owing the estate; that, upon the death of the intestate, his property did not descend to or through the grandfather of claimants, because he was dead, or to or through the father of claimants, for the same reason; that these heirs should not be made to pay the debts of their grandfather or the debts of their father; that, as such debts were not their debts, they were entitled to their share of the estate of the intestate free from such liability. The court said that this contention could not be sustained in view of the following provisions of the statute which covered the question, *viz.*: "If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leave no wife nor issue, the whole of his estate shall go to his parents." And "if one of his parents be dead, the whole of the estate shall go to the surviving parent; and if both parents be dead, it shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, or to either of them, and so on through ascending ancestors and their issue." The court stated that, while it was true that the presupposition in such statute, that the parents and those next in line of succession were still

Cook, J., delivered the opinion of the court:

There is but one question raised by this record we deem it necessary to consider, that is, Are the children of a son who died before his father died entitled to share in the distribution of their grandfather's estate, unaffected by any debts due by their father to their grandfather? We think this question must be answered in the negative.

Undoubtedly, the grandchildren of the deceased take by representation, and, in effect, stand in the shoes of their deceased parent. In *Hughes's Appeal*, 57 Pa. 179, it is said: "We must take it now as settled beyond recall . . . that grandchildren whose father died before their

living, was but a fiction of law, yet it is a fiction that gave to the children all the right they had to inherit from the intestate. That they took through their father, he through his father, and he in turn through the common ancestors of his father, the intestate. The ancestors of the intestate and the grandfather having taken the entire estate, the grandfather inherited his share subject to any equitable claim intestate's estate held against him. The father inherited through the grandfather subject to any equitable claim intestate's estate held against the grandfather or the father. That the present children can take no more than could have been taken by the grandfather or the father. They inherit and take exactly the same interest in the intestate's estate that the grandfather would have taken had he outlived the intestate, and they take it subject to the same conditions and equities that their grandfather would have taken it.

In addition to the above cases, which sustain the decision in *ADAMS v. YANCEY*, there is *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630, which is set forth in the principal case.

On the other hand, there are well-considered cases which hold that an heir takes in the distribution of a remote ancestor without deduction of any debt owing thereto by an immediate ancestor.

Thus, in *Destrehan v. Destrehan*, 4 Mart. N. S. 557, it was held that the share of a grandchild coming by representation to the succession of his grandfather should not be reduced by the amount of a debt due by the predeceased father to the grandfather.

And this decision was followed as authority in *Morgan's Succession*, 23 La. Ann. 290, a contest between brothers and a sister, and children of a predeceased brother, of the intestate, where it was held that such children's share in the intestate's estate should not be reduced by an amount owing to the estate by their father. In answer to the contention that, inasmuch as such children claimed a share in the estate not in their own right, but by representation of their father, they could have no greater

grandfather, the intestate, take, not paramount to their father, but through him by representation, such estate only as he would have taken, had he survived the intestate. In the distribution of the grandfather's estate, the grandchildren, therefore, take subject to the advancements made to their father, and to such debts from him to the intestate as were recoverable when the estate descended."

In *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630, the court said: "A note given by a son to the father is not, of itself, evidence of an advancement by the father. It is evidence of indebtedness by the son. The amount of the note may be recovered back from the son, either by the father in his lifetime, or by his per-

sonal representatives after his decease; but no part of an advancement can be recovered back. The very object of the father in taking the note should be presumed to be to avoid the inequality which would result if his personal estate, at his death, should be insufficient to give to each of his other children an equal sum. It is not a gift; the father does not divest himself of the property. . . . For the purpose of settling the distribution, the amount of this judgment debt should have been added to the said surplus and should form a part of the distributive share of the three grandchildren who represent their deceased father, James."

Speaking of the Kansas statute, substantially the same as ours, so far as the same

rights than he himself, were he still living, could exercise, the court said: "Representation is a fiction of law, the effect of which is to put the representative in the place, degree, and rights of the person represented. . . . A dead man can neither get nor give; he can neither inherit nor transmit. The representative of the deceased person does not receive by transmission from that person and *jure alieno*; he receives by designation of law and *jure suo*. It follows therefore that the representative is not, by the fact of representation merely, rendered personally liable for the debts of the person whom he represents. He is endowed by the law with the rights of the latter in a certain succession, but is not laden with the obligations of that latter to the rest of the world. He is not an accepting heir, but a designated representative. This doctrine is elementary, and we do not understand that its correctness is questioned by the appellants. . . . The right of property terminates with the death of the proprietor. We brought nothing into the world, and it is certain that we can take nothing out. The right of succession is not a natural, but a civil and social, right. Succession is a civil institution by which the law transmits to a new proprietor, designated in advance, the thing that the preceding proprietor has just lost. Especially is this true of the succession of collaterals, *ab intestato*, under the provisions of law which create and control the fiction of representation. The parties to this controversy are all collaterals, the succession is intestate, its distribution is regulated by rules that are purely artificial, and the question in controversy is one purely of law."

In *Stokes v. Stokes*, 62 S. C. 346, 40 S. E. 662, under a statute which provides that "if the intestate shall not have a lineal descendant, father or mother, but shall leave a widow and brothers and sisters, or brother or sister, of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother or sister, to the other moiety as tenants in common; the children of a deceased brother or sister shall take among

them respectively the share which their respective ancestors would have been entitled to, had they survived the intestate,"—it was held that nephews are entitled to their distributive share in an intestate uncle's estate without deduction of the debts due the intestate by their father who predeceased his brother. The court said: "The following are our conclusions as to the question under consideration: The right of retainer on the part of the administrator is a mere equity, not arising under, but is independent of, the statute. The share which the deceased parent would have been entitled to, if he had survived the intestate, does not constitute part of the assets of his estate, and is not liable to the payment of his debts. There is no privity between the estate of the deceased parent and his children as to property descending to them under the statute from their intestate uncle. The provision of the statute that the children of a deceased brother should take among them respectively the share which the ancestor would have been entitled to, had he survived the intestate, means the share to which he would have been entitled, under the statute, irrespective of any equity which would have arisen if the parent had survived the intestate. Any other construction would make the property of the children subject to his debts in behalf of a particular creditor, and not of any other creditors holding valid claims against his estate. The parent could not have assigned or released his interest in the estate, so as to be binding upon his children in case he did not survive the intestate. How, then, can this particular creditor claim an equity as against the right of the children when they were under neither moral nor legal obligation to pay the debt, and which would destroy their rights more effectually than if the parent has, by the most solemn writing, endeavored to dispose of all interest in the intestate's estate? If the statute had intended that the share of the children should be chargeable with the debts of the deceased parent, it would have made provision to that effect, as was done in the case of advancements."

may affect the question here considered, the supreme court of Kansas, in *Fletcher v. Wormington*, 24 Kan. 259, said: "If the legislature had intended what the defendant seems to claim that it did, it would in all probability not have added the words that it did after the words 'his share,' but would have added the words, 'absolutely and unconditionally,' or some other words of similar import." See also *Head v. Spier*, 66 Kan. 386, 71 Pac. 834.

We think the case of *Norfleet v. Callcott*, 90 Miss. 221, 43 So. 616, places this court in line with the decisions just referred to. It appears from the record in this case that the indebtedness of the deceased son is greater than the distributive share of his children, and, this being true, the grandchildren take nothing in this estate.

Reversed and remanded.

In *Kendall v. Mondell*, 67 Md. 444, 10 Atl. 240, where the contest was between a sister of the intestate and children of a deceased sister who was indebted to the intestate, and died first, it was contended that such indebtedness could be set off against the children's share of the estate by virtue of the provision of the Code "that if a father or mother be dead, the children of such father or mother shall receive the same share of the estate as the father or mother if living would have been entitled to, and no more." But the court, to show the fallacy of this argument, quoted approvingly from the opinion of the court below, as follows: "If Mrs. Mondell were living, she would take by inheritance the one undivided half of the real estate of which her sister died seised and possessed. The nephews and nieces take 'no more;' Mrs. Mondell's full share . . . would not be denied her if she were living. She would take it just as any other property, but it would be liable to her debts just like any other property. . . . If, instead of owing her sister through whom she inherited, she had owed some other person, she would be in the same situation precisely in respect to this one undivided half as she would be under the judgment to her sister. In either case the share might be liable to her creditors' claim; but the full share, one half, would go to her, and no more than this goes to the heirs, her children. Why the words 'and no more' are found in the statute may occasion diverse opinions. The probability is that they are there out of abundant caution, that is, to publish distinctly and with emphasis that the children of a deceased brother and sister take *per stirpes*, and not *per capita*." And so it was held that the property in controversy belonged by inheritance from their aunt to the children of her sister, and that the deceased sister never owned it or had

A suggestion of error having been filed, Cook, J., on June 30, 1913, handed down the following additional opinion (— Miss. —, 62 So. 419):

Careful consideration of the able and earnest brief of counsel in support of the suggestion of error fails to convince the court that there is error in the original opinion in this case. See —Miss. —, ante 1028, 62 So. 229. That the courts are divided upon the question decided is true, but we think we have followed the authorities announcing the soundest doctrine. The statute of limitations was not mentioned in the former opinion, because we were of opinion that the statute had not run, and because we expressly decided that appellees would take no interest in their grandfather's estate.

Suggestion of error is overruled.

any interest in it, and in no event could it be made liable for her debts.

In *Powers v. Morrison*, 88 Tex. 133, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 851, a contest between children of an intestate and a grandson of a deceased son who had been indebted to the intestate, it was held that the grandchild was not chargeable with the father's debt to the grandfather, under a statute which provides that, "when the intestate's children or brothers and sisters, uncles and aunts, or other relations of the deceased standing in the same degree alone, come into the partition, they shall take *per capita*, that is to say, by persons; and when a part of them being dead, and a part living, the descendants of those dead have a right to partition, and such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive." The court said: "We are of the opinion that the sole purpose of the article was to declare under what circumstances those entitled to the inheritance should take *per capita*, and under what contingencies they should take *per stirpes*. Such is the intention plainly manifested upon the face of the provision, and we find nothing in the language employed to indicate a further purpose that, when they take *per stirpes*, those standing in the remoter degree should be subject to the liabilities of their ancestors. The plaintiff in error in this case is entitled under the statute to the share which his father would have taken, if alive, at the death of the intestate. This share would have been one sixth of the property which descended to the children of the deceased. If the son of the intestate had survived his father, and had not paid his debt to the estate, in the adjustment of the equities between him and his coheirs, his share would have been set off by the

debt. His portion of the estate would simply have been credited upon his obligation. If he had survived, and had paid his debt to the administrator, he would have been entitled to an equal distribution with his brothers and sisters. If his estate had been solvent, it would have been the duty of the administrator to collect the debt, and it would have been the right of plaintiff in error to receive the share of the estate which he would have inherited, if alive. If, on the other hand, his estate had been solvent, and his debt had not been paid, and the plaintiff in error had received from his estate property subject to the payment of his debts, equal in value to the amount of the debt, then the latter would have become liable for the discharge of his obligation, and that liability could have been set off against the share of the estate he would otherwise have been entitled to receive. But the estate of his deceased father being insolvent, the plaintiff in error received no property from it which rendered him liable to the payment of the debts against it; and therefore he owes his grandfather's estate nothing, and there is no liability of his own to be set off against his share in the estate. It does not follow that, because the father of plaintiff in error, if he had been alive at the death of his intestate, would have had to account in settlement for his debt, that he would not have recovered his due share of the estate. He would not have been permitted to assert that his debt to the estate was of no value, though under other circumstances it may have been worthless. If alive, he would have received his full share in his debt. Being dead, since his child did not owe the debt, the latter was entitled to receive his share without accounting for the liability of his father. It is clear that if the intestate had left only grandchildren, the plaintiff in error would have received his full share, although the immediate ancestors of the other grandchildren had owed nothing to the grandfather's estate; and why a different rule should prevail when he takes *per stirpes*, and not *per capita*, we do not see."

In *Barnum v. Barnum*, 119 Mo. 63, 24 S. W. 780, it was held that while, under the law of descent, nephews and nieces of a deceased uncle inherit only the share in his estate that their father would have taken, had he been living, still they inherit not from their father, but directly from their uncle, and inherit without deduction of their father's indebtedness to their uncle's estate.

And in *Wells v. Wells*, 6 Ky. L. Rep. 216, it was held that where land descends directly to the grandchildren of the intestate, the parent who would have inherited being dead, it is not chargeable with the debts due the intestate by the parent, unless they may be regarded as advancements to be adjusted in an action for that purpose.

J. H. B.

NEW YORK COURT OF APPEALS.

WILLIAM W. FARLEY, State Commissioner of Excise, Recept.,

v.

ANTONIO SCHERNO et al., Appts.

(208 N. Y. 269, 101 N. E. 891.)

Intoxicating liquor — tax certificate — military reservation — consideration for bond.

1. A liquor tax certificate issued by a state to one intending to conduct a liquor business on a military reservation which is the property of the Federal government is a nullity, and furnishes no consideration for a bond conditioned for the proper conducting of the business.

Estoppel — representations of right to transact liquor business.

2. An applicant for a state tax certificate for a liquor business to be conducted on a Federal military reservation is not estopped to contest the validity of the bond conditioned for the proper conducting of the business, by representations as to his right to carry on the business there.

Intoxicating liquor — state tax certificate — punishing for sale in Federal territory.

3. A liquor tax certificate granted by a state for a business to be conducted on a Federal military reservation will not prevent a criminal prosecution in the United States courts for conducting the business there, although the statute provides for the same punishment as the state laws provide for the same offense when committed within the jurisdiction of the state.

(Cuddeback, J., dissents.)

(April 22, 1913.)

Note. — Liquor bond as affected by invalidity of license.

This note, as indicated in its title, is confined to the question as to the liability on a liquor bond as affected by the invalidity of the license, and therefore the question as to what defects or irregularities will invalidate the license is not within its scope. For the purpose of noting distinctions, however, some cases are included in which the contention that there was no liability on the bond, because of defects or irregularities affecting the license, was disposed of upon the ground that the defects or irregularities did not invalidate the license. Cases in which the defect or irregularity solely affected the bond, and not the license, are of course beyond the scope of the note.

There is considerable conflict among the cases on the question under annotation, though some of the apparently conflicting decisions may be reconciled when the distinction is observed between cases where

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Clinton County in plaintiff's favor in an action to recover the penalty of a bond given on the issuance of a liquor tax certificate to defendant Scherno. Reversed.

The facts are stated in the opinion.

Messrs. John E. Judge and Lucius A. Waldo, for appellants:

The bond in suit was illegal and void and was a nullity in its inception.

Mutual L. Ins. Co. v. Corey, 135 N. Y. 334, 31 N. E. 1096; Veeder v. Mudgett, 95 N. Y. 310; Lyman v. Schermerhorn, 167 N. Y. 113, 60 N. E. 324; People ex rel. Ritzenthaler v. Higgins, 151 N. Y. 570,

45 N. E. 1033; Lyman v. Kane, 57 App. Div. 549, 67 N. Y. Supp. 1065; Mitnacht v. Kellermann, 105 N. Y. 467, 12 N. E. 28.

No estoppel could work against defendants asserting the invalidity of the undertaking, because an undertaking is not a deed within the rules as to estoppel.

Talcott v. Belding, 4 Jones & S. 84; Dezell v. Odell, 3 Hill, 225, 38 Am. Dec. 628.

The consideration (the right to traffic in liquors) and object in view were impossible, so the bond was void, and cannot be legally enforced.

1 Keener, Contr. pp. 97-99.

The bond is part of the contract, and defendant cannot be estopped from show-

the breach of the bond was predicated upon the very facts which invalidated the license, and cases where the facts relied upon as a breach were such as would have constituted a breach of a bond based on a valid license.

For cases of the latter kind, the better rule seems to be that the sureties are estopped to set up the invalidity of the license on which the bond is based.

Thus, in Schullherr v. State, 68 Miss. 227, 8 So. 328, the court held in an action upon the bond of a liquor dealer for selling liquor to an intoxicated person, that, as the principal had received and acted upon his license, neither the principal nor the surety could question the validity of the license.

So, in State ex rel. Remo v. Golding, 28 Ind. App. 233, 62 N. E. 502, it was held in an action brought upon a liquor bond to recover damages for alleged injuries received in the place of business of the licensees by being assaulted and robbed, that the principal and sureties were estopped to show that the bond was void on the ground that the license was invalid because it was issued to the licensees jointly, contrary to law, instead of to only one person. The court said: "To declare that after they had reaped the benefits which alone could have arisen by virtue of the bond, that they were not amenable to its conditions for a violation of any of its terms, because the license had been issued to them jointly as partners, and hence the bond was void for that reason, would be to declare a rule repugnant to law, to every sense of justice and good morals. They acted under the bond as though it was valid and binding, and every sense of justice demands that for any violation of its conditions they should atone for resulting injuries."

So, in Lawlor v. State, — Ind. App. —, 99 N. E. 487, it was held that the sureties in an action on a liquor bond for a death of a person while intoxicated were estopped to assert that the license had become void because of the removal of the licensee from the state before the sales in question.

And in Bulger v. Prenica, 93 Neb. 697, 142 N. W. 117, it was held that where a 47 L.R.A.(N.S.)

surety company has entered into the bond which is necessary to procure a saloon license, and the principal has received the license and become liable for damages to individuals by reason of the traffic, the surety is estopped to plead that there was no valid ordinance in force at the time the license was issued.

See also Lyman v. Schermerhorn, 167 N. Y. 113, 60 N. E. 324, *infra*, which seems to assume that the invalidity of a license, at least if the license is for a place within the jurisdiction of the state, would not affect the liability of the sureties for a breach consisting of acts which would constitute a breach of a bond based on a valid license. But see FARLEY v. SCHERNO.

In the opinion in Thomas v. Hinkley, 19 Neb. 324, 27 N. W. 231, it is stated that the recitals in the bond as to the issuance of the license conclude the parties, unless there can be shown fraud, accident, or mistake: but in the syllabus by the judge writing the opinion, the statement of the decision upon this point is merely that the recital is sufficient *prima facie* as against the principal and sureties to show the issuing of a license.

The decision in Coleman v. People, 78 Ill. App. 210, was merely to the effect that the parties executing a bond are bound by the recital that the principal had obtained a license for one year, and cannot deny the same by showing that the license was for three months only, in an action for damages arising from sales within the year, but after the expiration of three months; and in White v. Manning, 46 Tex. Civ. App. 298, 102 S. W. 1160, that where the license and bond are in due form and the bond recites that an application has been made, it will be presumed, in the absence of proof to the contrary, that the officer issuing the license has complied with the law.

The liability of the sureties in the event of the invalidity of the license upon which the bond was based has been denied in some cases, even where the breach of the bond was predicated upon facts which would have amounted to a breach of a bond based on a valid license.

ing that the whole bond is invalid, notwithstanding any particular statements in it. The bond was void in its creation.

Bell v. Leggett, 7 N. Y. 183.

If there was originally no consideration, there was no contract, and that there was no contract may always be shown.

Browne, Parol Ev. 43; Ward v. Stahl, 81 N. Y. 406.

The contract was illegal.

Shedlinsky v. Budweiser Brewing Co. 163 N. Y. 439, 57 N. E. 620; Richardson v. Crandall, 48 N. Y. 362.

Mr. Louis M. King, with Mr. A. M. Sperry, for respondent:

The bond in suit was not illegal and void, and was not a nullity in its inception.

Thus, in Hillman v. Gallagher, — Tex. Civ. App. —, 120 S. W. 505, where the breach assigned was permitting plaintiff's minor son to enter and remain on the premises, it was held that it must be shown that a valid license had been issued to the dealer before there could be any recovery on the bond. The court cited in support of its position the decision of the court of civil appeals in Southard v. Green, — Tex. Civ. App. —, 59 S. W. 840, remarking that the reversal of that case by the supreme court (94 Tex. 470, 61 S. W. 705, *infra*), as upon the ground that the decision of the court of civil appeals that the license was void was erroneous, but that no disapproval as to its conclusion that a valid license was an indispensable prerequisite to a right of recovery on the bond was expressed.

So, in Saffroi v. Cobun, 32 Tex. Civ. App. 79, 73 S. W. 828, where the breach assigned was the sale of liquor to the plaintiff's husband, an habitual drunkard, it was held that there could be no recovery, it appearing that, by fraud of the principal, the clerk was induced to insert a locality other than that intended in a transfer of the license. Green v. Southard, 94 Tex. 470, 61 S. W. 705, was distinguished upon the ground that it did not appear in that case that the houses were numbered, and that there was no contention in that case of any fraudulent purpose.

As stated in the Hillman Case, the decision of the Texas supreme court in Green v. Southard, *supra*, holding the surety liable,—the breach assigned being the sale of liquor to a minor, and permitting him to enter and remain on the premises,—was upon the ground that the indefiniteness of the designation of the place of sale did not render the license void, and would have protected the licensee in a prosecution for selling liquor without a license. To the same effect is Douthit v. State, 98 Tex. 344, 83 S. W. 795.

So, in the following Texas cases, holding the surety liable, it does not appear that defects or irregularities complained of invalidated the license:

—Cox v. Thompson, 37 Tex. Civ. App. 607, 47 L.R.A. (N.S.)

Harrison v. Wilkin, 69 N. Y. 412; Charities & C. Comrs. v. O'Rourke, 34 Hun, 349; People ex rel. Meakim v. Eckman, 63 Hun, 209, 18 N. Y. Supp. 654; Lyman v. Gramercy Club, 39 App. Div. 661, 57 N. Y. Supp. 376; Lyman v. Brucker, 26 Misc. 597, 56 N. Y. Supp. 767.

The county treasurer, who is the certificate issuing officer under the liquor tax law, was bound to issue the certificate in question to Scherno.

Re Wellman & Ors. v. Blase, 3 Liquor Tax Reports, 517; People ex rel. Belden Club v. Hilliard, 28 App. Div. 140, 50 N. Y. Supp. 909; Re Bridge, 36 App. Div. 533, 55 N. Y. Supp. 54; Re Tonatio, 49 App. Div. 84, 63 N. Y. Supp. 560.

85 S. W. 34, affirmed in 202 U. S. 446, 50 L. ed. 1090, 26 Sup. Ct. Rep. 671; Cox v. State, — Tex. Civ. App. —, 85 S. W. 1199 (*dictum*), the court saying, upon the authority of the Green Case, that the mere fact that the application for the license designated two places to do business would not be a bar to a recovery on the bond;

—Faulkner v. Cassidy, 39 Tex. Civ. App. 415, 87 S. W. 904 (where the breach assigned was the sale of liquor to plaintiff's husband, an habitual drunkard), it being held that the failure of one who bought an unexpired license from another to have the transfer made upon the books of the officer by whom the same was issued, and the failure to file an application with the county clerk designating therein the particular house in which he professed to conduct his business, and to have such designation made in the license, did not render the bond sued on void. The court further held that the principal, by engaging in business and acting under the unexpired license which he had purchased, and executing the bond, was estopped to deny the title of the assignor and the authority of the agent of another from whom he had obtained the unexpired license, to make the assignment;

—Castellano v. Marks, 37 Tex. Civ. App. 273, 83 S. W. 729, where it was held in an action upon a bond for a penalty for selling liquors to a minor, that, the license and bond being in due form, the mere fact that the application was defective in not stating that the applicant desired to sell liquor in certain quantities, to be drunk on the premises, did not preclude a recovery on the bond against the principal and surety;

—State ex rel. Allen v. Harper, — Tex. Civ. App. —, 87 S. W. 878, where it was held that the bond was not void because of the failure of the clerk who issued the license to require a written application from the applicant, and because the licensee had not paid his taxes as required by statute.

State v. English, 74 N. H. 328, 68 Atl. 129, and Lyman v. Kurtz, 166 N. Y. 274, 59 N. E. 903, are not in point, as they are merely to the effect that it is no defense to the sureties on the bond that the person to

The defendants are bound by the application statement.

Re Clement, 53 Misc. 358, 104 N. Y. Supp. 905; Re Barnard, 48 App. Div. 423, 63 N. Y. Supp. 255; Re Deuel, 55 Misc. 618, 106 N. Y. Supp. 1030; Re Cullinan, 39 Misc. 646, 80 N. Y. Supp. 626.

Miller, J., delivered the opinion of the court:

This is an action to recover the penalty of a bond given on the issuing of a liquor tax certificate to the appellant Scherno, on the ground that there had been a breach of the condition of the bond in that he had allowed the premises to become disorderly, and had made a material false statement in his application for the certificate in stating that the premises belonged to his wife, and that he might lawfully carry on a traffic in liquors there-

on. The defense is that there was no consideration for the bond for the reason that the premises for which the certificate was issued formed a part of the military reservation and post known as the "Plattsburgh barracks" of the United States of America. The facts are not in dispute and were found by the court.

The state having given its consent to the purchase by the United States (see Laws of 1890, chap. 18), the legislative power of Congress over the lands purchased is exclusive. *Com. v. Clary*, 8 Mass. 72; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995. The state had no power to license the traffic in liquors on said premises, even if Congress had not expressly prohibited it, as it has. Act Feb. 2, 1901, § 38, chap. 192, 31 Stat. at L. 758, U. S. Comp. Stat. 1901, p. 804.

whom the license was issued or transferred intended to have it exercised for another's benefit.

Whatever may be true when the breach of the bond is predicated upon facts that would have constituted a breach of the bond even if it had been based upon a valid license, it seems clear that the sureties are not liable if the breach is predicated upon the very facts that invalidated the license, so that the action necessarily presupposes the invalidity of the license.

Thus, in *Lyman v. Schermerhorn*, 167 N. Y. 113, 60 N. E. 324, an action on a bond conditioned that the principal will not, while the business for which the liquor tax certificate is given shall be carried on, violate any provision of the liquor tax law, the action being based upon the violation of the provision of the liquor tax law that no one who shall have been convicted of a felony shall traffic in liquors, or be granted a liquor tax certificate, and the false statement of the principal in that regard,—it was held that, in the absence of complicity of the surety in such false statement, the latter was not liable. The court said that the traffic in liquor asserted as the breach of the bond was before the state asserted the falsity of the application and the invalidity of the certificate, and, therefore, as to the surety, the liquor tax certificate still protected the traffic; that when the state withdrew its approval and asserted that the certificate afforded no protection to those holding it, the bond, which was given in consideration of such protection, ceased to be supported by it. It is plainly implied in this case that, notwithstanding the invalidity of the license, the surety would have been liable on the bond if he had been aware of the prior conviction of the principal when it executed the bond. The court added that, until the state changed its position, the bond was good, and the certificate was good as to the surety. There is an apparent inconsistency between the last statement and the decision in the *FARLEY CASE*, 47 L.R.A. (N.S.)

unless, perhaps, there is a distinction arising from the fact that in the *FARLEY CASE* the false statement in the application, as well as the keeping of a disorderly house, was assigned as a breach of the bond, or in the fact that the license was for the sale of liquor at a place over which the state had no jurisdiction.

In *Lyman v. Mead*, 56 App. Div. 582, 67 N. Y. Supp. 254, and *Lyman v. Kane*, 57 App. Div. 549, 67 N. Y. Supp. 1065, denying recovery against the surety, the breach assigned was the misstatement in the application upon which the license was granted.—in the former case, a misstatement that the premises were not within 200 feet of a church, and in the latter, a misstatement as to the former occupancy of the premises as a hotel, and respecting conformity to the requirements of § 31 of the statute, and the consent of the property owners.

In *Lyman v. Mead*, supra, the court said that the surety might have been liable if it had been shown that, after the issuing of the certificate, the principal had engaged in the traffic in liquor at the place named, it being within 200 feet of a church.

In *Moniteau County ex rel. Bechtle v. Lewis*, 123 Mo. App. 673, 100 S. W. 1107, holding that the surety was not estopped from showing that the application and petition for the license located the dramshop at a place different from that stated in the bond, and, because of such variance, the surety was not liable on the bond, it does not appear whether the designation of the place in the license corresponded to that in the petition and application, or to that in the bond.

In *Cullinan v. Fidelity & C. Co.* 41 Misc. 119, 83 N. Y. Supp. 969, where, by mistake, the application for a liquor tax certificate and the bond itself gave the incorrect location of the principal's place of business, it was held that the surety adopted the mistake of the principal, and could not evade liability on the bond, there being no fault upon the part of the state.

A. H. N.

The liquor tax certificate was therefore a nullity and furnished no consideration for the bond.

It has been ruled below that the defendants are estopped by statements in the application to deny that the traffic in liquors could lawfully be carried on on said premises. But the case lacks one of the essential elements of an estoppel. The state has lost nothing in reliance upon the statements in the application. Indeed, it has received the license tax. *Metropolitan L. Ins. Co. v. Bender* (Metropolitan L. Ins. Co. v. McCoy) 124 N. Y. 47, 11 L.R.A. 708, 26 N. E. 345, is a typical case of an estoppel arising from a recital in a bond. The recital was that the bond was executed under seal. It was executed by the obligor and delivered by him to the person interested in having it accepted, who attached a seal and belivered it to the obligee, who accepted and acted upon it on the supposition that it had been executed under seal. I cite that case to mark the distinction between it and a case like this, in which no possible loss could have been sustained by the obligee in reliance upon the alleged false statement.

It is suggested, however, that, although the liquor tax certificate gave the holder no right to traffic in liquors on the premises in question, it still protected him from a criminal prosecution in the United States courts under § 5391 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 3651, which provides that, "if any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the state in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such state." But, as the state cannot license the sale of liquors on a government reservation over which the jurisdiction of Congress is exclusive, the lawfulness of such sale thereon is not affected by the question whether the state has granted a license therefor. The act having been prohibited, and no punishment specifically provided, it may be that the offender might be punished in the United States courts the same as he might be punished in the state courts for an unlawful sale of liquor on lands within the jurisdiction of the state. That question is not before us, and, in any event, it is plain that the liquor tax certificate granted in this case would furnish the

appellant Scherno no defense to such a prosecution.

The judgments of the Appellate Division and of the trial court should be reversed, and the complaint dismissed, with costs in all the courts.

Cullen, Ch. J., and Willard Bartlett, Hiscock, Chase, and Hogan, JJ., concur.

Cuddeback, J., dissenting:

The defendant Antonio Scherno applied to the county treasurer of Clinton county for a liquor tax certificate under § 15 of the liquor tax law. The law requires the application to contain a description of the place where the traffic in liquors is to be carried on, and a statement that the applicant "may lawfully carry on such traffic in liquors upon such premises." The application described certain premises and said that they were owned by Scherno's wife, and that he might lawfully traffic in liquors thereon. That statement was false. The premises are a part of the Plattsburgh barracks, a military post of the United States, whereon the traffic in liquors is unlawful.

The defendant the Fidelity & Casualty Company became the surety on the bond given to accompany the application, as required by § 16 of the liquor tax law (Consol. Laws 1909, chap. 34). The bond was conditioned, among other things, that there was "no material false statement in the application statement for said liquor tax certificate," and also that the applicant would not suffer or permit the place designated in the liquor tax certificate to become disorderly.

The county treasurer issued to Scherno the certificate applied for. Thereafter, and for nearly the full term covered by the certificate, Scherno did in fact traffic in liquors at the place mentioned therein, and ran a house of ill fame.

This action is brought against Scherno and his surety for a violation of the condition of the bond that Scherno would not permit the premises mentioned in the liquor tax certificate to become disorderly. The surety has interposed as a defense that the liquor tax certificate was void, for the reason that the state could not grant Scherno permission to traffic in liquors upon a military post of the United States, and that therefore the bond was without consideration. I think the question of consideration does not enter into the case at all. "For a statutory undertaking no consideration is necessary." *Thompson v. Blanchard*, 3 N. Y. 335; *Bildersee v. Aden*, 62 Barb. 175; *Post v. Doremus*, 60 N. Y. 371, 375; *Livingston v. Hammer*, 7 Bosw.

670, 677; *Johnson v. Ackerson*, 3 Daly, 430; *Gein v. Little*, 43 Misc. 421, 424, 89 N. Y. Supp. 488. It is sufficient that Scherno attained the object for which the bond was given.

The cause of action set forth in the complaint is that Scherno violated the condition of the bond by keeping a disorderly house, not that he made material false statements in the application. The facts showing that the statements in the application were false appear from the answer of the surety as a defense to the bond. The appellate division was clearly right in saying that the surety in the bond was estopped from setting up this defense. *Farley v. Scherno*, 147 App. Div. 375, 132 N. Y. Supp. 170. It makes no particular difference that the United States was the owner of the premises mentioned in the application. The result would have been the same, though they were owned by any person other than the one mentioned in the application, if the owner's consent to the traffic in liquors had not been obtained. The law required Scherno to show that he had such consent, and in that regard the statements in the application were false. This was a plain violation of the express condition of the bond, and it seems absurd that it should be considered as a defense in determining the liability of the obligors for the breach of their undertaking in another respect.

I recommend that the judgment appealed from be affirmed, with costs.

Petition for rehearing denied June 10, 1913.

OKLAHOMA CRIMINAL COURT OF APPEALS.

RE APPLICATION OF GEORGE CRUMP, JR.

(— Okla. Crim. Rep. —, 135 Pac. 428.)

Pardon — effect.

1. A pardon is an act of grace and mercy bestowed by the state through its chief executive upon offenders against its laws

Headnotes by DOYLE, J.

Note. — Pardon by lieutenant governor or governor *pro tem*.

Generally speaking, a pardon issued by a governor *de facto* is valid. This principle is placed on the ground that there should always be one capable of administering the laws at the head of the government. The existence of organized society is a primary necessity to all communities; its functions cannot safely be suspended 47 L.R.A.(N.S.)

after conviction, and a full unconditional pardon reaches both the punishment prescribed for the offense and the guilt of the offender; it obliterates in legal contemplation the offense itself; and hence its effect is to make the offender a new man.

Same — when effective.

2. A pardon takes effect upon delivery either to the person who is the subject of the favor, or to someone acting for him or on his behalf.

Court — inquiry into validity of pardon.

3. This court has no power to control or in any manner interfere with the functions of the executive department of the state government, but it has jurisdiction and power to inquire upon habeas corpus into the validity of a pardon under which the petitioner seeks to be discharged from the penitentiary, where after the delivery of the pardon he is detained in the custody of the warden upon an order of the governor, purporting to revoke the pardon.

Pardon — by lieutenant governor — validity.

4. The pardon in this case was granted by the lieutenant governor acting as governor in the absence of the governor from the state. Held, that under the Constitution, art. 6, § 16 (165, Williams'), in the absence of the governor from the state for any purpose or for any period of time, the constitutional functions of his office devolve *pro tempore* upon the lieutenant governor, and a pardon granted and delivered by the lieutenant governor as acting governor, in the absence of the governor from the state, is a valid and effectual pardon. *A fortiori* the warden had no authority to disregard it, and the governor's order purporting to revoke such pardon was necessarily a nullity.

(October 4, 1913.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from continued imprisonment in the state penitentiary after he had received a pardon. Writ allowed.

Statement by Doyle, J.:

On behalf of George Crump, Jr., a duly verified petition for a writ of habeas corpus was presented to the presiding judge of this court, representing that he was illegally restrained of his liberty and unlawfully im-

posed for even short periods of time. Whatever may be the rule as to the right of succession to the chief office within a state, occasions have arisen and will continue to arise when a case of disputed succession exists. During such intervals there must be a continued administration of the laws, and experience of government has shown that it is safer and better to recognize the person who succeeds in obtaining possession of the executive powers during the

prisoned in the state penitentiary by R. W. Dick, warden. It is further averred in said petition that: "The cause of said restraint according to the best of the knowledge and belief of your petitioner is that the said George Crump, Jr., was by the superior court of Pottawatomie county, Oklahoma, convicted of the crime of forgery, said conviction on appeal to this honorable court was affirmed (7 Okla. Crim. Rep. 535, 124 Pac. 632), and said petitioner sentenced to said penitentiary for a period of seven years, said term of imprisonment commencing on June —, 1912, but your petitioner alleges that said restraint is illegal and unauthorized because he says that on the 2d day of August, 1913, the honorable Lee Cruce, governor of the state of Oklahoma, being absent from the state of Oklahoma, to wit, at Kansas City, Missouri, the honorable J. J. McAlester, lieutenant governor of the state of Oklahoma, during the absence of Governor Cruce from the state of Oklahoma, and while Governor Cruce was still absent from the state of Oklahoma, granted your petitioner a full, complete, and unconditional pardon for the offense of which he was convicted, as above set forth, said pardon being signed by the said J. J. McAlester, acting governor of the state of Oklahoma, and sealed with the great seal of the state of Oklahoma, and attested by Benjamin F. Harrison, secretary of the state of Oklahoma, which said paid was then and

there delivered to the father of your petitioner, who was and is acting for and in his behalf. A duplicate of said pardon is hereto attached and asked to be taken and considered as a part of this petition."

The duplicate of said pardon is as follows:

State of Oklahoma, Executive Department.

The Acting Governor of the State of Oklahoma, to All Who Shall See These Presents—Greeting:

Know ye, that I, J. J. McAlester, lieutenant governor of the state of Oklahoma, and as such the acting governor of the state of Oklahoma in the absence from said state of the Hon. Lee Cruce, governor of the state of Oklahoma, do hereby, under and by virtue of the authority vested in me by the Constitution of the state of Oklahoma, grant unto George Crump, Jr., who was convicted at the January, 1911, term of the superior court of Pottawatomie county, Oklahoma, of the crime of forgery and sentenced to imprisonment in the state penitentiary at McAlester, Oklahoma, for the term of seven years, a full, complete, and unconditional pardon for the offense of which he was convicted as aforesaid. In witness whereof, I have hereunto set my hand at Oklahoma City, the capital, this 2d day of August, 1913, and do hereby direct the secretary of state forthwith to affix the great seal of the state of Oklahoma

existence of the contest, than to subject the government to the risk incident to a failure in the exercise of its chief executive function. *Ex parte Norris*, 8 S. C. 408.

Thus, while there appears to be little authority upon the point here raised, the decision in *RE CRUMP* seems to be correct, under general principles, in holding that, under a Constitution providing that, among other disabilities named, in case of the removal of the governor from the state, the office of governor, with its compensation, shall devolve upon the lieutenant governor for the residue of the term or until the disability shall be removed, an unconditional pardon granted to one convicted of crime and imprisoned therefor, being granted by the lieutenant governor at a time when the governor is temporarily absent from the state, is valid and effectual.

So, where the organic act of a territory commits the complete power to grant pardons to the governor, a pardon executed under the great seal of the territory by the secretary of the territory who is properly acting as governor in the absence of the governor himself is valid. *Territory v. Richardson*, 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552.

And where a governor resigns, and, according to the rule of succession, the secretary of state thereupon legally be-

comes acting governor, and where, according to the Constitution, the one who is elected at a general election in November to fill the office shall enter upon the duties of the office on the first Monday in January of the following year, until such date in January the acting governor continues as such, and a pardon issued by him before that date is valid, although the one elected at the general election to fill the office may previously have taken the oath of office and may have assumed to enter upon the discharge of the duties thereof; such attempt on the part of the latter to assume the powers and duties of the office is premature and invalid. *Re Moore*, 4 Wyo. 98, 31 Pac. 980.

Also, under a Constitution providing that the returns of every election of governor shall be sealed up by the managers of election in their respective counties, and transmitted to the secretary of state, who shall deliver them to the speaker of the house of representatives at the next ensuing session of the general assembly, and that as soon as the general assembly shall have organized the speaker shall open and publish such returns in the presence of both houses; and adding, that "the person having the highest number of votes shall be governor,"—the act of opening and publishing the returns is clearly for the purpose of giving the legislature information enabling it to

hereto and to attest the same with his signature.

J. J. McAlester,
Acting Governor of the State of Oklahoma.
[Seal.]

By the Governor, Benjamin F. Harrison,
Secretary of State.

A writ of habeas corpus was issued by Presiding Judge Armstrong directed to the respondent, who on August 14th, the day it was returnable, produced the petitioner in court and at the same time filed his return, which in part is as follows: "Respondent denies the allegation in petitioner's application filed herein that he has been pardoned of the offense of which he was convicted, and states that the purported pardon attached to the petition is void in that it was attempted to be granted, without authority of law, by the lieutenant governor of the state at a time when the governor of said state was qualified and acting, and when the occasion contemplated by the Constitution for the lieutenant governor to act as governor had not arisen. And respondent says that on July 31, 1913, Lee Cruce, Governor, left the state of Oklahoma and went to Kansas City, Missouri, to be temporarily absent from the state of Oklahoma for one day, nor was he at said time in any way incapable of discharging the powers and duties of the office of governor of the state of Oklahoma, nor did he remove from the state of Oklahoma, nor did the said governor before leaving the state, or at any

time during his temporary absence therefrom, request or in any manner indicate to the lieutenant governor any desire on the part of the governor that the said lieutenant governor should perform the functions of the office of governor during said temporary absence, nor did the said governor at any time during his temporary absence abdicate the duties of the office of governor of the state of Oklahoma, but before leaving the state of Oklahoma the said governor informed the chief clerk of the governor's office as to his whereabouts, and gave said chief clerk instructions that, if any matter involving executive action should be presented, he should immediately communicate with the said governor so that same might properly be attended to; that during said temporary absence the said governor was within twelve hours run of the capital of the state of Oklahoma and within nine hours' run of the boundary of said state of Oklahoma; that the said governor returned to Oklahoma and arrived within the boundaries of said state about 5:10 o'clock A. M. on the 3d day of August, 1913, and before the purported pardon was delivered to any person, arriving at the capital of the state at the hour of 9:05 A. M. on said 3d day of August, 1913; that upon the arrival at the capital of Oklahoma on the 3d day of August, 1913, of Lee Cruce, Governor, about 9:30 o'clock A. M., he revoked the attempted pardon of George Crump, Jr., and immediately directed respondent herein to disregard any such pre-

see whether it has any duty to perform in the premises; and where there is a choice on the face of the returns and no contest of the truth appears on their face, the legislature has nothing but a formal duty to perform; accordingly, where a particular person receives the highest number of votes, and the election returns are opened and the result so declared before one house of the legislature, even though the other house is not present, and where such person subsequently takes the oath of office and claims to be governor, his color of title is good; and his official acts are to be respected, as against the claims of another who was governor the preceding term and claims to be holding over, and who may have been recognized as governor by the house of the legislature not present at the time of the opening of the returns. Therefore a pardon granted by the one so elected and claiming to be governor is entitled to be respected as the official act of the governor. *Ex parte Norris*, supra. This case is followed and its principles reaffirmed in *Ex parte Smith*, 8 S. C. 495.

But where there are two persons present at the seat of government, each claiming to be governor *de jure*, and each assuming to perform the duties of that office, and in a 47 L.R.A. (N.S.)

contest instituted in order to determine the title to the office the legislature decides in favor of one, all authority of the other to act as governor thereupon ceases; and a pardon issued by him thereafter is invalid, even though he retains possession of the executive building, archives, and records, and assumes to continue to act as governor. *Powers v. Com.* 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464.

In this connection it may be of interest to note the decision in *People ex rel. Robin v. Hayes*, 82 Misc. 165, 143 N. Y. Supp. 325, to the effect that under a Constitution providing that, in case of the impeachment of the governor, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the disability shall cease, a governor who has been lawfully and constitutionally impeached is without authority, even before the issues raised by the articles of impeachment have been tried by the court, to grant a pardon to one imprisoned in a penitentiary; and that a paper purporting to be such a pardon, and signed by him as governor, is void; immediately upon the voting of impeachment by the assembly, the reins of power are transferred from the governor to the lieutenant governor. H. C. Sh.

tended pardon which might be delivered to respondent, further directed the respondent to hold the petitioner herein under the judgment hereinbefore mentioned. A copy of which order revoking the pretended pardon is hereto attached, marked Exhibit B and made a part hereof. Which said order of revocation was received by this respondent prior to any presentation to him of said pretended pardon issued by Lieutenant Governor McAlester."

The executive order of revocation is as follows: Exhibit B.

State of Oklahoma, Executive Department.

The Governor of the State of Oklahoma,
to All to Whom These Presents Shall Come
—Greeting:

Whereas, on the second day of August, 1913, J. J. McAlester, lieutenant governor of the state, issued an order undertaking to grant unto George Crump, Jr., of Oklahoma, who was convicted at the term of the superior court of Pottawatomie county, Oklahoma, of the crime of forgery, and was sentenced to imprisonment in the state penitentiary at McAlester, Oklahoma, for the term of years, a full, complete, and unconditional pardon for the offense of which he was convicted as aforesaid; and, whereas, the purported pardon has not yet been delivered to the said George Crump, Jr., and has not yet become effective, and is yet under the control of the governor of the state: Now, therefore, I, Lee Cruce, governor of the state of Oklahoma, by virtue of the authority vested in me by the Constitution and laws of this state, do hereby revoke the order tendered by J. J. McAlester in the case, and direct the warden of the penitentiary to return to the office of the governor of Oklahoma all papers issued by the said J. J. McAlester attempting to pardon the said George Crump, Jr., and I hereby expressly revoke any pardon or attempted pardon granted by the said J. J. McAlester while attempting to act as governor of this state in granting unto the said George Crump, Jr., a pardon as aforesaid. In witness whereof, I have hereunto set my hand at Oklahoma City, the capital of the state, this, the third day of August, 1913, and caused the great seal of the state of Oklahoma to be hereto affixed and the same to be attested by the signature of the secretary of state.

Lee Cruce,
Governor of the State of Oklahoma. [Seal.]

Attest: Benjamin F. Harrison,
Secretary of State.

The undisputed facts shown by the testimony upon the hearing are that George J. Crump, petitioner's father, acting for him as his agent and attorney, received the par-

don in question on the 2d day of August, after the same had been attested by the secretary of state, under the great seal of the state, and it was so delivered by the acting governor at the executive office, but was not presented to the respondent, warden of the penitentiary, until after he had received the executive order of revocation.

Counsel for petitioner also filed an exemplification of records of the office of secretary of state, showing official acts of Lieutenant Governor Bellamy, acting as governor in the years 1908 and 1910 while C. N. Haskell, Governor, was temporarily absent from the state, in granting pardons and paroles, requisitions issued, requisitions honored, and several executive proclamations declaring the result of certain special county-seat elections, also about 200 notary public appointments made at said times, and further showing official acts of Lieutenant Governor McAlester, acting as governor during the temporary absence of Lee Cruce, Governor, from the state in the year 1911, in granting pardons and paroles and approving bonds, and in appointing Jas. W. Steen, of Enid, district judge of the twentieth judicial district. An affidavit of Governor Cruce was filed, reiterating the facts averred and the conclusions stated in the answer of the respondent.

The case was argued orally by Judge Owen and Judge Richardson, former members of this court, representing the instant parties, and by Mr. Haskell and Mr. Forrest, representing two other persons who had been granted similar pardons. The arguments, usually able and exhaustive, covered the case in all its phases. Upon the conclusion of the arguments, and after a recess consideration of the case, the decision of the court was announced, and the writer, by direction of the presiding judge, rendered the opinion of the court; thereupon the writ was allowed and the petitioner released.

Messrs. Thomas H. Owen and George J. Crump for petitioner.

Messrs. Charles West, Attorney General, C. J. Davenport, and Smith C. Matson, Assistant Attorneys General, for respondent:

The temporary absence of Governor Cruce was not such an occasion as entitled the lieutenant governor to act as governor.

State ex rel. Crittenden v. Walker, 78 Mo. 139; State ex rel. Warmoth v. Graham, 26 La. Ann. 568, 21 Am. Rep. 551; People ex rel. Tennant v. Parker, 3 Neb. 409, 19 Am. Rep. 634; Ex parte Whitehouse, 3 Okla. Crim. Rep. 100, 104 Pac. 372; Carr v. Wilson, 32 W. Va. 419, 3 L.R.A. 65, 9 S. E. 31; Re Lemann, L. R. 22 Ch. Div. 633.

52 L. J. Ch. N. S. 560, 48 L. T. N. S. 389, 31 Week. Rep. 520; Re Moravian Soc. 26 Beav. 101, 4 Jur. N. S. 703, 6 Week. Rep. 851; Re Munger, 10 App. Div. 347, 41 N. Y. Supp. 882; Prather v. Hart, 17 Neb. 598, 24 N. W. 282.

Messrs. Ames, Chambers, Lowe, & Richardson also for respondent.

Messrs. E. G. McAdams and Norman R. Haskell, *amici curiæ*:

Lieutenant Governor McAlester was the *de jure* acting governor, during the absence of Governor Cruce from the state, and had power to pardon petitioner.

Westbrook v. Miller, 56 Mich. 148, 22 N. W. 256; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Forry v. Ridge, 56 Mo. App. 615; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; Mitchell v. Carter, 31 Okla. 592, 122 Pac. 691; Ex parte Ward, 173 U. S. 452, 43 L. ed. 765, 19 Sup. Ct. Rep. 459; Ex parte Norris, 8 S. C. 408; Constantineau, De Facto Doctrine, § 5; Powers v. Com. 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464; Chubbuck v. Wilson, 12 Ann. Cas. 888, and note, 151 Cal. 162, 90 Pac. 524; State ex rel. Worrell v. Carr, 13 L.R.A. 177, and note, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88; Andrews v. Portland, 10 Am. St. Rep. 280, and note, 79 Me. 484, 10 Atl. 458; State ex rel. Atty. Gen. v. Barrow, 29 La. Ann. 243.

Governor Cruce has no power to revoke the pardon issued by Lieutenant Governor McAlester.

Territory v. Richardson, 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Armstrong v. United States, 13 Wall. 154, 20 L. ed. 614; Re Williams, 22 L.R.A.(N.S.) 238, and note, 149 N. C. 436, 63 S. E. 108.

Mr. R. B. Forrest also *amicus curiæ*.

Doyle, J., delivered the opinion of the court:

The power to pardon is an executive power expressly vested by the Constitution of the state in the governor. He does not hold the power simply because he is the chief executive, but because the sole power to pardon is delegated to his office. Const. art. 6, § 10 (159, Williams'). "As human actions are necessarily imperfect, the pardoning power must be vested somewhere in order to prevent injustice when it is ascertained that an error has been committed." Bouvier's Law Dict. see "Pardon." A full, unconditional pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment, and blots out of existence

the guilt so that in the eye of the law the offender is as innocent as if he never committed the offense. It obliterates, in legal contemplation, the offense itself.

The doctrine of the authorities is that, "in contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him [the convict] to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position," and hence its effect is to make the offender a new man. Knote v. United States, 95 U. S. 149, 24 L. ed. 442; 4 Bl. Com. 404; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Young v. Young, 61 Tex. 191; State v. Page, 60 Kan. 664, 57 Pac. 514.

A pardon is an act of grace and mercy bestowed by the state, through its chief executive, upon offenders against its laws. Yet a pardon properly granted is also an act of justice, supported by a wise public policy. While the power to pardon, parole, reprieve, or commute after conviction for offenses against the state is a matter of executive discretion, this discretion should be exercised on public considerations alone. An undue exercise of the pardoning power is greatly to be deplored. It is inexcusable. It is a blow at law and order, and is an additional hardship upon society in its irrepressible conflict with crime and criminals. If the governor believes a law under which the prisoner has been convicted to be unjust or too harsh, still he should not for that reason alone exercise the pardoning power. The duty of mitigating the severity of the law lies with the legislature. As an officer he should look upon the law as wise and just, whatever may be his private opinion. An abuse of the pardoning power may be so great as to warrant an impeachment of the officer who exercises it.

Says Bishop: "No official person, whatever his station or the nature of his office, is justified in performing any official acts from private motives or in pursuance of mere private views. An executive officer, asked to grant a pardon, should neither comply nor refuse merely because he would personally be pleased to see the prisoner suffer or to see him go free. He should act upon public considerations. . . . He does not sit as a court of appeal from the legislature. If he believes the law under which a prisoner is suffering to be unwise or unjust, still this opinion cannot properly incline him to grant the pardon, because the power which makes and unmakes laws is not in him, and officially he is required to look upon the law as just and wise, however his private opinion may revolt. . . . In popular writings we often meet

with injuriously false views on this subject. Nothing can be more pernicious than the opinion, sometimes afloat, which assigns to the President or governor the authority to pardon without limit and denies to the impeaching power the right to interfere. The granting of pardons is discretionary in its nature; therefore it is necessarily the more open to control by the impeaching power. If it comes to be understood that a single man, intrusted with the high function of pardon, can open all the prisons of the country and let every guilty person go free, thus at a blow striking down the law itself, and not be himself punished for the high misdemeanor, the most disastrous consequences to liberty and law will sooner or later follow. Such a conclusion is itself the annihilation of law, and only upon law can liberty repose. Still, this sort of executive abuse will not authorize the courts to decline giving effect to the executive pardon." 1 Bishop, New Crim. Law, §§ 922 and 926.

A full, unconditional pardon takes effect upon delivery either to the person who is the subject of the favor or to someone acting for him or on his behalf. After delivery, a pardon cannot be revoked. The authorities, without any conflict whatever, deny to the governor any such power, and hold the pardon, when delivered, to be irrevocable. *Re Williams*, 149 N. C. 436, 22 L.R.A.(N.S.) 238, 63 S. E. 108; *Rosson v. State*, 23 Tex. App. 287, 4 S. W. 897; *Ex parte Powell*, 73 Ala. 517, 49 Am. Rep. 71; *United States v. Hughes*, 1 Bond, 574, Fed. Cas. No. 15,418; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600; *Ex parte Reno*, 66 Mo. 266, 27 Am. Rep. 337. Indeed, it would not only be contrary to principle that the governor should be invested with such authority, but the power itself would be of the most dangerous and pernicious character. Great evils would inevitably flow, in ways that may be readily suggested, from the exercise of any such power; and hence, wisely, no such power exists. *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am. Rep. 462.

An abuse of the pardoning power does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be manifest usurpation of authority. Our government is one whose powers, other than those reserved by the people, have been carefully apportioned between three separate co-ordinate departments,—the legislative, executive and judicial,—which emanate alike from the people,

having their powers alike limited and defined by the Constitution, each of equal dignity, and within their respective spheres of action equally independent, and exclusive in respect to the duties assigned. The language of the Constitution, art. 4 (50, Williams'), is: "The powers of the government of the state of Oklahoma shall be divided into three separate departments, the legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

With these preliminary observations we will proceed to the consideration of the questions presented, and state some of the reasons, without elaborating the arguments, which have led us to the conclusions and the decision heretofore announced in this case.

The pardon in question was granted, as appears from the petition and answer thereto, by the lieutenant governor, acting as governor, in the absence of the governor from the state. The decisive question in this case is whether the pardon granted by the lieutenant governor, acting as governor, to George Crump, Jr., is valid and effectual so as to entitle him to be released by the warden of the penitentiary, who holds him in confinement under the judgment and sentence of the superior court of Pottawatomie county.

The provisions of the Constitution providing for succession to the office of governor, and for the lieutenant governor to become acting governor, and for the vacancy of the office of lieutenant governor, are as follows:

"If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or be absent from the state, or become incapable of performing the duties of the office, the president, *pro tempore*, of the senate, shall act as governor until the vacancy be filled or the disability shall cease; and if the president, *pro tempore*, of the senate, for any of the above enumerated causes, shall become incapable of performing the duties pertaining to the office of governor, the speaker of the house of representatives shall act as governor until the vacancy be filled or the disability shall cease. Further provisions for succession to the office of governor shall be prescribed by law." Art. 6, § 15 (164, Williams').

"In case of impeachment of the governor, or of his death, failure to qualify, resignation, removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall

devolve upon the lieutenant governor for the residue of the term or until the disability shall be removed." Art. 6, § 16 (185, Williams').

Counsel for petitioner contend that, by the express terms of the foregoing provision of the Constitution, the lieutenant governor was not only governor *de facto*, but *de jure*, in the exercise of the powers and duties of that office, and might rightfully and lawfully assume and exercise all executive functions during the temporary absence of the governor from the state. The sole argument against this contention is that the authority to act as governor on such contingency is not given in terms, and counsel for respondent cite the cases of State ex rel. Warmoth v. Graham, 26 La. Ann. 588, 21 Am. Rep. 551, and State ex rel. Crittenden v. Walker, 78 Mo. 139, in support of their position.

The Warmoth Case was a proceeding by mandamus to compel the state auditor to pay the warrant of the governor for his salary from the 6th to the 19th of May and from the 26th of June to the 17th of July, 1871. The auditor refused to pay this warrant on the ground and for the reason that during said periods the governor was absent from the state, and that the duties of the governor, as well as his salary, devolved upon the lieutenant governor, to whom the salary had been paid. Under the Constitution of Louisiana it is provided that, in the absence of the governor from the state, or his inability to discharge the duties of the office, the powers and duties, as well as the salary of the office, devolve upon the lieutenant governor. It was held in that case that it was the duty of the auditor to pay the warrant.

The Crittenden Case was a proceeding by mandamus, and the only question presented was: Can the governor, who absents himself from the state for the purpose of performing duties imposed upon him by the Constitution and laws of the state, be deprived of his salary during such absence? It was held that the lieutenant governor was not entitled to receive the salary of the governor's office during such absence.

In these cases no question as to the validity of the executive acts of the lieutenant governor was raised. Clearly they are not authority in support of a collateral attack on the official acts of a *de facto* governor; for the salary of an officer can be recovered on the strength of a title of a *de jure* officer, although he has not performed the duties of the office, and a *de facto* officer cannot recover the salary of the office, although his official acts are valid. Constantineau, De Facto Doctrine, §§ 220 and 236. To entitle one to claim the emolu-

ments of an office he must show, if his right be questioned, that he is an officer *de jure*. 29 Cyc. 1393.

That the decision in these cases is not applicable is settled by the case of State ex rel. Atty. Gen. v. Barrow, 29 La. Ann. 243, a case to test title to the office of tax collector, where one Carey was removed and Barrow appointed by the lieutenant governor, acting as governor in the absence of the governor from the state, and the supreme court of Louisiana held that "the governor has discretionary power to remove a tax collector and appoint his successor. In the absence of the governor from the state, the lieutenant governor has a similar power." And in the opinion say: "The case contemplated by the Constitution had occurred, and, whatever power could have been exercised by the governor had he been present, the same could have been lawfully exercised by the lieutenant governor in his absence."

It is submitted by counsel for petitioner that a pardon granted by a *de facto* governor is valid.

An "officer *de facto*" is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the duties and functions of the office are exercised by one who was in the actual possession of it under color of title. Numerous authorities are collated in the case of Mitchell v. Carter, 31 Okla. 592, 122 Pac. 691, and in the opinion adopting the language of Chief Justice Fuller in Ex parte Ward, 173 U. S. 452, 43 L. ed. 765, 19 Sup. Ct. Rep. 459, it is said: "The result of the authorities is that title of person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." This principle is recognized as applicable to pardons granted by a governor *de facto*, and a pardon granted by a governor *de facto* is valid. Ex parte Norris, 8 S. C. 471.

In the case of Territory v. Richardson, 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552, the pardon was granted by the secretary of the territory, acting governor in the absence of the governor from the territory. And see Powers v. Com. 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464.

In all regular governments there is no interregnum, and there should always be someone capable of administering the laws at the head of the government. The *de facto* doctrine originated in England centuries ago, and was carried so far with respect to the English Crown that treasons committed under Henry VI. (a King "in deed, and not in right"), not in aid of the lawful claim-

ant, were punished under Edward IV. Bacon says that "it hath been settled that all judicial acts done by Henry VI. while he was King, and also all pardons of felony and charters of denization granted by him, were valid." Bacon, *Abr. Prerogative, A*; Constantineau, *De Facto Doctrine*, § 5. On the same principle when the power of Cromwell was overturned and Charles II. restored, the judicial decisions under the former remained unmolested, and the judiciary went on as before, still looking only to the *de facto* government for the time being. Hale's *History of Com. Law*.

As we think the validity of the pardon in question is sustained on higher and more satisfactory grounds than the *de facto* doctrine, it would subserve no useful purpose to further discuss this phase of the case. It is also contended by counsel for petitioner that the contemporary construction of these provisions of the Constitution by the executive department and judicial acquiescence therein fixes the construction.

From force of circumstances and conditions necessarily arising in the administration of the affairs of the government, both state and national, it is evident that those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the Constitutions and laws in numerous instances. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. Every department of the government, invested with certain constitutional powers, must in the first instance, but not exclusively, be the judge of its powers, or it could not act; and this practical construction by officials or departments outside of the judiciary may or may not be final according to the circumstances and nature of each particular case.

This court takes judicial notice of the uniform construction placed by the executive department upon these constitutional provisions. This court judicially knows that from time to time, beginning almost immediately after statehood, the lieutenant governor has always been the acting governor in the temporary absence of the governor from the state, and as such granted pardons, appointed and commissioned officers, including one of the present district judges of this state, issued proclamations creating cities of the first class and declaring the results of special elections to relocate county seats, issued and honored requisitions, appointed notary publics, and performed other executive acts, none of which have been questioned until the present time. On none of these occasions was there any pretense that anything prevented the governor from exercising the powers and performing the duties of the office, except his mere tempo-

rary absence from the state. And when as acting governor he pardoned petitioner and four others, the secretary of state recognized the lieutenant governor as the acting governor of the state, as is evidenced by the attestation with his signature and the great seal of the state. And all executive acts heretofore performed by the lieutenant governor, as acting governor in the absence of the governor from the state, have been recognized by all the departments of the state government and by the public generally as valid and binding. The court also takes judicial notice that Honorable Henry S. Johnston, president *pro tempore* of the first senate, and Honorable J. C. Graham, president *pro tempore* of the second senate, have each acted as governor during the coincident absence of the governor and the lieutenant governor from the state, and at such times performed the duties of that office. In all cases before the nisi prius and appellate courts arising on matters relating to and connected with the official acts of the lieutenant governor as acting governor, there has been a judicial acquiescence in this contemporaneous construction. The doctrine of the authorities is that contemporaneous and practical construction of constitutional provisions by the executive department will be considered by the courts in passing upon constitutional questions; and while they are not bound by such construction, except as to questions of a discretionary character, yet in all cases where there is doubt as to the meaning of such a provision, the courts will adopt and follow contemporaneous and practical construction by the officers whose duty it is to execute it, unless such construction is clearly erroneous.

It is evident that to reverse a construction put upon a constitutional provision by the department charged with its execution, after it has received such practical construction for any length of time, would be to occasion great injury to those who would be affected by such a change. 8 Cyc. 736, and cases noted; *Cooley, Const. Lim.* p. 67. The supreme court of this state has repeatedly recognized this doctrine. In the case of *League v. Taloga*, 35 Okla. 277, 129 Pac. 702, it is stated as follows: "The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation." And see *Foote v. Watonga*, — Okla. —, 130 Pac. 597; *Missouri, O. & G. R. Co. v. State*, 29 Okla. 640, 119 Pac. 117; *State ex rel. Reardon v. Hooker*, 26 Okla. 460, 109 Pac. 527. Says the supreme court of Oregon: "In all cases where those persons whose duty it is to

execute a law have uniformly given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statute, which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong." *Kelly v. Multnomah County*, 18 Or. 356, 22 Pac. 1110. And see *Brown v. United States*, 113 U. S. 568, 26 L. ed. 1079, 5 Sup. Ct. Rep. 648; *Hovey v. State*, 119 Ind. 386, 21 N. E. 890; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115.

The right and duty of the judiciary to take jurisdiction and decide cases when constitutional questions are presented are both imperative and inseparable, and the authoritative exposition of the Constitution will be found in the decisions of the appellate courts. The highest function of this court is to pass upon constitutional questions arising in cases involving the life and liberty of the citizen. This is the first time that a question involving the construction of § 16, art. 6, of our Constitution, has been presented to the courts. The Constitutions of nearly all the states have similar provisions, but we have been unable to find any express adjudication construing the same, for the simple reason, as we suppose, that the language used is so clear and unmistakable and the intention so plain that it has not been questioned. The constitutional provisions already quoted are *in pari materia* and should be considered together. Impeachment of the governor, his death, failure to qualify, or resignation, involves necessarily a vacancy in the office, and, if any one of said events occur, the right of the lieutenant governor to act is not open to question or doubt; and if, during a vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, or die, then the right of the president *pro tempore* of the senate to act as governor is unquestionable. The question therefore arises upon the construction to be placed upon the latter clause of § 16. The language is as follows: "Removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the lieutenant governor for the residue of the term or until the disability shall be removed." The office of governor and lieutenant governor are created, and their tenure, compensation, powers, duties, and functions are prescribed by the Constitution, and it is ordained that "the supreme executive power shall be vested in a chief magistrate, who shall be styled 'the governor of the state of Oklahoma.'" Art. 6, § 2 (151, *Williams*).

The duty of the courts in construing con-

stitutional provisions is to give effect to the intent of the framers and of the people in adopting the same; and, whenever it is possible to do so, each provision must be construed so that it shall harmonize with all others, to the end that the intent may be ascertained and carried out and effect given to the instrument as a whole. In all cases where the meaning is clear and unambiguous, the question is not, what was the intention, but what is the meaning of the language used.

Much stress is put upon the word "removal," as used in § 16, and counsel for respondent contend that the meaning of this word as used contemplates the permanent removal of the governor from the state. We cannot agree with this contention. The word "removal," as used in § 16, and the word "absent," as used in § 15, are convertible terms. In *Black's Law Dictionary*, "absence" is defined as "the state of being absent, removed, or away from one's domicile or usual place of residence."

In the case of *People ex rel. Atty. Gen. v. Wells*, 2 Cal. 198, the precise question before us was not presented, but Mr. Justice Anderson in his opinion discussing constitutional provisions almost identical said: "The latter clause of the 16th section of the 5th article makes provision for the vacancy of the office of lieutenant governor. It sums up all causes of vacancy, and, whether permanent or temporary, classes them under that head and by that single word. The recital of the language will enforce what I state. I repeat the clause: 'If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president of the senate shall act as governor, until the vacancy be filled, or the disability shall cease.' Here the word 'vacancy' is used both in a permanent and temporary sense. It may be absolute or becomes contingent upon the determination of the disability. It is previously provided that there shall be a lieutenant governor elected at the same time and place and in the same manner as the governor, and only one lieutenant governor, as there are only three judges. But he may become incapable of performing his duties, or be absent, and so be under disability; and during this time another shall take his place. When, however, that disability ceases, he retakes his place; and from whence does he come? From that temporary vacancy. He was living, but out of his functions, either incapable or absent, and therefore disabled from the performance of his duties. It would have been absurd to have created that, or any other office, not

subject to a temporary vacancy. That would have been the excess and folly of reverence and staid respect for the man, without the consideration for the public interest, to be found in the utility and necessity of the functions of the office. This train of incidents and reasonings runs through all the Constitution in relation to offices, their number, how to be occupied, how determined, and by what methods the functions shall always be kept in action. Thus the Constitution sustains the only practicable doctrine, as laid down, that the vested right of the tenure of the term attaches to the person of the elected incumbent, but that the functions of the office, in certain contingencies, separate from him temporarily, and adhere to a distinct class of powers within its department for the use, benefit, and protection of that great public for which the government was created. Thus, also, the Constitution has established the interpretation of the word 'vacancy' to be, as used in it, that it means either permanent or temporary. The cause and the reason go together. The absence or incapacity of performance produces the disability; the vacancy of the functions, for so long, follows; when the former ends, the latter are resumed by the original incumbent. For all this, the Constitution has used the word 'vacancy.' There it stands. There is no getting around it. It is the only truth; the solid and impregnable ground of the Constitution not incidentally formed, but constructed for a particular purpose, with premeditation, thought, wisdom, and that good, practical common sense which the objects and the occasion demanded. But I am not done with the support even in this very place of the Constitution; and, although I do not think it necessary, I hold it to be my duty to add every rivet which may make the work more secure. The 17th, being the next section after that I have already quoted, declares that 'in case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the disability shall cease.' There are two things which this still further demonstrates: First, that the Constitution never lost sight of the proposition that a temporary vacancy might occur in the functions of an office, while the tenure of it was held by the stated incumbent; that in such event another might fill it; and that, when the disability ceased, the former should resume his constitutional functions. Can anything be plainer than this? Second, that the first

section provides there shall be but one governor, as there should be only three judges of the supreme court; but the section under consideration contemplates certain contingencies which may cause a temporary vacancy of the functions of his office, and, though he be living and holding the tenure of the term, another may occupy and administer the functions. Thus the same idea is maintained throughout the Constitution, as applied to the very highest officer known to it. The mistake committed, usually, in forming an opinion upon this subject consists, as I have stated, in not drawing the proper distinction between the tenure of the term, which attaches to the person of the incumbent, and the functions of the office, which, under certain circumstances, he may exercise, but which belong to the sphere of a department for the right as well as the good of the people. From that sphere they cannot be separated. The Constitution, we find, makes that distinction. The law makes it. The policy of all governments has made it. The usages of all civilized nations have incorporated it." In the same case Chief Justice Murray in his opinion used this language: "It is said that our Constitution recognizes a temporary vacancy in the office of governor, and that there cannot be two governors in the abstract, any more than there can be four judges. It is sufficient, by way of answer, to say that the Constitution has declared what shall constitute a temporary vacancy in the office of governor and provided how the same shall be supplied, while it is silent with regard to every other officer. It is fair to suppose, upon every rule of construction, that, if vacancies for temporary incapacity in other constitutional offices had been contemplated, they would have been provided for."

A careful reading of the provisions (§§ 15 and 16 of article 6) will show that the enumeration of the causes of vacancy in the office of governor is so complete that they are susceptible of a construction which will cover every possible contingency, whether permanent or temporary. In case of a permanent vacancy of the office, the accession of the lieutenant governor continues for the residue of the term, if only temporary until the disability shall be removed. As chief magistrate he has important functions to perform that can never be safely suspended for any period of time. As a convincing demonstration of this, it is only necessary to advert to a few of his powers, functions, and duties. He is commander in chief of the militia, and as such represents the reserve force that constitutes the ultimate strength of the laws; and he shall cause the laws of the state to be faithfully

executed; he is chairman of the most important state boards; he must issue extradition warrants for fugitives from justice, and a few days' delay would often defeat the ends of justice; without unreasonable delay he must pass upon extradition warrants from sister states; he must approve the official bonds of certain state officers within a time certain; and under § 5970, Rev. Laws, he alone can reprieve or suspend the execution of a judgment of death beyond the time allowed by the trial court to perfect an appeal to this court, when the appeal has not been taken within the time allowed. See Opinion of Judges, 3 Okla. Crim. Rep. 315, 105 Pac. 684.

The functions of chief magistrate were created for the benefit of the state, and are local to it; and, as the constitutional functions of his office cannot be exercised out of the state, the effect of his absence from the state is to suspend his constitutional functions, and thereupon these functions devolve upon the lieutenant governor, and he becomes and is *de jure* and *de facto* governor until the absent governor returns to the state.

It is further provided by article 6, § 15, already quoted, that, if during a vacancy in the office of governor the lieutenant governor shall "be absent from the state, the president *pro tempore* of the senate shall act as governor until the disability shall cease, and, if the president *pro tempore* of the senate be absent from the state, the speaker of the house of representatives shall act as governor until the disability shall cease. In all this there is a perfect consistency pervading both sections. The unequivocal language of the latter clause of § 16 is that, upon his removal from the state, said office shall devolve upon the lieutenant governor until the disability shall be removed; and the plain intention of the framers of the constitution and the people in adopting it was to provide that, in his absence from the state for any purpose or for any period of time, however short, his constitutional functions shall devolve upon the lieutenant governor as acting governor. Such absence from the state is an abdication for the time being of the constitutional functions of his office, and the effect of that absence is to suspend his constitutional functions. He does not cease to be governor by his temporary absence from the state. His vested right of tenure in the term of office attaches to his person and is distinct from his executive functions; it goes with him; but the constitutional functions of his office belong to the public, and are confined to the state, and cannot be exercised out of the state; when he leaves the state, the constitutional functions of his office devolve

pro tempore upon the lieutenant governor; and, when he returns to the state *ipso facto*, he resumes all of the powers, functions, and duties of his office, and the lieutenant governor theretofore administering the executive functions temporarily under the Constitution ceases to be acting governor.

The true distinction is founded upon the difference existing in the nature of things between a personal vested right of tenure in the term and the functions of the office created in the interest and for the benefit of the public. We think that this is the unmistakable meaning of the language used, and that this construction is alike supported by reason, common sense, public policy, known political truths, and the contemporaneous and practical construction of the respective departments of our state government, and is conformable to the history of every state in the Union.

It follows that the pardon granted and delivered by the lieutenant governor as acting governor, in the absence of the governor from the state, is a valid and effectual pardon. *A fortiori* the warden had no authority to disregard it. As already indicated, the governor has no power to revoke a full and unconditional pardon that has been delivered; therefore his order purporting to revoke this pardon was necessarily a mere nullity.

It is our opinion that the petitioner is unlawfully restrained of his liberty by the respondent, and that he is entitled to a discharge from the imprisonment of which he complains, and he is therefore by the judgment of this court discharged therefrom.

Armstrong, P. J., concurs.

Furman, J., concurring:

The facts upon which this proceeding arose, and the writ of habeas corpus was issued, and the case determined by the court, during my absence from Oklahoma City. I therefore did not participate in the consideration of this case prior to its determination. But as the decision of the court has excited some criticism, and as I have no desire to escape full responsibility for any action by the court of which I approve, I desire to say upon a full and thorough investigation I fully concur in the views expressed by Judge Doyle. Any other view would be revolutionary.

Statement by Doyle, J.:

The government of the state of Oklahoma, in a letter which was read at the conference of governors held at Colorado Springs, Colorado, explaining his nonattendance there, makes an unfounded and indefensible assault upon the integrity of this court and

its decision in this case. His language, as published, is as follows: "The lieutenant governor seems determined to overthrow all of my policies and to make wholesale delivery of criminals from the penitentiary. The criminal court of appeals in this state has joined hands with the lieutenant governor in this raid on the penal institutions by holding that the moment I leave the state, even if my absence extends only five minutes, the lieutenant governor can do as he please. Under these conditions, it would be a crime for me to leave Oklahoma." This emanation of official arrogance and vindictive malevolence received nation-wide publicity through the public press. The reason, we suppose, is that the spectacle of a governor publicly assailing a high court of this state is without precedent in the annals of the Republic.

It may be said that this uncalled for and unjust reflection upon the court could do no permanent injury to a court strong in the consciousness of its own integrity and strong in the respect and confidence of the people of the state, and therefore it was unworthy of notice, and the wise course would be to ignore it. But, as a member of the court and the judge who delivered the opinion, I feel that when the chief executive officer of the state becomes so lost to the proprieties of position and a proper sense of decorum that he presumes, in his official capacity and in a public manner, to malign and condemn one of the courts of last resort of the state, because its decision did not conform to his views, that it becomes necessary for the good name of the state within and without its borders, and in order to preserve the respect and confidence of the people unimpaired and its own proper self-respect, that the court should vindicate itself by properly condemning such an assault upon its integrity.

It is the duty of the courts to keep the judicial reputation of the state free from even the appearance of dishonor, and to prevent the growth of that distrust in the minds of our own people that would certainly follow such a reflection upon their integrity if permitted to go unrebuked. The loss of public confidence in the integrity of the courts would be a calamity little less than the loss of judicial integrity itself. The pomp and circumstances which, in other countries, aid to clothe the courts and the law with dignity and power are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone and popular respect for law impaired. When confidence in

the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence, and crime. Says an able jurist: "The one element in government and society which the American people desire above all things else to keep from the taint of suspicion is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people, and the object of its social organization has failed. The protection of life, liberty, and property is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws, but, unless they are honestly administered, neither life, liberty, nor property enjoys the security which it is the object of government and society to give."

In the words of the immortal Marshall, "That greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, corrupt, or a dependent judiciary." Let us fervently hope no such curse may ever be drawn down upon the people of Oklahoma.

This court, independent of authority granted by the Constitution and laws, has the inherent power to punish for contempt of court, and it is its duty to employ with becoming firmness and dignity this power to protect itself and the reputation of the state against any unfounded and scandalous accusation made against it which has a tendency to prejudice the public, or to embarrass and obstruct, or prevent, the due administration of public justice.

It may be that the governor cannot be made to answer at the bar for a contempt of court, but the power to punish for contempt necessarily carries with it the right to repel, rebuke, and reprimand. The governor's control over the judicial branch of the government is no greater than that of the humblest private citizen. The verdicts of juries and the judgments of the courts are not subject to revision by him, except that he has the power to grant after conviction, reprieves, commutations, paroles, and pardons. In the exercise of this power he has arrogated to himself the right to nullify the law prescribing the death penalty for murder at the discretion of the jury; and he has often stated in published interviews and in speeches to public assemblies that he would not permit the law prescribing the death penalty for murder to be carried into execution during his term of office, and in accordance therewith, upon the sole

ground that he is opposed to capital punishment, he has uniformly commuted death sentences. In the case of Cotton, from Wagoner county, who without a pretense of justification killed an officer of the law, and who upon his trial was sentenced to be hanged, the governor, without waiting to receive the transcript of the evidence required by law to be furnished by the trial court to him, or permit this court to pass upon the legality of the sentence, commuted it. It is unnecessary to theorize or comment upon the deplorable results. The facts are too well known. He has also invoked the military arm of the state government to obstruct the execution of process issued upon a mandate of the supreme court. See the case of Fluke v. Canton, 31 Okla. 718, 123 Pac. 1049. Therefore it is not strange that he assumes authority to publicly censure and criticize the courts when their decisions do not meet his views even though it tends to destroy confidence in and excite odium against the courts and the law.

In the Prather Case, he, as by law provided, requested the opinion of the judges, and the same was given (see Opinion of Judges, 6 Okla. Crim. Rep. 18, 115 Pac. 1028); he commuted the sentence, and in a published interview announced that he did not think that the opinion stated the law. And his first message to the fourth legislature contained an unwarranted diatribe upon this court.

The theory of monarchical forms of government is that the reigning sovereign rules by "divine right," and that he is the depository of all supreme power, that whatever of liberty the people possess or enjoy is a gracious grant on the part of the sovereign, and the power to pardon is a dispensing power of the sovereign. A crime in such a country is not against the government, but against the King. With us the theory of government is different. If a man commits a crime in this state, he is prosecuted for having offended not against the executive, the legislative, or judicial branches of the government, but for having offended "against the peace and dignity of the state." This is a government of laws, and not of men; and the doctrine of divine right and passive obedience is as foreign to our institutions as the principle that the King can do no wrong.

How well the members of this court have honored their high trust, and how well they have administered the law in behalf of the life and liberty of the citizens, is a matter for the people to determine; but on behalf of my associates and myself, I can say that we have the consolation of knowing that we have endeavored to honor our judicial trust by a faithful regard to our 47 L.R.A. (N.S.)

official oaths and the Constitution and laws of Oklahoma.

SOUTH DAKOTA SUPREME COURT.

O. F. HERRON, Respt.,

v.

ALVA M. ALLEN, Appt.

(— S. D. —, 143 N. W. 283.)

Trial — inconsistent positions — waiver.

1. Claiming, on motion for new trial, that a deed was executed by an alleged grantor without consideration, waives a contention made at the trial that he did not execute it. **Fraudulent conveyance — who may question.**

2. The question of fraud in the execution of a deed can be raised by a stranger only when he is in a position to claim title as against the grantor.

Execution — redemption from first sale — second levy.

3. Judgment against a nonresident, founded on substituted service of process and attachment of real estate within the state, does not give such a lien upon the property as to support a second levy of execution for deficiency in case the debtor redeems from the sale under the first one.

New trial — newly discovered evidence — theory as to materiality.

4. A new trial will not be granted for newly discovered evidence merely because new counsel believes that evidence of a fact may be material, if the original counsel had full knowledge of the facts from the beginning of the controversy.

(October 6, 1913.)

Note. — Liability of property redeemed by judgment debtor or his grantee to satisfy deficiency on indebtedness for which it was originally sold.

In general.

In general, as to redemption after foreclosure sale, see note to Horn v. Indianapolis Nat. Bank, 9 L.R.A. 676.

As to right to judgment and execution for deficiency after mortgage foreclosure, see note in 4 L.R.A. 205; and as to deficiency judgment against nonresident served constructively, see note in 50 L.R.A. 583.

No case has been found similar to HERRON v. ALLEN, involving the question whether a second execution can be levied for a deficiency after redemption by the judgment debtor, where there has been only substituted service of process. But the reasoning of that case is sound, and is supported by the theory upon which the cases rest where there is personal service. The general rule, where there has been personal service, is that after the judgment debtor redeems, the property may be again subjected to execu-

A PPEAL by defendant from a judgment of the Circuit Court for Potter County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Hanten & Hanten, for appellant:

A judgment in a suit aided by attachment need not direct a sale of the property in satisfaction thereof, as the law implicitly imposes that duty upon the attaching officer.

Iowa State Sav. Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Low v. Henry, 9 Cal. 538; Waples, Attachment. 510.

tion and sale for a deficiency on the original judgment. The same rule has in some jurisdictions been held to apply as to the grantees of the judgment debtor, although there is a conflict of authority upon this point.

Redemption by judgment debtor.

In *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, not on its facts within the scope of the note, it was said: "When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage, but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all the property of a debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien."

In *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447, it was said: "The authorities are practically uniform that a redemption by the judgment debtor of his lands sold under execution will reinstate the lien of the judgment for any balance remaining unpaid, and subject the lands to a resale to satisfy such balance."

In *Campbell v. Maginnis*, 70 Iowa, 589, 31 N. W. 946, it was held that property redeemed by the judgment debtor could be subjected to a second sale upon a general execution under the decree to satisfy a deficiency arising upon the original sale; and in *Stoddard v. Forbes*, 13 Iowa, 296, the same principle is recognized.

Under statute providing that whenever real estate is redeemed by the owner, or person claiming under him, the sale shall be wholly vacated, and the real estate subjected to sale on execution as though the sale had not been made, it was said in *Herron v. Allen*, 116 Ind. 125, 19 N. E. 125, that the effect of such a redemption was that the judgment, so far as it remained unsatisfied, again became a lien upon the property, and was reinstated to its former position.

The lien required by attachment or garnishment is not lost by taking a general money judgment against the defendant without an order for the sale of the attachment property.

Coulson v. Saltsman, 71 Neb. 495, 98 N. W. 1055.

Where the property of the judgment debtor has been sold for less than the amount of the judgment, and redeemed from such sale by the judgment debtor, the property may again be sold on a second execution issued on the same judgment for the balance due thereon.

Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458.

Where real estate has been attached and the attachment preserved, an execution levied under a judgment recovered in such

vey v. Krost, 116 Ind. 268, 19 N. E. 125, that the effect of such a redemption was that the judgment, so far as it remained unsatisfied, again became a lien upon the property, and was reinstated to its former position.

Under the above statute, it was held in *Green v. Stobo*, 118 Ind. 332, 20 N. E. 850, that upon redemption by an heir of the judgment debtor, a second execution might be issued on the judgment, and the property resold to satisfy a deficiency upon the original sale.

And in *Mitchell v. Ringle*, 151 Ind. 16, 68 Am. St. Rep. 212, 50 N. E. 30, where the judgment debtor redeemed the property from foreclosure sale, and the same day conveyed it to his wife, it was held that a second execution might be issued and the property resold to satisfy a deficiency on the judgment.

It was also held in *Mitchell v. Ringle*, supra, that the fact that the resale occurred upon a writ which was in form an ordinary execution, instead of a copy of the order of sale and judgment, as provided by statute in cases of mortgage foreclosure, was a mere irregularity which had been waived.

And in *Goddard v. Renner*, 57 Ind. 532, it was said: "When real property is redeemed from a sale under execution, either by the owner or someone else acting in his behalf, the certificate of sale is simply annulled, and the property restored to the position it occupied before the sale, with the judgment lien or liens reinstated for any balances remaining unpaid, and may be resold to discharge such judgment lien or liens."

In *Allen v. McGaughey*, 31 Ark. 252, it was said that the effect of a redemption on behalf of the judgment debtor was to restore the property to him with a judgment lien upon it, just as if no sale had been made; and that a valid title might be obtained through a sale on a second execution upon the judgment issued before the judgment lien had expired.

Under statute providing that "if the debtor redeem, the effect of the sale is terminated, and he is restored to his estate," it

suit operates as a lien from the date of the attachment, prior to all encumbrances created by the debtor subsequent to the levy of the writ of attachment.

First Nat. Bank v. Redman, 57 Me. 405; Brackett v. Ridlon, 54 Me. 426; Brown v. Williams, 31 Me. 403; Nason v. Grant, 21 Me. 160; Huxley v. Harrold, 62 Mo. 516; Lackey v. Seibert, 23 Mo. 85; Harbison v. McCartney, 1 Grant. Cas. 172; Mattocks v. Farrington, 2 Haskell, 331, Fed. Cas. No. 9,298; Scaman v. Galligan, supra.

The very judgment on which the sale was had becomes again a lien, if it was not fully satisfied by the sale, and the land may be again sold.

Phyfe v. Riley, 15 Wend. 248, 30 Am. Dec. 55; Warren v. Fish, 7 Minn. 432, Gil.

was held in Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458, cited in HERRON v. ALLEN, that property redeemed by the judgment debtor might be resold upon a second execution to satisfy a deficiency in the original judgment.

The case of Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206, where the redemption was by a subsequent lien holder, by inference at least, supports the general rule that property redeemed by a judgment debtor may be resold to satisfy a deficiency on the judgment, the court saying that in the case before it "the redemption was not made by the judgment debtor so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay."

The general rule that property redeemed by a judgment debtor may be resold to satisfy a deficiency is also supported by the case of State ex rel. Allen v. Sherill, 34 Ind. 57, where, after redemption of the property by the execution defendants, another execution was issued on the judgment to collect a deficiency, and it was held that the lien for the deficiency had priority over other judgment liens.

Under the New York statute rendering the sale null and void under such circumstances, it was held in Wood v. Colvin, 5 Hill, 228, that, after redemption by the judgment debtor, the property might be resold on the original execution to satisfy a deficiency on the former sale. The situation after the redemption, it was said, was, by virtue of the statute, precisely as though no sale had been made, except that a part of the judgment had been satisfied.

The court, also, in Wood v. Colvin, supra, overruled a contention that after redemption of the property by the judgment debtor, a new execution should have been issued, holding that the property might be resold on the original writ to satisfy a deficiency. It was said that, as to the balance remaining due on the judgment, the writ still remained in force; that between the time of the sale and the redemption, the execution could not be used for the purpose of resell-

347; Settlemire v. Newsome, 10 Or. 446; Boyce v. Wright, 2 Abb. N. C. 163.

A new trial will be granted on the ground of newly discovered evidence where the latter is of such character that it will probably change the result of the former trial.

Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Gaines v. White, 1 S. D. 434, 47 N. W. 524.

Mr. Robert B. Fisk, for respondent:

A new trial will not be granted on the ground of newly discovered evidence, if the evidence might have been discovered by reasonable diligence in time to have been produced at the trial.

Spelling, New Tr. & App. Pr. § 209;

ing the property, but the moment the redemption was made, the execution was restored to its original vigor.

The principle that, after redemption by the judgment debtor, the judgment on which the sale was made becomes again a lien, if it was not fully satisfied by the sale, and the property can be resold to satisfy the deficiency, was apparently followed also in Bodine v. Moore, 18 N. Y. 347, where property subject to a prior mortgage was sold on two executions, one of which only was satisfied by the bid, and thereafter was again sold to satisfy the mortgage, and part of the surplus after payment of the mortgage was paid to the purchaser in satisfaction of his claims; and it was held that there had been, in effect, a redemption by the judgment debtor, since his property, converted into money, had been paid to and accepted by the purchaser at the sale, and that this virtual redemption operated to restore the lien of the party whose execution had been unsatisfied by the sale, the same as if a sale had never been made on the execution.

In Peckenbaugh v. Cook, 61 Iowa, 478, 16 N. W. 530, it was held that if property was conveyed by the judgment debtor to his wife without consideration, for the purpose of hindering and delaying creditors, and she after sale on execution, with money furnished by her husband, redeemed the property, the conveyance might be set aside, and the property subjected to payment of a balance remaining due upon the judgment, as in cases where the redemption was made by the judgment debtor. It was said that if the judgment debtor redeemed, the balance of the judgment at once attached as a lien upon the property.

See also the cases of Hays v. Thode, and Clayton v. Ellis, under the subdivision following.

Redemption by grantee of judgment debtor.

As above indicated, there is a conflict in the decisions as to whether, after redemption by a grantee from the judgment debtor, the property may be subjected to resale to

Ochsenreiter v. George C. Bagley Elevator Co. 11 S. D. 91, 75 N. W. 822; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524; *Merchants' Nat. Bank v. Stebbins*, 10 S. D. 466, 74 N. W. 199; *Smith v. Mutual Cash Guaranty Fire Ins. Co.* 21 S. D. 433, 113 N. W. 94; *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419; *Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703; *Hayne, New Tr. & App.* § 91; *Demmon v. Mullen*, 6 S. D. 554, 62 N. W. 380; *Wilson v. Seaman*, 15 S. D. 103, 87 N. W. 577; *Baker v. Joseph*, 16 Cal. 173.

The provisions of the Code in relation to service by publication must be strictly complied with in order to confer jurisdiction, and the affidavit must show that the

requirements of the statutes have been followed.

Soderberg v. Soderberg, 1 Dak. 503; *Whaley v. Carter*, 1 Dak. 504; *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 66 N. W. 453; *Davis v. Cook*, 9 S. D. 319, 69 N. W. 18; *Bothell v. Hoellwarth*, 10 S. D. 491, 74 N. W. 231; *Plummer v. Bair*, 12 S. D. 23, 80 N. W. 139; *Grigsby v. Wopschall*, 25 S. D. 564, 37 L.R.A. (N.S.) 206, 127 N. W. 605.

A personal judgment is absolutely null and void, and is subject to collateral attack.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Even if everything had been legally done,

satisfy a deficiency arising on the original sale. In an early decision in Iowa (*Crosby v. Elkader Lodge*, 16 Iowa, 399) it was held that, after such a redemption, the property might be again sold to satisfy a deficiency. But this decision was subsequently overruled. Under the New York and Indiana statutes it has been held that the property may be resold; and the same view is taken in Oregon, provided the grantee takes title subsequent to the rendition of the judgment, but not otherwise. But in California, Kentucky, and Montana, it is held that the property is not subject to resale. The true test would appear to be whether, at the time the grantee acquires his interest, the property is, under the statutes of the state, subject to a lien for the deficiency, though the enforcement of the lien is suspended and cannot be enforced against the purchaser; or whether the lien for the deficiency attaches for the first time upon the redemption. In the latter instance, it is apparent that the property, upon redemption by the grantee, should not be subject to resale for a deficiency, since he acquires title free from any lien. But if, during the period allowed for redemption, the lien be regarded as subsisting, and the remedy only suspended as against the purchaser, then the grantee acquires the property subject to the lien for the deficiency, and, upon redemption, it should be subject to resale for the unpaid balance of the judgment. The Oregon distinction, however, appears sound, that, in any event, the property cannot be resold for the deficiency in case the grantee acquires title previously to the rendition of the judgment, though subsequently to the mortgage.

In *Moody v. Funk*, 82 Iowa, 1, 31 Am. St. Rep. 455, 47 N. W. 1008, after citing decisions to the proposition that if the judgment debtor redeems, the property becomes subject to the lien of the unpaid balance of the judgment, the court said: "But there is a marked difference between the case of a redemption by the judgment debtor and that of a redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as is practicable, the full value of his

property sold on execution. If the execution creditor fail to bid for the land sold a just amount, the debtor should be permitted to transfer his interest to another for a fair consideration; and, if his grantee redeems, the execution creditor has no right to complain, for he might have bid for the land a larger sum. . . . Where the debtor redeems, and thus restores to his estate land subject to execution for other debts, there is more ground for holding that it may again be sold to satisfy the remainder of the unpaid judgment."

On the other hand, it has been said that upon principle it is difficult to distinguish the rights of a successor in interest who redeems, from those of the judgment debtor himself; that a conveyance by the debtor can confer no greater rights than he himself had; that the successor is not a bona fide purchaser for value, but simply occupies the place of the debtor, with no new or enlarged privileges. *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447.

In *Hays v. Thode*, 18 Iowa, 51, a distinction was drawn between a case where the property was redeemed by a judgment debtor or his assignee, and where it was redeemed by a lien creditor, the rule being laid down that in the former case the property becomes subject to resale for a deficiency on the original judgment, but that the contrary is true where the redemption is by a lien creditor.

But in *Clayton v. Ellis*, 50 Iowa, 590, it was said that what was stated in *Hays v. Thode*, supra, regarding the distinction between the redemption by the debtor or his assignee, and a creditor, must be regarded as *dictum*; and, overruling the case of *Crosby v. Elkader Lodge*, supra, the court laid down the rule that "the lien of the judgment as to the unsatisfied balance of the real estate sold is, as to all persons and in all cases, devested by the sale." The alleged redemption in this case, however, was by the owner of an unsatisfied part of the judgment, who, it was held, could not redeem from an execution sale under the same judgment. And while the *Crosby Case*, in holding that property redeemed by

and the attachment regularly issued and levied upon this land, that fact cannot justify, or give the court jurisdiction to render, a personal judgment against Loring.

- Exchange Nat. Bank v. Clement, 109 Ala. 280, 19 So. 817; Cudabac v. Strong, 67 Miss. 709, 7 So. 544.

And if the attachment does not entirely satisfy the judgment, plaintiff has no redress for the unsatisfied part.

Eastman v. Dearborn, 63 N. H. 366.

While a court may decree foreclosure of a mortgage on a nonresident's property, it cannot enter a deficiency judgment, unless he appears.

Blumberg v. Birth, 99 Cal. 417, 37 Am.

St. Rep. 68, 34 Pac. 102; Williams v. Follett, 17 Colo. 54, 28 Pac. 331.

In no event can the mere rendition of a personal judgment against a nonresident create a lien on his property.

Denny v. Ashley, 12 Colo. 167, 20 Pac. 332; Grover & B. Sewing Mach. Co. v. Radcliffe, 66 Md. 517, 8 Atl. 267; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447.

The jurisdiction of a court to render a judgment may be questioned in the collateral action, when any such judgment is relied upon.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Holmes v. Oregon & C. R. Co. 6 Sawy. 278, 5 Fed. 528, 7 Sawy. 401, 9 Fed. 245; Northern P. R. Co. v. Kurtz-

the grantee from the judgment debtor was subject to sale on a second execution to satisfy a deficiency on the judgment, was overruled, the court indicated that if the judgment debtor himself redeemed, it was of the opinion that the judgment, to the extent of the balance due, would constitute a lien on the premises, and the property might be resold on execution based on the judgment to satisfy the deficiency. That the opinion thus expressed is in accord with a later Iowa decision passing upon the precise point, see Campbell v. Maginnis, under "Redemption by judgment debtor," supra. In the latter case, however, the court said that it was very plain that the judgment debtor did not, by his redemption, acquire the same right which would be held by a creditor or by a purchaser who was a stranger to the judgment.

The earlier Iowa cases are cited in Todd v. Davey, 60 Iowa, 532, 15 N. W. 421, as holding that, "by the sale of the land upon foreclosure, the mortgagee exhausts his remedy against the land, and can neither again sell it upon the judgment nor redeem from the sale, either before or after redemption by the mortgagor." The decision, however, in holding that the mortgagee could not, after redemption, enforce the balance remaining due on the judgment as a lien against the property, does not seem in harmony with the other Iowa decisions, unless it is placed upon the ground that the redemption was made by a grantee, which was the fact in the case, although the court apparently regarded him as standing in the same position as his grantor.

Under the New York statute providing that redemption might be made by the judgment debtor, his devisee or heir, or his grantee, and that, upon redemption "by any person so entitled to redeem any real estate so sold, the sale of the premises so redeemed and the certificate of such sale shall be null and void," it was held in Titus v. Lewis, 3 Barb. 70, that property redeemed by a grantee of the judgment debtor might be resold upon the original judgment and execution to satisfy a deficiency arising upon the first sale. Since the redemption, by virtue of the statute, rendered the first sale

null and void, it was said that, by necessary consequence, there having been no sale, there was no extinguishment of the judgment lien; also that the circumstance that the property was redeemed by the grantee instead of by the judgment debtor, as in Wood v. Colvin, 5 Hill, 228, made no difference, for the statute made the sale void as to the grantee precisely as it did as to the debtor himself.

In Settlemyre v. Newsome, 10 Or. 446, it was held that property redeemed by the grantee of the judgment debtor might be resold to satisfy a deficiency on the original judgment. The statute, it was said, gave the grantee of the debtor the right to redeem, but was silent as to the effect of redemption.

And in Willis v. Miller, 23 Or. 352, 31 Pac. 827, under statute providing for a personal judgment for a deficiency in foreclosure sales, but also providing that if the judgment debtor redeemed, the effect of the sale should be terminated and he should be restored to his estate, it was held that property redeemed by one who became a grantee previously to the rendition of the judgment was not subject to resale upon an alias execution to satisfy a deficiency arising on the original sale. It should be noted that in Settlemyre v. Newsome, supra, the grantee purchased subsequently to the rendition of the judgment, but in the Willis Case the purchase was before the judgment was rendered. In distinguishing these two classes of cases, the court in Flanders v. Aumack, 32 Or. 19, 67 Am. St. Rep. 605, 51 Pac. 447, said that under the statute providing for a personal decree against the mortgage debtor for a deficiency, and enforcement by execution as in ordinary cases, such a personal decree against the debtor, from the date of its docketing, became a general lien upon his real property; that the resale does not take place under the order for the sale of the specific property covered by the mortgage lien, for that has been exhausted, but under the personal decree, and a redemption did not reinstate the specific mortgage lien, while it did the general lien acquired by the personal decree; that the redemption was from the sale, and not

man, 82 Fed. 243; *Mudge v. Steinhart*, 78 Cal. 39, 12 Am. St. Rep. 20, 20 Pac. 149; *Frankel v. Satterfield*, 9 Houst. (Del.) 204, 19 Atl. 899; *Mastin v. Gray*, 19 Kan. 469, 27 Am. Rep. 158; *Chicago, R. I. & P. R. Co. v. Campbell*, 5 Kan. App. 424, 49 Pac. 322; *Gregory v. Gregory*, 78 Me. 190, 57 Am. Rep. 793, 3 Atl. 281; *Balk v. Harris*, 122 N. C. 66, 45 L.R.A. 257, 30 S. E. 318; *Kingsborough v. Toulouse*, 56 Ohio St. 457, 47 N. E. 542; *Price v. Schaeffer*, 161 Pa. 534, 25 L.R.A. 700, 29 Atl. 279; *M. T. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 671, 41 S. W. 105; *St. Sure v. Lindsfelt*, 82 Wis. 349, 19 L.R.A. 517, 33 Am. St. Rep. 52, 52 N. W. 309.

Whiting, P. J., delivered the opinion of the court:

Much is being written and spoken, and rightly so, concerning the law's delay. It seems the fashion to cast the odium therefor upon the courts, and there are undoubtedly cases wherein the courts—both trial and appellate—have laid themselves open to just criticism. That the blame is not all theirs is well illustrated by the history of the cause now before us, which history is as follows: Action instituted August 8, 1903; issue of fact joined October 3, 1903; trial had March 30, 1905; argued before trial court June 27, 1906; findings of fact, conclusions of law, and judgment signed June 28, 1906; execution stayed to Sep-

tember from the mortgage; and if the lien of the personal decree had never attached, by reason of the mortgagor not having the fee of the property at the time it was rendered, there never existed any lien to be reinstated against his grantee, who purchased prior to the decree. It was said also in the *Flanders Case* that the decision in *Willis v. Miller* was not intended to overrule *Settlemire v. Newsome*, or modify it in any particular.

Settlemire v. Newsome, supra, was approved and followed in *Flanders v. Aumack*, supra, where, as in the former case, it was held that after redemption by one who became a grantee of the judgment debtor subsequently to the rendition of the judgment, the judgment creditor could resell the property to satisfy the deficiency. It was said that the effect of a sale under execution was to suspend, but not to divest, the lien of the judgment, as it suspended all subsequent liens, until redemption was made; that if the sale was perfected either to the purchaser, or through the redemption by subsequent lienors, the liens of all creditors having subsequent judgments or mortgages, as well as the lien of the judgment under which the sale proceeded, were swept away; but if redemption was made by the judgment debtor or his successor in interest, all the liens survived or were reinstated, as though no sale had been made; that this was true of subsequent liens, and it should be true of the lien of the judgment under which the sale proceeded, because if the latter took effect only as of the date of redemption, subsequent liens would become superior and entitled to prior payment upon a resale.

In *Kaston v. Storey*, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217, it was said that the effect of a redemption from foreclosure sale, by one who purchased the property from the judgment debtor subsequently to the rendition of the judgment, was to restore the property to the same condition as if no sale had been attempted, and obliterate every effect and consequence of the sale.

In *Barry v. Harnesberger*, 78 C. C. A. 338, 148 Fed. 346, where a deficiency judgment was obtained in a foreclosure suit, and the

property was within a year conveyed by the mortgagor, it was held, under the Illinois statute providing that when execution is not issued on a judgment within a year it shall cease to be a lien, but that execution may be issued at any time within seven years,—that execution could not be levied upon the deficiency judgment three years after its rendition, and the property in the possession of the grantee sold to satisfy the same. The ground of the decision is that under the Illinois decisions the original mortgage lien was fully discharged by the sale; that since no execution was levied thereon within the year, the deficiency judgment, if it ever was a lien upon the property, was not such at the time of the attempted levy; and therefore that the property in the possession of the grantee was not subject to execution to satisfy the deficiency judgment.

In *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221, the court said: "It is true that if the premises are redeemed by the mortgagor, they become like any other property owned by him, and may be subject to execution and sale for a deficiency; but that is because they belong to the debtor, and not on account of any lien by virtue of the mortgage. A redemption by any person not liable for the debt would free them absolutely, so that they could not even be levied upon by execution for a deficiency." To the same effect is *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563.

In *Seligman v. Laubheimer*, 58 Ill. 124, where the property was redeemed by one who was a second mortgagee, and also as grantee of the mortgagor, it was held that the first mortgagee, who had purchased the property for less than the amount of his mortgage, received the certificate of purchase, and obtained a special execution to collect the balance, could not have the redeemed property resold to satisfy the deficiency. The court regarded the lien of the first mortgage as extinguished by the foreclosure and the subsequent acts of the first mortgagee.

Under statute providing that whenever real estate is redeemed by the owner, or person claiming under him, the sale shall

tember 20, 1906; error in judgment corrected March, 1909; findings, conclusions, and decree filed March 26, 1909; September, 1909, time for moving for new trial and for serving proposed statement extended to October 20, 1909; statement settled June 11, 1910; motion for new trial served July 1, 1910; new trial denied January 19, 1911; notice of appeal served March 11, 1911; notice of appeal filed January 23, 1912, upon stipulation of counsel and leave of court obtained; respondent granted until April 1, 1912, within which to serve and file briefs; placed on April, 1912, calendar with respondent in default; taken up for final disposition when stipulations dated March 30, 1912, were found to have been filed May 3, 1912, which stipulations extended time for respondent to file briefs; cause stricken from calendar as same was not properly on calendar in view of above stipulations; other stipulations filed extending time for respondent's brief; respondent's brief filed April 30, 1913, being too late for April, 1913, calendar; May 29, 1913, ordered upon current calendar; reaches final decision in this court prior to date when it was entitled to go upon

the calendar of this court. Undoubtedly some of the delay was unavoidable, but much must have been inexcusable, and there was none for which any court was responsible, except as it may be held responsible for leniency granted parties and counsel.

This action was brought to quiet the title in and to a quarter section of land in Potter county. It appears there were other defendants than appellant, but no attention need be paid to them, as their rights, if any, rest upon those of appellant. Both parties claim title to this land through one George E. Loring. Plaintiff claims through a deed to him dated March 16, 1900, and recorded March 22, 1900, which deed was signed "G. E. Loring." Defendant claims through a sheriff's deed upon an execution sale, based upon a judgment against Loring in an action entitled Woodward v. Loring. There had been a prior execution issued on this judgment and levied on this land; a sale had been had upon such prior execution, upon which sale there was a deficiency remaining; Loring had redeemed this land from such prior sale; and March 22, 1900, the execution

be wholly vacated and the property subjected to sale on execution as though no sale had been made, it was held in *Goddard v. Renner*, 57 Ind. 532, that property redeemed by a grantee who acquired his interest subsequently to the rendition of the judgment might be sold on a second execution to satisfy a deficiency in the original judgment. It was said that if the judgment debtor had redeemed, he clearly could not have objected to a resale of the property for the payment of any unpaid balance of the judgment lien; and that the grantee occupied no better position than his grantor.

The word "owner" in the Indiana statute subjecting property that has been redeemed by the "owner," or person claiming under him, to resale to satisfy a deficiency, is not limited to "judgment debtor," but has been construed to authorize a resale to satisfy a deficiency where the redemption is by one who is not the judgment debtor, but has an interest in the property in question subject to the payment of the judgment. *Lemmon v. Osborn*, 153 Ind. 172, 54 N. E. 1058, where the party who redeemed the property was an unpaid vendor whose interest was subject to mechanics' liens.

In *Todd v. Oglebay*, 158 Ind. 595, 64 N. E. 32, in holding that the Indiana statute applied to redemption by one who became the owner by successive conveyances from a mortgagor, so as to authorize a resale of the property for an unpaid balance of the judgment, the court said that the statute applied to redemptions by the "owner, his executor, administrator, heirs, or devisees, and to one holding the legal or equitable title under the mortgagor or judgment debtor;

and such redemption restores the property with respect to the lien and incidents of the judgment or decree for any unpaid balance, to the identical status occupied before the first sale."

In *McQueeney v. Toomey*, 36 Mont. 282, 122 Am. St. Rep. 358, 92 Pac. 561, 13 Ann. Cas. 316, it was held that property redeemed by a grantee of the judgment debtor, who took title subsequently to the sale, was not subject to levy and sale under execution upon a deficiency judgment against the original debtor. But the court indicated that, under a statute providing that "if the debtor redeem, the effect of the sale is terminated, and he is restored to his estate," the deficiency debt attached as a lien upon the estate in his hands.

In *Makibben v. Arndt*, 88 Ky. 180, 10 S. W. 642, it was held that after redemption from foreclosure sale, and conveyance of the property, the mortgagee could not, by supplemental petition, procure a resale to satisfy the unpaid balance of the judgment, since the mortgage lien was extinguished by the original sale. The redemption in this instance, although previous to the conveyance, was with money obtained through the proposed grantee. It was said that the creditor might sell once, and might also subject the equity of redemption, but he could not sell and resell *ad infinitum* by virtue of the mortgage lien; that the parties to the mortgage contract understood at its inception that the property was liable to be sold once by virtue of it, and it was not for the court to make another contract for them. But the court was apparently of the opinion that if the property was held by the

through which defendant claims was issued for the deficiency, and was levied upon the land.

Application for new trial was made, one ground therefor being newly discovered evidence. It is contended that this new evidence would show that Loring executed the deed to plaintiff without consideration, and that plaintiff is a mere "straw man" holding title for Loring. It is also contended that this new evidence would show that there was in fact a warrant of attachment regularly issued and levied upon the property in question at the time of, and in connection with, the commencement of the action of Woodward v. Loring. The purported judgment in Woodward v. Loring was a default judgment, based upon personal service of summons and complaint upon Loring,—concededly a nonresident of this state,—which service was made in Iowa, and was based upon an order for publication of summons. The trial court found that no attachment had been issued in said action.

Numerous assignments of error are presented, but, as we view the record, all questions material to this appeal may be dis-

cussed under two headings: (1) Proof of plaintiff's title; (2) materiality of the question as to whether or not there was in fact an attachment issued and levied upon the property in question, in the action of Woodward v. Loring.

Plaintiff, to prove his title, offered in evidence the record of his deed as the same appeared in the office of the register of deeds. Such record was objected to upon the ground that there was no sufficient proof that George E. Loring and G. E. Loring were one and the same person; also upon the ground that the acknowledgment to said deed was defective in form, and for that reason the deed improperly of record, and such record incompetent as proof of its execution. These objections were overruled, and such ruling is assigned as error. Appellant also claims that the evidence received did not sustain the court's finding that plaintiff got title to the land from Loring. In view of the position taken by appellant upon his motion for new trial, he cannot be heard to say that Loring did not execute the deed in question. The grantee in said deed having brought this action, it appears that he has

debtor himself after redemption, it might be again subjected to sale to satisfy a deficiency, for it was said that if the debtor redeemed, it would often work to the advantage of the former lien holder, whose judgment was in part unsatisfied; that it added that much to his estate, to which the creditor might look for the balance of his judgment aided by execution upon it.

It was also held in Makibben v. Arndt, supra, that a statute providing that a sale of the property is "null and void" from the time of the redemption did not restore the lien of a mortgage which had been exhausted by the sale, so as to entitle the mortgagee, as against the grantee, to a resale for a deficiency. The court said that the redemption restored the title to the mortgagor, and to this end the law declared the sale a nullity; that if the effect were to revive the lien, there would be little effort by the debtor to redeem, but that, if the sale extinguished the lien, the debtor was given an opportunity to secure the means to redeem by putting the property in pledge.

In Simpson v. Castle, 52 Cal. 644, where, after the docketing of a deficiency judgment, the mortgagor conveyed the property, which was redeemed by the grantee, it was held that the judgment creditor could not sue out execution on the judgment for the deficiency, and resell the property. The ground for the decision is that, under the California statute, the deficiency judgment was not a lien upon the property during the period allowed for redemption, and therefore that the grantee took the same free from any lien. The statute provided that

if the judgment debtor redeemed, the effect of the sale was terminated, and he was restored to his estate as if there had been no sale; also that if the purchaser was also a creditor having a prior lien to that of the redemptioner, "other than the judgment under which such purchase was made," the amount of the lien should also be paid in order to effect a redemption. The latter clause was construed as equivalent to a declaration that during the time for redemption, the unsatisfied portion of the judgment was not a lien on the property sold, because a contrary construction would impute an intention to the legislature to create an arbitrary distinction between the lien of the judgment and other prior liens. It was said also that in case of a redemption by the judgment debtor, the effect of the sale was extinguished and the debtor was restored to his estate, "which, then, for the first time, became subject to the lien of the unsatisfied portion of the judgment."

While this note does not in general include cases dealing with the question whether, after sale of property on a judgment for the first instalment of a mortgage debt and a redemption, the property can be again subjected to sale for the other instalments as they become due, attention is called to the cases of *Eacher v. Simmons*, 54 Iowa, 269, 6 N. W. 274, and *Harms v. Palmer*, 73 Iowa, 446, 5 Am. St. Rep. 691, 35 N. W. 515, which were of this kind, but are frequently cited in connection with the subject here annotated; the latter case making a distinction between a redemption by the judgment debtor and by his grantee.

B. E. H.

accepted the deed, and, for the purposes of this action, it becomes immaterial what Loring's purpose was in the execution of said deed, unless appellant is in a position where he could claim title to said land as against Loring; if he could not claim title as against Loring, there can be, as against him, no fraudulent or fictitious transfer of said property by Loring. Is appellant in a position where he could claim title against Loring? This brings us to the second matter for our consideration.

Appellant makes no contention that the judgment which was obtained by substituted service was one which, without the issuance and levy of an attachment upon the land in question, would have become a lien upon the land, and would have supported a sale thereof under general execution; therefore, if the evidence received supports the finding that there was no attachment issued, appellant's only hope lies in a new trial, wherein he may prove the issuance and levy of an attachment. The court found there was no attachment. Would it have availed appellant anything if the court had found that an attachment had been regularly issued and levied upon the property prior to the taking of the default judgment? If not, then, if the trial court erred in its finding, such error was without prejudice to appellant, as was also the court's refusal to grant a new trial.

Would a finding of the issuance and levy of an attachment have availed appellant anything? Clearly not, unless, where there is a judgment against a nonresident based upon substituted service and seizure of property under attachment,—in other words, a judgment *in rem* (Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243; National Bank v. Peters, 51 Kan. 62, 32 Pac. 637; Oil Well Supply Co. v. Koen, 64 Ohio St. 422, 60 N. E. 603; Soulard v. Vacuum Oil Co. 109 Ala. 387, 19 So. 414),—the judgment creditor has such a lien against the property attached as will support a second sale thereof when the judgment debtor has redeemed the property from the first sale.

Appellant relies upon the case of Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458, wherein it was held that, in the case of a judgment *in personam*,—such a one as without any attachment becomes, when docketed, a lien against real property belonging to the judgment debtor,—if such property is sold under execution issued thereon, and the judgment debtor redeems the property from such sale, the judgment creditor may take out a second execution and sell such property to satisfy any de-

ficiency left upon the first sale. Appellant contends that this rule should apply in a case where the judgment is based upon substituted service and attachment of real property. In this he is clearly in error. It is well to bear in mind the foundation upon which the rule announced in Scaman v. Galligan, *supra*, is based.

A most exhaustive discussion of this rule will be found in Flanders v. Aumack, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447. From a study of the Flanders Case and of the numerous authorities cited therein, it will be found that the ground upon which the courts which have approved the rule that there can be a second execution and sale for deficiency remaining after first sale upon execution issued upon a judgment *in personam* is the fact that such a judgment becomes a general lien against the real property, and such lien is not cut off by a sale that is rendered null and void by the judgment debtor's redemption of the property. But the lien of a judgment and the lien of an attachment are two entirely different things. Upon the levy of an attachment one acquires an inchoate, or, as it is sometimes termed, a conditional lien,—a lien which will become fully established only upon the rendition of a judgment either *in rem* or *in personam*. Judges and text writers often speak of this lien as one that becomes merged in the judgment lien. This use of the word "merged" is certainly inaccurate. Ordinarily, when we speak of one thing merging in another, it is when, upon such merger, at least one of the things loses its former identity, and no such a merger takes place when the inchoate attachment lien comes into full force and effect upon the happening of that condition upon which its continued existence depended,—the entry of judgment in the action. When a judgment is *in rem*, there is, by virtue of the judgment alone, no lien whatsoever. This is evidenced by the fact that there would have been no valid judgment were it not for the attachment, and by the further fact that, even where there has been an attachment issued and levied upon certain real property, the judgment is not a lien against any other real property of the judgment debtor. The judgment itself, standing alone, is not even a lien upon the property attached; this is evident from the fact that, if an execution sale was made upon a judgment, and it should afterwards develop that the attachment was void, the sale would be a nullity. Neither does an attachment lien merge in the lien of a judgment *in personam* so as to lose its distinctive features. In case of sale upon an

execution based upon a judgment *in personam* preceded by an attachment, the purchaser, by virtue of the attachment lien, would acquire such title as the debtor had at the time the attachment was levied, regardless of all liens upon or transfers of the property subsequent in date to the levy of the attachment, and such purchaser would also acquire additional interest in the property levied upon which the judgment debtor might have acquired subsequent to the levy of the attachment and prior to the docketing of judgment; but if, after sale made, the attachment should be declared invalid, while the purchaser, by virtue of the judgment lien, would still hold any and all interest which the judgment debtor held in the property at the time the judgment was docketed, he would lose all of the benefit that would have come to him because of the special lien which would have been acquired through the attachment if it had been valid. It is thus clear that, while the inchoate lien may be given full vitality by a judgment, yet it remains a separate, distinct, and specific lien, differing essentially in its nature from the only lien that can be acquired through a judgment alone, namely, a general lien. This special lien is in all things analogous to that of a mortgage, pledge, mechanics' lien, agisters' lien, etc. In the case of mortgage foreclosure by suit, the judgment does not create the mortgage lien,—it merely adjudicates its existence and directs sale to enforce it. If, upon a foreclosure, there should be only substituted service against the mortgagor, the money judgment rendered would be one purely *in rem*, and would be no lien against any property of such mortgagor; any sale of such property would rest directly upon the mortgage,—the only effect of the judgment being in its adjudication of the existence of the mortgage lien, and the amount secured thereby, with a direction that special execution issue to pay such amount. If, in such foreclosure action, there was personal service upon the mortgagor, or he entered personal appearance, then such judgment would not only adjudicate the validity of the mortgage lien and the amount secured thereby, and authorize the enforcement of such lien by sale, but, being also a judgment *in personam*, the deficiency judgment, if any, would become a lien upon any real estate of the mortgagor, and as such sufficient to support an execution sale thereof. It is well established by the authorities that any sale upon special execution in a foreclosure action, foreclosing a real estate mortgage, mechanics' lien, or any other special lien, terminates such lien, and no future sale can

be made by virtue thereof. It follows that, after a foreclosure sale, there can be no second special execution, and, if the foreclosure judgment was solely *in rem*, neither could there be any general execution for deficiency,—no special execution because the special lien is at an end, no general execution because there is no general lien,—but if the judgment had been one *in personam* as well as *in rem*, then, after the sale upon the special execution, there could be a general execution for any deficiency, which general execution could be levied upon any land against which the judgment *in personam* was a lien; and if there should be applied the rule announced in the Scaman Case, there could be a levy upon and sale of the land theretofore sold under the special execution, providing said land belonged to the judgment debtor, and had been by him redeemed from such sale under special execution. See *Flanders v. Aumack*, supra; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563.

It follows that, even if an attachment did issue and was levied upon the property in question, the lien thereof, which was established by the judgment and continued by the execution, terminated upon the execution sale, and could be no more restored than could any other special lien upon which sale had been made; therefore a finding that an attachment was issued and levied upon the property would have availed appellant nothing, his title resting, as it does, entirely upon the second execution sale issued upon a judgment *in rem*, and which execution was, for reasons above stated, wholly void.

An examination of the record shows that one of the attorneys who, upon behalf of appellant, prepared this case for trial in the circuit court, was one of the purchasers on the second sale; that he was one of the attorneys for Woodward in the action against Loring, and that, according to his own affidavit, he knew, prior to the trial of this cause, all about the issuance and service of the writ of attachment in *Woodward v. Loring*, as well as the sources from whence he might have obtained competent evidence in relation thereto. Instead of this being a case where there was an excusable lack of diligence in the discovery and unearthing of material evidence, it is one wherein there appears to have been a very late discovery, by new counsel for appellant, of the fact that proof of such attachment might be material,—something which comes far short of warranting the granting of a new trial.

The judgment and order appealed from are affirmed.

TENNESSEE SUPREME COURT.

JENNINGS, NEFF, & COMPANY

v.

CRYSTAL ICE COMPANY

and

ATLANTIC ICE & COAL CORPORATION,
Appt.

(— Tenn. —, 159 S. W. 1088.)

Corporation — purchase of assets of another — liability for deaths.

1. A corporation which purchases all the assets of another with its own stock and bonds, which it permits to be distributed among the stockholders without any pro-

Note. — Effect of consolidation, merger, or absorption of corporation on its unsecured liabilities, in the absence of statutory or contract provision relative thereto.

The earlier cases on the question above stated are collected in a note to Atlantic & B. R. Co. v. Johnson, 11 L.R.A.(N.S.) 1119, to which reference is made for the statement of the general rules deducible from the decisions; and in a note supplemental thereto, appended to Luedecke v. Des Moines Cabinet Co. 32 L.R.A.(N.S.) 616.

A note of collateral interest is appended to Stone v. Cleveland, C. C. & St. L. R. Co. 35 L.R.A.(N.S.) 770, on Liability of one railroad corporation possessing stock control of another for the acts and contracts of the latter.

In order that a promise may be implied on the part of a corporation to pay the debts of another corporation to the property and franchises of which it has succeeded by valid purchase, the conduct relied upon must show such an intention. Colorado Springs Rapid Transit R. Co. v. Albreacht, — Colo. App. —, 123 Pac. 957.

Liability of corporation into which another is merged.

In Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co. 138 Ga. 353, 75 S. E. 468, it was held that where one corporation is merged into another, the acquiring corporation by reason of the merger becomes liable for payment of all unpaid debts and unperformed contracts of the acquired corporation.

Liability of successor corporation for claims against predecessor.

In Good v. Ferguson & W. Land, Lumber, & Handle Co. — Ark. —, 153 S. W. 1107, it is said that while the assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust, this doctrine is 47 L.R.A.(N.S.)

vision for payment of the debts of the latter company of which it has knowledge, actual or constructive, is liable for their satisfaction out of the property received by it.

Equity — jurisdiction — suit to reach assigned claim.

2. Equity has jurisdiction of a suit by a creditor of a corporation to reach a claim in its favor which is alleged to have been assigned to another corporation, and to be its property, subject to the debts of the assignor, although it would have been subject to levy or attachment at law had it remained the property of the assignor.

(October 11, 1913.)

not without its restrictions; and that the law seems to be well settled that a new corporation is not liable for the debts of an old corporation merely because the former was organized to succeed the latter.

In Seymour v. Boise R. Co. — Idaho. —, 132 Pac. 427, it appeared that both the incorporators and the board of directors of the new corporation knew of the plaintiff's claim at the time of the organization of the corporation, and also at the time of the transfer of the property of the old corporation to the new corporation; that the organization of the new corporation, and the transfer of all the property and franchises of the old corporation to it, were in fact and law only a reorganization of the old company, the new corporation having a board of directors who composed a majority of the board of directors of the old corporation, and more than 98 per cent of the subscribed stock of the new corporation being held by the same stockholders who held the stock of the old corporation; and that the payment made for the alleged sale and transfer, as evidenced by the resolutions passed by both companies at the time of the transfer, was the delivery to the stockholders of the old corporation of shares of the common and preferred stock of the new corporation and the proceeds of a certain number of bonds of the new corporation. It was held that the new corporation could not equitably take over and receive all the franchises and property of the old corporation, knowing of the plaintiff's claim, and at the same time turn over to the stockholders of the old corporation these shares of stock in the new corporation, and encumber the property with a bonded indebtedness, and then avoid liability for a judgment recovered by plaintiff against the old corporation in an action for damages on account of personal injuries; and therefore that the judgment should stand as a judgment collectable not only out of the property and franchises received from the old corporation, but out of any and all property belonging to the new corporation.

In Meridian Light & R. Co. v. Catar, — Miss. —, 60 So. 657, it appeared that the stockholders in an unprofitable street railway company agreed with certain promoters

APPEAL by defendant Atlantic Company from a decree of the Chancery Court for Hamilton County in complainant's favor in a suit to enforce the collection and payment of a judgment in its favor against defendant Crystal Company. Affirmed.

The facts are stated in the opinion.

Messrs. Sizer, Chambliss, & Chambliss, for appellant:

There being no evidence to indicate that the sales and conveyances made by the Crystal Company to the Atlantic Company were fraudulent, and the uncontroverted evidence being that the latter company did not assume or agree to pay the indebtedness

of the Crystal Company to the complainants, the chancellor erred in rendering judgment against the Atlantic Company for said indebtedness.

Cook, Corp. 6th ed. § 673; 10 Cyc. 1266-1268; Memphis Water Co. v. Magens, 15 Lea, 37; Bristol Bank & T. Co. v. Jonesboro Bkg. & T. Co. 101 Tenn. 545, 48 S. W. 228; Armour v. E. Bement's Sons, 62 C. C. A. 142, 123 Fed. 56; Anderson v. War Eagle Consol. Min. Co. 8 Idaho, 789, 72 Pac. 671; Sharples Co. v. Harding Creamery Co. 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; Abilene Cotton Oil Co. v. Anderson, 41 Tex. Civ. App. 342, 91 S. W. 607; Hage-

that they would transfer the property to a corporation to be organized, in consideration of receiving stock in and bonds of the new company; which was accordingly done. It was held that the new company was not a purchaser in good faith and for value; but that it was virtually a reincarnation of the old company and therefore liable for an injury claim by a passenger accruing during the existence of the old company.

Liability of corporation purchasing assets and business of another.

In Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554 (the decisions of the courts below in which are referred to in the note in 32 L.R.A. (N.S.) 616) the Supreme Court held that the reservation by the old stockholders in an agreement for the reorganization of an insolvent railway company, of a stock interest in the new company, which was to and did purchase the railway property at a foreclosure sale made pursuant to the agreement and under a consent decree, although free from fraud, leaves the property still subject to the claims of nonassenting unsecured creditors of the original company, who were not parties to the foreclosure, nor made such by notifying creditors by publication to prove their claims.

In Wesco Supply Co. v. El Dorado Light Co. — Ark. —, 155 S. W. 518, it was held that a corporation which took over all the property (except a small amount of book accounts) of another corporation then in financial difficulties and unable to meet its obligations, the same person being the president, business manager, and owner of all the stock of the selling corporation at the time of the transfer, and president, business manager, director, and owner of four fifths of the stock of the purchasing corporation, which issued its stock in payment not to the old company nor to a trustee for the benefit of its creditors, but directly to the stockholder owning all the stock,— was not, under the circumstances, an innocent purchaser, and that it was therefore bound to the payment of creditors of the old concern to the extent of the value of the assets received therefrom, without regard 47 L.R.A.(N.S.)

to whether there was any agreement to assume its obligations.

In Harbison-Walker Refractories Co. v. McFarland, 156 Ky. 44, 160 S. W. 798, it appeared that a Kentucky corporation transferred by deed its entire property and assets to an Ohio corporation which, about four years later, made a similar transfer of all its property and assets to a Pennsylvania corporation which was evidently incorporated for the especial purpose of taking over such property and that of other corporations doing a like business; the three companies being under a common management. These transfers were accomplished merely by the purchasing companies taking over the assets of the selling companies, and issuing stock of the buying company whenever it was practicable, to the stockholders of the selling company in lieu of their original stock, and by making other arrangements with the holders of stock who would not agree to the merger. Under these circumstances it was held that the decision of the case depended upon the broad equitable principle that where one corporation takes over the assets of another corporation without paying to it any consideration therefor, the absorbing corporation takes the assets of the absorbed corporation *cum onere*; and therefore that the Pennsylvania corporation was liable for a judgment recovered by the administrator of a workman killed while in the employ of the Kentucky corporation.

In Mahaffey Co. v. Russell & Butler, 100 Miss. 122, 54 So. 807, the court, in disapproving an instruction having the effect to impose liability upon a successor corporation for a claim against its predecessor, should it be found that the former took over any of the assets whatever of the latter, said: "This is not the law. It is true that one corporation cannot, to the prejudice of its creditors, give away its assets to another corporation; nor can one corporation defeat the creditors of another by the purchase of its assets, even for value, unless such purchase is bona fide. In either case, the purchasing corporation is liable for the debts of the selling corporation, but only to the extent of the value of the assets actually received by it."

E. S. O.

man v. Southern Electric R. Co. 202 Mo. 249, 100 S. W. 1081.

The property bought to be impounded, to wit, the amount due from the railroad company to the Crystal Company under the Federal court decree, was property which could have been reached and subjected by execution and garnishment; and therefore the filing of the bill did not create any lien on said property.

Bryan v. Zarecor, 112 Tenn. 503, 81 S. W. 1252.

Mr. W. B. Miller, for appellee:

It is immaterial whether the transfer here involved was fraudulently intended or not. It was "invalid" as against creditors.

Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

Any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either secured or unsecured creditors comes within judicial denunciation.

Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 683, 43 L. ed. 1134, 19 Sup. Ct. Rep. 827; 2 Cook, Corp. § 672; Grenell v. Detroit Gas Co. 112 Mich. 72, 70 N. W. 413; Morrison v. American Snuff Co. 79 Miss. 330, 89 Am. St. Rep. 598, 30 So. 723; Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. 79 Miss. 353, 89 Am. St. Rep. 656, 30 So. 725; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 810; Moffatt v. Smith, 41 C. C. A. 671, 101 Fed. 771; Buckwalter v. Whipple, 115 Ga. 484, 41 S. E. 1010; Slattery v. St. Louis & N. O. Transp. Co. 91 Mo. 227, 60 Am. Rep. 245, 4 S. W. 79; Vance v. McNabb Coal & Coke Co. 92 Tenn. 47, 20 S. W. 424; State ex rel. Fisher v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

Green, J., delivered the opinion of the court:

The Crystal Ice Company, prior to 1910, operated two ice plants in the city of Chattanooga. Its properties were valued at about \$300,000. It is not clear from the record just how many bonds it had outstanding; the amount was certainly not more than \$90,000, however. Its current indebtedness seems to have been about \$13,000. The net value of its assets, therefore, was in the neighborhood of \$200,000. It was a Georgia corporation.

By two conveyances dated February 1, 1910, and November 11, 1910, respectively, the Crystal Ice Company transferred all its property of every description to the Atlantic Ice & Coal Corporation, which latter

concern was chartered under the laws of Virginia. By the first conveyance above referred to, the plants operated by the Crystal Company were transferred to the Atlantic Company, and the former company ceased its business of manufacturing ice. It appears to have retained, however, its office for the purpose of collecting accounts and other similar matters, and by the second conveyance above referred to, on November 11, 1910, all its choses in action, bills receivable, a contingent interest in some litigated property, and all remaining assets were transferred to the Atlantic Company. After the second conveyance, while the Crystal Ice Company remained a corporate entity, it was a mere shell; having no property of any description.

Prior to February 1, 1910, the date of the first conveyance above mentioned, the complainants herein had brought suit against the Crystal Company in the courts of Hamilton county, and this suit was pending when the Crystal Ice Company was absorbed by the Atlantic Company in the manner just stated. A judgment was recovered against the Crystal Company by the complainants on April 21, 1911, and this judgment was affirmed by this court at the September term following, the amount thereof being \$2,786.81 and costs. Execution was issued upon this judgment and was returned *nulla bona*, the Crystal Company being without assets at this time.

Aside from some \$13,000 of its debts which were assumed by the Atlantic Company, the only consideration received by the Crystal Company for its assets was stock and bonds of the Atlantic Company. These securities of the absorbing company were turned over to the Crystal Company at the ratio of \$1.75 for every \$1 of its own stock. The transfer seems to have been effected through a Georgia trust company, and the securities of the Atlantic Company were distributed to the stockholders of the Crystal Company from Atlanta. Practically all of the stockholders of the Crystal Company resided in Georgia.

The complainants filed this bill in the chancery court of Hamilton county, seeking to reach certain real estate in Chattanooga transferred in this deal by the Crystal Company to the Atlantic Company, and also to reach a certain fund in the hands of the Nashville, Chattanooga, & St. Louis Railway, assigned by the Crystal Ice Company to the Atlantic Ice & Coal Company, and to subject this land and this fund to the satisfaction of their judgment against the Crystal Ice Company. It amounted to something over \$6,000, and was withdrawn by the Atlantic Company, a bond being substituted therefor.

The chancellor sustained complainants' suit and gave them a decree on the above-mentioned bond for the amount of their judgment and interest, and the Atlantic Company has appealed to this court.

From the foregoing, it is seen that we have presented to us a case in which one corporation has acquired practically the entire assets of another in exchange for the stock and bonds of the purchasing company. The selling company retains no property and goes out of business. This is not, strictly speaking, a legal merger, because the selling company retains its legal entity, although it is entirely dismantled of its assets. Such a transaction is sometimes referred to as a *de facto* merger. Whether the merger be *de facto* or *de jure*, the plight of the creditors of the absorbed corporation is the same. No property is left out of which they may satisfy their claims in either case in the hands of the selling corporation.

We think the chancellor's decree was correct.

It is insisted for appellant that where a corporation transfers all its assets to another corporation for a fair and adequate consideration, and both corporations maintain a separate existence, in the absence of fraud, the purchasing corporation will not be liable for the debts of the other.

The doctrine that corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution of corporate property is made among stockholders, is fully established in Tennessee, and creditors have a right to follow its assets or property into the hands of anyone who is not a holder in good faith in the ordinary course of business. *Vance v. McNabb Coal & Coke Co.* 92 Tenn. 47, 20 S. W. 424; *Pom. Eq. Jur.* § 1046.

There is abundant authority likewise for the proposition that where one corporation, for its own stock and bonds, purchases all the assets of another, without provision for the debts of the latter, the transaction is out of the ordinary course of business, and the very circumstances of the case imply full knowledge on the part of the purchasing corporation of all facts necessary to charge the property in its hands with the debts of the selling corporation. *Thomp. Corp.* § 6547; 10 Cyc. 1267; *Altoona v. Richardson Gas & Oil Co.* 81 Kan. 717, 26 L.R.A. (N.S.) 651, 106 Pac. 1025; *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413.

We may further observe that suit was pending on this particular demand at the time of the absorption of the properties of the Crystal Company by the Atlantic Company. Moreover, in the contract whereby 47 L.R.A. (N.S.)

certain of the Crystal's property was transferred, a number of its debts were scheduled, and it was agreed that the Atlantic Company should assume payment of the debts named, "and none other." The implication is unavoidable that the Atlantic Company knew of the existence of claims against the Crystal other than those it assumed, and undertook to relieve itself of liability for same by contract. We must conclude that it had both actual and constructive notice of such unpaid debts.

It follows that when this purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities which it had substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to the diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical, and creditors should not be forced to surrender their claim against available, visible assets, and transfer such claim to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders.

This would be true even if the securities the Atlantic Company had given in exchange for the properties of the Crystal Company had actually been held intact by the latter company until all creditors were satisfied. As a matter of fact, however, in this case these securities were distributed among the stockholders of the Crystal Company from Atlanta, and there is nothing to indicate that such distribution was not had immediately upon the conveyance of the Crystal Company being executed.

Furthermore, these were securities of a foreign corporation, and were distributed among nonresidents of the state, and we are unwilling to approve any device by which tangible property of a corporation located here and subject to the debts of that corporation can be withdrawn from the reach of creditors and distributed among nonresident stockholders. Corporate creditors may not be thus deprived of available security for their claim, and forced to resort to diffi-

cult and inconvenient litigation in foreign states.

We are aware that there is some conflict in the cases as to the rights of creditors under circumstances such as these, but we think the views we have expressed are sustained by the weight of authority. We have no hesitation in announcing our belief that such views are correct, and they are in harmony with the following cases: *Altoona v. Richardson Gas & Oil Co.* 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025; *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413; *Hurd v. New York & C. Steam Laundry Co.* 167 N. Y. 89, 60 N. E. 327; *McIver v. Young Hardware Co.* 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; *Ft. Payne Bank v. Alabama Sanitarium*, 103 Ala. 358, 15 So. 618; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.)* 4 McCrary, 432, 13 Fed. 516; *Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co.* 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725.

Our own cases, while not exactly in point on principle, support our holding. *Vance v. McNabb Coal & Coke Co.* 92 Tenn. 47, 20 S. W. 424; *Long v. Fisher Typewriter Co.* 1 Tenn. Ch. App. 668.

The case of *Bristol Bank & T. Co. v. Jonesboro Bkg. & T. Co.* 101 Tenn. 545, 48 S. W. 228, is not applicable, for that treated of the conveyance of the assets of a partnership, and not those of the corporation.

Referring again to the authorities above cited, it is said by the New York court of appeals in *Hurd v. New York & C. Steam Laundry Co.* 167 N. Y. 89, 60 N. E. 327, that when a creditor of a corporation so absorbed demands payment of his claim, "he is referred to the empty shell which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund, he is told that the capital stock of the defendant in the hands of those who may be bona fide holders is his only resort. This is not the law."

In *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413, it is said: "A corporation cannot sell all of its property, and take in payment stock in a new corporation, under an arrangement that has the effect of distributing the assets of the vendor among its stockholders, to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of creditors. Such an arrangement is a diversion of the trust fund. . . . It was bound to know that this property was charged with

such debts, and ought not to be distributed among the stockholders to the exclusion of creditors. It was a party, then, to a diversion of the trust fund, and, having in its possession such fund, holds it subject to the payment of debts. It cannot be called a bona fide purchaser of the property as against existing creditors."

The Kansas court in the case of *Altoona v. Richardson Gas & Oil Co.* 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025, says: "Where a corporation becomes practically extinct, transferring all its assets to another, and receiving in return stock in the other corporation, which succeeds to its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one. Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

The North Carolina court in *McIver v. Young Hardware Co.* 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169, observes: "Such a conveyance of the assets is practically, and to all intents and purposes, a voluntary one, as no consideration is actually paid to the corporation which can stand as a substitute to creditors for the assets so transferred, and be as available and valuable to them as the original trust fund, the place of which it has taken. A transaction that produces this result will not defeat the trust which the law imposes upon the fund, nor impair the remedy of creditors if any debts remain unpaid."

Responding to the contention that creditors should be required to resort alone to the stock of the purchasing company received for the assets of the selling company, in *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.)* 4 McCrary, 432, 13 Fed. 516, the court says: "Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market."

Without further elaboration or quotation from the cases, we are satisfied that our conclusion heretofore announced is sound, and we are content to rest it upon the authorities mentioned. Cases bearing on all phases of this question are collected in notes in 11 L.R.A.(N.S.) 1119, and 32 L.R.A.(N.S.) 616.

In the recent case of *Northern P. R. Co. v. Boyd* (April 28, 1913), 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, the Supreme Court goes to far greater length than do we herein to protect the rights of a corporate creditor.

It is insisted that the chancellor was in error in subjecting the fund in the hands of the Nashville, Chattanooga, & St. Louis Railway to the payment of this judgment. The contention is that this fund was a debt due to the Crystal Company, and that this bill is merely a proceeding to subject this debt due the Crystal Company to a judgment against that company, and it is argued that equity has no jurisdiction of such proceedings, inasmuch as the fund in the hands of the railway company was subject to levy or attachment at law. *Bryan v. Zarecor*, 112 Tenn. 503, 81 S. W. 1252, is cited for this.

Appellant misapprehended the scope of the bill. It is distinctly stated therein in the alternative that this claim against the railway is due to the Atlantic Company, and is the property of the Atlantic Company, and in one aspect the bill seeks to reach it as the property of the Atlantic Company. Considered in this light, the bill was properly maintained. This demand, subject to the result of the litigation between the railway company and the Crystal Company, was duly assigned to the Atlantic Company, as the proof shows, and the complainants had a right to follow all property of the Crystal Company into the hands of the Atlantic Company to the extent that such property was exchanged for stock and bonds. Considering this fund as the property of the Atlantic Company, it could have been reached in no other way than by bill in equity.

There is no error in the decree of the Chancellor, and it will be affirmed, with costs.

COLORADO SUPREME COURT.
(In Banc.)

CARL E. H. GRAEB, Plff. in Err.,
v.

STATE BOARD OF MEDICAL EXAMINERS et al.

(— Colo. —, — Pac. —.)

Physicians and surgeons — revocation of license — offering to cure incurable disease.

Since there is no such thing as a manifestly incurable disease, the legislature cannot authorize the revocation of the license of a physician for obtaining a fee "on the representation that a manifestly incurable disease can be cured."

(Bailey, Gabbert, and Hill, JJ., dissent.)

(October 6, 1913.)

Note. — As to grounds for revoking physician's license, see note to *Richardson v. Simpson*, 43 L.R.A.(N.S.) 911.
47 L.R.A.(N.S.)

ERROR to the County Court of the City and County of Denver to review a judgment dismissing a writ of certiorari to review an order of respondents canceling petitioner's license to practise medicine for alleged violation of a statute. Reversed.

The facts are stated in the opinion.

Mr. Franklin H. Bryant, for plaintiff in error:

Plaintiff should not wantonly and arbitrarily be deprived of the right to practise the profession of medicine simply because of a difference of opinion as to whether a patient of his was or was not suffering from "a manifestly incurable disease."

Hewitt v. State Medical Examiners, 148 Cal. 590, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750.

Messrs. Harry E. Kelly and Charles H. Haines, with Mr. Benjamin Griffith, Attorney General, for defendants in error:

If a man's condition is manifestly incurable, and he accepts the services of a physician and pays for those services wholly because of the physician's representations that he can permanently cure him, the law requires the revocation of the physician's license.

Aiton v. Medical Examiners, 13 Ariz. 354, — L.R.A.(N.S.) —, 114 Pac. 962; *Meffert v. State Bd. of Medical Registration* (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, 195 U. S. 625, 40 L. ed. 350, 25 Sup. Ct. Rep. 790; *State Medical Board v. McCrary*, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912 A, 631; *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *State ex rel. Feller v. State Medical Examiners*, 34 Minn. 391, 26 N. W. 125; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Re Smith*, 10 Wend. 458; *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

Scott, J., delivered the opinion of the court:

On the 8th day of December, 1906, Elenor J. Shields filed a complaint with the State Board of Medical Examiners charging the plaintiff in error as follows: That Ernest Herman Carl Graeb, heretofore licensed to practise medicine under the laws of this state, and now holding a valid license so to do, did, on the 19th day of September, A. D. 1906, and on the 23d day of September, 1906, and at various times between said

19th day of September, A. D. 1906, and up to or about the 11th day of November, A. D. 1906, in the city and county of Denver, state of Colorado, obtain a fee on the representation that manifestly incurable disease could be cured, by soliciting, demanding, and receiving a fee and fees upon the specific representation that he could permanently cure one John L. Shields of the disease known as consumption, said Shields having died on the 11th day of November, A. D. 1906, said representation having been made to said John L. Shields and to deponent and to complainant and to others who hold themselves willing to appear and testify, said disease being at said time and times manifestly and absolutely incurable, a fact which deponent and complainant believes that said Graeb well knew at said times.

Upon a hearing by the board, and on April 2, 1907, the license of Dr. Graeb was revoked. A writ of certiorari was issued out of the county court, and upon hearing thereon, and on the 18th day of December, 1907, the writ was dismissed. The case is before us for a review of the proceedings. The question as to whether or not certiorari is a proper remedy in this case is not raised, and therefore not decided. The only question presented is the validity of that portion of § 6068, Rev. Stat. 1908, authorizing the state medical board to revoke the license of a physician upon the ground of "obtaining a fee on the representation that a manifestly incurable disease can be permanently cured." It is contended that this provision is void for the reason that it is in conflict with certain provisions of the state and Federal Constitutions, and is too indefinite and uncertain to constitute such an offense as by reason whereof a physician may be deprived of his license to practise his profession. The scope of the county courts' powers and duties in the matter of review on certiorari, together with a review of the law as to the powers of State Boards of Medical Examiners generally, will be found in the case of *Chenoweth v. State Medical Examiners*, — Colo. —, 135 Pac. 771. It is therefore not necessary to enter into these features in this opinion, but to adopt what was said in that case in so far as it may be applicable to the case at bar.

That part of § 6068, Rev. Stat. 1908, under which the plaintiff in error was charged, and under which he was deprived of his license to practise medicine, is: "The obtaining of a fee on the representation that a manifestly incurable disease can be permanently cured." We cannot enter into the question of the regularity of the trial before the board, or the sufficiency of the proof in the case. The whole question hinges on what is, or whether there is a distinctly,

"manifestly incurable disease." In other words, is this term sufficiently definite and specific as to constitute such an offense against the public morals and public welfare, as may be sustained by the courts as being sufficient to justify the action of the medical board in this case? It will be observed that no disease is named in the statute as being manifestly incurable.

We are relieved from much of the difficulty that would be ordinarily incident to this case, by the statements and admissions of counsel for the board. It is substantially admitted that the statute would not be valid if construed to have reference to a disease manifestly incurable *per se*, but it is contended that we should construe the statute to have reference to any disease whatsoever with which the patient may be afflicted and of which disease he is in a manifestly incurable condition.

The position of the board is very clearly stated in this respect in their brief in *Hamilton v. Board*, 135 Pac. —, to which brief we are referred and asked to consider in connection with this case. This is as follows: "If the question were in controversy in this case as to whether the words 'manifestly incurable diseases' is so indefinite as to be unenforceable we would welcome the issue, but we hesitate to burden this court with a vast number of authorities on a point not in issue. Suffice it to say that the words last quoted do not refer to any diseases *per se*, but to a condition of the patient suffering from almost any disease. It is true that consumption is not 'a manifestly incurable disease' in itself, but an invalid suffering from consumption may have reached a stage in which the disease is 'manifestly incurable.' Under our statute, a physician might lawfully take money for representing that he could cure one case of consumption and at the same time be committing an offense from taking money under a similar representation as to another case of the same disease which had manifestly gone beyond the curable stage." This argument is also advanced in this case, but not so clearly stated as in the above quotation. This position is not tenable. If the statute had intended a manifestly incurable person, or a manifestly incurable diseased condition, it would doubtless have so recited. But the language is a "manifestly incurable disease." Clearly the descriptive words "manifestly" and "incurable" apply to the disease, and not to the person or the condition of the person afflicted with the disease. This is likewise the charge in the complaint, for it alleges "that a manifestly incurable disease could be cured, . . . the disease known as consumption." *Cour-*

sel for the board have cited no authority justifying such construction of the language used in the statute as that for which they contend, and we do not see how language so clear and explicit can be so tortured. If there is no disease known and understood to be manifestly incurable, then the statute states no offense in that particular, and the board was without jurisdiction in the premises.

Dr. Graeb in the complaint is charged with receiving the fee on the representation that he could cure the manifestly incurable disease consumption, with which disease the patient at the time was afflicted. Counsel for the board say: "It is true that consumption is not a manifestly incurable disease in itself." Inded, it is not contended that any disease is manifestly incurable, but, on the contrary, counsel for the board say: "The statutory provision does not proceed upon the assumption that any disease by name, as such, is incurable, for a specific disease that is incurable to-day may be curable to-morrow through the advancement of medical science; but it proceeds upon the undeniable fact, everywhere accepted, that diseased conditions do become 'manifestly incurable.'"

If, then, the State Board of Medical Examiners, composed of those presumed to be skilled in the science of medicine, speaking through their counsel, say that neither consumption, the disease referred to in the complaint, nor any other disease, is manifestly incurable, which is the only authority, legal or medical, presented in this case on that subject, we must hold as a matter of law that the statute, in so far as it is herein considered, is void because of insufficiency and uncertainty.

The only case cited by counsel for the board as tending to sustain the contention that the statute is not void for indefiniteness and uncertainty, and considering anything like a similar statute, is *State Medical Board v. McCrary*, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912 A, 631. The statute considered in that case contained the words "chronic and incurable." It will be observed that the court discussed these words as used together, and refers to the word "chronic" only as having a clear and definite meaning. It is there said: "The word 'chronic' is the antithesis of acute, and a 'chronic and incurable' disease is generally understood to be one of long standing, deep-rooted, obstinate, persistent, and unyielding to treatment. On this account those afflicted with such diseases become discouraged and to an extent desperate, and more easily become the prey of conscienceless and unscrupulous practitioners in the med-

ical profession." We know of no statute containing like provisions to the one under consideration, and none such has been called to our attention.

It may be admitted that if Dr. Graeb was of the opinion that Shields's condition was incurable, and so believed, and that, having such opinion and belief, he obtained from Shields a fee upon the representation and promise that he (Graeb) could cure him permanently, such act upon the part of Graeb would constitute such moral turpitude as may well furnish sufficient ground to deprive him of his license, if there was a statute so providing. But we have studied the statute in vain for any ground upon which any such charge may be reasonably included, and upon which the board may revoke a medical license. Our statute has omitted all such provisions as "dishonorable conduct" or such other similar causes as are common in like statutes, and which have been sustained by the courts. It is to be regretted that our law-makers have elected to depart from the well-beaten paths in this regard, and to enter into a new and untried field by the use of terms, without precedent and without apparent consideration or reason.

The statute is the sole source of the authority of the board, and it assigns certain specified acts and conduct as may justify the revocation of a license. These are: (a) The employment of fraud or deception in applying for a license or in passing the examination required; (b) the practice of medicine under a false or assumed name; (c) the personation of another practitioner of a like or different name; (d) the conviction of a crime involving moral turpitude; (e) habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate for performance of professional duties; (f) procuring, aiding, or abetting in procuring a criminal abortion; (g) obtaining a fee on the representation that a manifestly incurable disease can be permanently cured; (h) causing the publicity and circulation of an advertisement of any medicine or means whereby monthly periods of women can be regulated or the menses, if suppressed, can be re-established; and (i) causing the publication and circulation of an advertisement relative to any disease of the sexual organs. It will be noted that even the commission of a crime is not sufficient basis for revocation, but there must first be conviction.

Thus, moral turpitude is excluded except in case of conviction in a court of justice, and is in this way eliminated as a basis for revocation under the statute.

Quite clearly the causes designated in the statute are exclusive, and the maxim, *Expressio unius est exclusio alterius*, applies. But, if we were to concede the contention that the statute relates to the condition of the patient, and not to the disease with which he may be afflicted, when would the question of curability cease to be one of opinion and become a manifest fact? We may concede that physicians of skill and experience can form a well-grounded opinion as to the question of curability, but of necessity this can be of no greater force than that of opinion and conclusion. Manifestation is specific demonstration to the eye, clear alike to all, skilled or unskilled. Then, at what point short of death may we reasonably say that the ultimate result of such a disease ceases to be a question of opinion and becomes a manifest fact? We are not willing to sanction a rule for punishment because of difference or mistake in opinion, nor to agree that those of a skilled class may be penalized for an opinion differing from that of their fellows. If so, where are we to draw the line of such difference, and who may be safely trusted to render judgment as between them? We cannot concede the infallibility of man nor deny the providence of God. If, then, we should adopt the reasoning of counsel for the board, the provision of the statute still remains too indefinite and uncertain to form the basis of a judgment for the revocation of a physician's license.

The judgment is reversed, with instructions to the court to enter an order canceling the action of the State Board of Medical Examiners in revoking the license of the plaintiff in error to practise medicine.

Musser, Ch. J., and Garrigues and White, JJ., concur.

Gabbert, J., dissenting:

The police power of government is inherent in every sovereignty. It is that power vested in the legislature which may be exercised by the enactment of laws, the purpose of which is to protect and promote the public welfare. That such is the purpose of the clause of the statute under consideration, and that its enforcement will protect the public, there can be no question. The majority opinion, however, decides that it does not, for the reason it cannot be said there is any disease known and understood to be manifestly incurable. This is too narrow a construction. When is a disease manifestly incurable? Clearly when it is evident it has reached the stage that it cannot

be made to yield to medical treatment. That is what laymen, as well as the medical profession, understand from the expression "a manifestly incurable disease." The intent of the law is to be considered in its interpretation, and, in ascertaining such intent, the evil against which it is directed must be considered. It is common knowledge that one suffering from disease can easily and readily be imposed upon by those who, by reason of the fact that they have obtained a license to practise medicine, are presumed to possess that degree of skill in the treatment of disease which will enable them to accomplish that which they represent they can. The object of the statute is to prevent what would be nothing less than extortion by members of the medical profession, obtaining money from persons or the relatives and friends of those suffering from disease by promising a cure when it is apparent that the patient is beyond the reach of medical science. Such being the object of the statute, the words employed to express it should not be given such a narrow construction as will result in destroying its beneficent purpose, when from such language, and the general understanding of what it means, it is apparent that the legislature intended to prevent the helpless ill being imposed upon by the promises of a cure when it was evident their condition was such that it could not be accomplished.

The judgment of the county court should be affirmed.

Hill and Bailey, JJ., concur in this opinion.

ILLINOIS SUPREME COURT.

CHICAGO TITLE & TRUST COMPANY
v.
CORNELIUS J. DOYLE, Secretary of State,
Appt.

(259 Ill. 489, 102 N. E. 790.)

Corporation — consolidation — tax as for new incorporation.

An apparent merger of two corporations by retention of the name of one and abandon-

Note. — Liability for incorporation tax upon extension, reorganization, consolidation, or merger of existing corporations.

Since the terms of the statutes imposing an organization tax or charter fees upon corporations are usually such as to apply to all new corporations, whether or not they may arise from the extension, re-

donment of that of the other, and increase of the capital stock of the former to take up the stock of the other, under a statute providing only for consolidation of corporations, does not prevent the operation of the rule that consolidation works a termination of the constituent parts and creates a new corporation in place of them, and therefore the new concern is liable for the tax imposed for the organization of corporations.

(July 18, 1913.)

A PPEAL by defendant from a decree of the Circuit Court for Sangamon County overruling a demurrer to a bill filed to enjoin him from paying into the state treasury the amount of a tax imposed for the organization of corporations. Reversed.

The facts are stated in the opinion.

organization, or consolidation of existing corporations, the pivotal question in each case is whether the transaction is such as to give rise to a new corporation. And whether the transaction in any particular case will have such effect depends in the first place upon the statute under which action is taken and the intention therein manifested; and in the second place, where the statute is such as to permit either the creation of a new corporation or the continuance of the old corporation with an amended charter, upon the intent and purpose expressed by the parties in the light of the statute under which the transaction takes place. In *People v. New York, C. & St. L. R. Co.* 129 N. Y. 474, 15 L.R.A. 82, 29 N. E. 959, it was said by Andrews, J., delivering the opinion of the court: "It is perfectly competent for the legislature in consolidation acts to declare what shall be the status of the domestic corporations which shall avail themselves of their provisions, and also of the consolidated company. Whether the new consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of the corporate franchises and an extinguishment of their corporate existence, and as creating a new corporation, combining, to the extent permitted by the act, the powers of the corporations out of which it was formed, and vesting in it the property of the constituent companies, depends upon the legislative intention. Where, under the act, the result of the consolidation is a new corporation in place of two or more domestic corporations, the resulting entity may properly be said to be a corporation 'incorporated by or under a general or special law of this state,' and therefore subject to the organization tax prescribed by chapter 143 of the Laws of 1886."

Although the question whether a new corporation has been created by an extension, reorganization, consolidation, or merger of existing corporations is not peculiar to the class of cases collected in this 47 L.R.A. (N.S.)

Messrs. P. J. Lucey, Attorney General, and T. E. Dempcy, Assistant Attorney General, for appellant:

The consolidation of one corporation with another, or others, creates a new corporation, and works a dissolution of the constituent corporations.

10 Cyc. 302; 6 Am. & Eng. Enc. Law, 810; *W. Scheidel Coil Co. v. Rose*, 242 Ill. 484, 90 N. E. 221.

There was a consolidation of the capital stock, franchises, and properties of the Chicago Title & Trust Company with the capital stock, franchises, and properties of the Real Estate Title & Trust Company.

W. Scheidel Coil Co. v. Rose, supra.

Messrs. Lackner, Butz, von Ammon, & McGregor, for appellee:

The creation of a new corporation is not

note, but arises also in cases involving the rights of stockholders, creditors, or the corporation itself, the circumstance that it has been dealt with in many of its specific aspects in other annotation in this series, and the possibility that a corporation may be considered by the courts as a new corporation for some purposes and as a continuance of an existing corporation for other purposes, have been deemed to warrant the limitation of the scope of the present note to cases dealing with the question of liability for incorporation taxes.

As to the right of corporations to consolidate, and the effect of consolidation in various aspects, see Index to L.R.A. Notes, Corporations, III.

It may further be stated by way of preface that the fact that the antecedent corporation or the constituent corporations have paid an organization tax has uniformly been treated as immaterial to the question of liability.

Extension.

A corporation which has once paid an organization tax upon its capital stock need not pay such tax again when it proceeds to extend its corporate existence by amendment as provided by law, such an extension not being the formation of any new or different corporation. *Ohio Valley Tile Co. v. Bruner*, 148 Ky. 358, 146 S. W. 749. In discussing this question the court said: "When, in due form, it has executed and had recorded its such articles of incorporation, it is at once an existing corporation, possessed of whatever rights the state may have given to its corporate creatures under its general laws. Among these rights is that to amend any of its articles of incorporation, a right expressly conferred by § 559 of the statutes. It has paid its tax and gained its right of existence, and with it as well the right to amend its articles, the 6th of which is that specifying the duration of its existence. The general assembly provided for no additional tax upon such extension of the

a necessary incident to the consolidation of corporations. One corporation may be consolidated into another, and the latter retain its corporate identity.

Meyer v. Johnston, 64 Atl. 603; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Lauman v. Lebanon Valley R. Co. 30 Pa. 42, 72 Am. Dec. 685; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

A contract of consolidation, whereby one corporation transfers all its property and franchises to another, operates as a dissolution of the former. The existence of the corporation to which the transfer is made continues.

2 Clark & M. Priv. Corp. § 354; 2 Morawetz, Priv. Corp. 2d ed. § 942; Chicago & E. I. R. Co. v. Doyle, 256 Ill. 514, 100 N.

E. 278; Chicago, S. F. & C. R. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373; Meyer v. Johnston, 64 Ala. 603; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Lauman v. Lebanon Valley R. Co. 30 Pa. 42, 72 Am. Dec. 685; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

Cartwright, J., delivered the opinion of the court:

On June 21, 1912, the Chicago Title & Trust Company and the Real Estate Title & Trust Company, two corporations of this state organized to carry on the same kind of business in the city of Chicago, entered into an agreement that the Real Estate Title & Trust Company should be consolidated into the Chicago Title & Trust Com-

pany, though it was careful to provide for an additional payment upon the increase of the capital stock, if any should be made by amendment. Nor did the general corporation law fix any limit as the outside period of the corporation's duration. In organizing, the corporation at bar might just as well have fixed its duration at one hundred years as at the period of twenty-five years, which it did name. The tax required on organization would have been no more; and when it named the period of twenty-five years, it had the statute before it, saying that it could at any time amend that particular article of incorporation and extend the duration of the same corporation upon which its organization tax had once been paid. The argument, upon the other hand, is that the tax is a tax not upon the organization so much as upon the right to exist for the period named in the original articles as the period of the corporate duration. There is nothing in the context of the act to warrant this narrow and restrictive construction. Nor, in view of the specially admitted right to extend by amendment the duration of its life, can it be plausibly maintained that the tax was paid in the beginning for the right to be a corporation only during the period originally named. . . . Such an extension is not the formation of any new or different corporation. Its affairs are not wound up or liquidated; there is no distribution of its assets; there is no change in the personnel of the stockholders or their liability; there is no alteration or break in the continued existence of the corporation upon which the organization tax has once been paid. Franklin County Ct. v. Deposit Bank, 87 Ky. 370, 9 S. W. 212. The general assembly might provide for a new tax upon such an extension; but it has not done so. If the corporation, however, should, by amendment, substantially change its scope, rights, and powers, there might be a consequent right to exact the organization tax; but that question is not here for decision. The ground of its collection in such a state of case would rest upon the determination of whether the

change were so substantial or material as to create in fact a new corporation."

But a corporation the period of whose existence has expired, and which, by the terms of the statute, may thereafter act only for the purpose of closing up its business, is not thereafter entitled to have recorded an amendment to its articles of incorporation extending its corporate life without paying an organization tax. Home Bldg. Asso. v. Bruner, 134 Ky. 361, 120 S. W. 306.

Reorganization.

In Com. v. Licking Valley Bldg. Asso. 118 Ky. 791, 82 S. W. 435, where a building and loan association was reincorporated under a law [chap. 32, Ky. Stats. 1903, § 554] providing that "any corporation created by and existing under the laws of this state may organize under the provisions of this chapter by executing and recording, as provided, articles of incorporation; and when the requirements of this chapter, and other laws relating to it, are complied with, it may commence business and become a corporation under this chapter, and thereupon all business effects, assets, and property, real and personal, of such corporation, shall be vested in and become, without deed or transfer, the property of the new corporation, subject to all liabilities existing against the corporation, its officers or stockholders, at the time of reorganization,"—the amended articles of incorporation extending its term of existence, increasing the amount of indebtedness which might be incurred, and securing the rights, privileges, and powers conferred by the new statute upon building associations organized under it,—it was held that, notwithstanding the name of the corporation was the same as that of the old, its business substantially the same, the stockholders of the old corporation the stockholders of the new without transfer upon the books of the company, and all business and property of the old corporation vested in the new without the transfer of the property, a new

pany, which should retain its corporate name, by-laws, officers, terms of existence, corporate organization, and its existing capital of \$5,000,000, divided into 50,000 shares of the par value of \$100 each; that the capital stock of the Real Estate Title & Trust Company of \$1,000,000, divided into 10,000 shares of the par value of \$100, should be surrendered, canceled, and extinguished; that the Chicago Title & Trust Company should take the necessary steps to increase its capital stock to \$5,600,000, and should deliver the \$600,000 of additional stock for distribution among the stockholders of the Real Estate Title & Trust Company, in the proportion of \$60 par value of the stock of the consolidated company for \$100 par value of stock of the Real Estate Title & Trust

Company to be surrendered, canceled, and extinguished; and that the necessary steps should be taken to increase the number of directors of the consolidated company to nineteen or more. On July 29, 1912, meetings of the stockholders of the two corporations were held and the agreement was ratified. The agreement to increase the capital stock and number of directors was carried out, and certificates of the consolidation and the increase of stock and number of directors were presented on July 31, 1912, to Cornelius J. Doyle, secretary of state. A fee of \$649 was paid to the secretary for the increase of the capital stock alone, but he refused to accept, file, or record the certificates without the payment of \$5,000 additional, claiming that the consolidation

corporation was created which became liable for an organization tax upon its capital stock.

A corporation which seeks the benefits flowing from the general corporation laws of the Kentucky statutes, by organizing or amending under them, must pay an organization tax on its capital stock. *Ohio Valley Tie Co. v. Bruner*, 148 Ky. 358, 146 S. W. 749.

But a corporation which has paid an incorporation tax on its original capital stock does not, upon filing amended articles of incorporation by which its capital stock is reduced and its name changed, but which make no substantial change in the scope, rights, and powers of the corporation, thereby become a new corporation, and liable for an organization tax. *Bruner v. Louisville Packing Co.* 144 Ky. 471, 139 S. W. 764.

A corporation formed under the reorganization acts of the state of New York (chap. 430, Laws of 1874, amended by chap. 446, Laws of 1876), by the purchasers of property and franchises of a railroad company at a foreclosure sale, is a new and entirely different corporation from the one whose property and franchises have been purchased, though it has by force of statute when formed all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; and is therefore liable to pay the organization tax required by chap. 143 of the Laws of 1886, which provides that every corporation incorporated under any general or special law of the state, having capital stock divided into shares, shall pay a tax of one eighth of 1 per cent upon its authorized capital stock. *People ex rel. Schurz v. Cook*, 110 N. Y. 443, 18 N. E. 113, affirming 47 Hun, 467, 10 N. Y. S. R. 660.

In *Re New York & Suburban Invest. Co.* 16 N. Y. Supp. 213 (a special term decision), it was held, construing a statute (chap. 567 of Laws 1890) authorizing existing corporations to "reincorporate" under a new corporation law, upon a reso-

lution of a majority of the stockholders at a meeting called for the purpose, and the execution, acknowledgment, and filing of a certificate of the proceedings of such meeting, which must also contain statements required to be set forth in the certificate to be made and filed by a corporation originally formed under the act,—that such an act was not an act of the corporation, but of the stockholders individually; and that the employment in the statute of the word "reincorporate," and the declaration therein that, from the time of the filing of the new certificate, "such corporation shall be deemed to be a corporation organized under this chapter," taken together with the requirement of a certificate so essentially different than that required by the act under which the corporation was originally formed, the change in the number of persons necessary to the formation of a new corporation or reincorporation of an existing one, the various things required to be done in addition to those required by that act before the company is to be deemed a corporation under the act of 1890 and authorized to engage in business, and the additional powers and privileges acquired by an incorporation under it,—indicated a legislative design that all organizations created under it should be regarded as new corporations and subject to the provisions of existing laws applicable thereto. The court accordingly arrived at the conclusion that an existing corporation so taking advantage of the provisions of the new law was liable to the organization tax imposed upon the formation of new corporations; and further adduced, in support of its conclusion, the fact that by the reincorporation the powers of the corporation were increased and its corporate existence extended.

But in *Re Kansas City Smelting & Ref. Co.* 13 App. Div. 50, 43 N. Y. Supp. 51, the appellate division reached a different conclusion in construing a substantially identical provision of the "business corporations law" (chap. 691, Laws of 1892, as amended by chap. 671, Laws of 1895), holding that a reincorporation under such pro-

created a new corporation, and that he was entitled to fees on its capital stock. The \$5,000 was paid under protest and a receipt was given, which contemplated a suit for an injunction to test the right of the state to the fee. The consolidated corporation, the Chicago Title & Trust Company, thereupon filed its bill in this case in the circuit court of Sangamon county against Cornelius J. Doyle, individually and as secretary of state, praying for an injunction restraining him from paying over said sum of \$5,000 to the state treasurer. The defendant demurred to the bill, and it was stipulated that, if the effect of the consolidation was not to form a new corporation, but merely to continue the original Chicago Title & Trust Company as a corporation

with increased capital stock, the plaintiff was entitled to the relief prayed for; but if a new corporation was created, it was not so entitled. The chancellor overruled the demurrer, and, the defendant electing to stand by it, a decree was entered in accordance with the prayer of the bill, and commanding the defendant to repay to the plaintiff said sum of money.

Corporations are creations of the general assembly, which grants to them such privileges and endows them with such powers as are deemed for the public good. As a corporation must be created originally by statutory authority, any consolidation, purchase, or merger by which it acquires the franchises of another corporation must also have statutory authority. *W. Scheidel Coil*

vision is a corporate act, and not an act of the stockholders individually; the reasoning of the court being that the legislature may confer upon stockholders power to act for the corporation, and that if a majority of the stockholders, in reorganizing under the provisions of the statute in question, were acting for themselves individually, and not for the corporation under a power conferred on them by the act, it would be difficult to see how they could transfer to the new company any other than their own individual interest in the existing corporation. It was accordingly held that such a reorganization cannot be deemed the formation of a new corporation, but should be regarded as the continuation of the existing one with an amended charter. In support of this conclusion the court referred to the fact that the legislature had provided by chapter 668, Laws of 1892, that in case of the consolidation of two corporations into a new corporation, said new corporation shall be required to pay an organization tax only upon the amount of its capital stock in excess of the aggregate amount of capital stock of the constituent corporations, and said that it is not reasonable to suppose that it was the purpose of the legislature, while exempting a new corporation organized by the consolidation of two companies from payment of the organization tax, to impose that tax upon a single company reorganized in pursuance of the provisions of the business corporations law.

Merger.

Where, under a statute authorizing the consolidation of railroad companies, authority exists for the making of a consolidation agreement that will either have the effect to continue the corporate existence of each of the constituent companies, or to merge one or more of them into another and to provide for the continuance in existence of only one of the companies and the extinguishment of the others, or to extinguish all the constituent companies and form a new corporation as the successor of 47 L.R.A.(N.S.)

all the contracting parties, the effect of an agreement between three railroad corporations which, after reciting the situation of the several properties and the purpose to consolidate them in order to promote the interests of the companies and increase their ability to perform their duties to the public as common carriers, provides that the said "constituent companies do hereby consolidate, unite, and merge their several railways, their several properties, capital stocks, franchises, rights, and privileges in and into one corporation, . . . upon the terms, conditions, and agreements set out in the following articles;" and further recites that two of the constituent companies have granted and conveyed to the third all and singular the railroads and all other property and franchises, rights, privileges, and immunities owned, held, or enjoyed by them,—all of the words necessary to effect a complete conveyance and transfer being employed, and the intent to convey being recited; and by which the constituent companies further agree that the name of the purchasing corporation shall remain the same; that it shall assume all debts and obligations that were liens upon the property of the merging company; and provides for an increase of the capital stock of the purchasing corporation, and makes provision for the exchange of stock and bonds outstanding against the merging companies; and further expressly stipulates that, "by the execution and delivery of this indenture and the subsequent filing thereof as aforesaid, no new corporation is or will be created, but the corporate existence and organization of the Chicago company formed by the execution, delivery, and filing of its articles of consolidation, bearing date of the 6th day of June 1894, will be continued,"—is not to provide for a new corporation, but to continue the existence of the purchasing corporation with an increase of capital stock as the successor to the title, rights, and duties of the others; and therefore filing fees need be paid only for the increase, and not on the whole capital stock. *Chicago & E. I. R. Co. v. Doyle*, 236 Ill. 514, 100 N. E. 278.

Co. v. Rose, 242 Ill. 484, 90 N. E. 221. As the whole matter is under the control of the general assembly, the effect of a consolidation, with respect to the extinction of the constituent corporations and the creation of a new corporation, or the continued existence of one or both of the constituent corporations, depends upon the statute under which the consolidation is effected. The general rule is that the consolidation effects the dissolution of the original corporations, and brings into existence a new corporation possessed of the property, rights, and franchises, and assuming the liabilities, of those passing out of existence. 6 Am. & Eng. Enc. Law, 2d ed. 810; 10 Cyc. 302. If the general assembly simply authorizes a consolidation, it must be held to have in view

that general rule and intend that it shall apply. It may, however, authorize the merger of one corporation into another and the continuance in existence of the latter, as where it authorizes the purchase by one corporation of the franchises, stock, and property of another. It may also result, as a matter of law, from a consolidation, that each of the constituent corporations remains in existence in a certain sense and a new corporation is also created.

Our decisions contain examples of each of these results in cases of consolidations of corporations. In *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595, where the charter of a railroad company authorized it to consolidate its stock with that of a Wisconsin corporation,

Consolidation.

• If the attempted consolidation is illegal for want of legislative authority, no fee can accrue to the state, because not even a *de facto* corporation results; such a corporation can exist only when there is a law under which a *de jure* corporation may be created. *State v. Rutland R. Light & P. Co.* 85 Vt. 91, 81 Atl. 252.

In *State v. Rutland R. Light & P. Co.* supra, it was held that no charter fee upon consolidation of existing corporations accrues under Vermont Pub. Stat. 4287, which provides (as amended by Acts 1908, No. 103) that three or more "persons" may, by articles of association, form a corporation, because it refers to natural persons only, and not to corporations; nor does a fee accrue under Pub. Stat. 800, which provides that persons seeking incorporation by special act of the general assembly shall deposit, as therein provided, a fee therein specified; since the new corporation formed by the consolidation derives its corporate character from the legislature through an act or acts authorizing the consolidation, and though such a corporation is in this sense created by a special act of the legislature, it cannot be known when the legislative authority will be made use of and a consolidation effected, or what are the terms of the consolidation, or the amount of capital stock of the consolidated company which is made the basis of the amount of the tax required.

Where the effect of proceedings authorized by a statute [Hurd's Rev. Stat. chap. 32, ¶ 50], for the purpose of consolidating corporations under a new name, with a capital stock equal to that of the constituent companies, is the dissolution of the constituent companies and the bringing into existence of a new corporation, having all the property, rights, powers, and franchises, and subject to all the duties and obligations, of the constituent companies, organization fees must be paid, notwithstanding such fees have been paid by the constituent companies. *W. Scheidel Coil Co. v. Rose*, 242 Ill. 484, 90 N. E. 221.
47 L.R.A. (N.S.)

A consolidated corporation formed under a statute providing that any two or more railroad companies in the state, owning railroads which, when completed and connected, will form one continuous line, are authorized to consolidate, with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the state or otherwise which belong to or rest upon either of the companies, such consolidation to be accomplished by a contract ratified by the majority in interest of all the stock held in each constituent company, and the filing of a certified copy of such articles of agreement with the corporate name to be assumed by the new company, and the exchange of certificates of stock in the constituent companies for that of the new consolidated company,—is a new corporation, and is liable to pay the statutory organization fees as such. *State ex rel. Houck v. Lesueur*, 145 Mo. 322, 46 S. W. 1075. The court said: "We are of opinion that the consolidation, when completed in the manner provided, does create a new corporation just as effectually as by any other mode allowed by our laws. It will be observed that new stock in a new company issues in lieu of stock in the old companies, and a new corporate name is assumed. The new corporation owns all the property, whereas the companies only owned each its own part. The circumstance that the new company remains liable for all the contracts of the old companies does not militate against our conclusion that the statute creates a new corporation, but is entirely consistent therewith."

In *People ex rel. New York Phonograph Co. v. Rice*, 57 Hun, 486, 11 N. Y. Supp. 249, affirmed on opinion of court below in 128 N. Y. 591, 28 N. E. 251, it was held that a corporation formed by the consolidation of two existing corporations, having a capital equal to the aggregate of capitals of the two corporations so consolidated, and with a term of corporate existence the same as that of the corporation having the shorter term, such consolidation being under the authority of a statute (chap. 960, Laws of

it was held that a consolidation did not constitute the constituent corporations one corporation of both states or of either; that the corporation of each state continued the corporation of the state of its creation. In *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. 874, it was held that on the consummation of the consolidation of railway companies in two or more states, authorized by the laws of the states creating them, a new corporation will be created, having in each state all the powers, rights, and franchises which the constituent corporations had in that state, but that it will not have in one state the powers of the constituent corporations in the other state; that in relation to the different states the consolidated corporation will be a separate corporation, governed by the laws of the state as to its property therein; that the constituent corporations do not necessarily cease to exist although they lie dormant and their property rights, powers, and franchises are possessed and exercised by the new consolidated corporation. That decision was to the effect that from a legal standpoint the new consolidated corporation remains a distinct corporation in each state from which the corporate existence of the constituent corporations springs. This decision was reached on account of the territorial jurisdiction of the several states and a want of jurisdiction beyond the boundaries of the state.

1867) which refers to the consolidated body as a "new company," and states that on its organization all the rights, franchises, and interests of the constituent corporations shall be deemed to be transferred to and vest in such new corporation, which would be unnecessary if there were not a new corporation,—is both a new corporation, and one formed under a general law of the state, and so liable to pay the organization tax on capital stock imposed by chap. 143, Laws of 1886, as amended by chap. 284, Laws of 1887, on "every corporation . . . incorporated by or under any general or special law of this state," even though each of the consolidating companies had already paid a similar tax, the language of the statute being clear, and containing no exemption from such tax of any corporation of which the consolidating companies or one of them has already paid an organization tax.

In *State v. Rutland R. Light & P. Co.* supra, it was held that, by force of Vermont Pub. Stat. 800, which provides that persons seeking incorporation by special act of the general assembly shall deposit, as therein provided, the fee therein specified, a fee becomes due upon the passage of a statute which confirms and legalizes all acts and contracts whereby certain corporations consolidated with another corporation, and further provides that all the charter rights, 47 L.R.A.(N.S.)

There is another class of cases relied upon to sustain the decree in this case, and they are cases where a statute authorized a corporation to purchase and own the assets, stock, and franchises of another corporation. One of them is *Chicago, S. F. & C. R. Co. v. Ashling*, 160 Ill. 373, 43 N. E. 373. The consolidation in that case took place under the act of June 30, 1885 (Laws 1885, p. 229), by which all railroad companies of this state were authorized and empowered to purchase and hold, in fee simple or otherwise, and to use and enjoy, the railway property, corporate rights, and franchises of another company or other companies owning railroads with which they connected. The *Chicago, Santa Fé, & California Railway Company* purchased the property, stock, and franchises of the *Chicago & St. Louis Railway Company*, and issued its stock, dollar for dollar, in exchange for the stock of the *St. Louis company*. It was contended that the transaction was a purchase, and not a consolidation; but the court said there was no magic in words, and calling a transaction a purchase and sale would not prevent it from being a consolidation; that the *St. Louis company* was left without property, corporate rights, franchises, or stockholders; that it was a consolidation, but the purchasing company continued in existence with enlarged powers, franchises, and property rights. The court stated the general

franchises, powers, and privileges conferred upon the companies named are continued in force and conferred upon the company into which they are consolidated, and that each of the constituent companies shall cease to exist.

—with corporation of another state.

In *People v. New York, C. & St. L. R. Co.* 129 N. Y. 474, 15 L.R.A. 82, 29 N. E. 959, reversing 61 Hun, 66, 15 N. Y. Supp. 635, it was held that since the consent of the legislature of another state is essential to the consolidation of a domestic corporation with one of that state, a railroad company formed by the consolidation under the laws of New York and of other states, of a New York corporation with corporations of such other states, is not "incorporated by or under any general or special law" of the state of New York, within the meaning of an act (chap. 143, Laws of 1886) to tax stock corporations for the privilege of incorporating.

But in *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721, affirmed, as to the constitutional questions involved, in 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865, it was held that a company formed by the consolidation of an Ohio railway company with a corporation of an adjoining state was a "new corporation," within the meaning of the statute of Febru-

rule that a new corporation is created by consolidation, but said that the rule was subject to exceptions depending upon the statute, and in that case the statute very clearly contemplated the continued existence of the purchasing company. The same condition existed in the case of *Chicago & E. I. R. Co. v. Doyle*, 256 Ill. 514, 100 N. E. 278, where there was a consolidation under the same statute of 1885 authorizing the purchase. Under such a statute the purchase of the property, corporate rights, and franchises of a corporation merges that corporation into the one with which it is consolidated, and no new corporation is created.

The remaining cases arose under statutes which provided for the consolidation of corporations. The act of February 28, 1854 (Laws 1854, p. 9), authorized and empowered railroad companies and plank road companies to consolidate their property and stock with each other whenever their roads intersected by continuous lines, and to consolidate with companies out of the state whenever their lines connected with the lines of such companies. It was held that, where two railroad companies consolidated under that statute, the original corporations became extinct, and the new company formed succeeded to the ownership of the two roads, together with all property, effects, rights, and franchises held and enjoyed by either of the old companies. *Peo-*

ple ex rel. Walker v. Louisville & N. R. Co. 120 Ill. 48, 10 N. E. 657. The consolidation in the case of *W. Scheidel Coil Co. v. Rose*, supra, was effected under the act in force March 26, 1873 (Laws 1871-72, p. 487), as amended in 1887 (Laws 1887, p. 132), and again in 1889 (Laws 1889, p. 95), which simply provides for the consolidation of corporation. Neither in the title nor body of the act is there anything which would take a consolidation under it out of the ordinary and general rule that the constituent corporations cease to exist and a new one is created. That statute contains no authority for the merger of one corporation into another, or for the purchase of the property, stock, or franchises of one corporation by another, and it was held that a new corporation was created. The consolidation in this case was under the same act, and necessarily our conclusion must be the same. The fact that the corporations in this case gave to their consolidation the form and language of a merger cannot affect the question in any manner. The corporations could not control the statute, but the statute controlled them, and effect must be given to the consolidation according to the legislative intent. The question of the effect of the consolidation must be answered by a consideration of the terms of the statute under which the consolidation took place, and not what the parties resolved or did not resolve as

ary 12, 1889, which provides: "For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the secretary of state; said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock as is provided for by the articles or agreements of consolidation for the new consolidated corporation created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

—amount of tax.

A new corporation formed by the consolidation of two corporations, one of which held 61 per cent of the stock of the other, the certificate of consolidation stating that when the stock so owned shall have been

exchanged for the appropriate amount of stock of the consolidated company, such stock of the consolidated company shall be canceled by the constituent company, is liable for an organization tax on its total authorized capital stock, and not merely on the balance of stock remaining after deducting the canceled stock. *State v. Consolidated Gas, E. L. & P. Co.* 104 Md. 364, 65 Atl. 40.

—effect of statutory exemption.

A statute (chap. 668, Laws of 1892) providing that, "in case of the consolidation of two corporations into a new corporation, said new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said two corporations," upon which such a tax should have theretofore been paid, is to be construed in the light of the intent of the legislature to prevent a liability on the part of a corporation which has paid an organization tax, to again pay the same tax upon consolidating with another corporation which has also paid such tax; and is therefore equally applicable where the consolidation is of more than two corporations. *People ex rel. Eickemeyer-Field Co. v. Rice*, 66 Hun, 130, 21 N. Y. Supp. 48, affirmed on opinion of court below in 138 N. Y. 614, 33 N. E. 1083.

E. S. O.

to such effect. The consolidation put an end to the existence of the original corporations, and a new one was formed with a capital stock of \$5,000,000. The secretary did right to demand the whole amount paid, and the chancellor erred in sustaining the demurrer.

The decree is reversed, and the bill dismissed.

Petition for rehearing denied October 16, 1913.

KENTUCKY COURT OF APPEALS.

ANDREW M. SEA, Jr., Admr., etc., of
Henry Conrad, Deceased, Appt.,
v.
EVA CONRAD.

(155 Ky. 51, 159 S. W. 622.)

Divorce — restoration of property — paid-up insurance policy.

1. A paid-up life insurance policy taken by a man for the benefit of his wife is within a statute providing that upon divorce the court shall restore any property which either party may have obtained directly or indirectly from or through the other during marriage and in consideration or by reason thereof.

Estoppel — leaving insurance policy with beneficiary — effect.

2. The administrator of one who had taken life insurance in favor of his wife, which became paid up before the parties were divorced, so that by statute the divorce restored the right to the proceeds of the policy to him, is not estopped to assert title to such proceeds, by the fact that the policy is left in possession of the wife, if the husband collects the dividends on it.

Insurance — right to proceeds — children — divorce of parents.

3. Children who are entitled to the proceeds of a policy of insurance on their father's life in case of the death of his wife, the prior beneficiary in his lifetime, cannot claim the proceeds in case the father dies before his wife, although she has been deprived of the right to the money by divorce proceedings.

(October 1, 1913.)

A PPEAL by the administrator from a decree of the Common Pleas Branch,

Note. — As to effect of divorce on rights of beneficiary under insurance policy or benefit certificate, see notes to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A.(N.S.) 478, and *Green v. Green*, 39 L.R.A.(N.S.) 370, and the later case of *Snyder v. Supreme Ruler*, F. M. C. 45 L.R.A.(N.S.) 209.
47 L.R.A.(N.S.)

First Division, of the Circuit Court for Jefferson County, in plaintiff's favor in a suit to recover the amount due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Mr. Wilson D. Crabb, for appellant:

The mere possession of the policy by Eva Conrad is immaterial, because the right and title thereto were in Henry Conrad.

When a divorce has been granted, each must restore to the other all property received during marriage in consideration thereof.

Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354, 854; *Dunker v. Schuff*, 134 Ky. 192, 119 S. W. 742; *Lankford v. Lankford*, — Ky. —, 117 S. W. 962; *Thomason v. Thomason*, 142 Ky. 177, 134 S. W. 161; *Irwin v. Irwin*, 107 Ky. 24, 52 S. W. 927; *Golding v. Golding*, 82 Ky. 51; *Bayer v. Fusché*, 7 Ky. L. Rep. 832.

Limitation cannot be pleaded by Eva Conrad, because Henry Conrad did all he could, viz., to demand of the insurance company the dividends.

The same reasoning applies in the case at bar as in a matter of fraternal insurance, and why not the same rule of law?

Green v. Green, 147 Ky. 608, 39 L.R.A.(N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913 D, 683; *Breeden v. Western & S. L. Ins. Co.* 148 Ky. 488, 146 S. W. 1104.

Messrs. J. R. Duffin, S. M. Sapinsky, and Paul Blackwood for appellee.

Settle, J., delivered the opinion of the court:

This suit was brought by appellee, Eva Conrad, against the Mutual Benefit Life Insurance Company, of Newark, New Jersey, to recover \$5,000, with interest, claimed on policy No. 117,140, issued by it February 4, 1884, upon the life of her former husband, Henry Conrad, who died April 11, 1911. The policy is what is known as a ten-year term policy; that is, in consideration of the payment, February 4, 1884, of a premium of \$310.55, and the payment of a like sum on the 4th day of February in each following year, until ten full premiums were paid, the insurance company, by the terms of the policy, agreed to pay the sum of \$5,000 to the appellee, Eva Conrad, the beneficiary named therein, within sixty days after due notice and satisfactory proof of the death of the insured, Henry Conrad. It is alleged in the petition that the insured, Henry Conrad, paid each of the annual premiums for ten years as it became due. The answer of the Mutual Life Insurance Company admitted the contract of insurance, as contained in the policy, but

denied that the appellee, Eva Conrad, was entitled to the proceeds thereof, and alleged that such proceeds should be paid to the children of Henry Conrad, who were, by its cross petition, made parties to the action and called upon to assert their claim thereto. It was permitted to pay into court the amount due upon the policy. Thereafter the appellant, Andrew M. Sea, Jr., administrator of the estate of Henry Conrad, deceased, filed a petition asking that he be made a party defendant, and that same be taken as his answer and counterclaim to appellee's petition and cross petition against the insurance company and children of Henry Conrad. The answer contains several paragraphs, in one of which the administrator denies that the appellee or children of Henry Conrad are entitled to the proceeds of the policy. In another, he sets up and pleads that, in an action for divorce between appellee and Henry Conrad, deceased, instituted, in 1895, in the chancery branch of the Jefferson circuit court, judgment was entered divorcing the parties, granting appellee \$7,000 alimony, and restoring to each all property and property rights acquired from the other by or in consideration of the marriage; and that, though, by virtue of her being at the time of the issuance of the policy the wife of Henry Conrad, she was named therein as the beneficiary, by the judgment referred to and by reason of § 425, Civil Code, and § 2121, Kentucky Statutes, appellee was divested of the beneficial interest she took under the policy, and same was vested in Henry Conrad; and that thereafter, on April 30, 1897, Henry Conrad, in pursuance of this right, made demand upon the insurance company for the dividend then due upon it as a paid-up policy, and thereafter repeated such demands, at the accrual of the subsequent dividends thereon, until his death, which dividends were, as demanded, paid to him by the insurance company. In still another paragraph of the administrator's petition, answer, counterclaim, and cross petition, it was alleged that the insurance policy in question became by the rendition of the judgment of divorce, and continued until his death, the property of Henry Conrad, for which reason it was claimed by the administrator as assets of his estate, which he, the administrator, was entitled to receive and apply, if necessary, to the payment of the decedent's debts, or distribute as required by the laws of the state. Appellee, Eva Conrad, filed a demurrer to the petition, answer, counterclaim, and cross petition of the administrator, which the circuit court sustained, dismissed the administrator's claim, and directed the re-

ceiver of the court to pay appellee, Eva Conrad, the amount of the policy theretofore paid by the insurance company into court. From the judgment manifesting these several rulings, the administrator has appealed.

In our opinion, the policy in question is property. It became a "paid-up" policy on the 4th of February, 1895, the date of the maturity and payment of the tenth and last premium, and, though the judgment of divorce was rendered November 30, 1895, it is admitted that every dividend, beginning with the first one of February 4, 1896, declared on the policy after it became a "paid-up" policy, was received by Henry Conrad down to the time of his death. It is apparent, therefore, that the policy, and Henry Conrad's beneficial interest therein at the time of the granting of the divorce, was not only property, but that it was an investment from which he derived an annual profit, from the time it became a "paid-up" policy until his death.

If correct in this conclusion, the question then arises: What legal effect had the judgment of divorce upon the rights of the parties with respect to this policy or its proceeds? Did the beneficial interest given the wife by the policy continue after the divorce, or was it divested by the divorce and vested in the husband? This question, as raised by a state of facts such as are here presented, has never been passed on by this court; and as we have not been favored by appellee's counsel with a brief containing their view of the case, and the record does not contain the written opinion it indicates was delivered by the judge of the circuit court at the time of deciding the case, we are not advised as to the grounds upon which he adjudged appellee entitled to the proceeds of the policy in controversy. We assume, however, that, in so holding, that court followed the doctrine announced in *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *McKee v. Phoenix Ins. Co.* 28 Mo. 383, 75 Am. Dec. 129; *Overhiser v. Overhiser*, 63 Cal. St. 77, 50 L.R.A. 552, 81 Am. St. Rep. 612, 57 N. E. 965; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, which, in substance, hold that, where the policy of insurance is an "old line" policy, in the absence of a provision in the contract to the contrary, the designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased; therefore, that the wife's interest in such a policy, payable to her, is not affected by a divorce. We have never given our approval to this doctrine, nor have

we expressly disapproved it, except with respect to mutual benefit associations. It was held inapplicable in *Green v. Green*, 147 Ky. 608, 39 L.R.A.(N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913 D, 683, wherein it is said: "Without approving of the rule applied by some courts in the case of ordinary life insurance companies, we are of the opinion that there is every reason why a different rule should prevail in the case of mutual benefit societies. The latter are organized for the benefit of the members, their families, and those dependent upon them. To permit the benefits to be paid to those who at one time sustained such relation, but did not sustain that relation at the time of the member's death, would be to frustrate the purpose of the society. In other words, to entitle one to receive the proceeds of a certificate in a fraternal society, he must, unless the contract or charter and by-laws provide otherwise, bear the required relation at the time of the member's death. That being true, we are of the opinion that the divorce operated to revoke the designation of appellant as the beneficiary in the certificate in question, and to substitute decedent's mother in her place."

We are of opinion that the question here involved is controlled by the provisions of § 425, Civil Code, and § 2121, Kentucky Statutes. Though not in all respects identical in language, these sections are identical in meaning; hence in this connection it will be sufficient to quote either. Section 425, Civil Code, provides: "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof; and any property so obtained without valuable consideration shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing."

It is manifestly the meaning of the Code that the judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage, "in consideration or by reason thereof;" and this is true whether the return of the

property is ordered by the judgment of divorce, or in a subsequent proceeding.

If the order of restoration be, as is often the case, merely formal, or none is made when the divorce is granted, any question as to what property shall be restored by either party to the other may be settled by subsequent proceedings. *Williams v. Gooch*, 3 Met. (Ky.) 487; *Smith v. Smith*, 22 Ky. L. Rep. 255, 56 S. W. 968; *Bennett v. Bennett*, 95 Ky. 545, 26 S. W. 392; *Johnson v. Johnson*, 96 Ky. 391, 29 S. W. 322.

There can be no doubt of the fact that appellee was, by the terms of the policy issued upon the life of Henry Conrad, named therein as the beneficiary because she was his wife, and by reason thereof had an insurable interest in his life. It is patent, therefore, that whatever interest or right she then had or took under the policy was acquired in consideration or by reason of her marriage to Henry Conrad. The interest or right she thus acquired was destroyed by the judgment of divorce, which operated, by virtue of its terms and the provisions of the Code, to divest her of it. It is not material that there was never an actual return of the policy by her to her former husband, or that its return was never demanded by him. The mere physical retention of the policy by her, whether intentional or otherwise, did not confer upon her any right to it, and the fact that she never demanded or received the dividends that accrued and were paid upon it, and that they were demanded and received by Henry Conrad as long as he lived, shows that each of them understood that she no longer had any interest in the policy. The policy was merely evidence of the contract with the company, upon which its liability could not be enforced until the death of Henry Conrad. Had he, at any time after his divorce from appellee, instituted proceedings for that purpose, he might have compelled the delivery to him of the policy: but his failure to do so, whether it arose from a disinclination to have further litigation with his former wife, or other cause, in view of his continued collection of the dividends thereon, is not to be taken as evidencing his recognition of her right to it; nor is his administrator, by reason thereof, now estopped to claim its proceeds.

While appellee at no time subsequent to the divorce, and before Henry Conrad's death, had an insurable interest in his life, it is unnecessary to determine whether

that fact, of itself, was sufficient to divest her of any interest in the policy of insurance; it is sufficient to place our decision, as we do, on the ground that she was divested of such interest by the judgment of divorce, and the effect § 425 of the Code compels us to give it.

Appellee urges no equitable claim or right to any part of the proceeds of the policy, such as might have existed in her favor if she had paid the premiums on it, or that she is entitled to reimbursement out of the proceeds for money or property of hers which Henry Conrad failed or refused to restore to her following the divorce; but her only claim to the proceeds of the policy rests upon the naked ground that she is entitled thereto, because of the fact that she is named in the policy as beneficiary, and the further fact that, notwithstanding the divorce, she has retained possession of the policy.

In *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354, 854, the divorced wife, after the death of the former husband, was allowed to share equally with her children the proceeds of an insurance certificate or policy issued by a fraternal society on the life of the husband, although, following the granting of the divorce, he procured of the society a new certificate payable to another as beneficiary. But the reasons of the court and soundness of the grounds for so holding will fully appear from the following excerpt from the opinion: "It is argued that there is no widow surviving the deceased by reason of the divorce granted by the chancellor, by which the marriage tie was severed. It has been held that a policy of insurance on the life of the husband for the benefit of the wife was not forfeited by reason of a divorce subsequently obtained, but that the right of the wife still continued. *Goldsmith v. Union Mut. L. Ins. Co.* 17 Abb. N. C. 15. Whether this is the correct doctrine is not necessary to be determined, as in this case the appellee, although divorced, whose earnings contributed to keep the insurance alive, and who divided the estate to which she had title with her husband when the divorce was granted, on the idea that she was invested with a beneficial interest in this fund, should enjoy its benefits equally with her children, and as the appellants are not entitled, they have no right to complain."

In *Dunker v. Schuff*, 134 Ky. 192, 119 S. W. 742, we held that where money given to a wife by her mother went into her husband's property, and he received the bene-

fits thereof, and her savings also went into his property, in a proceeding by the husband under § 425, Civil Code, after divorce by the wife, to have restored to him property conveyed by him to the latter in consideration of the marriage, such restoration should be adjudged by the chancellor only after a balancing of the equities between them. The property involved in this case was a piece of real estate in the city of Louisville and a paid-up policy of insurance on the life of the husband, and the judgment required an equal division of the proceeds of the policy and real estate between the divorced parties.

The principle announced in *Leaf v. Leaf* and *Dunker v. Schuff*, supra, is recognized in the following cases, also decided by this court: *Lankford v. Lankford*, — Ky. —, 117 S. W. 962; *Thomason v. Thomason*, 142 Ky. 177, 134 S. W. 161; *Golding v. Golding*, 82 Ky. 51; *Irwin v. Irwin*, 107 Ky. 24, 52 S. W. 927.

No such equities as existed in behalf of the divorced wives in the cases supra are presented in appellee's behalf in the instant case. She does not claim to have paid any of the premiums on the policy on the life of her former husband, or that he ever received or had the benefit of any money or property of hers, and her demurrer to the pleading of the administrator admits the truth of its allegations as to the judgment of divorce and its legal effect upon the property rights of the parties. This being true, we must conclude that, by virtue of that judgment and the provisions of § 425, Civil Code (§ 2121, Ky. Stat.), she was divested of any beneficial interest in the proceeds of the policy, in controversy, and that the circuit court erred in adjudging her entitled to same.

We are also of opinion that the children of Henry Conrad were properly refused the proceeds of the policy. By the terms of that instrument they could only become beneficiaries in the event of the death of appellee before that of their father. As that contingency did not occur, and appellee, the original beneficiary, was deprived of any interest in the proceeds of the policy by the judgment of divorce, the right and title thereto, upon the death of the insured, passed under the statute to his administrator, who is now entitled to receive same.

For the reasons indicated, the judgment is reversed, and cause remanded for the rendering of such judgment and further necessary proceedings as will accord with the opinion.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,

Appt.,

v.

W. S. HAZEL.

(155 Ky. 30, 159 S. W. 673.)

License — based on amount of business — reasonableness.

1. Imposing a license tax on persons who purchase at a tax sale to the amount of \$500, without taxing those who purchase a less amount, is not an unreasonable classification.

Tax — imposition on purchasers at tax sale.

2. The legislature may impose a tax on persons purchasing property at tax sales.

Same — county taxes — due commonwealth.

3. Taxes assessed by a county are within the operation of a statute imposing a license tax on persons who purchase to a specified amount land sold for taxes "due this commonwealth."

Same — agreement with owners — effect.

4. That a purchaser at a tax sale does so under agreement with the owners of the property, by which they shall have a right to redeem, does not exempt him from the license tax on persons who purchase at such sales to a specified amount.

(October 1, 1913.)

Note. — License tax on purchasers of tax titles or tax brokers.

There seem to be no cases except *Com. v. HAZEL*, on the construction of statutes requiring a license to purchase property at tax sales, and a "tax broker" seems to have been defined for the first time by the Kentucky legislature, so far, at least, as the courts have been obliged to deal with the subject. The following cases are set out for the purpose of comparing the decision in *Com. v. HAZEL* with former holdings of the same court.

In *Bitzer v. Thompson*, 105 Ky. 514, 44 L.R.A. 141, 49 S. W. 199, a city ordinance providing that "every person, firm, or corporation who buys claims shall pay a license of \$150 per year" was held to be unconstitutional as applied to a person who buys, merely as an investment, a few claims against the city, which are admitted to be just and due, but which are not paid because of a lack of funds. The court said: "We are, however, of opinion that the ordinance or statute which requires the license to be paid as a condition precedent to a citizen buying a claim or claims is unconstitutional and void. It is doubtless true that, if a person was engaged in the general business of brokerage, or making it his business to buy general claims, it would be

A PPEAL by the Commonwealth from a judgment of the Circuit Court for Daviess County dismissing its petition for the imposition of a license tax on defendant under a statute imposing such tax on persons purchasing property at tax sales. Reversed.

The facts are stated in the opinion.

Mr. J. P. Whittinghill for appellant.

Messrs. Birkhead & Wilson for the Commonwealth.

Hobson, Ch. J., delivered the opinion of the court:

Section 4224, Ky. Stat., provides that, before engaging in any occupation or selling any article named therein, the person desiring to do so shall procure a license and pay the tax therein required. The last subdivision of the section is in these words: "Any person or corporation who shall purchase lands sold for taxes due this commonwealth, as provided in this chapter, shall be deemed a tax broker whenever the amount of such purchases shall aggregate \$500, and shall, within fifteen days after the said sale, procure a license as such from the auditor of public accounts. Such tax broker shall pay for said license an amount equal to 15 per centum of the aggregate amount of the purchases made by him, and the sales to him shall not become effective until said license shall have been procured. No claim shall be allowed by the auditor to such purchaser for defects of

competent to impose a license fee; but, according to the averments in this petition, the appellant was only purchasing claims on the city of Louisville, which were admitted by said city to be just and due, and it would seem that it would be unreasonable to impose a license tax upon a citizen who merely wanted to buy a few claims, or some of a particular class, as an investment. It would also be injurious to the claimant, whose claim could not be paid when due, to require a tax to be paid to the same authority who owed the claim before the purchaser could be allowed to buy the same. The tendency of such a license would be to impose a hardship upon the claimant as well as upon the purchaser, and it seems that public policy forbids the imposition of any such tax or restriction in regard to the purchase of such claim. Such license would tend to lessen the value of the claim which the city had undertaken to pay at maturity, and consequently would enable the city to derive a profit or revenue from its own laches, and would tend to lessen the number of claim buyers, and, as a consequence, cheapen the claim, and thereby wrongfully injure the credit of the city."

And *Gast v. Thompson*, 20 Ky. L. Rep. 1319, 49 S. W. 1113, upon identical facts, was decided the same day as and ruled by the *Bitzer* Case, *supra*, and in the *Gast*

title, errors of assessment, or otherwise." Any person or corporation who shall fail to procure the license as hereinabove required, or who violates any of the above provisions, shall, on conviction, be fined not less than \$25 nor more than \$100 for each offense.

This action was brought by a revenue agent in the Daviess county court, in the name of the commonwealth, against W. S. Hazel, it being charged in the petition that in January, 1908, 1909, and 1910, he purchased land at tax sales made by the sheriff at the courthouse door in Owensboro, Kentucky, the amount of his purchases at each sale being over \$500; but that he had not paid the license tax in any year. Judgment was prayed against him for the license taxes, amounting to about \$400, with interest and a penalty of 20 per cent. An agreed statement of facts was filed, and on these facts the county court gave judgment against Hazel. He appealed to the Daviess circuit court. In the circuit court the case was submitted upon the same agreed facts. The circuit court dismissed the plaintiff's petition, holding the statute unconstitutional. The commonwealth appeals.

The circuit court was of opinion that under the Constitution all persons engaged in any business or profession must be taxed or else the taxation of one class without any tax on the other would be a discrimination that the Constitution does not authorize; that under the statute in question a person might be a tax broker and not be subject

to a license fee if he did not do \$500 worth of business, while the man who did \$500 worth of business would have to pay a license fee. In *Covington v. Dalheim*, 126 Ky. 26, 102 S. W. 829, a license upon grocery stores, graded according to the number of delivery wagons and horses employed, was held unconstitutional in that the tax was imposed upon grocers who delivered by wagon, and those who did not use a wagon were exempted. In *Read v. Graham*, 31 Ky. L. Rep. 569, 102 S. W. 860, the same principle was applied to milk dealers, who were taxed in the same way. In *Hager v. Walker*, 128 Ky. 1, 15 L.R.A. (N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254, a license tax on real estate agents was declared unconstitutional because it exempted all real estate agents outside of cities and towns from the payment of the tax. But none of these cases seem to us to apply here. In *Bitzer v. Thompson*, 105 Ky. 514, 44 L.R.A. 141, 49 S. W. 199, it was held that a license tax on claim brokers did not apply to a person who bought a few claims as a side investment, but did not follow the business of buying claims. Similar rulings have been made in other states. Thus, a man who keeps a general store is not a junk dealer, although he may occasionally take in trade a piece of second-hand furniture. *Duluth v. Bloom*, 55 Minn. 97, 21 L.R.A. 689, 56 N. W. 580; *Com. v. Ringold*, 182 Mass. 308, 65 N. E. 374; *John-*

Case, on second appeal in 23 Ky. L. Rep. 992, 64 S. W. 632, it was held that no matter how many claims the person bought, and regardless of the fact that he made a business of purchasing the claims, the ordinance was unconstitutional as to him. The court said: "The distinction is that to avoid the ordinance he must buy exclusively for himself; he must not deal as a broker."

And in *Louisville v. Simons*, 133 Ky. 782, 119 S. W. 185, a city ordinance requiring every person lending or advancing money on assignment of salaries to pay a license tax was held to be unconstitutional so far as it requires the payment of the taxes by persons only buying claims against the city. The court cites *Bitzer v. Thompson*, supra, and copied the opinion as quoted, supra, as the ground of the instant decision, and said: "It is apparent that the imposition of a \$1,000 license tax, as contemplated by the present ordinance, for the right to purchase claims against the city of Louisville, as appellees are doing, would not only result in the evils described in the opinion in *Bitzer v. Thompson*, supra, but, in addition, strongly tend to establish a monopoly in the business of buying such claims, for the exorbitant amount of the license fee would confine such business in the city of Louisville to a very few purchasers, or, more

likely, to one person, firm, or corporation."

But in *COM. v. HAZEL*, the court says: "It is earnestly insisted that it is unreasonable that the state should sell land to the highest bidder for the nonpayment of taxes, and, on the other hand, levy a tax on persons who bid at the sale, thus deterring people from bidding, and preventing the property from selling as readily as it would. But the whole matter of collecting the public revenue rests in the sound discretion of the legislature; and, in the absence of a constitutional provision on the subject, the question is purely legislative, and not judicial. The legislature may declare the public policy of the state in the absence of a constitutional provision to the contrary." In the former opinions a city ordinance was the subject for consideration, but the decisions do not rest upon any distinction between it and a state statute. In the instant case the statute merely prescribed "a test by which it could be determined whether a man was or was not a tax broker;" but it would not be seriously contended that the legislature could arbitrarily place persons who are constitutionally nontaxable in the taxable class merely by definition, and the language above quoted indicates that the court did not intend so to hold.

J. W. M.

son v. Williams, 8 Ind. App. 677, 36 N. E. 167; 30 Cyc. 1164.

The legislature did not intend that everyone who bought property at a tax sale should be regarded a tax broker. It was intended to reach the class of persons who make it a business to deal in this class of property; and, in declaring that one whose purchases at a sale should aggregate \$500 should be deemed a tax broker, it was merely laying down a test by which it could be determined whether a man was or was not a tax broker. License taxes are often regulated by the amount of business done; and it is not an unreasonable discrimination when the legislature declares that a person whose purchases at a sale do not aggregate \$500 shall not be deemed a tax broker. It is true that some hardship may result. The man whose purchases amount to \$490 at a sale will not be taxed, while the man whose purchases amount to \$510 will be taxed. But in any classification there must be a line drawn, and those on one side of the line will be exempt, while those on the other side of the line will be subject to the tax. Manifestly it would not do to require everybody who buys at a tax sale a piece of property to pay a license tax. The tax act is not aimed at the man who makes an occasional purchase, but at him who makes such purchasing his business, and is not invalid. It rests on a reasonable classification.

It is earnestly insisted that it is unreasonable that the state should sell land to the highest bidder for the nonpayment of taxes, and, on the other hand, levy a tax on persons who bid at the sale, thus deterring people from bidding and preventing the property from selling as readily as it would. But the whole matter of collecting the public revenue rests in the sound discretion of the legislature; and, in the absence of a constitutional provision on the subject, the question is purely legislative, and not judicial. The legislature may declare the public policy of the state in the absence of a constitutional provision to the contrary.

On the agreed facts it was shown that Hazel's purchases at each of the sales amounted to less than \$500 if the county taxes and the cost were not included. It is true that in the statute the words used are "lands sold for taxes due this commonwealth;" but by § 4129, Ky. Stat., the sheriff is, by virtue of his office, the collector of all state, county, and district taxes, unless directed to be paid to some other person. By § 4148, Ky. Stat., all state, county, and district taxes, except as otherwise provided, shall be due on the 1st day of March after the assessment. Section 4151, 47 L.R.A. (N.S.)

Ky. Stat., provides that when land is sold for taxes, and no one will bid the amount of the taxes, interest, and cost, it shall be the duty of the sheriff to purchase same for the state, county, and taxing district having taxes against the delinquent, for the amount of the taxes due, interest and penalty, cost and commission thereon; the owner to have the right to redeem the land at any time within two years. It will thus be seen that, when the land is sold for taxes due the state, it must also be sold for the county taxes; and, if no one else will bid, the sheriff must bid in the land for the state and the county for both the state and the county taxes. The county is only an arm of the state government. Its taxes are levied by the authority of the state, and are taxes due the commonwealth within the meaning of the statute in question, for purchasers at tax sales must buy for the county taxes as well as the state taxes. The amount for which the sale is made is the unit on which the license tax is to be computed. The words "the amount of such purchases" must mean the price paid for the various pieces of property.

In the agreed statement of facts, it was also set out that Hazel bought a part of the property at the request of the owners and under an agreement with them by which the property he so purchased might be redeemed by them upon substantially the same terms and conditions as fixed by the statute for the redemption of property sold for taxes. There was nothing in this agreement to exempt Hazel from the license tax. The agreement was simply that Hazel would buy the property at the sale and hold it as purchaser; the owners preferring that he should buy it rather than someone else. He did not buy it for them, but for himself, and he was to have all the rights of a purchaser at a tax sale.

We therefore conclude that the statute is valid, and that neither of the defenses set out in the agreed facts is maintainable.

Judgment reversed, and cause remanded for a new trial.

LOUISIANA SUPREME COURT.

ADELE B. SHIELD

v.

F. JOHNSON & SON COMPANY, Limited,
et al.

(132 La. 773, 61 So. 787.)

Negligence — concurrent — joint liability.

1. If the concurrent negligence of two or

Headnotes by SOMMERVILLE, J.

more persons combined results in an injury to a third person, the latter may recover from either or all.

Same — last clear chance — doctrine between defendants.

2. The doctrine of "the last clear chance" has no application between two or more defendants, as to one another, who are charged with concurring fault resulting in injury and damage to a plaintiff.

Parties — wife — authorization of husband.

3. The authorization of the husband to the wife is unnecessary in a suit by her for damages resulting from personal injuries to her, which damages are "recoverable by herself alone."

(March 31, 1913.)

CROSS APPEALS from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence; defendant Johnson

& Son Company appealing from the judgment against it; and plaintiff appealing from so much as rejected her claim against the defendant railway and light company. Reversed on defendants' appeal. Affirmed on plaintiff's appeal.

Messrs. Dinkelspiel, Hart, & Davey, for liquidators of F. Johnson & Son Company, defendants:

Under the doctrine of last clear chance, the defendant Johnson Company is relieved from responsibility for its alleged negligence.

Wilkinson, Personal Injuries, § 70; McGuire v. Vicksburg, S. & P. R. Co. 46 La. Ann. 1543, 16 So. 457; Belle Alliance Co. v. Texas & P. R. Co. 125 La. 777, 51 So. 846, 19 Ann. Cas. 1143; Hanna v. New Orleans R. & Light Co. 126 La. 634, 52 So. 855; Lea v. Kentwood & E. R. Co. 131 La. 852, 60 So. 370; Sullivan v. Vicksburg, S. & P. R. Co. 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N.

Note. — The applicability of the doctrine of last clear chance as between persons sued as joint tort feors presents a novel aspect of that much discussed subject. It seems clear, however, as held in *SHIELD v. F. JOHNSON & SON CO.*, that the doctrine was inapplicable to the case on the pleadings, in view of the fact that the negligence charged against the railway company was not the failure to exercise due care after discovering the danger, but the failure to keep a lookout or to observe other precautions prior to the actual discovery of the danger, and of the allegation that the negligence of the two defendants was concurrent, since, by the weight of authority, — although there is some conflict on the point, — the concurring negligence of the party invoking the doctrine is fatal to its application, where the negligence charged against the other party consisted merely of acts of omission prior to the actual discovery of the danger (see note to *Dyerson v. Union P. R. Co.* 7 L.R.A. (N.S.) 132, and various other notes and comments referred to in the note to *Southern R. Co. v. Bailey*, 27 L.R.A. (N.S.) 379). The conclusion on the evidence that the railway company was not guilty of negligence at all, of course, precluded all opportunity of raising the question on the merits.

A different question would have been presented if it had been alleged or found in *SHIELD v. F. JOHNSON & SON CO.*, that the motorneer of the car actually discovered, and ought to have realized, the danger in time to stop the car, even assuming that the chauffeur's negligence was concurrent; or if it had been alleged or found that the chauffeur, although originally guilty of negligence, was unable to extricate his taxicab, and that, in that situation, the motorneer, by the performance of his duty to keep a lookout, could have discovered the danger

and averted the accident, even though he did not in fact discover it. Upon either hypothesis, according to the weight of authority, — although there is some conflict, — the antecedent negligence of the chauffeur would not have precluded a recovery by him against the railway company if he had been injured (see as to first hypothesis, notes in 7 L.R.A. (N.S.) 132, and 27 L.R.A. (N.S.) 379, and as to the second hypothesis, notes in 55 L.R.A. 418, and 36 L.R.A. (N.S.) 957). Since, upon the latter hypothesis at least, i. e., that the chauffeur could not extricate his taxicab, the result, under the doctrine of last clear chance, would be attributable to the view that his antecedent negligence was a remote cause or condition of the accident, and not one of the proximate causes thereof, — for a recent case in which this view of the doctrine is clearly expressed, see *Nehring v. Connecticut Co.* 45 L.R.A. (N.S.) 896, — it might be argued with some plausibility that if the interruption of the chauffeur's negligence would have the effect to make the negligence of the motorneer in failing to keep a lookout the sole proximate cause of an injury to the chauffeur, it would have the same effect as to an injury to a passenger riding with the chauffeur. It may be doubted, however, whether the courts in any event would be inclined to apply a doctrine originally designed to permit one to recover for an injury to himself notwithstanding his own antecedent negligence, so as to relieve him from liability to a third person who, in the first instance, at least, was brought into a position of danger by reason of the former's negligence.

For the question of proximate cause as affecting applicability of the rule denying contribution between joint tort feors, see note to *Tacoma v. Bonnell*, 36 L.R.A. (N.S.) 533.

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E. 679; *Costello v. Third Ave. R. Co.* 161 N. Y. 317, 55 N. E. 897; *Laughlin v. St. Louis & S. F. R. Co.* 144 Mo. App. 185, 129 S. W. 1006; *Island & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; *Shearm. & Redf. Neg.* 5th ed. § 99; *Wharton, Neg.* 4th ed. § 340; *Thomp. Neg.* 2d ed. § 232; *Patterson, Railway Acci. Law*, § 58; *Healey v. Dry Dock*, E. B. & B. R. Co. 14 Jones & S. 473; *Birmingham R. Light & P. Co. v. Simpson*, — Ala. —, 59 So. 213; *Appel v. Selma Street & Suburban R. Co.* — Ala. —, 59 So. 164; *Birmingham R. Light & P. Co. v. Drennen*, 175 Ala. 338, 57 So. 876.

Messrs. Merrick, Lewis, Gensler, & Schwarz, with Mr. Edwin T. Merrick, for plaintiff:

If there was concurring negligence, plaintiff is entitled to damages against both defendants.

Roby v. Kansas City Southern R. Co. 130 La. 880, 41 L.R.A.(N.S.) 355, 58 So. 696; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *Holzap v. New Orleans & C. R. Co.* 38 La. Ann. 185, 58 Am. Rep. 177; *Perez v. New Orleans City & Lake R. Co.* 47 La. Ann. 1391, 17 So. 869; *Smith v. O'Brien*, 46 Misc. 325, 94 N. Y. Supp. 673; *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606; *Dale v. Denver City Tramway Co.* 97 C. C. A. 511, 173 Fed. 788, 19 Ann. Cas. 1223.

There can be no doubt of the liability of F. Johnson Son & Company Limited, for negligence.

Illinois C. R. Co. v. O'Neill, 100 C. C. A. 658, 177 Fed. 330; *Perez v. New Orleans City & Lake R. Co.* 47 La. Ann. 1391, 17 So. 869; *Hemingway v. New Orleans City & Lake R. Co.* 50 La. Ann. 1087, 23 So. 952; *Dieck v. New Orleans City & Lake R. Co.* 51 La. Ann. 280, 25 So. 71; *Lanphier v. F. Johnson & Son Co.* 117 La. 742, 42 So. 254; *Roby v. Kansas City Southern R. Co.* 130 La. 880, 41 L.R.A.(N.S.) 355, 58 So. 696.

Negligence is shown on the part of the railroad company also.

Holzap v. New Orleans & C. R. Co. 38 La. Ann. 189, 58 Am. Rep. 177.

Plaintiff was authorized by her husband to bring this suit.

Lacour v. Delamarre, 2 La. Ann. 140; *Dunn v. Woodward*, 11 La. Ann. 265; *Hart v. Connolly*, 49 La. Ann. 1587, 22 So. 809; *Evans v. De L'Isle*, 24 La. Ann. 248; *Payne's Succession*, 25 La. Ann. 202; *Jumonville v. Sharp*, 27 La. Ann. 461; *Le 47 L.R.A.(N.S.)*

Blanc v. Dubroca, 6 La. Ann. 360; *Lewis v. Holmes*, 109 La. 1035, 61 L.R.A. 274, 34 So. 66; *Fried's Succession*, 106 La. 279, 30 So. 839; *Harkness v. Louisiana & N. W. R. Co.* 110 La. 822, 34 So. 791.

Messrs. Dart, Kernan, & Dart for defendant Railway & Light Company.

Sommerville, J., delivered the opinion of the court:

Mrs. Adele B. Shield, joined, aided, authorized, and assisted by her husband, Henry Shield, sues defendants in the sum of \$12,934 for personal injuries suffered by her through the alleged concurring fault and negligence of defendants.

There was a verdict in favor of the plaintiff, Mrs. Shield, and against F. Johnson & Son Company, Limited, in the sum of \$6,000; and her claim against the New Orleans Railway & Light Company was rejected.

Mrs. Shield appeals from the judgment in favor of the New Orleans Railway & Light Company; and F. Johnson & Son Company, Limited, appeals from the judgment against it.

The verdict rendered in the case reads as follows:

New Orleans, December 7th, 1911.

We, the jury, find a verdict for the plaintiff in the sum of \$6,000 against the defendants, A. J. Stallings and Bernard McCloskey, liquidators of F. Johnson & Son Company, Limited, and reject the demand against defendant New Orleans Railway & Light Company.

But the judgment rendered in the cause does not follow the verdict of the jury. It is in favor of Henry Shield, the husband, as well as Mrs. Shield, when he was before the court claiming only incidental damages, and the verdict of the jury did not undertake to find in his favor. The judgment is as follows: "It is ordered, adjudged, and decreed that there be judgment in favor of plaintiff, Adele Boyd Shield, and Henry Shield, and against the defendants A. J. Stallings and Bernard McCloskey, liquidators of F. Johnson & Son Company, Limited, in the full sum of \$6,000, with legal interest thereon from date of judgment until paid, and all costs." And there was further judgment in favor of the New Orleans Railway & Light Company.

As the judgment did not follow the verdict of the jury, it will be annulled and set aside; and a proper judgment will be entered in the cause.

The defendant F. Johnson & Son Company, Limited, excepted to the petition of

plaintiff on the ground that she had not been authorized by her husband as required by law to institute and prosecute the suit. But the law is that damages resulting from personal injuries to the wife shall not form part of the community, but shall always be and remain the separate property of the wife, and recoverable by herself alone. Act 68 of 1902, p. 95. The term employed by the lawmakers is "recoverable," the plain, ordinary, and natural meaning of which is that which is able to be recovered; "obtainable from a debtor or possessor, as by legal process." It means that which can be recovered as a matter of legal right. And the wife "by herself alone" may recover the damages resulting from personal injuries to her. She does not need the authorization of her husband to recover damages for personal injuries in the courts of the state. *Schoppel v. Daly*, 112 La. 201, 208, 36 So. 322; *Re Oliver* (D. C.) 109 Fed. 784, 788.

Defendant the Johnson Company, also excepted to the petition on the ground of vagueness. This exception was properly overruled. Both defendants excepted on the ground of no cause of action. This exception is aimed, in part, at those items of damages set forth in the petition for doctor bills, nurse bills, drug bills, clothing, and hospital ambulance service connected with the injury alleged by plaintiff. These are expenses of the community for which the husband is responsible; and he alone can recover therefor. As the case is to be remanded, it is unnecessary to now dispose of this point, beyond sustaining the exception as to these items in the wife's original petition. The exception of no cause of action was based, further, upon those allegations in the petition which allege concurring fault and negligence on the part of both defendants; the latter arguing that the allegation as to the fault of one defendant as set forth in the petition destroyed the effect of the allegation as to the fault of the other defendant.

Plaintiff alleges that she was a passenger in a taxicab belonging to the defendant F. Johnson & Son Company, Limited, when it collided with a street car belonging to the New Orleans Railway & Light Company, and that she was injured in said collision in the manner set forth in detail in her petition. With reference to the fault of the Johnson Company she alleges: "That said chauffeur in charge of the taxicab occupied by petitioner, Adele Boyd Shield, notwithstanding he saw or could have seen that said car was approaching, negligently and unskillfully attempted to cross the track in front of the car, when

he should have stopped. In all of which he failed and was negligent. If he saw the car, he did not stop and wait until it passed, as he should have done. If he did not see the car coming, then it was negligence in not keeping proper watch and lookout, and looking for it as he approached Derbigny street or some street near there, for he did not stop, but drove across Canal street in front of the approaching electric car which struck the taxicab in which your petitioner, Adele B. Shield, was seated,"—and then proceeding to give a description of the injury suffered by her. "It was at fault in running said Canal Belt car at a high rate of speed beyond that allowed by city ordinances; by running a car not equipped with the proper apparatus for quick stopping, and said company was likewise negligent in not keeping a proper lookout. That if the motorneer, agent, and vice principal of the New Orleans Railway & Light Company had been propelling his car at a safe rate of speed, and keeping a proper lookout, he would have seen the said taxicab turn to start across the track, and could have stopped his car before striking said taxicab, but this he carelessly and negligently failed to do."

The petition clearly sets forth the causes which resulted in the personal injuries alleged to have been sustained by plaintiff. Here the causes of the alleged injuries are charged to have been joint, separate and independent acts of negligence of both defendants are alleged to have produced directly the injury of which plaintiff complains, and, under such circumstances, each is responsible for the entire result, even though acts or neglect of one of them alone might not have caused the accident. 38 Cyc. 458, 483, 488; 29 Cyc. 498.

If, on the trial of the case, plaintiff were to prove that both defendants were jointly concerned in the negligence which caused the injury to her, they would be held liable therefor; under such circumstances, her suit presents a cause of action as to both of them. She may eventually recover from one or both. 29 Cyc. 487.

Defendant the Johnson Company argues further in support of its exception of no cause of action, that the doctrine of "the last clear chance" should be applied; and petitioner be held to the last allegation in her petition to the effect "that if the motorneer, agent, and vice principal of the New Orleans Railway & Light Company had been propelling his car at a safe rate of speed, and keeping a proper lookout, he would have seen the taxicab turn to start across the track, and could have stopped his car before striking the said

taxicab, but this he carelessly and negligently failed to do," and that said allegation relieves the Johnson Company from responsibility for its alleged fault and negligence.

The doctrine of "the last clear chance" cannot be invoked by joint tort feorsors against one another. It has been applied only in those cases where the injured party has been negligent in exposing himself to peril; and where such negligence on his part will not be regarded as the proximate cause of the injury if the wrongdoer either became aware of the peril in time to avoid the collision that caused the injury, or might have become aware of it had he exercised reasonable care to ascertain whether a peril which was to be anticipated did in fact exist. 38 Cyc. 456. But the rule has no application even between the injured party and the wrongdoer when the latter contributes to it; there, negligence is concurrent at the very time that the accident occurs. The question is one for the jury as to whether, notwithstanding negligence on the part of the person injured in getting into a position of peril, defendant's servants could have avoided the injury with the exercise of reasonable care and diligence, and hence whether or not they were negligent in this respect. 29 Cyc. 530; 36 Cyc. 1631. The exception was properly overruled.

We are cited to the decision in *Perez v. New Orleans City & Lake R. Co.* 47 La. Ann. 1391, 17 So. 869, where we maintain an exception of no cause of action filed by the railroad company on the ground that "plaintiff's petition alleges that the immediate cause of the accident was the carelessness or negligence of the driver of the tallyho on which the deceased was riding," and holding that it was "quite impossible for it [the railroad company] to have been in fault or guilty of negligence, if, as plaintiff alleges, the driver of the tallyho attempted to put his conveyance across the railroad track when one of the company's trains was approaching, 'when, by reason of the approach of the said train, such attempt was dangerous, and that through the gross carelessness and recklessness of the driver, said wagonette was struck,' and young Perez instantly killed." The doctrine of the last clear chance was not discussed in that opinion, and it had no place there.

In the present case plaintiff distinctly alleges that the immediate and proximate cause of the accident to her was due to the concurring carelessness or negligence of the two defendants. And upon such allegations one or both of them may be held

responsible in damages for the injury suffered by her.

On the Merits.

Plaintiff alleges that on the occasion of the accident to her, she had hired from F. Johnson & Son Company, Limited, a company engaged in hiring carriages and taxicabs and other vehicles for public conveyance, a taxicab which was driven by a chauffeur who was young and inexperienced, ignorant of his duty and of the management of the machine; that the Johnson Company was responsible to her for her safety, and that the injuries to her were due to the "concurrent fault and negligence of the chauffeur of the said taxicab of said F. Johnson & Son Company, Limited, and the said motorneer of the said street car."

Plaintiff introduced evidence going to show that F. Johnson & Son Company, Limited, had held themselves out to the public as the owners of the said taxicab: but when that company offered evidence for the purpose of showing that it was not the owner of said vehicle, plaintiff objected to the same, and the objection was sustained. The Johnson Company in its answer had denied "all and singular the allegations contained in plaintiff's petition, and, specially, that any act of any person representing your respondent contributed in any way to the accident, if such accident there was," etc. This answer put at issue every allegation contained in plaintiff's petition, and gave to defendant the right to offer evidence to show that it was not the owner of the taxicab in question, and that it had never held itself out as the owner thereof. There was error in rejecting this testimony. The case will be remanded.

Plaintiff, Mrs. Shield, has appealed from the judgment dismissing her suit against the New Orleans Railway & Light Company, and she asks for a reversal of the same. The evidence as to the fault or negligence of the railway company is conflicting; but, after examining and weighing same, we are of the opinion that there was no concurrent fault or negligence on the part of that company. The evidence shows that the motorneer of the car which collided with the taxicab was efficient and watchful; that the car was in good order; that it was being operated at the usual rate of speed, and not contrary to the city ordinances; and that the motorneer did everything that could be expected of a reasonable person under the circumstances to prevent the accident.

Several witnesses examined on behalf of

plaintiff, as well as those examined on behalf of the railway company, show that the accident was unavoidable in so far as the railroad company is concerned, and that everything possible was done by the motor-neer to avoid the collision. There can be no recovery by the plaintiff against the railway company under these circumstances.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed.

It is now ordered that the exception of no cause of action be sustained to that portion of plaintiff's claim for expenses incurred for doctors, medicine, nurses, clothing, and ambulance service.

It is further ordered, adjudged, and decreed that this case be remanded to the trial court to be there tried in accordance with law and with the views herein expressed as to the defendant F. Johnson & Son Company, Limited, costs to await the final determination of the cause.

It is further ordered, adjudged, and decreed that the judgment in favor of defendant the New Orleans Railway & Light Company be affirmed, with costs in both courts.

On application for rehearing, which was denied April 28, 1913, the following *Per Curiam* response was handed down:

The judgment herein is amended so as make the costs of appeal on the appeal of F. Johnson & Son Company, Limited, payable by Mrs. Adele B. Shield, appellee.

MAINE SUPREME JUDICIAL COURT.

CLARA C. COOMBS et al., Appts.,
v.

LENOX REALTY COMPANY.

(— Me. —, 88 Atl. 477.)

Injunction — to compel removal of overhanging wall.

An injunction will not be issued to compel the removal of the wall of a building which, owing to climatic conditions during process of construction, bulged over the division line about 2 inches, several feet above the earth, where the injury to the adjoining owner is at the time of suit trifling, and at no time can be so great that it will not be many times outweighed by the expense of moving the wall.

(October 13, 1913.)

Note.—Effect of mandatory injunction to compel removal of structures encroaching on adjoining property, see note to *Kershishian v. Johnson*, 36 L.R.A.(N.S.) 402, 47 L.R.A.(N.S.)

A PPEAL by plaintiffs from a judgment of the District Court for Androscoggin County dismissing a bill filed to enjoin the removal of a wall overhanging plaintiffs' property. Affirmed.

The facts are stated in the opinion.

Mr. George C. Webber, for appellants:

Equity will restrain the continuance of a nuisance by injunction whenever substantial damages might be recovered at law, or when the nuisance is permanent, however small the damages.

Crump v. Lambert, L. R. 3 Eq. 409, 15 Week. Rep. 417; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 DeG. M. & G. 304, 22 L. J. Ch. N. S. 811, 17 Jur. 677, 1 Week. Rep. 185, 19 Eng. Rul. Cas. 273.

One who creates a nuisance upon another's land is under a legal obligation to remove it, and successive actions may be maintained until he is compelled to do so.

Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140; *Rockland Water Co. v. Tillson*, 69 Me. 269; *Dority v. Dunning*, 78 Me. 390, 6 Atl. 6; *Williams v. Camden & R. Water Co.* 79 Me. 546, 11 Atl. 600; *Attwood v. Bangor*, 83 Me. 586, 22 Atl. 466; *Curtis Mfg. Co. v. Spencer Wire Co.* 203 Mass. 452, 133 Am. St. Rep. 307, 89 N. E. 534; *Lynch v. Union Inst. for Sav.* 159 Mass. 309, 20 L.R.A. 842, 34 N. E. 364; *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. 8; *Russell v. Brown*, 63 Me. 203; *Battishill v. Reed*, 18 C. B. 696, 25 L. J. C. P. N. S. 290, 4 Week. Rep. 603.

Mr. Harry Manser, for appellee:

At the hearing of a case upon appeal, accompanied by a full report of all the evidence, the decision of the single justice below upon matters of fact will not be reversed unless clearly erroneous, and the burden of showing such error falls upon the appellants.

Young v. Witham, 75 Me. 536; *Paul v. Frye*, 80 Me. 26, 12 Atl. 544; *Jameson v. Emerson*, 82 Me. 359, 19 Atl. 831; *Berry v. Berry*, 84 Me. 544, 24 Atl. 957.

The injunction should not be granted.

Lynch v. Union Inst. for Sav. 159 Mass. 306, 20 L.R.A. 842, 34 N. E. 364; *Methodist Episcopal Soc. v. Akers*, 167 Mass. 500, 46 N. E. 381; *Harrington v. McCarthy*, 169 Mass. 492, 61 Am. St. Rep. 298, 48 N. E. 278; *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17.

Equity jurisdiction, having once been invoked, may be retained for the assessment of damages.

Brande v. Grace, 154 Mass. 210, 31 N. E. 633; *Cobb v. Massachusetts Chemical Co.* 179 Mass. 423, 60 N. E. 790; *Methodist Episcopal Soc. v. Akers*, 167 Mass. 560, 46 N. E. 381; *Levi v. Worcester Consol. Street*

R. Co. 193 Mass. 116, 78 N. E. 853; Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17.

Spear, J., delivered the opinion of the court:

This is a bill in equity in which the plaintiffs allege that the brick wall of the defendant's building, 18 feet from the ground, and between the second and third floor and continuing to the roof, shows a maximum overhang upon the plaintiffs' premises of about $1\frac{1}{2}$ inches; and pray that the encroachment upon the plaintiffs' land occasioned thereby may be adjudged a nuisance, and that the defendant may be ordered and required to remove it forthwith.

The case comes up on appeal from the decree of the sitting justice. In this decree the law and the facts are so fully stated that the court feels fully justified in adopting it as a proper declaration of the law. If we were to write an opinion, it would necessarily be but a restatement of the law found in the decree, as we fully indorse both the reasoning and the result therein announced. The decree is as follows:

"This case came on to be heard on bill, answer, and proof, and was argued by counsel. And now, after mature deliberation, I make the following findings of fact and rulings in law:

"The defendant, in the winter of 1911-12, erected a four-story brick apartment building on Turner street, Auburn, on land adjoining the plaintiffs' land. At the bottom, the wall next to the plaintiffs' land was built about 1 inch in from the division line, and was so continued up to the second story. At a point between the second and third stories, owing, it is said, to the freezing of the mortar nights in extreme cold weather, the wall gradually bulged out as it was built up, until it was in a place or places 2 inches over the line. The trouble was then noticed by the contractor, and the wall was gradually drawn in until at the top it projected over the line about a quarter of an inch. The result was that when the wall was completed there was an area on its side, towards the easterly end, 20 to 30 feet high and 30 to 40 feet long, which overhung the plaintiffs' land, and the overhang was 2 inches at the most, and from that down to a point at the bottom, and a quarter of an inch at the top.

"It is not shown that any of the defendant's officers or agents knew of the bulging until after the building was completed. The contractor testified, and I find, that, although he knew of the bulging before the wall was completed, he did not think it was over the line. The plaintiffs have not been

guilty of laches, and have in no sense acquiesced.

"It is not disputed that the plaintiffs, owning the soil in fee, owned also *ad usque cælum*, and the overhang of the wall is an invasion of their rights. They have already brought two successive actions of trespass *quare clausum fregit* for the trespass, and have recovered judgment in each. The plaintiffs now bring this bill for a mandatory injunction to compel the defendant to remove the overhang of the wall which is over their line.

"The plaintiffs have a three-story wooden tenement building on their lot, standing so near the offending brick wall of the defendant that it will be impossible to remedy a very considerable portion of the overhang by working on the outside. The wall will have to be torn out from the inside and rebuilt, if abatement is ordered. The plaintiffs are sustaining no pecuniary damage at the present time, and will not so long as their present use of their property is unchanged.

"It is not disputed that equity has jurisdiction to order the invasion of the plaintiffs' premises to be abated. The grounds of such jurisdiction, as usually stated, are the want of a complete remedy at law, since full compensation for the entire wrong cannot be obtained in an action at law for damages (see 4 Pom. Eq. Jur. § 1357, and note), and to prevent a multiplicity of actions, since a plaintiff might be compelled to bring a succession of actions in order to obtain relief. See 1 Pom. Eq. Jur. § 252, and 5 Pom. Eq. Jur. §§ 496, 516.

"But it does not follow that a writ of mandatory injunction should be granted in all cases. It is a discretionary writ. The discretion, however, is not an arbitrary one, but is to be exercised in accordance with settled rules of law. The rules by which I think this case must be tested are stated in *Lynch v. Union Inst. for Sav.* 159 Mass. at page 308, 20 L.R.A. 842, 34 N. E. 364, in these words: 'In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he had wrongfully done affecting the plaintiff, and to pay the damages. In such a case a plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. . . . On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damages caused to the

defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law. . . . The doctrines applied by the court of equity in cases of this kind call for a consideration of all the facts and circumstances which help to show what is just and right between the parties.'

"I think the case at bar falls within the second class of cases mentioned in the Massachusetts case. Here there was no intention nor attempt to appropriate the plaintiffs' property. The contractor made a mistake. The injury to the plaintiffs is now trivial, and at no time can it be so great that it would not be many times outweighed by the expense, damage, and loss which would necessarily be occasioned to the defendant if it should be compelled to remove the overhang of its wall. I do not think that equity requires or permits the court to use its strongest arm to produce a result so inequitable. I think the bill should be dismissed, but, under the circumstances, without costs. For further discussion, see *Methodist Episcopal Soc. v. Akers*, 167 Mass. 560, 46 N. E. 381; *Harrington v. McCarthy*, 169 Mass. 492, 61 Am. St. Rep. 298, 48 N. E. 278; *Levi v. Worcester Consol. Street R. Co.* 193 Mass. 116, 78 N. E. 853; *Kendall v. Hardy*, 208 Mass. 20, 94 N. E. 254; *Kershishian v. Johnson*, 210 Mass. 135, 36 L.R.A.(N.S.) 402, 96 N. E. 56; *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17.

"It is therefore ordered, adjudged, and decreed that the bill be dismissed."

Appeal denied.

MARYLAND COURT OF APPEALS.

STATE OF MARYLAND, Appt.,

v.

JOHN H. GURRY.

(— Md. —, 88 Atl. 546.)

Municipal corporation — segregation ordinance — uncertainty.

1. An ordinance that it shall be unlawful

Note. — Validity of segregation statute or ordinance prohibiting persons of different race or color from living in same locality.

The only reported case besides *STATE v. GURRY*, passing upon the validity of an ordinance prohibiting persons of the white and colored races from living in the same locality, appears to be *Ashland v. Coleman*, a Virginia lower court decision reported in 19 Va. L. Reg. 427. 47 L.R.A.(N.S.)

for a white person to use as a residence or place of habitation any house, building, or structure, or any part of any house, building, or structure, situated or located on any block, the houses, buildings, and structures on which block, so far as the same are occupied or used as residences or for places of abode in whole or in part, shall be occupied or used as residences or places of abode by colored persons, is not unenforceable because of uncertainty, since the words, "in whole or in part," modify residences or places of abode, and not blocks.

Same — single subject.

2. An ordinance does not violate a charter provision requiring it to embrace but one subject by providing for the use of separate blocks by white and colored persons for residences, churches, and schools.

Civil rights — segregation ordinance — validity.

3. No unconstitutional discrimination between races occurred in prohibiting white and colored persons from moving into blocks occupied exclusively by members of the other race.

Municipal corporation — segregation ordinance — reasonableness.

4. An ordinance which prohibits a white or colored owner of property in a block wholly occupied by members of the other race, and every other member of his race, from moving into it, is such an unreasonable interference with vested property rights that it cannot be presumed that power to pass it was conferred upon the municipality by the general welfare clause of its charter.

(October 7, 1913.)

APPEAL by the State from a judgment of the Circuit Court of Baltimore City sustaining a demurrer to an indictment charging defendant with violation of the segregation ordinance. Affirmed.

The facts are stated in the opinion.

Messrs. Edgar Allan Poe, Attorney General, William L. Marbury, and W. L. Rawls, for the State:

The mayor and city council being vested with all the police power which the legislature itself might exercise, the question of the validity *vel non* of the ordinance here involved is to be determined upon the same basis as if that ordinance were an enactment of the legislature itself.

It was there held that a municipal corporation possessed the power to enact such an ordinance under its general grant of power to preserve the peace and good order; that the court would take judicial notice that the close association of persons of the white and the colored races results or tends to result in breaches of the peace, immorality, and danger to the health, in view of the history of legislation in that state, which provides for separate coaches on railroads, and separation on street cars,

Rossberg v. State, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581.

The ordinance must be upheld because the means which it adopts are really designed to accomplish legitimate public purposes, and are not shown to be arbitrary or unreasonable.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as to promote the public health, the public morals, or the public safety. The objects of the ordinance are clearly within the police power as thus defined.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Jacobson v. Massachusetts, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 558, 3 Ann. Cas. 765; Noble State Bank v. Haskell, 219 U. S. 111, 55 L. ed. 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; Slaughter-House Cases, 16 Wall. 62, 21 L. ed. 404; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Berea College v. Com. 123 Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 Ann. Cas. 337, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct.

Rep. 33; West Chester & P. R. Co. v. Mica, 55 Pa. 209, 93 Am. Dec. 744.

When it is established that the purpose of such legislation is the accomplishment of some object promotive of the public welfare, then such legislation cannot be stricken down by the court, unless it clearly appears that the means provided bear no reasonable relation to the end sought to be accomplished.

McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Schindler v. Chicago, 226 U. S. 589, 590, 57 L. ed. 368, 369, 33 Sup. Ct. Rep. 182.

Such legislation cannot be thwarted upon the ground that personal liberty or the rights of private property are interfered with, unless such interference plainly appears to be greater than is fairly demanded by the purpose and object of the legislation.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Cochran v. Preston, 108 Md. 227, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

This court, without usurping legislative functions, cannot override the will of the

separate waiting rooms at railroad stations, and separate schools, and the recent legislation in the state expressly authorizing municipalities to enact segregation ordinances.

That an ordinance which prohibited the establishment of residences in the future upon any given street or block by white or colored people, except where a majority of residents of such street or block are white or colored, is not an unreasonable exercise of the police power, where persons owning or occupying property at the passage of the ordinance are not affected thereby, nor prevented from purchasing and holding property after the passage of the ordinance wherever they may desire within the corporate limits, except that in such case they may not occupy houses in certain streets or blocks as residences, and where the regulation of the use of property applies without discrimination to all white and colored persons alike. *Ibid.*

That such an ordinance does not offend against the 14th Amendment of the Federal Constitution, as depriving one of his liberty or property without due process of law. *Ibid.*

Nor deny to citizens of the United States the equal protection of the laws. *Ibid.*

It will be observed that these decisions are based upon the separate coach regulations and separate school laws for the white and the colored races, which have been quite generally upheld by the courts, including the Supreme Court of the United States, where it has been held that no badge of slavery or involuntary servitude contrary to the 13th Amendment of the 47 L.R.A.(N.S.)

United States Constitution is imposed by an act requiring equal but separate accommodations for the white and the colored races by providing separate coaches or compartments. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, affirming 45 La. Ann. 80, 18 L.R.A. 639, 11 So. 948; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18.

And that a state statute providing for equal but separate railway coaches or compartments for the white and the colored races, and the assignment of passengers to such coaches or compartments according to their race, by conductors, is not in conflict with the 14th Amendment to the Federal Constitution, prohibiting discrimination by a state because of race or previous condition of servitude. *Plessy v. Ferguson*, *supra*.

And that a law which requires that separation of the white and the colored races in public conveyances is a reasonable exercise of the police power of a state. *Ibid.*

In speaking of the 14th Amendment of the Federal Constitution, Mr. Justice Brown said in *Plessy v. Ferguson*, *supra*: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race

people as expressed by their chosen representatives, no matter how much it may differ with those representatives as to the wisdom or policy of the legislation.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Schmidinger v. Chicago*, 226 U. S. 587, 588, 57 L. ed. 367, 368, 33 Sup. Ct. Rep. 182; *McLean v. Arkansas*, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 365, 366, 54 L. ed. 518, 519, 30 Sup. Ct. Rep. 301.

The ordinance, being equal in its operation upon white and colored persons alike, works no deprivation of the equal protection of the laws.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

Mr. S. S. Field, also for the State:

The ordinance does not violate any provisions of the Constitution.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

An ordinance passed in pursuance of au-

thority in the charter has the same effect as if it had been passed by the legislature itself.

Gould v. Baltimore, 120 Md. 534, 87 Atl. 818; 2 *McQuillin*, Mun. Corp. § 643 and notes, pp. 1409, 1412.

The mayor and city council of Baltimore, proceeding by ordinance, in the exercise of the police power, have as full and ample authority within the city as the legislature itself has within the state.

Rossberg v. State, 111 Md. 396, 134 Am. St. Rep. 626, 74 Atl. 581.

The ordinance was a valid exercise of the police power.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Deems v. Baltimore*, 80 Md. 173, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Atkin v. Kansas*, 191 U. S. 207-223, 48 L. ed. 148-158, 24 Sup. Ct. Rep. 124; *Hart v. State*, 100 Md. 595, 60 Atl. 457; *State v. Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *State v. Hyman*, 98 Md. 615, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; *Hodges v. United States*, 203 U. S. 15, 51 L. ed. 68, 27 Sup. Ct. Rep. 6; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.*, 203 U. S. 55, 51 L. ed. 88, 27 Sup. Ct. Rep. 1; *Noble*

to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. . . . So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is 47 L.R.A.(N.S.)

not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

In *Re Lee Sing*, 43 Fed. 359, it was held that a city ordinance which declared it to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city, except in a certain section with prescribed limits, was void for unduly discriminating against the Chinese; for depriving them of their property without due process of law, where it appeared that a great many persons would be compelled to remove from the portion of the city heretofore occupied by them; for being in direct conflict with the statutes of the United States which provide that all persons shall have the same right in every state and territory, to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens; and as being in violation of the treaty with China providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to residence as may be enjoyed by the citizens or subjects of the most favored nation.

As to constitutionality of discrimination based on race or color in police regulations affecting morality, see *Re Opinion of Justices*, 34 L.R.A.(N.S.) 604, and note thereto.

And for separation of passengers, see *Index to L.R.A. Notes, Carriers*, § 43.

For separation of school children, see notes 14 L.R.A. 581, 24 L.R.A.(N.S.) 447, 31 L.R.A.(N.S.) 180. A. L. R.

State Bank v. Haskell, 219 U. S. 110, 55 L. ed. 116, 32 L.R.A.(N.S.) 1082, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; *Jacobson v. Massachusetts*, 197 U. S. 11, 26, 30, 31, 49 L. ed. 643, 649, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Crowley v. Christensen*, 137 U. S. 89, 34 L. ed. 622, 11 Sup. Ct. Rep. 13; *Berea College v. Kentucky*, 211 U. S. 46, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

Messrs. W. Ashbie Hawkins and George W. F. McMechen, for appellee: The ordinance is void, as it contains more than one subject.

Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014.

Municipal corporations cannot go beyond the powers granted to them, and must exercise such powers in a reasonable manner. And courts must judge in each case before them whether the exercise of the power be reasonable.

Dill. Mun. Corp. 4th ed. 253-319; *Memphis v. Winfield*, 8 Humph. 707; *St. Louis v. Weber*, 44 Mo. 547; *State v. Hyman*, 98 Md. 606, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; *Seneca v. Cochran*, 84 S. C. 279, 26 L.R.A.(N.S.) 124, 66 S. E. 288; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

The provisions of this ordinance are unjust, unreasonable, oppressive, and burdensome, and arbitrary and unnecessary to the public welfare.

Ibid.

The effect of this ordinance is to oppress a certain class of citizens, and improperly to discriminate against them in their property rights, and thereby restrict, and so virtually prohibit, their use of their own property.

Wynehamer v. People, 13 N. Y. 396; *People v. Gillson*, 109 N. Y. 390, 4 Am. St. Rep. 465, 17 N. E. 343; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 177, 20 L. ed. 560; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

If a law is applied and administered by public authority so as practically to make unjust discriminations between persons similarly circumstanced in law, in matters affecting their substantial rights, it will be held invalid as being, in operation, such a denial of equal protection as is within the prohibition of the Constitution.

6 Am. & Eng. Enc. Law, 2d ed. 79; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, 347 L.R.A.(N.S.)

Am. Crim. Rep. 547; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

The ordinance is a violation, or an attempted violation, of the obligation of a contract, or a restraint upon one's right to contract.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Ritchie v. People*, 155 Ill. 103, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

The Constitution says that no state shall "deny to any person within its jurisdiction the equal protection of the law."

Freund, Pol. Power, 663; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 31, 25 L. ed. 992; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Cooley, Const. Lim.* 282; *Lin Sing v. Washburn*, 20 Cal. 534; *History of 14th Amend. Flack*.

No more arbitrary selection can ever be justified by calling it "classification."

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 105, 43 L. ed. 913, 19 Sup. Ct. Rep. 609.

This ordinance denies to certain persons the equal protection of the laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47.

In the construction of a statute the intention of the legislature is to prevail, and to be collected from the whole of the law and the circumstances that produced it.

Hooper v. Creager, 84 Md. 195, 35 L.R.A. 202, 35 Atl. 967, 1103, 36 Atl. 359; *Upshur v. Baltimore*, 94 Md. 743, 51 Atl. 953; *Storck v. Baltimore*, 101 Md. 476, 61 Atl. 330; *Roland Park Co. v. State*, 80 Md. 448, 31 Atl. 298; *Commercial Bldg. & L. Asso. v. Mackenzie*, 85 Md. 132, 36 Atl. 754.

A statute which, by its retrospective operation, divests vested and valuable rights, is void.

Re Tiburcio Parrott, 6 Sawy. 373, 1 Fed. 481; *Baughner v. Nelson*, 9 Gill, 299, 52 Am. Dec. 694; *Appeal Tax Ct. v. Western Maryland R. Co.* 50 Md. 274; *Williar v. Baltimore Butchers' Loan & Annuity Asso.* 45 Md. 546; *Wynehamer v. People*, 13 N. Y. 396; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 476, 34 L.R.A.

(N.S.) 998, 94 N. E. 920; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The city council has not the power implied in the passage of this ordinance.

Bostock v. Sams, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665; *St. Mary's Industrial School v. Brown*, 45 Md. 332; *Ho Ah Kow v. Nuan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *State v. Hyman*, 98 Md. 597, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; *Seneca v. Cochran*, 84 S. C. 282, 26 L.R.A.(N.S.) 124, 66 S. E. 288.

Corporate authorities can exercise no power which is not, in express terms, or by fair and reasonable implication, conferred upon the corporation.

St. Mary's Industrial School v. Brown, 45 Md. 310; *Vansant v. Harlem Stage Co.* 59 Md. 333.

The legislature, much less a city council, cannot under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts not concerning the health, safety, or welfare of society, and the courts may examine into and annul any such illegal legislation.

Slaughter-House Cases, 16 Wall. 87, 21 L. ed. 412; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Stockton Laundry Case*, 26 Fed. 611; *People v. Gillson*, 109 N. Y. 391, 4 Am. St. Rep. 465, 17 N. E. 343.

The United States Supreme Court has sanctioned the compulsory separation of white and colored persons in public conveyances; it has intimated that the assignment of separate residence districts on the basis of color, creed, or nationality, would not be tolerated, and it has been held that Chinese persons cannot be compelled to live in one portion of a city.

Re Lee Sing, 43 Fed. 359; *Re Tie Loy*, 11 Sawy. 472, 26 Fed. 611; *Re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Re Quong Woo*, 7 Sawy. 531, 13 Fed. 229; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end; it cannot invade the rights of persons and property under the guise of police regulation when it is not such in fact.

Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 198, 22 Am. Rep. 71; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Briesecker*, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193; *Sprigg v. Garrett Park*, 89 Md. 406, 43 Atl. 813.

The law will not allow the right of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest that such is not the object and purpose of the regulation.

People v. Gillson, 109 N. Y. 399, 4 Am. St. Rep. 465, 17 N. E. 343; *State v. Broadbelt*, 89 Md. 573, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771.

The determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Baltimore & O. R. Co. v. Waters*, 105 Md. 422, 12 L.R.A. (N.S.) 326, 66 Atl. 685.

This ordinance is but an effort to satisfy and sustain the unreasonable prejudices of one class of the community against another, and to protect what that one class believes to be its property rights.

Baltimore & O. R. Co. v. Waters, *supra*.
Mr. C. Ames Brooks also for appellee.

Constable, J., delivered the opinion of the court:

There is involved in this appeal the validity of the ordinance of the mayor and city council of Baltimore city, known as the "segregation ordinance." The appellee, a colored man, was indicted for violation of § 2 of said ordinance, and, upon the lower court sustaining a demurrer to the indictment, this appeal was taken from the judgment thereupon entered.

The ordinance, which is composed of ten sections, is entitled "An Ordinance for Preserving Peace, Preventing Conflict and Ill-Feeling Between the White and Colored Races in Baltimore City, and Promoting the General Welfare of the City by Providing, so far as Practicable, for the Use of Separate Blocks by White and Colored People for Residences, Churches, and Schools."

Section 1 provides: "That from and after the passage of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building, or structure, or any part of any house, building, or structure, situated or located on any block, as the same is hereinafter defined in § 4, the houses, build-

ings, and structures on which block, so far as the same are occupied or used as residences or places of abode, in whole or in part, shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in § 3 hereof. Such a block shall be deemed a colored block for the purposes of this ordinance."

Section 2 is in the identical language of § 1, except that it prohibits any colored person from doing what § 1 prohibits any white person from doing.

Section 3 excepts domestic servants from the operation of §§ 1 and 2, when they reside with their employers.

Section 4 is: "That the word 'blocks,' as the same is used in this ordinance, shall be construed to mean that portion of any street or alley upon both sides of the same between the two adjacent intersecting or crossing streets." And it further provides the method, in cases where either of the adjacent streets intersects, but does not cross, the street upon which the block in question may be located, by which that portion of the block on the side of the street facing the intersecting street is to be classified.

Section 5 fixes the penalty for violation of the prohibitions of §§ 1 or 2 of the ordinance.

Section 6 provides the manner of determining whether blocks upon which there were no buildings used as residences at the time of the passage of the ordinance, but upon which it is desired by the owners thereof to erect buildings for the purposes of residences, shall become either colored or white blocks.

Section 7 provides the means whereby blocks which were either white or colored under §§ 1 and 2 can be opened to the occupancy of both white and colored persons.

Sections 8 and 9 provide that no buildings not so used prior to the passage of the ordinance shall be used as churches or schools without a permit from the board of police commissioners, and no permit shall be issued to allow the use of such buildings by colored persons in a white block or white persons in a colored block.

Section 10 provides that nothing in the last four sections shall be taken to affect the validity of the first five sections.

The learned judge below, in sustaining the demurrer, filed an opinion from which it appears that the reason for the court's action was based upon the unenforceability of the ordinance because of the uncertainty of the language of §§ 1 and 2.

There can be no question that, this being a penal ordinance, it must be strictly construed; but this rule is open to the limitation that the construction must not be an unreasonable or forced one. As was de-

clared in *Keller v. State*, 11 Md. 525, 69 Am. Dec. 220: "Even penal laws, which it is said should be strictly construed, ought not to be so strictly construed as to defeat the obvious intention of the legislature." . . . And, though they are not to be extended by construction, they should receive a rational interpretation." In Wharton's Criminal Law, 10th ed. vol. 1, § 28, the rule is stated thus: "Penal statutes are to be strictly construed. . . . In construing such statutes, however, we are to look for their reasonable sense; and if this is clearly ascertained it must be applied, though a narrower sense is possible."

In the opinion of the court we find this language: "In an effort to interpret these sections (1 and 2) we are forced to the conclusion that the thing prohibited is the residence of a white person in a block occupied, in whole or in part, by colored persons, or the residence of a colored person in a block occupied, in whole or in part, by white persons." From which, and also other portions of the opinion, it is apparent that the words "in whole or in part" were taken to modify the word "block." But this is a construction to which we cannot accede. Although at a casual reading of these two sections the language does apparently admit of this construction, nevertheless, upon close scrutiny, it is clear that the words "in whole or in part" were used to modify the words "residences or places of abode." Therefore the meaning of the language of the sections is plain that the thing prohibited is that, when the buildings on a block, "so far as the same are occupied or used as residences or places of abode, in whole or in part, shall be occupied or used as residences or places of abode" by the members of one race, then no member of the other race shall occupy any building on that block as a residence; the effect of the words "in whole or in part" being to cover blocks where all of the houses were wholly occupied, as well as where there were some vacant, but all that were occupied being occupied by the members of the same race, or where some of the houses were partly used as residences and partly as shops, stores, or for purposes other than residences, that in that event the only portion of the house to be considered in determining as to whether or not the block should come under the operation of the ordinance was to be the portion used as residences. The blocks which at the time of the passage of the ordinance were occupied by both white and colored are left entirely free for the same character of occupancy. Although language could have been used to make the meaning clearer, we are of the opinion that these sections are free

from uncertainty, and therefore it was error to have declared the ordinance void for that reason.

The appellee contends that the ordinance is in conflict with § 221 of the city charter, wherein it is provided: "Every ordinance enacted by the city shall embrace but one subject, which shall be described in its title," etc. This has been declared to be an adaptation of article 3, § 29, of the state Constitution. There have been so many adjudications upon that section that there can no longer be any doubt as to its correct interpretation. And what was said in the case of *Gans v. Carter*, 77 Md. 1, 25 Atl. 603, seems to be applicable here: "We have but a word to say, and that is to repeat what we have so often said, that the object of this clause was to prevent the embodying into the same act distinct and separate matters of legislation, having no connection whatever with each other, and matters not referred to in the title." Measured by this standard there can be no force in the contention.

The main question in this case arises, however, over whether the provisions of this ordinance are in conflict with article 23 of the Bill of Rights of the Constitution of Maryland and 1st section of the 14th Amendment of the Constitution of the United States. The title to the ordinance recites its purpose to be "for Preserving Peace, Preventing Conflict and Ill-feeling Between the White and Colored Races in Baltimore City, and Promoting the General Welfare of the City," etc. What is applicable to the white race is made precisely applicable to the colored race. No advantage that is enjoyed by one race is denied the other. Every restriction placed upon the one is in exact terms imposed upon the other. Upon whether or not this ordinance is a valid exercise of the police power must depend its enforceability.

That the city has the power under its charter to pass ordinances, in the exercise of the police power, equal to legislative enactments, must be regarded as settled in this state since the case of *Rossberg v. State*, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581, wherein this court said: "Broader or more comprehensive police powers could not be conferred under any general grant of police power, for the purposes mentioned in § 18, than those granted in that section, and when we consider the 'welfare clause' of the charter (§ 31), greater emphasis could not be laid upon the implied powers of the city for the maintenance of the peace, good government, health, and welfare of the city than is there laid. . . . In the present case, the legislative grant is not merely one of power to pass 47 L.R.A.(N.S.)

ordinances relating to specified police powers, regarded as a part only of the general police power, but the grant is of 'all the power commonly known as the police power, to the same extent as the state has or could exercise said power within said limits.' The implication, therefore, is a necessary one that, notwithstanding the preceding clause of that section of the charter enumerated certain purposes for which ordinances might be passed, the legislature intended the city to have, in addition, the power to pass ordinances for any and all purposes relating to the exercise of the police power."

If, then, the legislature could pass a statute under the police power of the state, providing for the segregation of the races, as we think it could, there would seem to be no doubt that the mayor and city council of Baltimore can pass a valid ordinance having the same end in view. It is true, however, that, notwithstanding the broad powers vested in the mayor and city council by the charter, some distinction is made between statutes passed by the legislature and ordinances passed by a municipality under the police power,—one illustration of which is what was said by Chief Judge McSherry in *State v. Hyman*, 98 Md. 618, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742. The court must undoubtedly take into consideration the reasonableness of the provisions of this ordinance, and determine whether any of those involved in this case are so unreasonable or oppressive as to cause it to assume that the legislature did not intend to empower the municipality to enact them as they stand,—whatever may be said as to the court's powers in construing statutes which have a real and substantial relation to any object properly within the police powers of the state.

Both state and Federal courts have been most industrious in dealing with the many cases growing out of the laws claimed to have been passed in the exercise of this power, known as the "police power," and it might be well to consider what is meant, in a constitutional sense, by that term. As was said by that learned jurist, Chief Justice Shaw, in *Com. v. Alger*, 7 Cush. 53: "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." And the definition there given has been, probably, more often quoted with approval than any other: "The power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall

judge to be for the good and welfare of the commonwealth and of the subjects of the same." In *Champer v. Greencastle*, 138 Ind. 339, 24 L.R.A. 768, 46 Am. St. Rep. 390, 35 N. E. 14, it is thus defined: "The police power of the state so far has not received a full and complete definition. It may be said, however, to be the right of the state . . . to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the Federal Constitution, or which do not violate any of the provisions of the organic law." In *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134: "The power to impose such restrictions upon private rights as are practically necessary for the general welfare."

In *Deems v. Baltimore*, 80 Md. 173, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 650, this court said: "Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public. . . . It may be said to rest upon the maxim, *Salus populi suprema lex*; and the constitutional guaranties for the security of private rights . . . have never been understood as interfering with the power of the state to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. 'Property of every kind,' says Mr. Justice Story, 'is held subject to those general regulations which are necessary for the common good and general welfare.' And the legislature has the power to define the mode and manner in which everyone may use his property." In *State v. Hyman*, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742: "The exercise of the police power, being for the promotion of the public good, is superior to all considerations of private rights or interest, and by virtue of it the state may lawfully impose upon the exercise of private rights such burdens and restraints as may be necessary and proper to secure the general health and safety." In *Police Comrs. v. Wagner*, 93 Md. 191, 52 L.R.A. 775, 86 Am. St. Rep. 423, 48 Atl. 456, the court said: "The state has power to pass such laws as are necessary to protect the health, morals, or peace of society." In *Cochran v. Preston*, 108 Md. 220, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048: "The power to prescribe regulations demanded by the general welfare for the common protection of

all is known as the police power of the state, and is inherent in every sovereignty."

The Supreme Court has, times almost without number, been called to pass upon laws enacted by the states upon matters relating to their internal government, and has given expression to the meaning to be ascribed to the police power. In the *Slaughter-House Cases*, 16 Wall. 62, 21 L. ed. 394, which were the first cases involving a construction of the 14th Amendment, the court said: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. . . . And persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned.'" In the case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it was said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals." Again in *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560: It is "the most essential of powers, at times the most insistent, and always one of the least limitable, of the powers of government." "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderating opinion, to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A. 487. In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, the court said: "But neither the Amendment [14th], broad and comprehensive as it is, nor any other Amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, mor-

als, education, and good order of the people." In *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 349, 4 Ann. Cas. 1175: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." In *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, the court said in dealing with the extent of the police power: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."

It is not, nor can it be, contended that the 14th Amendment took from the states the police power they possessed at the time of the adoption of the Constitution. They now possess the power to the same extent, subject, of course, to the fundamental principles of civil rights. *Slaughter-House Cases*, supra; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Jacobson v. Massachusetts*, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. "It does not deprive the states of the right to preserve order within their limits, to pass laws against crimes and punish offenders, to regulate relations between individuals, to control for the public good the use of private property, to protect the health, life, and safety of the people, and to that end, not only to enact suitable legislation, but to destroy private property that is dangerous to the well-being of the state." *Cooley*, Const. Law, 251.

That this power is far-reaching and most important to the preservation of the states cannot be denied. It has been impossible to confine its operation to a set rule, but every community has been left to meet the circumstances of each case as the conditions changed, and to determine upon the necessity for action. *Allgeyer v. Louisiana*, 165 U. S. 590, 41 L. ed. 836, 17 Sup. Ct. Rep. 427. There is, however, the constant warning present, practically, in all the cases, in the examples and rule, that the exercise of the power must not be unreasonable, but must be enacted in good faith, for the promotion of the public

good, and not for the oppression or annoyance of a particular class. *Plessy v. Ferguson*, 163 U. S. 555, 41 L. ed. 262, 16 Sup. Ct. Rep. 1138.

If legislative bodies, under the guise of protecting the public welfare, arbitrarily pass laws which have no relation to that object, the courts will determine whether there was a proper exercise of the power. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. Naturally, at times, the exercise of this power limits to some extent the enjoyment of the fundamental rights; but if the restraints are deemed by the law-making body necessary for the general welfare, and are not "so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred," the courts will not interfere, for the local authorities are primarily the judges of the necessity of such legislation. And although courts may disagree as to the propriety of the legislation, unless it plainly, and beyond all question, exceeds the power, there should be no judicial interference. *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *McLean v. Arkansas*, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; *Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76.

If, then, this power is inherent in every state for the preservation of its general welfare, is the ordinance in question an unreasonable exercise of it, and are its provisions so arbitrary and oppressive that they amount to the invasion of a person's constitutional rights?

As we have seen, the avowed object of the ordinance is to preserve peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of Baltimore. The means employed are that blocks which were occupied by colored people exclusively should continue to be occupied by them exclusively, and that blocks occupied exclusively by white people should so continue to be occupied by them. The ordinance does not legislate on what were "mixed blocks"—those occupied by members of the two races—at the time it was passed; and whatever other objections may be urged against it, it cannot be truly said that there is any discrimination in the ordinance against the colored race. Indeed, in its practical operation it would be more burdensome on white people than on col-

ored people, for it is well known that white people own the great bulk of property in Baltimore city, and hence, where the property of one colored person would be affected by such an ordinance, that of many more white people would be. What is denied one class is denied the other; what is allowed one class is allowed the other. There is therefore no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further.

No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to; but the fact remains, however much it is to be regretted, and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, everyone having the interests of the colored people as well as the white people at heart ought to encourage rather than oppose it. Mr. Justice Brown said in *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138: "The object of the Amendment [14th] was undoubtedly to enforce the absolute equality of the two races before the law; but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

If the welfare of the city, in the minds of the council, demanded that the two races should be thus, to this extent, separated, and thereby a cause of conflict removed, the court cannot declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment, how can it be contended that the city council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict? As was said in *Plessy v. Ferguson*, *supra*, which was a case involving separate railroad coaches for white and colored persons within the limits of a state: "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order." —and further that they could not say that such separation was unreasonable or obnoxious to the 14th Amendment. A large number of the states have laws regulating, like in the foregoing case, the separation of the races in railroad cars, including our own state. *Hart v. State*, 100 Md. 595, 60 Atl. 457. The courts have uniformly held that this was a reasonable exercise of the police power, and was not a discrimination when the same accommodations were provided for each race.

Penalties in criminal laws are not only imposed to punish violators, but to deter the commission of crime. If, as is practically conceded in this case, the living in such close proximity produces friction that is liable to result in open clashes and disorder, why should not the governing body take cognizance of it, and legislate to avoid it, and thereby promote the general peace? It seems that it would be the better exercise of their discretion for the public welfare, to discourage by removing the cause, than to trust to deterring by the fear of punishment. In this state, as well as in a number of others, there has been a statute in force for many years prohibiting marriages between white and colored persons, and imposing a heavy penalty for its violation, and in *Plessy v. Ferguson*, *supra*, the Supreme Court said: "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state." That case, as well as many others, has also recognized the right of states to establish separate schools for white and colored children, and, as we have seen, to require the separation of the white and colored races in public conveyances. Without giving other illustrations of the exercise of the police power, we are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power. It only remains for us to determine whether the ordinance as drawn should be sustained.

It will be observed that the first five sections of the ordinance do not depend, for their validity, upon the remaining sections,

their validity, upon the remaining sections,

which legislate on subjects germane to, but not essential to, §§ 1 and 2. As the indictment is for the alleged violation of § 2, which is in the precise language of § 1 (excepting the latter is applicable to white persons, and the former to colored persons), those two are the most important sections for our consideration. The serious objection to them is that they wholly ignore all vested rights which existed at the time of the passage of the ordinance. Prior to that time any white person undoubtedly had the right not only to own, but to move into and use as a residence or place of abode, any house, etc., situated in what is by § 1 made a colored block, and a colored person had the same rights as to what is by § 2 made a white block. If the traverser, for example, on May 15, 1911, when the ordinance was passed, owned a dwelling in what was made a white block, he could not under the ordinance move into it, although it was perfectly lawful for him to own it when he became owner and to use it as a dwelling. He might be unable to rent it to a white person, and as a colored person was prohibited from moving into it he could not rent it to a colored person, and he could not under the ordinance move into it himself. The result would be that his house would remain idle, unless he could sell it, which would under the circumstances likely be at a great sacrifice, although when he acquired it he had the right under the Constitution and laws of Maryland to occupy it as his dwelling, or to rent it to any person, white or colored, to be used for legitimate purposes. Or it might be that a white person had a valuable and attractive house in a "block" which was otherwise occupied by colored people, yet if, at the passage of the ordinance, it happened to be unoccupied as a dwelling, he could not under the ordinance move into it or rent it to a white person. To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person, and if he could not use it himself he would be deprived of not only the income from it, but of such use of it as is guaranteed to every owner of property by the Constitution and laws of the land. Of course, the same conditions might exist when the owner of the one house was colored and the other residents of the block were white, although probably not so likely to happen.

We do not lose sight of the fact that the absolute control of property by an owner may be subject to reasonable regulations under the police powers of the state. An owner of property cannot establish a bawdyhouse or other nuisance in it because

he is the owner of it. He cannot necessarily use it just as he pleases, if such use thereby injuriously affects others. He may be prohibited from using it while it is in such condition that the use of it will be dangerous, or, in some cases, will be injurious to others. He may be prohibited from manufacturing or selling intoxicating liquors in it. Other instances might be given of the exercise of the police power, but we have not hitherto known of a case which approached the exercise of such power as is contended for under this ordinance,—to prohibit one who was the owner of a dwelling when the ordinance was passed from moving into it, simply because he is of a different color from other persons using that block as residences or places of abode, although he might keep his premises in better sanitary condition and in every way more attractive than the others. He may be quite as well-behaved and as law-abiding as the other residents of the block; he may have paid more for his houses than the others for their respective houses, or may have inherited the family residence. It is not because there is any reason why it could not or should not be used as a dwelling, but simply because he is white and the others colored. Such an ordinance may work some hardships, even as to after-acquired property; but if property is acquired when valid laws or ordinances affecting it are in force, it is taken subject to them.

Under §§ 1 and 2 of the ordinance the most serious consequences might follow their adoption, and rights which had always existed be taken away by the action of the municipality. Without deeming it necessary to consider whether it would be possible for the legislature itself to thus take away such vested rights under the exercise of the police powers, we deem the provisions as they were passed too unreasonable to permit us to assume that the legislature intended to confer on the municipality the power to thus affect vested rights. Indeed, when we see such provisions as those in § 7, which provide for a majority of the owners of either real or leasehold property in a block subject to the operations of §§ 1 or 2 having the inspector or of buildings declare that said block is no longer subject to the operation of such section, it would be difficult to conclude from the ordinance itself that the mayor and council were so convinced of the necessity for such an exercise of the police powers as would justify such interference with vested rights. A practical difficulty in the enforcement of §§ 1 and 2, which occurs to us, is the lack of any provision in the ordinance for some sufficient public no-

tice of what blocks are affected,—which are to be white, and which colored. Unless there be some public record giving the necessary information, there would probably be great confusion in the examination of title and passing on the rights of purchasers, even if no difficulties arise in the enforcement of such sections.

We do not understand why in § 3 the exception was limited to domestic servants, or just how comprehensive that term was intended to be. It would be difficult to include caretaker, chauffeur, or janitor in the term “domestic servants;” but, as the validity of the ordinance is not thereby affected, we will not discuss that further.

As the case before us does not involve the provisions of §§ 6, 7, 8, and 9, we will not discuss them separately, or pass upon the validity *vel non* of such provisions as the delegation of powers attempted by §§ 6 and 7 to property owners, etc.; but for the reason stated we will affirm the judgment.

MINNESOTA SUPREME COURT.

H. C. DODGE, Respt.,
v.

I. C. GILMAN, Appt.

(122 Minn. 177, 142 N. W. 147.)

Slander — words spoken in judicial proceedings

1. In this action for slander, the complaint alleged that defendant maliciously spoke certain slanderous words of and concerning plaintiff. The answer was a general denial and a plea that the words were privileged. It is held that statements made in the course of judicial proceedings, in order to be privileged, must be pertinent and material to the case. Under this rule, the trial court rightly refused to direct a verdict for defendant.

Pleading — damages — slander — reputation.

2. In an action for defamation, where the complaint claims more than nominal damages to the reputation of plaintiff, defendant may, under a general denial, prove the bad reputation of plaintiff at and prior to the time of the slander or libel, though

Headnotes by BUNN, J.

Note. — For bad character or reputation of plaintiff as mitigating damages for libel or slander, see note to Wood v. Custer, 38 L.R.A.(N.S.) 1176.

Generally as to privilege of witness as to defamatory testimony, see note to Cooper v. Phipps, 22 L.R.A. 836. See also Blakeslee v. Carroll, 25 L.R.A. 106; Cooley v. Galyon, 60 L.R.A. 139; and Sebree v. Thompson, 11 L.R.A.(N.S.) 723.
47 L.R.A.(N.S.)

the complaint does not specifically allege plaintiff's good reputation.

Same — malice — good faith.

3. Where the complaint alleges that defendant acted maliciously, and states a case for the recovery of punitive damages, defendant may, under a general denial, prove facts tending to show good faith and absence of malice on his part.

Appeal — exclusion of evidence — prejudice.

4. It was prejudicial error to exclude evidence of the bad reputation of plaintiff for honesty and integrity prior to the speaking of the slanderous words; but the error in excluding evidence to show defendant's good faith and the absence of malice was not prejudicial, the recovery being limited by the charge to compensatory damages.

(June 20, 1913.)

A PPEAL by defendant from an order of the District Court for Watonwan County, denying a motion for judgment *non obstante veredicto* or for new trial after verdict in favor of plaintiff in an action brought to recover damages for slander. Reversed.

The facts are stated in the opinion.

Mr. J. W. Seager, for appellant:

The defendant is entitled to bring to the consideration of the jury any circumstances which legitimately tend to disprove or lessen the degree of malice.

18 Am. & Eng. Enc. Law, 2d ed. 1098; Sharpe v. Larson, 74 Minn. 323, 77 N. W. 233.

Evidence of plaintiff's bad character or reputation may be introduced by the defendant under the general issue.

18 Am. & Eng. Enc. Law, 2d ed. 1101.

This was an absolute privileged occasion.

Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066, 7 Ann. Cas. 528; Sherwood v. Powell, 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103.

Messrs. Paul C. Cooper and J. E. Haycraft, for respondent:

The fact that defendant in a suit for libel or slander believes the charge to be true is no justification.

25 Cyc. 414; Hewitt v. Pioneer-Press Co. 23 Minn. 178, 23 Am. Rep. 680; Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; Lotto v. Davenport, 50 Minn. 99, 52 N. W. 130.

Under statute, where defendant intends to give circumstances in evidence in mitigation of damages, they must be specifically pleaded.

Mielenz v. Quasdorf, 68 Iowa. 726, 28 N. W. 41; Craver v. Norton, 114 Iowa, 46, 89 Am. St. Rep. 346, 86 N. W. 54; Halley v. Gregg, 82 Iowa, 622, 48 N. W.

974; *Ladwig v. Heyer*, 136 Iowa, 196, 113 N. W. 767; *Meyers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249.

Recoupment must be specifically pleaded in answer.

Horn v. Western Land Asso. 22 Minn. 233; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Sayles v. Quinn*, 196 Mass. 492, 82 N. E. 713.

Bunn, J., delivered the opinion of the court:

This is a slander case. Plaintiff recovered a verdict, and a motion of defendant for judgment notwithstanding the verdict or for a new trial was denied. Judgment was entered on the verdict, and defendant appealed therefrom to this court.

The facts which the evidence warranted the jury in finding as true, stated only with enough detail to make understood the questions involved here, are as follows: An action was on trial before a justice of the peace in the city of St. James, involving the ownership of a cow. In this action one Hinton was plaintiff, and the defendant here was defendant. Plaintiff was represented by an attorney, while defendant acted as his own counsel. Defendant called one Joblinske as a witness, and in the course of his examination asked this question: "Did you see Henry Dodge in my pasture?" The question was objected to, and the justice asked defendant what he wanted to prove. Defendant said that he wanted to show that Dodge (the plaintiff in the instant case) was around his place, snooping around his premises. Plaintiff's attorney objected, and defendant got up from his seat, pointed to Dodge, who was in the court room, and said: "That man Dodge has been cutting my fences, running over my land, and injuring my stock, and stole Crowley's hay, and said my cattle ate it up." Dodge had not testified as a witness in the case, though it appears that he had been a witness against defendant in a former trial of the action before another justice. This is the version of the episode as given by plaintiff and the justice, and we must assume here that it is the correct one, though it differs in some particulars with the evidence of defendant and his witnesses.

1. It is contended by defendant that the slanderous words were privileged, because spoken during the progress of the trial, and in response to the question of the justice as to what he wanted to prove. The words spoken were not pertinent or material to the issue in the case on trial, nor to the question asked by the justice. It is well settled in this state that state-

ments made in the course of judicial proceedings must at least be pertinent and material to the case to be privileged. *Sherwood v. Powell*, 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103. This disposes of the claim that the trial court should have granted a motion to dismiss, or directed a verdict for defendant, as the words were clearly slanderous.

2. The trial court sustained an objection to a question asked by defendant's counsel as to the reputation of plaintiff for honesty and integrity, and also an objection to another question as to whether the witness had heard plaintiff make any statements as to defendant's cattle eating the hay, and whether he had not, prior to the justice court trial, informed defendant of that fact. Apparently the ground upon which these objections were sustained was that the answer did not specifically allege the bad reputation of plaintiff, or specifically allege matters tending to show want of malice. The complaint did not allege good reputation on the part of plaintiff, but did allege that defendant acted maliciously, and asked substantial damages. There seems to be much doubt as to the law in this state on the subject of whether evidence of the bad reputation of the plaintiff in a libel or slander case is admissible under a general denial, and also whether evidence to show lack of malice in mitigation of damages is admissible under a general denial. It seems desirable to set these questions at rest.

We will first consider the admissibility under a general denial of evidence of the bad reputation of plaintiff prior to the time of the libel or slander. It is maintained with apparent confidence by plaintiff's counsel that this court has decided such evidence inadmissible under a general denial, where the complaint does not specifically allege the good reputation of plaintiff. The case of *Dennis v. Johnson*, 47 Minn. 56, 49 N. W. 383, is relied on. In this case the complaint alleged plaintiff's good reputation, and it was held that a specific denial of this allegation was sufficient to put the fact in issue. The court said: "It may be conceded, in accordance with the claim of the respondent, although we do not so decide, that, unless the answer is so framed as to specifically put the reputation of the plaintiff in issue, such evidence would not be admissible." The language in the last part of the opinion, to the effect that, had the complaint rested upon the presumption of the plaintiff's good name, the defendant, in order to specifically make an issue upon it, would have been obliged to affirmatively aver that it was

bad, cannot be construed as a decision to that effect, in view of the express statement that the point is not decided. It is clear, we think, that the Dennis Case does not decide the question. Clearly *Lotto v. Davenport*, 50 Minn. 99, 52 N. W. 130, is no authority either way. We have found no other Minnesota case that says anything to the proposition before us here. But the authorities elsewhere are numerous, and generally to the effect that evidence of plaintiff's bad reputation is admissible under a general denial, where the complaint asks substantial damages for injury to reputation, though it does not specifically aver plaintiff's good reputation. 1 Wigmore, Ev. §§ 70, 71, and cases cited in note 1, § 73. Whether, in an action for defamation, the defendant may use plaintiff's poor reputation, or lack of reputation, to mitigate the damages, has been, irrespective of the question of pleadings, "one of the most controverted questions in the whole law," says Mr. Wigmore. He gives the argument in favor of admitting such evidence, and the argument *contra*, as expressed in the leading cases. In most, if not all, cases which hold evidence of bad reputation admissible, it was held admissible under a plea of the general issue. There is no doubt that in this state a defendant in an action for defamation may prove the poor reputation of plaintiff, or his lack of reputation, in mitigation of damages, if his pleading is sufficient. The only open question is whether a general denial is sufficient, or whether defendant must specifically aver plaintiff's poor reputation. There have been cases holding that a plea of the general issue or a general denial was insufficient to raise the issue, but the great weight of authority is the other way.

In addition to the cases from the English, Canadian, and American courts cited in the note to § 73 in Mr. Wigmore's valuable work, we refer to the following authorities: In *Newell, on Slander & Libel*, 2d ed. page 648, § 60, it is stated that a plea of the general issue operates as a denial of the damage, where more than nominal damages is claimed. In 18 Am. & Eng. Enc. Law, 2d ed. 1101, it is said that as a general rule evidence of the plaintiff's bad character or reputation may be introduced by defendant under the general issue, though there are cases holding otherwise. In 13 Enc. Pl. & Pr. 72, the rule is announced that "the general character or reputation of the plaintiff is put in issue by a plea of the general issue, and under this plea evidence to show the general bad character of the plaintiff before and at the time of the alleged defamation

is always competent in mitigation of damages." In Cyc. the same rule is given. 25 Cyc. 481. The cases, with a few exceptions, that are cited in the foregoing text-books, fully support the rule, and we have no hesitation in saying that there is a practical unanimity of authority outside of this state in favor of admitting evidence of the bad reputation of plaintiff, under a general denial. It seems clear to us, also, that this is the logical and correct rule. The gist of an action for defamation is injury to plaintiff's reputation. He need not allege that it was good, and an unnecessary allegation to that effect does not change the issues. Where plaintiff claims general damages in more than a nominal amount for an injury to his reputation, surely a general denial puts in issue the fact and amount of the damage, as well as the speaking or writing of the defamatory language. In all cases where plaintiff alleges damages from the wrongful or negligent act of defendant, a general denial puts in issue the question of damages, as well as the doing of the act alleged. We fail to see why a different rule should apply to an injury to reputation. We therefore adopt in this state the rule that under a general denial defendant in an action for defamation, where more than nominal damages to the reputation of plaintiff is claimed, may introduce evidence of the bad reputation of plaintiff on the question of damages, whether or not the complaint alleges good reputation.

3. We also hold that, when the complaint alleges that defendant acted with malice, a general denial puts this allegation in issue, and under it defendant may introduce any evidence reasonably tending to show that he acted in good faith. Here again there has been confusion in the law. When the defendant does not plead a justification (and clearly this must be specifically pleaded), it has been a subject of controversy how far he could prove acts of plaintiff which justified a belief in his guilt. But, in the absence of statute, we think it is the general rule that absence of malice may be shown under a general denial, where the complaint alleges malice, thereby making a case for the recovery of exemplary damages. Where there is no plea of justification, it is well established that defendant cannot prove under the general issue the truth of the words spoken or published, either as a defense or in mitigation of damages; and it is the better opinion that he cannot prove the existence of rumors of plaintiff's guilt of the act charged for the purpose of 'negating the harm done to plaintiff's reputation.' 1

Wigmore, Ev. § 74. But a wholly dif-

ferent question arises when the conduct or rumored conduct of plaintiff is offered, not as showing his want of reputation, or as tending to lessen the actual damages, but as constituting defendant's grounds for a belief in the guilt of plaintiff, and thus tending to show good faith and absence of malice. It is settled law in this state that this kind of evidence is admissible, if the answer is sufficient. *Sharpe v. Larson*, 74 Minn. 323, 77 N. W. 233; 2 Dunnell's Minn. Dig. p. 282, § 5532. The question is again one of pleading. Good faith or absence of malice is, of course, not a defense to an action of slander or libel; nor does proof of good faith or want of actual malice go to lessen the actual or compensatory damages. But where the complaint contains the necessary allegations to warrant the recovery of punitive damages, such evidence has undoubted relevancy; it may lessen the amount of punitive damages, or do away with such damages altogether. On principle, no good reason can be suggested for holding that a general denial does not put in issue an allegation of malice in the complaint, unless our statute (Rev. Law 1905, § 4152) makes it incumbent on defendant to allege in his answer facts showing want of malice.

This statute provides as follows: "The defendant [in actions for slander or libel] may allege in his answer both the truth of the matter charged as defamatory and any circumstances in mitigation of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances." As said in *Hewitt v. Pioneer-Press Co.* 23 Minn. 178, 23 Am. Rep. 680, this statute entirely removed "the vexatious uncertainty and embarrassment which, before the statute, existed as to when a defendant in a suit for libel or slander could prove mitigating circumstances." But it is not held in the *Hewitt Case*, or in any case in this state, that this statute made it necessary for the defendant to specifically allege facts in mitigation when the complaint alleges actual malice. The answer in the *Hewitt Case* did plead the mitigating circumstances, and it apparently has been the general practice to do so; but we can find nothing in the statute that makes it necessary, when it otherwise would not be. The "vexatious uncertainty and embarrassment" existing before was not in regard to the question of the necessity of pleading mitigating circumstances, or facts to show good faith, but as to the admissibility of such facts in evidence under any pleading. Neither in the reasons for its enactment, nor in the language of the statute, is there warrant for the construction that it makes it

necessary for defendant to specifically aver facts showing his good faith in mitigation of punitive damages. We hold that, where the complaint states a case for the recovery of punitive damages, defendant may prove absence of malice and good faith under a general denial.

We therefore reach the decision that it was error for the trial court to exclude evidence of plaintiff's bad reputation for honesty and integrity prior to the speaking of the slanderous words. As the relevancy and admissibility of the answer appeared from the question itself, it was not necessary for defendant to show what he expected to prove by the witness. The evidence excluded bore on the question of compensatory damages, and we are unable to hold that the amount of the verdict might not have been less had this evidence been admitted, and therefore the error was prejudicial.

It was also error to exclude evidence to show lack of malice on defendant's part. But this, we think, was error without prejudice. Its only bearing was on the question of punitive damages, and the instructions to the jury limited the recovery to the injury to plaintiff's reputation, or compensatory damages.

We find no merit in any of the other assignments of error, but there must be a new trial for the error in excluding evidence of plaintiff's bad reputation.

Order reversed, and new trial granted.

MISSISSIPPI SUPREME COURT.

SALLIE THOMPSON, Appt.,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(— Miss. —, 63 So. 185.)

Negligence — unsafe premises — artificial lake — drowning of child.

A railroad company which has created a shallow lake in a woods near a town by damming a water course is not, although it is charged with notice that children resort there to play, liable for the death of a child who, while wading in the lake, steps into a deep hole and is drowned.

(October 13, 1913.)

Note. — Doctrine of attractive nuisance as applied to ponds, reservoirs, water ways, etc.

The earlier cases discussing this question may be found in the note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1143.

The attractive-nuisance doctrine is based on the negligence of the proprietor who fails

APPEAL by plaintiff from a judgment of the Circuit Court for Pike County sustaining a demurrer to the declaration in an action brought to recover damages for the death of plaintiff's minor child, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Whitfield, McNeill, & Whitfield for appellant.

Mr. C. L. Sivley, with Messrs. Mayes & Mayes, for appellee:

Defendant was not liable.

Bottum v. Hawks, 84 Vt. 370, 35 L.R.A. (N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1025; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 19 L.R.A. (N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann.

Cas. 981, 21 Am. Neg. Rep. 272; *Swarts v. Akron Waterworks Co.* 77 Ohio St. 262, 19 L.R.A. (N.S.) 1156, 122 Am. St. Rep. 522, 83 N. E. 74, 11 Ann. Cas. 968, 21 Am. Neg. Rep. 289; *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 75 N. W. 735; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, 10 Am. Neg. Rep. 8; *Moran v. Pullman Place Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598, 1 Am. Neg. Rep. 4; *Salla-*

to protect young children attracted to his premises by some dangerous thing or place artificially created there, and where he should have anticipated that the children would be lured into danger. It assumes that he has control of the premises and the right and power to erect fences or guards thereon for the protection of children that will be attracted there. Consequently a city has been held not liable in *Tavis v. Kansas City*, 89 Kan. 547, 132 Pac. 185, for the drowning of two boys in a pool, attractive to children as a place to wade and swim, where the city had no knowledge of the pool, did not own or control the ground where it existed, and had no right to build fences or barriers around it. The pool in this case was in a creek, a natural water course, spanned by a culvert constructed by the city, which it was claimed was so narrow as to form a pool in times of freshets. It was stated that while the doctrine invoked applied to things or places artificially created, it had no application to pools or places in a river or creek which existed in the order of nature.

It is stated in *Charvoz v. Salt Lake City*, — Utah —, 45 L.R.A. (N.S.) 652, 131 Pac. 901, that the decisions relating to the attractive nuisance or so-called "turntable doctrine" are somewhat at variance with respect to what facts bring a particular case within the doctrine. A thing may be attractive or alluring to children and be inherently dangerous, and yet not fall within the principle governing the "turntable cases." Again, a thing may be attractive, but whether it is also dangerous may be a question of fact; or it may be attractive and dangerous, and yet not be the proximate cause of the injury complained of; or, although attractive and dangerous, it may nevertheless be common and natural and of a character that makes it impracticable to be guarded against. In all such cases the thing, whatever it may be, lacks the element which controls the doctrine of the "turntable cases," namely, that to maintain it in an unprotected and unguarded condition constitutes it an attractive and dangerous nuisance. It is obvious, there-
47 L.R.A. (N.S.)

fore, that courts cannot in advance lay down an inflexible rule by which all cases may be determined. Nor will all reasonable men agree whether the facts of a particular case bring it within the doctrine or not. There seems to be a strong tendency to limit rather than extend the doctrine. Thus, it is held in the above case that a city is not, on the theory of attractive nuisance, liable for the death of a small child which is drowned in a shallow stream of warm mineral water which the city permits to flow along the roadside, where children were shown to be afraid and did not play in the stream. "Both as a matter of law and as a matter of public policy," said the court, "we feel that the so-called 'turntable doctrine' should not be extended to govern such a case as here presented."

So, a waterworks company has been held not liable for the death by drowning of an infant who came upon its land without invitation, and there fell into a reservoir or basin of water while playing about it, without the knowledge of the company. *Swarts v. Akron Waterworks Co.* 77 Ohio St. 235, 19 L.R.A. (N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272.

And it has been held that the mere maintenance of an insecurely covered well of hot water upon an open space unfenced from the street, near the rear of a theater, would not render the owner liable for the injury of a thirteen-year-old child of average intelligence who fell into it, although the child was allured to the place by a desire to see what was going on in the rear part of the theater. *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600.

So it is held in *Bottum v. Hawks*, 84 Vt. 370, 35 L.R.A. (N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1025, that one maintaining an opening into an underground mill race located near a public highway and school building, between which and the opening there are no barriers, and about which children are accustomed to play because of its attractive character, is not bound to protect it to prevent accidents to the children,

day v. Old Dominion Copper Min. Co. 12 Ariz. 124, 100 Pac. 441; Indianapolis Water Co. v. Harold, 170 Ind. 170, 83 N. E. 993; Blum v. Weatherford & C. Bros. 121 La. 298, 46 So. 317; Scoggins v. Atlantic & G. Portland Cement Co. — Ala. —, 60 So. 175; Cahill v. Stone, 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; Spengler v. Williams, 67 Miss. 1, 6 So. 613.

Cook, J., delivered the opinion of the court:

Appellant in her declaration states, in June, 1911, the appellee railroad company constructed a dam, which formed a pond or lake of water, covering something like 100 acres of land, in the woods adjoining its main line, in the northern suburbs of

the city of McComb, and a half mile from the residence portion of the city; that there had been a branch or ditch running through the land covered by the lake, and that defendant caused deep and dangerous holes to be left in the said branch by the backing up of the water in the branch or ditch bed; that the lake so formed was uninclosed, and was open and without warning or trespass signs. It is further charged, prior to the time said lake was formed, Meredith Thompson, the infant child of plaintiff, nine years of age, customarily passed along a public pathway on the said lake or pond; that after the lake was formed it was the custom of children to wade in the lake, and that this was permitted by the agents of the appel-

and therefore is not liable for the death of a child who falls into it and is drowned. "As a general rule," said the court, "an owner is under no legal obligation to trespassers or licensees to keep his premises or property in proper condition; and this rule applies with equal force to children and adults. This last statement, it must be admitted, would not in all jurisdictions go unchallenged. But the authorities generally agree to it, even those which accept the doctrine of the turntable cases, and we feel safe in asserting that, in the absence of the elements of 'attractive' danger, and knowledge, actual or implied, of the presence of the child, the tender years of a technical trespasser or licensee will not raise a legal duty on the part of the landowner where none otherwise exists." (See quotation from opinion in Bjork v. Tacoma, infra.)

So it is held in Gordon v. Snoqualmie Lumber & Shingle Co. 59 Wash. 272, 29 L.R.A.(N.S.) 83, 109 Pac. 1044, that a barrel to receive the exhaust steam from a mill, which is covered, accessible only on one side, and filled with hot water from which steam continually arises, is not, if it appears to be safe, an attractive nuisance, so as to render the owner liable for the scalding of a child going to it for water, although to his knowledge children had been in the habit of playing near it and taking water from it. The court said: "If the barrel of water in this case may be held to be inherently dangerous, so as to belong to that class of cases where owners are liable for accidents to children, then the barrel of rain water, or the pond, or the cherry tree, or a fire on a vacant city lot near where children are accustomed to play, is an attractive nuisance; and if children are drowned or injured therein, the owners of such lots are liable. Such, of course, it not the rule."

And as said in THOMAS v. ILLINOIS C. R. Co.: "If, as a matter of law, the owners of fish ponds, mill ponds, gin ponds, and other artificial bodies wherein it is possible that boys may be drowned, can be held guilty of actionable negligence unless they inclose or guard same, few will be able to

maintain these utilities, and to our minds an intolerable condition will be created."

It seems that in order to render applicable the doctrine of the "turntable cases" the injury must have occurred on private property, a place where the injured person had no right to be, but was induced to go by an attractive piece of machinery or other matters equally attractive to children. Consequently it is held in Capp v. St. Louis, — Mo. —, 46 L.R.A.(N.S.) 731, 158 S. W. 616, that the doctrine of the "turntable cases" does not apply to a case of the drowning of a boy in a pond in a public park where he had the right to be. In this case the city's negligence was held a question for the jury.

In Bjork v. Tacoma, — Wash. —, 135 Pac. 1005, it was held a question for the jury whether an opening in a flume, exposing a constantly flowing stream of water beneath, in an unfenced right of way contiguous for a long distance to a public street in the city, and permitted to be used as a common playground by the children of the neighborhood, was a thing of such location and character as to be attractive and alluring to small children, so that danger therefrom should have been reasonably anticipated and guarded against by the city. The court, in distinguishing Gordon v. Snoqualmie Lumber & Shingle Co. supra, said that that case, "though carrying the doctrine of immunity as a matter of law to a considerable extent, by no means goes as far as we are asked to extend it in this case. It was there held that the safeguards were such and the location of the barrel of hot water was such that the defendant could not reasonably be expected to anticipate the danger. In fact, there was no danger if the plug in the barrel had been secure, and there was no evidence imputing notice to the defendant that the plug was not secure. That this was the determinative factor in that case is shown by the following language there used: 'It is not shown what caused the plug to come out, and there is no showing of notice or opportunity of notice to respondent of a defective condition of the barrel or plug.'"

lee; and that the railroad could have seen children wading in the lake daily, had they kept a watchman at the lake. On July 20, 1912, the boy, "Meredith Thompson, who walked along the said pathway by said pond or lake with other children, and was attracted to and impliedly invited to said pond or lake, and with other children waded in said pond or lake, and into one of said dangerous holes, was drowned." A demurrer was interposed to this declaration, and sustained by the trial court, and this appeal challenges the correctness of the judgment sustaining the demurrer.

A map of the *locus in quo* is filed with the declaration, and from this map we gather that the lake or pond covered an area of about 80 acres, and that the water line followed the irregular meander line of the natural elevations of the land. The branch or ditch winds along over this territory, following a general course from southwest to northeast. The pathway mentioned in the declaration does not appear upon the map, and it is impossible for us to tell how far the boy strayed from the water's edge to the point where he was drowned; but, assuming that the boy entered the pond at a point nearest to the place where he was drowned, he must have waded at least 250 feet from the edge of the water in order to reach the "deep hole" where he was drowned. It is stated in the declaration that the place where the boy was drowned is about 500 yards from

the railroad line, and the map shows this estimate of distance to be about right.

From the map and the averments of the declaration the state of case the court is called upon to decide is about this: The appellee, a railroad company, in the conduct of its business purchased 100 acres of woodland a half mile from the residential portion of the city of McComb, and by building a dam across the natural drainage of this land they impounded the water therein, forming thereby the lake in question. The nine-year-old son of appellant and other boys were in the habit of wading in this pond, which fact was known to the agents of appellee, or would have been known, had appellee placed a watchman over this uninclosed lake. On July 20, 1912, the boy waded at least 250 feet in the water, stepped into a "deep hole" in the original drainage ditch or branch, and was drowned.

It is contended that the pond as maintained was dangerous and attractive to children, and that the law imposed upon appellee the duty to guard same, either by inclosing it with a fence or wall, or by providing a watchman to warn children of the hidden dangers, and to prevent them from wading in the pond; and, having failed to do either of these things, the railroad company is liable in damages to the mother of the boy, nine years of age, who came to his death by reason of the company's negligence. To support this view of the law the following cases decided by this court are cited, viz.: *Mackey v. Vicksburg*, 64

The court said: "That the child, a mere baby, was a technical trespasser, or at most a mere licensee, is an immaterial circumstance. A child attracted to premises open and unguarded in a populous neighborhood by things maintained thereon enticing to the childish curiosity and instincts is not a culpable trespasser in any sound sense. This is against the weight of authority when measured in mere numbers, which holds the child to the rule applied to the adult who, when injured while trespassing upon the premises of a defendant, can recover damages only when the injury was wanton or was due to recklessly careless conduct on the defendant's part. But, as said by a candid text writer [1 *Thomp. Neg.* 2d ed. § 1026]: 'This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed, his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty towards him which they

would not owe under the same circumstances towards an adult.'"

It was held in *Palermo v. Orleans Ice Mfg. Co.* 130 La. 833, 40 L.R.A. (N.S.) 671, 58 So. 589, however, that where a child four years old fell into a street gutter containing hot water which had flowed from the defendant's plant, and was painfully burnt, the defendant would be held liable for damages where the evidence showed that the water and steam attracted the curiosity of the children of the vicinity, and that the defendant's watchman at the gutter left his position before the accident happened to the child. The court said: "The hot water and steam in the gutter was a dangerous agency in a public place, forbidden by ordinance of the city of New Orleans, and defendant knew that it was likely to attract children. According to defense witnesses the hot water and steam did attract children who were warned and driven away. Defendant was negligent in not taking proper precautions to prevent other children from coming in contact with the hot water. A watchman at the gutter would have probably prevented the injury of plaintiff's son."

J. D. C.

Miss. 777, 2 So. 178; Spengler v. Williams, 67 Miss. 1, 6 So. 613; Temple v. McComb City Electric Light & P. Co. 89 Miss. 1, 11 L.R.A.(N.S.) 449, 119 Am. St. Rep. 698, 42 So. 874, 10 Ann. Cas. 924.

The court's opinion in Mackey v. Vicksburg is as follows: "It is averred in the declaration, and the demurrer admits it to be true, that the defendant deposited the dirt cut from the hill upon the rear of the plaintiff's lot, by means whereof he was enabled and invited to escape from his inclosure and to go upon the precipitous and dangerous path cut along the hill, and leading from the place of escape to the point of danger from which he fell." As we construe this case, the declaration averred that the city constructed a pathway onto and leading from the home of the six-year-old plaintiff to a precipitous eminence 75 feet high, from which plaintiff fell and was injured, the court saying: "If the defendant by the exercise of reasonable forethought could have anticipated the probability of the child's action, it should have guarded against the danger by removing the earth or obstructing the pathway."

In Spengler v. Williams the sole and only point submitted to the court by the briefs of counsel was the failure of the plaintiff to establish by specific proof that the defendant "knew that so piling lumber in the street would attract children, or that it was in fact calculated to entice them to play around it;" and all the court said was addressed to that point. However, we think the court did decide that the jury was entirely justified in deciding without specific proof that the defendant, by the exercise of reasonable forethought, should have reasonably anticipated that the lumber pile would probably have attracted children; and this is undoubtedly true.

Coming now to Temple v. McComb City Electric Light & P. Co.: In this case the declaration averred that "the defendant, in transmitting electricity, which it knew to be a dangerous agency, through a thickly settled part of McComb city, negligently removed the insulation from its wires at a place where they passed through the limbs of a tree, which had numerous branches extending almost to the ground, and in which plaintiff and other children played, and that by reason of the removal of the insulation from the wires they thereby became dangerous, while, if properly insulated, they would have been harmless, and that plaintiff, being ignorant of their dangerous condition, while climbing among the branches of the tree, came in contact with an uninsulated wire and received the injuries of which complaint is made. The 47 L.R.A.(N.S.)

defendant demurred to the declaration, because it failed to aver (1) that defendant had reason to believe that the wires were constructed in such place and manner as to result in injury to plaintiff or anyone else; (2) that it was through the fault of defendant that plaintiff was injured; but, on the other hand, the declaration shows that it was through the fault of plaintiff that the accident occurred." It will be noted that the court in this case was dealing with a case involving negligence in the handling of one of the deadliest agencies,—electricity,—and the crux of the decision may be found in the last crisp and forceful sentence of the opinion, *viz.*: "This court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations, handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care."

The decision in this case meets with our entire approval, and the rule therein announced need not be confined to "public utility corporations," but is applicable to all handling "these extraordinarily dangerous agencies." We think it clear that the three cases decided by this court are all sound in principle, and it may be, as contended by appellant, that they commit this court to the doctrine announced in the turntable cases. Independent of authority, we believe these cases are based on the principles of simple justice, and that they will appeal to the common sense of all intelligent thinkers. In each of the cases the injury might have been reasonably anticipated as probable, and the court only required the defendants to take reasonable precautions, which would have prevented the injuries complained of, and compliance with the precautions would have been entirely feasible.

In the instant case there was no enticing of appellant from his very dooryard, and providing for him a continuous pathway to the obviously dangerous place, as in the Mackey Case; nor was there any use of the public thoroughfare of a populous city for the setting of an inviting and manifestly dangerous trap for children at a place where dangerous trap for children a place where the very natural and probable result followed the careless indifference of the defendant, as in the Spengler Case. Again, we have no case involving the careless handling of electricity in the streets of a city at a place where the instincts of a natural and healthy boy would carry him, as was the case in the Temple Case.

Here we have a generally shallow body

of water covering a large area in the woods, a half mile from the inhabited parts of the town, wherein boys waded, and wherein appellant's boy was drowned. We think it must be conceded that this deplorable tragedy could not have been anticipated as probable by the exercise of reasonable forethought, nor could it have been prevented by any reasonable precautions. Of course, one could have anticipated the possibility of this sad event; but we think the danger was comparatively remote. Scattered over the length and breadth of the land are innumerable ponds and lakes, artificial and natural; and occasionally a boy or man loses his life while wading or bathing in such body of water. If, as a matter of law, the owners of fish ponds, mill ponds, gin ponds, and other artificial bodies, wherein it is possible that boys may be drowned, can be held guilty of actionable negligence unless they inclose or guard same, few will be able to maintain these utilities, and to our minds an intolerable condition will be created.

In the case of *Peters v. Bowman*, 115 Cal. 345, 355, 56 Am. St. Rep. 106, 47 Pac. 113, 598, 599, 1 Am. Neg. Rep. 4, which was one where a boy had been drowned in an unguarded pond on private property, the court, in holding the owner not liable, stated the distinction in these words: "A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed."

With the exception of the excerpt from the opinion in the California case, we have confined ourselves to the decisions of our own court, and do not think it necessary or advisable to discuss the conflicting decisions of other courts upon questions similar to the one under review. We do not recede from the principle announced by this court in *Dampf v. Yazoo & M. Valley R. Co.* 95 Miss. 85, 48 So. 612; but the law arises out of the facts of each case, and under the averments of the declaration in 47 L.R.A. (N.S.)

the instant case, we are of opinion that no negligence can be imputed to appellee. **Affirmed.**

NEBRASKA SUPREME COURT.

WILHELM FLEGE, Plff. in Err.,
v.
STATE OF NEBRASKA.

(93 Neb. 610, 142 N. W. 276.)

Prosecuting attorney — assistant — appointment.

1. Where, in a criminal prosecution, an application is made to the district court for the appointment of an assistant prosecutor, if the court finds that such an appointment should be made, no attorney should be appointed who is known to be a partisan as against the accused, and, who has theretofore been employed and paid by another suspected person, and for whom he has appeared in the preliminary examination and in a former trial of the accused in the district court, taking an active part in both trials for the purpose of protecting his suspected client. Under such an appointment a fair and impartial trial of the accused person could not be reasonably expected.

Juror — challenge — formed opinion.

2. The statute (Criminal Code, § 465) provides that where a proposed juror in a criminal prosecution has read the testimony of the witnesses, and upon which he has formed or expressed an opinion as to the guilt or innocence of the accused, he is incompetent as a juror. Where that fact is made clearly to appear, and that the opinion is still retained, it is manifest error to overrule a challenge for cause. Upon this subject there is no discretion lodged in the court. The statute is mandatory, and no court has the right to ignore it.

Evidence — exhibit — rejection.

3. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence,—evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but

Headnotes by REESE, Ch. J.

Note.—*Right of accused to complain because prosecution is conducted or assisted by an unofficial member of the bar.*

The earlier cases covering the question under annotation will be found in the note to *State v. Bartley*, 24 L.R.A. (N.S.) 564.

These notes do not cover the effect of the appearance of special attorney or private counsel before the grand jury (for such cases, see note to *Hartgraves v. State*, 33 L.R.A. (N.S.) 568); nor the question of the right of a prosecutrix in bastardy proceedings to private counsel (for such cases, see

which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted. Therefore, when material evidence, such as the bloody and soiled clothing of a decedent, is admitted in evidence in a prosecution for murder, it should appear during the trial that the evidence would tend to throw light upon some material inquiry in the case. If not, it should be rejected.

Same — expert — admissibility.

4. Expert evidence in cases where the subject of discussion is on the border line between general and expert knowledge, as in questions of value, is not conclusive upon court or jury, but the latter may draw their own inferences from the facts, and accept or reject the statements of experts; but upon questions involving a highly specialized art, with respect to which a layman

can have no knowledge at all, the court and jury must be dependent on expert evidence.

Criminal law — instruction to acquit.

5. An instruction which informs the jury that if they "believe the defendant not guilty, and that he did not shoot and kill" the decedent, they should acquit, ought not to be given, although in the same instruction they are informed that they must find the accused guilty beyond a reasonable doubt before they could convict him. It is not necessary that the jury should believe the act was not committed by him. It devolved upon the state to prove he did commit the crime charged beyond a reasonable doubt.

(Rose and Letton, JJ., dissent.)

(May 17, 1913.)

note to *State v. Smith*, 33 L.R.A.(N.S.) 463).

It was held in *People v. O'Farrell*, 247 Ill. 44, 93 N. E. 136, that the trial court did not err in permitting two regularly licensed attorneys to assist the state's attorney.

And where the prosecuting attorney is sick, it is not improper to permit private counsel to assist in the prosecution. *People v. Gray*, 251 Ill. 431, 96 N. E. 268, the court stating that such matter rests largely in the discretion of the court, to be decided according to the special facts and situation in each case.

In *Fox v. State*, 102 Ark. 393, 144 S. W. 516, it was held that there is no error in permitting private counsel to assist the prosecuting attorney where the latter is in direct charge of the case.

And there is no objection that the case was stated to the jury by special counsel for the state, and not by the regular prosecuting attorney. *State v. Boyer*, 232 Mo. 267, 134 S. W. 542.

And the fact that an attorney who was assisting the prosecuting attorney read the indictment to the jury is not reversible error. *State v. Chocklett*, — Iowa, —, 136 N. W. 534.

Nor is there any error in permitting special counsel to conduct the examination of witnesses for the state. *State v. Finley*, 245 Mo. 465, 150 S. W. 1051.

In *Reed v. State*, 2 Okla. Crim. Rep. 589, 103 Pac. 1042, in holding that private counsel may participate in the prosecution of one charged with homicide, the court said that the laws of the state prohibited only persons other than the county attorney or his deputies from performing such acts in the prosecution of crimes as are strictly official, such as appearing before and advising the grand jury, verifying informations, etc.; that the assistance of private counsel in the trial of criminal cases is not prohibited, it being a matter entirely in the discretion of the county attorney, who has complete control in conducting public prosecutions, subject only to the supervision of the court upon the trial. And the court 47 L.R.A.(N.S.)

added that it is well and wise that the policy of the law permits such assistance, as wealth, influence, and eminent ability are often arrayed on the side of the defense which require such assistance for the proper administration of the criminal law, regardless of the ability and zeal of the county attorney.

In *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369, it was assigned as error that the court refused to have one employed as attorney to prosecute, regularly sworn as prosecuting attorney, but it was held that, inasmuch as there was no law requiring an attorney who assists in the prosecution to be sworn, a failure to do so was not error; and the court said there was nothing to show how the failure to require him to be specially sworn was prejudicial to the defendant; that it must be presumed, in the absence of anything to the contrary, that the court would permit only a competent attorney of the circuit to act, and that he would conduct a case for the state in a manner not unduly to prejudice defendant's rights before the jury.

A private attorney who assists the county attorney in the absence of one of the latter's assistants, and who had not accepted a fee as private prosecutor, was held not to be disqualified by the fact that he had had a conversation with the defendant at the jail relative to his employment as counsel for him, the record showing that he had not secured any confidence of the defendant and had not been employed. *Emerson v. State*, 54 Tex. Crim. Rep. 628, 114 S. W. 834.

In *State v. Johnson*, 24 S. D. 590, 124 N. W. 847, the action of the court in entering an order on its own motion appointing counsel to assist the prosecution was assigned as error. In sustaining the trial court, it was said that § 934, Pol. Code 1903 of South Dakota, as amended by chapter 90 of the Laws of 1905, which provides that "the circuit court . . . when, in the opinion of the court, the ends of justice would be promoted thereby, may appoint, by an order to be entered in the minutes of the court, some suitable person, an at-

ERROR to the District Court for Thurston County to review a judgment convicting defendant of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. J. J. McCarthy and Berry & Berry, for plaintiff in error:

The evidence of the state in this case is insufficient to sustain the verdict.

Jahnke v. State, 68 Neb. 194, 94 N. W. 158, 104 N. W. 154; Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51; Underhill, Crim. Ev. 2d ed. § 248, p. 454.

A person who has formed an opinion founded upon reading reports of the testimony of the witnesses is incompetent to sit as a juror.

Carroll v. State, 5 Neb. 31, 2 Am. Crim. Rep. 424; Smith v. State, 5 Neb. 181.

An admission from a juror that he can render an impartial verdict upon the law and the evidence is not sufficient. It must affirmatively appear from the facts brought out in the examination that such is the case.

Lucas v. State, 75 Neb. 11, 105 N. W. 976.

torney at law, to perform for the time being the duties required by law to be performed by the state's attorney," clearly conferred this authority, and that its exercise is wholly discretionary and cannot constitute reversible error.

Section 20, chap. 7, Neb. Comp. Stat. 1911, provides that the county attorney may, under the direction of the district court, procure such assistance in prosecuting one charged with felony as he may deem necessary; and in construing this statute in McKay v. State, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, it was held that it was not complied with by an order of the court "permitting" private counsel employed by outside parties to assist in the prosecution, and so it was reversible error to overrule a timely objection to such private counsel's participation in the prosecution. The court stated that this statute called for affirmative action by the county attorney and the court, and that the mere acquiescence in or assent to the appearance of private counsel did not constitute the affirmative action required by the state, and was not sufficient.

But in Galloway v. State, 88 Neb. 447, 129 N. W. 987, where defendant's counsel, after the jury was sworn in but before any witnesses were examined, objected to the appearance of counsel in the case as assistant to the prosecuting attorney, for the reason that he was not the county attorney nor a deputy county attorney, nor appointed by the court in the case, it was held that no prejudice to defendant was shown, nor was there any error in overruling the objection, as it was shown that defendant's counsel knew that such assistant counsel had been associated with the prosecuting 47 L.R.A. (N.S.)

Evidence which, if effective at all, could serve only to excite the minds and inflame the passions of the jury, should not be admitted.

McKay v. State, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913 B, 1034.

The jury alone are the judges of the weight of the testimony, and of what is shown by the testimony of the witnesses, and an instruction telling the jury what effect must be given to the evidence, or tending to discredit certain testimony, is erroneous.

Coon v. McClure, 53 Neb. 622, 74 N. W. 65; Long v. State, 23 Neb. 33, 36 N. W. 310; Clarence v. State, 86 Neb. 210, 125 N. W. 540.

It is for the jury alone to determine what weight shall be given the testimony, and a party has a right to have the evidence of experts considered by the jury without any admonition by the court.

Hayden v. Frederickson, 59 Neb. 141, 80 N. W. 494.

Where the subject-matter is one demanding scientific knowledge and skill, the court

attorney in the trial of criminal cases for some time; that he had appeared as counsel in the case from the time the case was called, and before any jurymen were called into the box; and the defendant's counsel knew from the time he was appointed to defend that such assistant was to appear in the case. And the court added further that no request was made to re-examine the jurors.

In Johns v. State, 88 Neb. 145, 129 N. W. 247, it was held that, as counsel had an opportunity to examine all the jurors touching their acquaintance or affiliation with the assistant counsel, the assignment of error that such counsel appeared for the first time subsequently to the time the cause was called for trial was not well taken.

In Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116, it was held that a member of a bar of another state may be selected, but he must qualify himself to practise in the particular case as requested by statute.

And also in Louisiana the district judge is empowered by statute to appoint a competent attorney to represent the state when for any cause the district attorney is refused, necessarily absent, or sick. State v. Daspit, 129 La. 752, 56 So. 661; State v. Britton, 131 La. 877, 60 So. 379; State v. Buhler, 132 La. 1065, 62 So. 145.

And an attorney appointed, pursuant to such statute, when the prosecuting attorney is sick, is vested with all the powers of the regularly elected prosecuting attorney. State v. Daspit, supra.

And such associate may be intrusted with the exclusive conduct of the case, if the district attorney is present. State v. Petrich, 122 La. 127, 47 So. 439.

and the jury must be dependent upon the expert testimony, and there can be no other guide.

Leitch v. Atlantic Mut. Ins. Co. 66 N. Y. 100; *Burton v. Neill*, 140 Iowa, 141, 118 N. W. 302, 17 Ann. Cas. 532; *Ewing v. Goode*, 78 Fed. 442; 5 Enc. of Ev. 647; *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

Messrs. Grant G. Martin, Frank E. Edgerton, and C. A. Kingsbury for the State.

Reese, Ch. J., delivered the opinion of the court:

This is the second time this case has been presented to this court. The opinion upon the former hearing is reported in 90 Neb. 390, 133 N. W. 431, where the material facts presented by the evidence on the part of the state are quite fully stated, and need not be here repeated. After the cause was remanded to the district court, the venue was changed to Thurston county, where a trial was had, and the cause submitted to the jury on practically the same

evidence on the part of the state as at the former trial. The jury returned a verdict finding plaintiff in error, who will hereafter be referred to as defendant, guilty of manslaughter, when the indeterminate sentence of the law was pronounced against him. He brings error to this court, assigning 290 alleged errors of the district court in connection with the proceedings and trial. The assignments are specific, and many are well founded, but it will be impossible for us to discuss them without extending this opinion to an unnecessary and unreasonable length. Particular attention can be given to comparatively few of them.

It appears from the record, and as shown by our former opinion, that the principal witness on the part of the state, one Albert Eichtencamp, who testified to having seen defendant kill his sister (Louise Flege), had testified to a different state of facts at the coroner's inquest, the effect of which was the complete exoneration of defendant. While the witness was never arrested nor charged in any legal proceeding with the commission of the crime, there appears to

Nor is such assistant attorney required to take the oath prescribed by the regularly elected district attorney. *State v. Britton* and *State v. Buhler*, supra.

Where the district attorney is incompetent to act, and has recused himself for cause, his assistant is equally so, as the district attorney cannot do indirectly what he cannot do directly, and therefore the court has the right under the statute to appoint a special district attorney to represent the state. *State v. Buhler*, supra.

Authority to appoint an attorney to act in a solicitor's place "when the solicitor is absent" does not depend upon the sufficiency of solicitor's excuse for being absent, or upon his having any excuse at all. *Newell v. State*, — Ala. App. —, 62 So. 968.

It is within the discretion of the trial judge to permit private attorney to appear and assist the prosecuting attorney, whether he is employed by persons interested in the prosecution, or appears as a volunteer; and if not guilty of conduct which prevents defendant from having a fair trial, the latter cannot complain. *State v. Briggs*, 45 Mont. 400, 123 Pac. 410.

And so under the Code an attorney employed by the board of a stock commissioners has a right to appear in aid of the prosecution of one charged with grand larceny, he having stolen live stock. *Ibid*.

But in *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451, it was held that injustice had been done to the defendant where it appeared that, against the objection of defendant's counsel, the court permitted the prosecuting attorney of another county and two other experienced attorneys, who had been employed and paid by outside persons, to assist the prosecuting attorney in prosecuting defendant, who

was defended by counsel appointed by the court, one of whom had been engaged in practice less than two years, and the other had had no previous experience in criminal cases. The court said that there can be no doubt of the right of a court to permit counsel employed by private parties to assist the state's attorney, but this discretionary power should never be abused by permitting counsel for the defendant to be overwhelmed, on account of their inexperience, by the number and ability of counsel assisting the state's attorney; and, further, this discretion should be exercised with greater caution where counsel are appointed by the court, than where they are employed by the defendant. And the court stated that, in its opinion, the number of attorneys assisting the state's attorney in this case should have been limited, or else additional experienced counsel should have been appointed to represent the defendant.

And in *Rex v. Gilmore*, 6 Ont. L. Rep. 286, 7 Can. Crim. Cas. 219, the private prosecutor of a charge of perjury desired that private counsel retained by him should aid in the conduct of the prosecution, against the will and desire of both the prosecution and the defense. And in denying him the privilege, the court said that, though it is the right of everyone to make a complaint with the view to the institution of criminal proceedings, and also under certain circumstances to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, nor bound by any judgment that may be made in it. While he may, with the consent of the proper authority, proceed in the name of the sovereign, yet against the will of both parties he has no power over or voice in the proceedings.

J. H. R.

have arisen a known suspicion on the part of some that he might be the guilty party. He and his relatives employed an attorney to assist in the prosecution of defendant at the preliminary trial, and upon the former trial in the district court, evidently under the belief that the conviction of defendant would remove all suspicion from Eichencamp. The attorney appeared and took an active part in the prosecution at the two trials, and was paid for his services by Eichencamp and his relatives. After the cause was removed to Thurston county, the state was represented by the county attorney of Dixon county and the county attorney of Thurston county, when application was made to the court for the appointment of Eichencamp's former attorney to assist the two county attorneys in the prosecution of the case in the approaching trial. The application was resisted upon the ground that the attorney's former employment as a private prosecutor, employed by Eichencamp, rendered him an improper person to have charge or any part in the prosecution, the purpose of which was for the protection of Eichencamp. The attorney was called to the stand and candidly stated his relations with Eichencamp, which continued up to the close of the former trial, which resulted in the conviction of defendant. The objection of defendant was overruled, the appointment made, and the attorney entered upon and took an active part throughout the trial, making, to say the least, a vigorous argument to the jury, which in some respects we cannot approve. While we intend no personal reflections upon the attorney, yet we do not hesitate to say that the appointment should not have been made, and that it was prejudicial error to make it. It is impossible to conceive of an attorney, after having served Eichencamp as he had, and for the purpose for which he had been employed, to enter upon the trial with the single purpose of impartially seeking to know the truth, protecting the rights of defendant, and seeing that they were maintained, if need be, at all hazards. Not only this court, but all courts, have so clearly stated the judicial duties of a public prosecutor as to leave no room for doubt as to the entire impartial attitude of a prosecutor so as to leave no room for question upon this point. In *Liniger v. State*, 85 Neb. 98, 122 N. W. 705, we said: "Public prosecutors and peace officers owe no greater obligation to the public than to a defendant charged with crime, and they should as zealously protect the one as the other." This being true and maintained by all courts, it must appear to the mind at once

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that the appointment of a partisan special prosecutor was not in the interest of the fair and impartial trial guaranteed by the Constitution. The obligation of an attorney to his client, when once employed in a particular case or matter, can never be shaken off. It is a perpetual obligation which abides to the end of life, unless, in a proper case, waived by the client. With this obligation resting upon the memory of a conscientious lawyer, as the appointee no doubt was and is, it would be impossible for him to forget his sworn duty to his former client, and there would be a constant inclination to ask of himself: "What effect will this evidence or argument have upon the rights of my first client, to whom I am still bound by every principle of law and honor? I should be faithful to my trust and protect Eichencamp in every way possible. If defendant is convicted, Eichencamp is forever cleared of the suspicion resting against him." We are forced to the conclusion that no honest and conscientious attorney could be able, nor should be if he could, to withstand such an appeal.

Error is assigned upon the ruling of the court wherein certain jurors were challenged for cause while being examined upon their *voir dire* as to their competency and qualification as such jurors. John D. Girardot was called as a proposed juror. His examination is of too great length to be set out in full. He testified that he had read of the case from the time of the murder to the time of being called as a juror, and had in the meantime conversed with his family and others about it; that he was "real certain" that he had formed an opinion as to the guilt or innocence of the defendant; that probably it was more of an impression than an opinion; that, if selected as a juror, he would try to give the defendant a fair and impartial trial; that the reports which he read in the newspapers published the testimony of the witnesses, all of which he read, consisting of a couple of columns each day, and upon which he formed an opinion, which he yet retained, and which would take strong evidence to remove; that he could not lay aside that opinion without some reason for it and evidence to cause the change; that he was afraid he could not lay that opinion aside until he had some evidence to change it.

Q. You think evidence might change it, do you?

A. Yes; good, strong evidence I reckon would change it.

The juror was challenged for cause, the

challenge overruled, and the juror excused on defendant's peremptory challenge.

August Lindgrand, another proposed juror, testified that he had read the published testimony of the witnesses who were examined at the former trial, "from beginning to the end," and upon that evidence he formed an opinion as to the guilt or innocence of the defendant; that he had never changed that opinion; that it would take considerable evidence to change it, as it was a fixed opinion; that he would have to have "a pretty good reason" for changing his mind. He was challenged for cause, the challenge overruled, and the juror excused on a peremptory challenge.

J. W. Twyford, another proposed juror, testified that he read the *Sioux City Journal*, which published daily reports of the evidence and the testimony of the witnesses at the former trial, which he read, and upon which he formed an opinion of the guilt or innocence of the defendant, and which he would not change until he had some reason for changing it. He was challenged for cause by the defendant, the challenge overruled, and the juror excused on defendant's peremptory challenge.

Wilson W. Waters upon his examination testified that he had read the reports of the former trial and the testimony of the witnesses in the *Sioux City Journal*, on which he formed an opinion as to the guilt or innocence of the defendant; that he retained that opinion; could not change it without having some reason to change it; certainly would not. That in his present state of mind, if retained as a juror, if no evidence was introduced, his verdict would be guilty, resting upon the opinion which he then had, and would continue to believe him guilty until he had sufficient evidence to change his mind, which he could not do until he had evidence to cause the change. The defendant's challenge for cause was overruled, the juror retained, and he signed the verdict of the jury as foreman.

Thomas Conley, examined on his *voir dire*, testified that during the former trial the testimony of the witnesses was published in the papers, and that he read the testimony, and upon that he formed an opinion as to the guilt or innocence of the defendant, deciding the case in his own mind; that he had never had any occasion to change his mind since that time, and had that opinion still; that it was a definite opinion to a certain extent; that he could not lay that opinion aside before hearing the evidence; that it would be impossible to divest himself of that opinion without hearing the evidence; that, if accepted as a juror, he would enter upon his duties with that opinion in his mind, and it 47 L.R.A. (N.S.)

would require evidence to remove it. The juror was challenged for cause, the challenge overruled, and he was excused on defendant's peremptory challenge.

Exceptions were taken to the ruling in each case. Counsel for the state examined each juror at length,—as also did the court,—when they testified that they thought they could render a fair and impartial verdict without reference to the opinion thus formed. The defendant exhausted all his peremptory challenges, being required to deplete the number to which he was entitled by law by challenging the incompetent jurors. The jurors seemed to be candid and conscientious in their answers; but the fact that they so answered was not enough to render them competent.

It is provided in § 468 of the Criminal Code: "The following shall be good causes for challenge to any person called as a juror on the trial of any indictment: . . . Second. That he has formed or expressed an opinion as to the guilt or innocence of the accused: Provided: That if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial and will render such verdict, may in its discretion admit such juror as competent to serve in such case." It will be readily seen that, where the opinion is formed from "reading reports of their (the witnesses') testimony," the juror does not come within the proviso, and is incompetent without reference to what he may say as to his ability to render an impartial verdict, or what influence his preconceived opinions might have upon his judgment in weighing the evidence.

In *Carroll v. State*, 5 Neb. 31, 2 Am. Crim. Rep. 424, we held that if it appear that the juror has formed an opinion from reading reports of testimony of witnesses, he is incompetent, although he may be willing to swear that, notwithstanding such opinion, he feels able to render an impartial verdict, and the judgment was reversed solely upon the one ground with reference to but one juror.

In *Curry v. State*, 4 Neb. 545, it is said:

"We think it is clear that where the ground of challenge is the formation or expression of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel it must be shown, by an examination of the juror on his oath, not only that his opinion was formed solely in the manner stated in this proviso, but, in addition to this, the juror must swear unequivocally" to his ability to render a fair and impartial verdict upon the law and evidence. As an opinion formed from reading the report of the testimony of the witnesses is excluded from the proviso, it is as clear as the English language can make it that the district court had no discretion in the matter whatsoever, but its plain duty was to sustain the challenge. The jurors were wholly incompetent. Such has been the plain provision of the statute since the early days of the judicial history of the state, and the courts have recognized its binding force. Why the statute was ignored is not a question with which we have to deal. The Constitution guarantees to every man a fair trial by an impartial jury. That a juror could be considered impartial who had read the evidence of the witnesses on a former trial, and formed an abiding opinion thereon, and could by any effort on his part disrobe himself of that opinion, is not within the reach of human nature, and hence the statute absolutely disqualifies him. See *Smith v. State*, 5 Neb. 181. The defendant exhausted his peremptory challenges, and therefore did not waive his constitutional and statutory rights. *Thurman v. State*, 27 Neb. 628, 43 N. W. 404; *Kennison v. State*, 83 Neb. 391, 119 N. W. 768; *Brinegar v. State*, 82 Neb. 558, 118 N. W. 475; *State v. Brown*, 15 Kan. 400, 2 Am. Crim. Rep. 423.

During the introduction of the testimony, the state offered in evidence the clothing worn by the decedent at the time of her death, consisting of her dress, chemise, sunbonnet, and apron, in their soiled, burnt, and bloody condition. Those exhibits were objected to by the defense as incompetent, irrelevant, and immaterial, not tending to establish any issue or fact in the case, nor tending to prove defendant's guilt, but only for the purpose of inflaming the jury. The objection was overruled; the garments, admitted in evidence over defendant's exceptions, were displayed and held up before the jury. Error is assigned upon this ruling. There are, no doubt, many instances in which there is no error in the admission of such articles in evidence. Sometimes it becomes necessary for the state to prove the proximity of the firearm to the wound made

by the ball, and this may be done by showing the burnt condition of, or powder stains upon, the clothing. In other cases it may be necessary to prove the relative locations of the victim and person using the firearm. This may often be shown by the range and course of the ball in passing into or through the clothing and body of the decedent. It is also permissible if it tends to prove the identity of the person killed or of the slayer. But some necessity for this class of evidence should appear to justify its admission. This involves the exercise of discretion on the part of the trial court. There is nothing in the record showing that the exhibition of the bloody and burnt garments was a proper or necessary part of the state's case. The court adheres to the holding in *McKay v. State*, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913 B, 1034, Id., 91 Neb. 281, 39 L.R.A. (N.S.) 720, 135 N. W. 1024, Ann. Cas. 1913 B, 1039, that if it appears that the introduction of the bloodstained garments was for the purpose of arousing the passions of the jury, and by that means securing a conviction, the practice should be condemned and a judgment of conviction reversed. Unless it appears that the offered evidence would be material to some inquiry in the case on trial, such exhibits should be excluded. See *Cole v. State*, 45 Tex. Crim. Rep. 225, 75 S. W. 527; *Christian v. State*, 46 Tex. Crim. Rep. 47, 79 S. W. 562; *Melton v. State*, 47 Tex. Crim. Rep. 451, 83 S. W. 822; *Williams v. State*, 61 Tex. Crim. Rep. 358, 362, 136 S. W. 771; *Lucas v. State*, 50 Tex. Crim. Rep. 219, 95 S. W. 1055. In 2 Wharton, on Criminal Evidence 10th ed. § 941, it is said: "As clothing is in the nature of demonstrative evidence, it has a strong tendency to arouse feelings of prejudice or passion, and unless the articles so introduced serve the purpose of identifying the deceased, or of honestly explaining the transaction, the introduction is irrelevant, and constitutes prejudicial error; and particularly is this true when it is displayed in such manner as to arouse prejudice and passion."

On the part of the defense, Dr. Meis, of Sioux City, Iowa, Professor Walter S. Haines, of Rush Medical College, Chicago, and Prof. Ludvig Hektoen, of the same place, were called as expert witnesses. It is shown beyond dispute or contradiction that at or about 12 o'clock on the day of the homicide the decedent ate her usually hearty dinner, consisting of a variety of food. If the testimony of Eichtencamp is true, she was slain about one hour thereafter, or about 1 o'clock P. M. A post mortem examination was had some time

that evening or early the next morning. The body was embalmed and buried. Some considerable time thereafter (a number of months) the body was exhumed and found to be in a good state of preservation, the stomach removed, and the contents sent to Professor Haines for analysis. It was agreed by all that the wound in the head would, and did, produce instantaneous death. The experts testified that at death all digestion of food taken into the stomach immediately ceased. The analysis disclosed that the contents of the stomach were quite thoroughly digested, and it was shown that digestion would scarcely be commenced within one hour after eating; that it could not be advanced to the extent shown short of two and one half to three hours thereafter, and therefore it was insisted that it was impossible that decedent could have been killed within one hour after eating the noon meal. The testimony of all the witnesses on that part of the case agrees that about 1 o'clock on the day of the homicide the defendant left his home and did not return until late in the afternoon and after the discovery of the body of the decedent. After a somewhat careful examination by questions and answers, certain hypothetical questions were asked and answered by which the testimony of the experts was further elucidated. We have examined the evidence with care and are unable to discover where the hypothetical questions varied in any material degree from the testimony, and especially from the evidence and theory of the defense. The experts were men of high standing in their profession and of known probity of character. In instructing the jury the court gave the fifteenth instruction, as follows:

"You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary you are to carefully scrutinize the evidence, and from that determine what, if any, of the averments are true, and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not true, and that they are of such character as to entirely destroy the reliability of the opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you that an opinion based upon a hypothesis wholly incorrectly assumed or incorrect in its material facts, and to such an extent as to impair the value of the

opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be, and, where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor."

As an abstract proposition of law, this instruction may be in the main unobjectionable, and might be properly given in a case to which it should be applied; but we are unable to see where or how it could have any just application to this case. As a general rule the principle involved in this instruction is recognized as applying to the testimony of experts upon questions in which most people have what might be denominated common knowledge, and when such testimony is presented to the jury or other trier of fact, who may have opinions of their own derived from common experience and observation, and, if an expert gives an opinion which is at variance with that common knowledge or experience, the juror is allowed to make use of his own knowledge, intelligence, and judgment in weighing the testimony of the expert. But this rule does not apply in its entirety where the substance of the testimony is upon a subject not understood or known by the layman, and the testimony is confined to purely scientific investigations and close application with which others than those making the investigations have no knowledge. As said by Judge Taft in *Ewing v. Goode*, 78 Fed. 442: "In many cases expert evidence, though all tending one way, is not conclusive upon the court and jury; but the latter, as men of affairs, may draw their own inferences from the facts and accept or reject the statements of experts. But such cases are when the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide."

It cannot be denied that the question of post mortem digestion is one upon which the great majority of people have never

thought and have no information whatever. This want of knowledge is not confined to laymen. It involves long, careful, patient, and persistent investigation, and comparatively few have given the subject sufficient thought or investigation to enable them to speak with anything like exact knowledge thereon. As said in the quotation above given, there can be no other guide than the knowledge of those who have made the subject a matter of special study. True, the jury may bring to their aid such knowledge and experience as they may have upon the subject in hand, but, in the absence thereof, they would not be justified in ignoring the testimony of fully qualified experts. The subject is one upon which the layman, the lawyer, the judge, and even the physician is not called upon to investigate as fitting him for his profession or station in life. It is safe to say that not one person in thousands has given the subject any investigation or thought. Courts and jurors are usually totally in the dark thereon, and must depend upon the researches of those who have made the subject one of special investigation, and upon which they are qualified to give correct opinions. The expert witnesses were men of known competency and standing in their profession, and upon such the courts must, to a great extent, depend for their guidance when considering questions of the kind under consideration. It must also be observed that, as shown by the bill of exceptions, much the greater portion of the testimony of the experts was not given upon hypothetical questions, but upon direct questions containing no statement of facts, hypothetical or otherwise, to which they responded by the statement of facts resulting from their researches and investigations. The instruction is almost a literal copy of one given in the trial of *Gue-tig v. State*, 66 Ind. 94, 32 Am. Rep. 99, wherein the instruction was approved. In that case the question of the insanity of the accused presented the principal defense. The difference in the quality of the subjects under investigation must be apparent to every thinking mind. On the question of the sanity of an individual the inquiry is not limited to the testimony of expert witnesses, but the nonexpert, who has observed the conversation, conduct, and bearing of the accused, is as competent to testify as the expert. This cannot be true upon the subject of post mortem digestion. Upon this subject no one but the expert is qualified to testify at all. As said in *Lawson on Expert & Opinion Evidence* 2d ed. 285: "It is safer, on the whole, to trust to the judgment of learned men, acquired by study, observation, and skill, than to

the imperfect deductions of jurors, hastily derived from readings not familiar to them, unassisted by study, examination, and comparison of kindred subjects. . . . Great respect should be accorded to the views of such a class of witnesses." It must appear to any thinking mind that the instruction was too general as applying to all cases, and a regard to the due administration of justice would require greater care and discrimination in an instruction upon a question of this kind.

By the sixteenth instruction the jury are permitted to "accept or reject such opinions, as you may accept as true, or reject as false, any other facts in the case. The jury are instructed that the opinions of the witnesses as experts are merely advisory, and are not binding on the jury. and the jury should accord to them such weight as they believe, from the facts and circumstances in evidence, the same are entitled to receive." The testimony of the experts explained to the jury the process of digestion, the combination of gases and acids which entered into the process, the necessity for vital action in order that the fluids be secreted by the stomach, but which instantly ceased upon death. All this was carefully stated and explained. without contradiction or dispute, and, by the very nature of the testimony, would naturally convince the minds of the jury of its truth, yet the jury were informed that they might ignore it all, without a syllable of evidence calling it in question. and, necessarily, without any knowledge or experience on their part by which it might be compared or tested. The jury evidently took the court at its word, and arbitrarily cast the proof aside as not worthy of belief.

In the twenty-third instruction the jury were informed that defendant denies the killing of the decedent, and claims that she was not killed until after he left his home on the day of the homicide, "and if you believe the defendant not guilty, and that he did not shoot and kill the said Louise Flege, as alleged in the information, or in the event that the evidence introduced in the case is so evenly balanced that you cannot tell whether defendant or some other person shot and killed the deceased, as alleged, then you should acquit the defendant; or if you entertain any reasonable doubt of the guilt of the accused of the crime charged in the information, then you should give the defendant the benefit of such doubt and acquit him." This instruction is objectionable in several particulars: First, if the jury believe the defendant not guilty, they should acquit; second, if they believe he did not shoot and kill the decedent, they should acquit him; third, if the

evidence is evenly balanced, they should acquit; fourth, if they cannot tell whether defendant or some other person committed the crime, they should acquit; or, fifth, if they have any reasonable doubt of his guilt, they should acquit. We know of no rule of law that requires the jury to "believe the defendant not guilty," or that he "did not shoot and kill" the decedent, before they could acquit. The burden is on the state to prove his guilt beyond a reasonable doubt, and this part of the instruction, as well as others, except the last clause, should not have been given. It could only confuse the jury, and possibly cause them to believe that they must "believe" him "not guilty," and believe he "did not shoot and kill" decedent, before they could acquit.

In the twenty-sixth instruction the jury were again informed that "if you find that he did not shoot the said Louise Flege, or entertain a reasonable doubt of his guilt, you should acquit him." Here is a repetition of the same vice. It was not necessary that the jury should find that he did not commit the deed. The question to be decided was, Has the state proved beyond a reasonable doubt that he did?

A sharp criticism is made against the conduct of counsel for the state in the closing argument to the jury, but, as that attorney will appear no further in the case, the contention need not be further considered. There is also complaint as to the conduct of other counsel for the state. As it is hardly probable that the objectionable language, which we need not specify, will be repeated on another trial, it is thought that it need not be further noticed. Prosecuting officers should always remember that it is not so much their duty to secure convictions as to present the truth without indulging in crimination or recrimination or personal abuse of an accused. If unjust practice is indulged in, the court should repress all such efforts with a firm hand. The Constitution and laws guarantee to every person a fair trial. It is the duty of the courts to see that this guaranty is fulfilled. *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318; 12 Cyc. 571; *McKay v. State*, 90 Neb. 63, 74, 39 L.R.A. (N.S.) 714, 132 N. W. 741, 745, Ann. Cas. 1913 B, 1034; *Nickolizack v. State*, 75 Neb. 27, 32, 105 N. W. 895; *Wilson v. State*, 87 Neb. 638, 649, 128 N. W. 38; *Leahy v. State*, 31 Neb. 568, 48 N. W. 390; *State v. Irwin*, 9 Idaho, 35, 60 L.R.A. 716, 71 Pac. 608, 13 Am. Crim. Rep. 620; *Bailey v. People*, 54 Colo. 337, 45 L.R.A. (N.S.) 145, 130 Pac. 832.

The judgment of the District Court is reversed, and the cause remanded.
47 L.R.A. (N.S.)

Rose, J., dissenting:

The state in employing counsel in criminal cases will be unnecessarily and injuriously hampered by the rules announced. The successful prosecution of a guilty defendant in a contested case depends in a large measure upon the learning, skill, and energy of prosecuting attorneys. A county cannot be expected to elect a prosecutor prepared at all times, without assistance, for every legal combat. Many eminent courts hold that the power to employ attorneys to prosecute persons charged with felonies is inherent in sovereignty. 31 Cent. L. J. 344. In the employment of counsel the county attorney, with the consent of the court, acts for the state. The trial judge, who is impartial in the contest, is acquainted with local attorneys, and can readily acquaint himself with the character of the services demanded in each particular case. Accused was defended by gifted lawyers. They are capable of emotional advocacy. They are not strangers to science or philosophy. They brought to their client not only their own zeal and accomplishments, but they searched the mysterious processes of nature in his behalf and enlisted the services of a chemical analyst possessing perhaps the highest possible degree of human skill. Their conduct was commendable, and accused in being thus fortified was strictly within his rights. In the presence of such adversaries, is the sovereign obliged to employ impartial counsel who will confront them in obsequious humility? If so, the case might as well have been dismissed at the start. I believe in the doctrine that "the forensic contest should be fought with something like a just equality of opposing forces." 31 Cent. L. J. 345. Any capable, upright lawyer who will conduct himself properly under the directions of the court may properly be called to assist in the prosecution. Counsel for defendants are partisans. The jury and the judge must be unprejudiced and impartial, but disinterested complacency should not be exacted of counsel for the state. Both the trial and the reviewing court should, in the midst of the legal storm, make rulings and enforce the law, unaffected by sentiment or emotion; but the prosecutor should not be required to conform to that standard of official conduct. Reviewable error must be predicated upon a ruling of the trial court. Unless the assistant prosecutor was guilty of some prejudicial act during the trial, no possible harm resulted from the order overruling the objections to his employment. An erroneous and prejudicial ruling in regard to a specific act of misconduct is essential to a reversal on that ground. Such a rul-

ing has not been specifically pointed out by the majority. The criticism of the trial court and of the assistant prosecutor in this respect is, in my opinion, unmerited.

An attorney is not bound by any duty to advocate the punishment of the innocent for the purpose of shielding a guilty client. No lawyer worthy of his profession ever recognized such a tie, either before or after employment. Happily, the thirst of religious bigots and of political tyrants for human blood has not crept into our institutions. The fears formerly inspired by such abominations should therefore be laid to rest with the odious conditions under which they were begotten. Owing to human frailties, juries, prosecuting attorneys, and trial courts may err, but the present record does not show any disposition on the part of those who participated in this trial to shed innocent blood under the forms of the law. The duty of the trial court is not confined to enforcing the right of defendant to a fair and impartial trial. There is an equal duty to see that the state has a lawful opportunity to establish its charge against accused. The violation of one duty wrongs the individual. The violation of the other wrongs society as a whole. The district judge is appointed by the Constitution to be the arbiter between the individual and society collectively. In a criminal prosecution he sees the conditions as they arise. Any rule which improperly interferes with his discretion weakens his power and impairs the efficiency of the tribunal over which he presides. Rulings which have an unnecessary tendency to discourage and humiliate prosecuting officers in the performance of their duties, to weaken the power of the state, and to lessen respect for criminal tribunals, should be avoided.

I adhere to my dissent from the bloody garment rule announced in *McKay v. State*, 90 Neb. 63, 39 L.R.A.(N.S.) 714, 132 N. W. 741, Ann. Cas. 1913 B, 1034, and 91 Neb. 281, 135 N. W. 1024, 39 L.R.A.(N.S.) 720, Ann. Cas. 1913 B, 1039, and followed in this case. It attaches too much importance to shadow and too little to substance. The passions of sensible men who sit on juries play too tragic a part in records for review.

In my opinion, the effect of the expert testimony, under all the circumstances of the case, was a question for the jury. It is not conclusively established by the evidence that decedent's stomach went into the hands of the analyst as nature left it. It had previously been opened and examined. It may fairly be inferred from the evidence that part of the contents was missing. That part analyzed may have

been eaten in the forenoon. The report of the analyst, therefore, does not annihilate the direct evidence of defendant's guilt. If science is to pronounce the decree of omnipotence in a criminal prosecution, the hypothesis adopted by the scientist should be free from infirmities like those mentioned.

Letton, J., dissenting:

I cannot agree with the opinion on the following points:

(1) The scorched and burned garments directly corroborated the testimony of Eichtencamp, and therefore, tested by the very rule announced in the opinion, were properly admitted in evidence.

(2) As pointed out by Judge Rose, the expert evidence, under the circumstances in this case, was not conclusive as to the length of time that elapsed after the deceased ate a meal and before her death. While the principle of law quoted from Judge Taft is correct, it is not strictly applicable here.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

ELIAS MARLOWE, Appt.,

v.

DRURY BLAND.

(154 N. C. 140, 69 S. E. 752.)

Master — fire set by servant — Liability.

A master who merely sends his servant into a field to cut and pile corn stalks is not liable for injury done to neighboring property by the servant's setting fire to the pile in order to dispose of the stalks, since the attempt to burn them is not within the scope of his employment.

(December 20, 1910.)

Note. — Liability of master for act of servant in setting out fire while clearing land.

As to liability of employer for act of independent contractor in setting out fire, see notes to *St. Louis & S. F. R. Co. v. Madden*, 17 L.R.A.(N.S.) 788, and *Carlton County Farmers' Mut. F. Ins. Co. v. Foley Bros.* 38 L.R.A.(N.S.) 175.

Wherever a servant is charged with the work of clearing up land, and in the furtherance of such duty sets fire to grass, weeds, brush, etc., the master is held liable for any damage which may result by reason of the fact that the fire spreads to adjoining land; and this is true although the servant may

APPEAL by plaintiff from a judgment of the Superior Court for Rutherford County directing a nonsuit in an action brought to recover damages for injury to plaintiff's property by fire set out by defendant's servant. Affirmed.

Statement by Hoke, J.:

Civil action to recover damages for negligently allowing fire to get out in a neighbor's woods and thereby causing damages, etc.

There was evidence tending to show that defendant had a hired man named Major Melton, and on the 22d of March, 1907, he directed Melton to cut and pile some cornstalks in a 4-acre field on defendant's place, and after giving these directions,

have acted contrary to the master's directions.

Patterson v. Sams, 2 Ga. App. 755, 59 S. E. 18; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Armstrong v. Cooley*, 10 Ill. 509; *Lewis v. Shultz*, 98 Iowa, 341, 67 N. W. 266 (prairie land being fitted for mowing the following year); *Seybold v. Eisle*, 154 Iowa, 128, 134 N. W. 578 (fire set to tall grass by servants engaged in plowing land, to aid in the plowing); *Smaltz v. Boyce*, 109 Mich. 382, 69 N. W. 21 (burning brush in logging camp); *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Gould v. Northern P. R. Co.* 50 Minn. 516, 52 N. W. 924 (section hands clearing right of way, set fire to brush); *Gibson v. Wood Lumber Co.* 91 Miss. 702, 45 So. 834; *Voegeli v. Pickel Marble & Granite Co.* 49 Mo. App. 643 (rubbish burned in street); *Wickham v. Wolcott*, 1 Neb. (Unof.) 160, 95 N. W. 366 (burning over waste land); *Simons v. Monier*, 29 Barb. 419 (servant set fire to brush on land he was engaged in summer fallowing); *O'Connell v. Strong*, *Dud. L.* 265 (fire was set with master's consent); *Knight v. Towles*, 6 S. D. 575, 62 N. W. 964; *Paraffine Oil Co. v. Berry*, — Tex. Civ. App. —, 93 S. W. 1089 (fire set to burn grass from around defendant's oil well); *Keith v. Keir* (1812) 13 F. D. (Sc.) 679, as cited in 10 Bing. 387 (fire lighted to facilitate clearing operations). See also *Serandat v. Saisse*, L. R. 1 P. C. 152, 35 L. J. P. C. N. S. 17, 12 Jur. N. S. 301, 14 Week. Rep. 487; *Johnston v. Hastie*, 30 U. C. Q. B. 232.

As early as 1698, in *Turberville v. Stampe*, 1 Ld. Raym. 264, Holt, Ch. J., laid down the rule that if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master would be liable in an action for damage done to another by the fire; for it shall be contended that the servant had authority from his master, it being for his master's benefit.

So, in *Read v. McGivney*, 36 N. B. 513, the court, in discussing an instruction which it held to be erroneous, said: "What

went off with a load of lumber; that Melton went at the work he was given to do; cut and piled the stalks as directed, and then proceeded to set fire to them; that there was wind blowing at the time, and the fire, having been set at a point about 10 steps from the woods, sparks were blown by the wind over into the woods of plaintiff, causing a fire and doing two or three hundred dollars of damage. Major Melton, the hired man, being examined as a witness for plaintiff, among other things testified: "Bland sent me to the field to cut and pile the stalks. . . ." On his cross-examination the witness stated: "The wind was not blowing at the time I piled up the stalks. I did not tell anyone I was going to burn the stalks;

this means is that the defendant, having hired a man and sent him to clear up land with instructions (assuming that the instructions were given) that he must not set fire, yet if the man, within the scope of his employment and in the performance of the work which he was sent to do, did set fire, his principal was not liable." As stated above, the court rejected this rule.

And in *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715, where the fire was started by the son of defendant, the court, in speaking of the evidence, said: "There was enough to show that the son was employed by him, not merely to do some one specified thing, as to plough a particular field, but as a general farm hand; and that within the scope of his employment was to do the grubbing, to facilitate which he set the fire. Where a master authorizes a servant to work for him, the former is liable for injury to another caused by the latter's negligent manner of doing the work, or by some negligent act of his, done in the course of and for the purpose of performing the work, even though the master may have forbidden him to be negligent, or to do the negligent act. Authority to the servant to be negligent is not required to make the master liable. The evidence was sufficient."

And in *Forzen v. Hurd*, 20 N. D. 42, 126 N. W. 224, it was held in a headnote by the court that in order to hold a party liable for loss occasioned by a prairie fire which it is undisputed he did not set or negligently permit to escape from his control, it must appear that the parties who originated and tended the fire were, in so doing, acting under his express or immediate direction, or that they were at such time in his employ, and required or directed by him to do certain work the due performance of which, in the ordinary course, involved the setting of fire to the prairie grass.

An instruction that a defendant may be held liable for damages occasioned by prairie fire if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at that time, in the course of their usual employment on the farm, and doing his work the

I just set the stalks on fire. No wind when I set fire to the stalks. Defendant didn't tell me to set them afire. I just thought, while I was out there, I would burn them. I tried to stop the fire, but couldn't. He turned me off because I set the fire out." Defendant offered no evidence. At the close of the testimony, on motion duly made, there was judgment of nonsuit, and plaintiff excepted and appealed.

Messrs. McBrayer, McBrayer, & McRorie for appellant:

No counsel contra.

Hoke, J., delivered the opinion of the court:

We are of opinion that, on the facts of this case, the judgment of nonsuit should be affirmed.

In *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440, that being an action for slander by reason of certain defamatory words, uttered by the superintendent of the road, in conversation with an applicant for employment, after he had told such applicant that the company did not wish to employ him, it was held, generally, in reference to the maxim, *respondet superior*: 2. "Where the question of fixing

same as your men do when you are gone," contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to prairie grass under conditions that render such act extremely hazardous. *Ibid.* (Headnote by the court.)

The master is liable for the results of a fire set out on the prairie by his orders, even if the servants did not strictly pursue his orders in all respects. *Armstrong v. Cooley*, 10 Ill. 509.

In *Patterson v. Sams*, 2 Ga. App. 755, 59 S. E. 18, it was held that an allegation that the defendant's servant allowed fire to spread from a brush heap on defendant's land near the plaintiff's line onto the latter's premises, where it burned her wood, because the servant went away and left the fire burning, although he knew it was likely to spread and do injury to the plaintiff, is sufficient on demurrer.

A similar rule has been applied where a servant set fire to rubbish which he was charged with collecting and disposing of.

Thus, in *Voegeli v. Pickel Marble & Granite Co.* 49 Mo. App. 643, it was held that authority to burn rubbish in a street must be presumed from authority to pile it there. The court said: "The depositing of the rubbish in the street must be regarded as a temporary disposition of it, for otherwise it would have amounted to an unlawful obstruction of the street. Its prompt removal in some way would necessarily be one 47 L.R.A. (N.S.)

responsibility on corporations by reason of the tortious acts of their servants depends exclusively on the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it. 3. Where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized." And the court, in the opinion sustaining a judgment of nonsuit, said: "The test of responsibility established by the better-considered authorities being, 'whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it.' When such authority is express, the matter is usually free from difficulty; but the authority may be implied, and on a given state of facts, admitted or established, frequently is conclusively implied, and responsibility imputed as a matter of law;" and on the same subject quotes with approval from *Wood on Master and Servant*, § 279, as follows: "The question usually presented is whether, as a matter

of the implied duties resting on the defendants' servants in carrying on the business."

So, in *McDermott v. Consolidated Ice Co.* 44 Pa. Super. Ct. 445, the master was held liable for injury caused by the janitor of a building burning rubbish in the yard when he had been instructed to burn it in the furnace.

A few of the American decisions apparently adopt a contrary view.

Thus, in New Hampshire, the doctrine has been adopted that the master cannot be held liable for damages occasioned by the spread of fire if the servant had not received any express authority to kindle it at the particular place in question. *Wilson v. Peverly*, 2 N. H. 548. Nor if he was directed not to kindle it unless the master was present. *Andrews v. Green*, 62 N. H. 436.

In *Moe v. Job*, 1 N. D. 140, 45 N. W. 700, the court sustained a judgment for the defendant upon the ground that the defendant did not himself set the fire, and did not expressly authorize anyone to.

The decision in *MARLOW v. BLAND* is not necessarily in conflict with the principle followed by the majority of the cases set out in the earlier part of the note, for in this case the servant's instructions were simply to cut and pile the corn stalks, and he was in nowise charged with any duty as to the disposition of them after they had been piled.

W. M. G.

of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it." And further (§ 307): "The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders." And in *Roberts v. Southern R. Co.* 143 N. C. 176-179, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 510, 10 Ann. Cas. 375, being an action against a railroad company for an assault and battery committed by one employee on another, the same author (§ 288) is quoted as follows: "An employer who leaves to an employee to do certain acts for him according to the employee's judgment and discretion is answerable for the manner or occasion of doing it, provided it is done bona fide and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness, and wholly outside of the duties conferred upon him."

A perusal of these and other authorities on the subject will disclose that on the question of responsibility of the master, by reason of implied authority, the test is whether the tortious act complained of was committed in the course of the servant's employment, and within its scope. *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015; *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718; 29 Cyc. pp. 1528-1533; *Jaggard, Torts*, pp. 256, 257. In the citation to Cyc., supra, p. 1533, and on this term, "scope of employment," it is said: "In determining whether a master is liable for the torts of his servants, the most difficult question is whether the particular act or omission of the servant causing the

injury for which the master is sought to be held liable was committed within the scope of the servant's employment; and this question is in most cases one of fact, to be determined by the jury from the surrounding facts and circumstances. The terms, 'course of employment' and 'scope of the authority,' are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule; the authority from the master generally being gatherable from the surrounding circumstances. An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act, rather than its method of performance, is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because done with intent to benefit or serve the master; nor merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in question."

A correct application of these authorities and the principles upon which they rest to the facts presented will, in our opinion, sustain the action of the lower court in ordering a nonsuit. As a general proposition the duty of a hired man is to do what he is told; and in this instance he was directed to do a definite, specific thing, importing no menace to anyone, and after completing the work that was given him to do, he goes on of his own motion and does something else,—engages in an act which is not infrequently a source of danger to neighbors,—and does it under circumstances amounting to a negligent wrong and causing substantial pecuniary injury. Plaintiff did not rely on the inferences which might arise from the fact that his neighbor's hired man, while engaged in clearing off a field, on a windy day, set fire to a pile of cornstalks near the plaintiff's woodland, from which it might be reasonably inferred that this negligence was within the scope of his employment, but his own proof goes further and shows that the employee had no orders to burn these stalks, nor was he sent with general directions to clear off the field, involving some extent of discretion in his method, as in the citation from *Wood*, approved in *Robert's Case*, supra; but he was directed to do this specific act, and the course and scope of his employment, in this instance, was to do as he was told. The

distinction, we think, finds support in the cases above referred to in our own reports of *Daniel v. Atlantic Coast Line R. Co.* and *Jackson v. American Teleph. & Teleg. Co.* supra. In the first case recovery was denied where an agent in charge of property of the principal, having reason to believe that someone had committed a theft, without being ordered to do so, caused the arrest of the suspected person, and it was held that the duty of caring for the property did not extend to punishing one who had injured or stolen it, and so the act was beyond the scope of the employment. In *Jackson's Case*, an employee of a telegraph company in charge of hands who were placing poles for a new line caused the arrest and imprisonment of an obstructing landowner, with the view and purpose of putting him out of the way until they could go through his land. There was no direction to do this on the part of the company, but it was held to have authorized the act because done in the course and scope of the employment.

There are numerous authorities which appear to conflict with the disposition that we make of the present appeal. Many of these, however, as pointed out in *Sawyer's Case*, supra, can be distinguished and consistently upheld on the ground that the facts involved a breach of some independent duty that the employer directly owed to the injured person, and do not depend entirely on the relation of master and servant,—as in case of injuries received by passengers on trains or in depots of common carriers, or customers in a general store. They are there by invitation of the employer, and a duty exists directly between the parties. This is the view, we think, that the case of *Redding v. South Carolina R. Co.* 3 S. C. 1, 16 Am. Rep. 681, properly presents. True, the recovery there was sustained in a very learned opinion and made to rest chiefly on the ground of agency alone; but we doubt if, on the facts appearing in that case, the breach of duty owing directly from the employer to the injured person is not the stronger position. In other cases responsibility may be imputed and recovery sustained by reason of intrusting the employee with dangerous implements and agencies, as in *Stewart's Case*, 146 N. C. 47, 59 S. E. 545, or because the occupation is such as to not unnaturally import menace to outsiders, as in *Hunter's Case*, 152 N. C. 682, 29 L.R.A. (N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237,—a principle which forbids that the employer shall be excused even by the interposition of an independent contractor. Again, there are cases where the act complained of was done in furtherance of the work that the

employee was given to do and in the course of its performance, as when an employee or numbers of them are sent to clear off a new ground or a railroad right of way. Here the employer would be responsible for negligent acts done in furtherance of the work and during its continuance, though the precise method employed at the time might be against the express orders of the employer. The act comes clearly within the scope of the employment. Wood on Master and Servants puts the very case in § 285: "So a master was held liable for the acts of his servants employed to clear land for him in setting fires to burn the brush . . . and this, even when the fires were built against his orders." And *Jackson v. American Teleph. & Teleg. Co.* supra, and *Ward v. Young*, 42 Ark. 542, illustrate the same general principle. But where, as in this case, a hired man is directed to do a definite, specific thing, entirely harmless in itself, and after completing this goes forward without instructions and without the knowledge of employer and does something else which imports a menace to outsiders, thus entirely changing the character of the work he was given to do, and not embraced within the terms or meaning of the order,—this, we think, can in no sense be considered as within the scope of the employment, and the doctrine of *respondet superior* has no application.

The judgment of nonsuit will be affirmed.

NORTH CAROLINA SUPREME COURT.

MRS. R. M. THOMASSON

v.

HACKNEY & MOALE COMPANY, Appt.

(159 N. C. 299, 74 S. E. 1022.)

Damages — mental anguish — breach of contract with agent.

One cannot recover damages for mental anguish because of the loss by a photographer of undeveloped negatives of her

Note. — Mental anguish as basis of action for loss of photograph.

Upon the question of the right of a photographer or artist to use picture for his own purpose, see note to *Douglas v. Stokes* 42 L.R.A. (N.S.) 386 and the earlier notes therein referred to.

Upon the right of action for use of photograph or name for advertising purposes, see note to *Foster-Milburn Co. v. Chinn*, 34 L.R.A. (N.S.) 1137, and the earlier notes therein referred to.

As to recovery for mental anguish in telegraph cases, see Index to L.R.A. Notes, under title "Damages," §§ 102, 103.

child, who died after the exposures were made, although he was notified of the facts when they were delivered to him for development and printing, if they were delivered by an agent who did not suggest or give notice that she was acting for the mother.

(Clark, Ch. J., dissents.)

(May 28, 1912.)

APPEAL by defendant from a judgment of the Superior Court for Buncombe County in plaintiff's favor in an action brought to recover damages for mental anguish suffered by plaintiff, resulting from the loss of undeveloped negatives of her dead child. Reversed.

The facts are stated in the opinion.

Messrs. Merrick & Barnard, for appellant:

In order to entitle the *feme* plaintiff to recover damages for mental anguish caused by a breach of contract, it was necessary that the defendant should have had notice of her interest in the contract, and that a failure to perform the contract on its part would result in mental suffering to her.

Cranford v. Western U. Teleg. Co. 138 N. C. 182, 50 S. E. 585; Helms v. Western U. Teleg. Co. 143 N. C. 386, 8 L.R.A.(N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 Ann. Cas. 643; Holler v. Western U. Teleg. Co. 149 N. C. 336, 19 L.R.A.(N.S.) 475,

63 S. E. 92; Chappell v. Ellis, 123 N. C. 259, 68 Am. St. Rep. 822, 31 S. E. 709; Tillinghast-Styles Co. v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621; Davidson Development Co. v. Southern R. Co. 147 N. C. 503, 61 S. E. 381.

Mr. H. C. Chedester, for appellee:

Plaintiff can recover damages for mental anguish alone, upon breach of contract, where the defendant, at the time of making such contract, had full knowledge of the object and purpose of the plaintiff in making the same, and such damages were in the reasonable contemplation of the parties at the time the contract was made.

Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 893, 11 S. E. 1044; Shaw v. Western U. Teleg. Co. 151 N. C. 638, 66 S. E. 668; Green v. Western U. Teleg. Co. 136 N. C. 489, 67 L.R.A. 985, 103 Am. St. Rep. 955, 49 S. E. 165, 1 Ann. Cas. 349; May v. Western U. Teleg. Co. 157 N. C. 416, 37 L.R.A.(N.S.) 912, 72 S. E. 1059; Wells, F. & Co's Exp. v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824; 8 Am. & Eng. Enc. Law, 2d ed. 672; Louisville & N. R. Co. v. Hull, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; O'Meallie v. Moreau, 116 La. 1020, 41 So. 243; Renihan v. Wright, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822; Reese v. Western U. Teleg. Co. 123 Ind. 294, 7 L.R.A. 583, 24 N. E. 163; Carmichael v. Bell Teleph. Co. 157 N. C. 21, 35 L.R.A.(N.S.) 651, 72 S. E. 619, Ann. Cas. 1913B, 1117.

It is to be noted in connection with the decision in the foregoing case that it was handed down in a state which allows a recovery for mental anguish alone; at least, in cases of the negligent transmission or delivery of telegrams; but in the present case the basis of the decision denying recovery for mental anguish is the fact that the connection of the plaintiff with the contract in question was not in any manner made known to the defendants, in consequence whereof she was not entitled to a recovery. Upon the question of the right of person not mentioned in telegram, and whose interest is not communicated to the company, to recover for mental anguish, see note to Holler v. Western U. Teleg. Co. 19 L.R.A.(N.S.) 475, and the earlier note therein referred to.

It will be seen by a comparison of the cases cited in the earlier note that the North Carolina court was consistent in denying a recovery in the case at bar.

A search of the authorities has disclosed no other case in which the plaintiff sought to recover for mental anguish in connection with the loss of a photograph, in which his connection with the photograph was not disclosed. In jurisdictions in which a recovery for mental anguish alone is per-

missible in any case, it would seem that a recovery for the loss of a photograph would be allowed in a proper case, since there can be no question but that mental anguish might follow the loss of a photograph of a deceased relative or friend just as surely as it would follow the failure to receive a telegram relating to the sickness or death of a friend.

Family portraits have no market value, but it seems to be the rule asserted in all the cases which discuss the question that the true measure of damages in the case of the loss of such photographs is not the market value, but the actual value to the person sustaining the loss.

Thus, in Green v. Boston & L. R. Co. 128 Mass. 221, 35 Am. Rep. 370, in an action against a carrier for the loss of photographs, the court, in approving the trial court's action in refusing an instruction that "the plaintiff can recover only a fair market value of the article lost," said: "To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into

Walker, J., delivered the opinion of the court:

This is an action upon contract. The plaintiff alleges that, having been advised that her infant child was about to die, she caused a number of photographic negatives to be made by a friend with her kodak, and that said negatives or films were taken to defendant to be developed and finished, and the films returned and the photographs delivered to the plaintiff; the defendant at the time being engaged in the business of developing such negatives and making photographs from them. The defendant received the films and undertook to develop and finish the same for a price to be paid by the plaintiff, but, having lost them, he failed to return them with the photographs according to the contract. The plaintiff further alleges that these negatives were the only ones she had of the deceased child, and she has no other pictures or likenesses of her, and defendant received and accepted the films or negatives with full knowledge of the facts. He knew the child was dead, and that, if the films were lost and the photographs not delivered, the plaintiff would not be able to have a likeness of her child taken. The evidence shows that the films were taken to the defendant on July 10, 1906, by Mrs. Dora Phillips, a sister of the plaintiff, who delivered them to a clerk of the defendant at its place of business, and he promised to develop them and make photographs from them. The plaintiff, it seems from her

complaint, seeks to recover damages for mental anguish suffered by her, resulting from the loss of the films and photographs from them of her child who died. It may be that, by a very liberal construction of the complaint, we may gather that the plaintiff has alleged that she suffered other damage by the breach of the contract, but this, perhaps, is immaterial, as the recovery was confined by the judge's charge to damages for the mental anguish which she suffered. The jury rendered a verdict for the plaintiff, upon which judgment was rendered, and the defendant appealed.

In order to determine whether there was error in allowing the recovery of damages for mental anguish, it will be necessary to set out particularly what was said by Mrs. Dora Phillips when she delivered the films to the clerk of the defendant. She testified as follows: "When I went in, he said, 'Lady, can I wait on you?' and I answered, 'Yes; I have some films to be developed of my sister's little girl.' He was behind the counter and had waited on me before, when I bought some books from him. I left the films with him and told him that I wanted them developed, that they were pictures of my sister's little girl, and that she was dead. I told him there were several of them and I hoped some would be good, and he replied, 'You can get them Monday,' and I said that it was the last we had of them, and, if any were good, to finish a dozen and put them on the cards they had, and that I would want more if they were good.

account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."

In *Louisville & N. R. Co. v. Stewart*, 78 Miss. 600, 29 So. 394, in an action against a carrier for loss of goods, including portraits in oil, the court quoted the above statement with approval.

So, in *Suydam v. Jenkins*, 3 Sandf. 614, the court said *obiter*: "The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the *pretium affectionis*, instead of the market price, ought then to be considered by the jury or court in estimating the value."

And in *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808, the Green Case was also cited with approval by the court, who sustained an action in the trial court to the following effect: "In determining the value of the family portraits which have no market value, if you find such to have been lost, you may look to the original cost of the same and to the probable cost of reproducing and replacing the same, as shown by the testimony."

In *Wamsley v. Atlas S. S. Co.* 50 App. 47 L.R.A.(N.S.)

Div. 199, 63 N. Y. Supp. 761, reversed on other grounds in 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896, which was an action for the loss of a box of photographs taken in a foreign country, the court said that the fact that these articles had no market value was quite clearly shown, and in such a case the plaintiff was at liberty to give such other evidence as would assist the jury in assessing the actual value of the property; that this was to be done by showing the nature of the property, the cost of obtaining the photographs, the purpose for which they were procured, and the difficulty of replacing them. The court further said that the jury were also entitled to take into consideration the value of the property to the plaintiff.

In *Ladd v. Ney*, 36 Tex. Civ. App. 201, 81 S. W. 1007, which was an action by an artist for the loss of two busts, the court, in holding that the amount of damages awarded by the jury was excessive, said: "Also if it be a family picture, though without market value, we may conclude that it has a value to the owner because it discloses to him the features of a relative. The busts in question are not shown to represent relatives or even friends of the plaintiff."

W. M. G.

He laid the films on the counter and I said, 'Be careful of them, as they are the only films we have of the little dead girl.' The films or pictures were taken with a kodak on July 3d, and the child died the next day." As the films were delivered to the defendant by Mrs. Dora Phillips, and the contract was to develop them and make photographs from them for her, without any suggestion or notice to the defendant that she was acting for her sister, Mrs. Thomasson, who is the plaintiff, we do not think that, under the cases recently decided by this court, the latter can recover damages solely for mental anguish.

We held in *Helms v. Western U. Tele. Co.* 143 N. C. 386, 8 L.R.A.(N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 Ann. Cas. 643, that a party who is not mentioned in a telegraphic message, or whose interest therein is not otherwise disclosed to the company, cannot recover substantial damages for mental anguish alleged to have been sustained by reason of the non-delivery of the message, and it was said by Justice Brown, who spoke for the court in that case, that the principle thus announced is supported by the "overwhelming weight of authority." The evidence in that case of the company's knowledge as to who was the principal, or, in other words, as to the identity of the person in whose behalf the message was sent, was quite as strong as, if not stronger than, the evidence in this case, to fix the defendant with notice of the fact that Mrs. Phillips was acting in behalf of her sister, the plaintiff. In the course of the opinion in the *Helms Case*, Justice Brown says: "The same principle applies where the message is sent for the benefit and at the instance of anyone whose name does not appear on its face. The well-known rule laid down in *Hadley v. Baxendale*, 9 Exch. 345, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. N. S. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502, decided in 1854, has been applied by the Supreme Court of the United States to telegraph cases, and it is held that where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably occupy, the measure of damages for negligence is the sum paid for sending. *Primrose v. Western U. Tele. Co.* 154 U. S. 29, 38 L. ed. 884, 14 Sup. Ct. Rep. 1098; *Western U. Tele. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577. Our own court has adopted the same principles of law as applicable to this class of cases. . . . In *Williams v. Western U. Tele. Co.* 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359 . . . [it is 47 L.R.A.(N.S.)

said]: 'The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service.' In *Cranford v. Western U. Tele. Co.* 138 N. C. 162, 50 S. E. 585, the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it, and was not brought to the attention of the company, and it is specifically held that 'there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message.' See also *Kenyon v. Western U. Tele. Co.* 126 N. C. 232, 35 S. E. 468."

We have more recently affirmed the same doctrine in *Holler v. Western U. Tele. Co.* 149 N. C. 336, 19 L.R.A.(N.S.) 475, 63 S. E. 92, and, in so far as it is applicable to telegraphic messages, the rule is settled by that case, which cites and reviews all prior cases in this court upon the subject. A careful reading of that case will show that it was not intended to decide that the beneficial interest of a third party, or party not named in the message, should be ascertained and appear by answer to a distinct issue containing an inquiry as to the fact. We were there dealing with issues inadequate to support the judgment. It would clearly be sufficient if it appeared from the evidence, the charge of the court, and the verdict upon the issues, when considered and construed together, that the defendant had notice of such beneficial interest at the time of making the contract; or, as held in *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.* 155 N. C. 148, 71 S. E. 71, at some intermediate time, under certain circumstances and restrictions therein indicated. The last-cited case sustains the proposition hereinbefore stated. Referring to the matter, Justice Hoke says, in substance, that in the *Helms Case*, supra, the contract had been finally broken and was not in the course of performance, and the sole question at issue being the amount of damages for mental anguish suffered, and due to the defendant's negligent act or breach of the contract, "the personality of the party and his relationship to the subject of the message" was material and should have appeared.

Applying the principle thus established to this case, there was nothing said by Mrs. Phillips to defendant's clerk which would

her sister, and not solely for herself. There was nothing unusual in having the films developed and the photographs made for herself. The child was her niece and it was perfectly natural that she should place a special and peculiar value upon the films, and desire to preserve a photograph of her. The jury might have guessed or conjectured that she was acting for her sister, but this will not do. *Byrd v. Southern Exp. Co.* 139 N. C. 273, 51 S. E. 851.

The plaintiff, if she establishes her cause of action, will be entitled at least to nominal damages, and she may recover the value of the films if she can prove the same. Whether, in ascertaining this value, the jury may consider the *pretium affectionis*, that is, an imaginary value placed upon a thing by the fancy of its owner, growing out of his or her attachment for the specific article, its associations, and so forth, which, perhaps, may not inaptly be called its sentimental value, we need not say, as there was no recovery for the value of the films; but it may not be irrelevant to refer to the question, and, this being so, we cannot do better than to quote what is said in *Hale on Damages* at page 184: "In most cases the market value of the property is the best criterion of its value to the owner; but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the *pretium affectionis*, instead of the market price, ought then to be considered by the jury or court in estimating the value." When analyzed, the damage caused by the loss or destruction of property of this nature consists of two elements: First, the loss of the real property value; second, the grief or mental suffering at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered in a proper action in addition to the actual value of the property." *Suydam v. Jenkins*, 3 Sandf. 621.

There is some conflict in the authorities relating to this matter, and we will not now attempt to reconcile them or decide what is the correct principle. It has been held that the sentimental value of property, the *pretium affectionis*, as it is called, cannot be recovered as compensation for the destruction or conversion of such property. *Moseley v. Anderson*, 40 Miss. 49. It has 47 L.R.A. (N.S.)

which the possession of an article gives, like the satisfaction which comes from having a contract respected and performed, is of a nature that the law does not recognize as a subject for compensation. *Sedgw. Damages*, § 251. We find it stated in *Parsons on Contracts*, 3d ed. 209, that this *pretium affectionis* cannot be recovered unless in cases where the conversion or appropriation of the property by the defendant was actually tortious. *Hale, Damages*, supra. We barely allude to the subject in *East Lake Lumber Co. v. East Coast Cedar Co.* 142 N. C. at pages 416 and 417, 55 S. E. 306, when discussing the jurisdiction of courts of equity in cases of injunctions, as follows: The courts of equity "finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases; namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been established by a legal adjudication unless the complainant was attempting to establish it by an action at law and needed protection during its pendency; and, secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage; as, for instance, in the case of the destruction of shade trees or of any other wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned for by compensation in money, such as torts committed on property and things having a value distinct from their intrinsic worth; for instance, a *pretium affectionis*, though not a merely imaginary value." Of course, damages which are merely imaginary, or have no real or substantial existence, should not be allowed. In this case the question is purely academic, as it is not presented by any exception, but we considered it proper that we should make some reference to it, as it is contended that the films had a value peculiar to plaintiff, apart from their intrinsic value.

There was error in the charge under which damages for mental anguish were awarded.

Clark, Ch. J., dissenting:

Upon this evidence, the reasonable inference was that the plaintiff, in desiring to get the films of the "little dead girl" developed, was acting as agent of her sister, the mother of the little girl, and that the defendant's agents must have understood as much. The court left that issue of fact to

the jury, and they found that such was the case. Indeed, this is the only natural inference to be drawn from the evidence.

The defendant's agent was told that the little girl was dead, and that these films had been taken, some just before and some just after her death, and that they were the only films there were of the child. The defendant's agent must have known that there would be mental anguish if these films were negligently destroyed. Any knowledge of a mother's heart would have told him that.

In *Young v. Western U. Telegr. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044, this court said: Damages for injury to feelings, such as mental anguish, are given, though there may be no physical injury in many cases. They are allowed where a party is wrongfully put off a train; in action for breach of promise of marriage; for slander; for libel; for criminal conversation; for seduction; for malicious prosecution; for false arrest; and for wrongfully suing out an attachment. Such damages have been allowed in many other cases where the natural result of the breach of contract or a tort was the infliction of mental anguish.

The verdict and judgment of \$400 should be sustained.

NORTH CAROLINA SUPREME COURT.

G. V. LEWIS, Appt.,
v.

NORFOLK SOUTHERN RAILWAY COMPANY.

(— N. C. —, 79 S. E. 283.)

Railroad — warning signals — turkeys.

1. A railroad company is bound to give warning signals when a train approaches turkeys feeding on and along the track.

Note. — Duty of railroad as to fowls upon track.

As to liability for killing or injuring live stock on track because of lack of proper headlight, see note to *Hanger v. Chesapeake & O. R. Co.* 39 L.R.A. (N.S.) 271.

See also notes in 11 L.R.A. 460; 25 L.R.A. 291; and 24 L.R.A. (N.S.) 858, on duty of railroad employees to keep lookout for live stock on the track; and notes in 25 L.R.A. 162, and 35 L.R.A. (N.S.) 1018, on constitutionality of statute imposing absolute liability upon railroad for injuries to animals.

"With regard to injuries to animals, railroad companies are not held to the highest decree of care, but only to the exercise of ordinary care. But on the other hand, 47 L.R.A. (N.S.)

Evidence — inference by jury — habits of fowls.

2. The jury may infer that turkeys feeding on a railroad track would have flown beyond danger, had a warning whistle been given upon approach of a train, and that failure to give such signal was therefore the proximate cause of their being killed by the train.

(September 10, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for Washington County in defendant's favor in an action brought to recover for the alleged negligent killing of plaintiff's turkeys by defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Gaylord & Gaylord for appellant.

Mr. W. M. Bond, Jr., for appellee:

A railroad engineer can assume, up to the very moment of impact, that a turkey will fly from the track, and he is under no obligation to slacken the speed of his train, or to give warning of the approaching, other than is made by the noise of the approaching train.

Nashville & K. R. Co. v. Davis, — Tenn. —, 78 S. W. 1050; 33 Cyc. 1164, note 9, 1226; *Wilson v. Wilmington & M. R. Co.* 10 Rich. L. 52; *Moore v. Charlotte Electric R. Light & P. Co.* 136 N. C. 554, 67 L.R.A. 470, 48 S. E. 822; *Flora v. Norfolk Southern R. Co.* — N. C. —.

Clark, Ch. J., delivered the opinion of the court:

It was in evidence that "about midday the defendant's train passed plaintiff's house, which was about 60 yards from the track. The train was twenty minutes late and going extra fast. The engine ran over and killed six of plaintiff's turkeys, which were 250 yards further down the track. Those in charge of the train could have seen

except in the case of trespassing animals, it is not necessary, in order to render them liable, that there should be gross negligence or wanton or wilful injuries. . . . The weight of authority is undoubtedly to the effect that, as a general rule, a railroad company is not liable for injuries to trespassing animals in the absence of gross negligence or wilful or intentional injury; but it has been held that, in the application of this rule, a distinction should be made between a failure to observe such precautions as are designed to guard generally against possible injuries, and precautions to avoid a particular injury where the danger is known, and that, while it is not necessary to maintain a lookout for trespassing animals, the fact that animals are wrongfully upon a railroad track does not relieve the railroad company, after their presence and peril are

the turkeys a distance of 500 yards. No whistles were blown and the train made no other noise than that usually made in running. The engine did not let off any steam. There were no obstructions on the track to prevent the turkeys being seen." Upon this evidence it was error to grant a nonsuit. From the known characteristics of turkeys, a flock of them feeding on or crossing a track might not notice that the train was approaching or attempt to fly. But as when a gun is discharged close by, if there had been the sharp blow of the whistle, the turkeys would doubtless have taken to wing or have run. They are very timid, if alarmed, but they are not alert to perceive danger.

It has been repeatedly held that it is error not to sound the whistle when cattle or horses are on the track, which are seen by the engineer in time, or which should have been seen by him in time, to give warning by the whistle. Turkeys would be much less likely to notice the approach of a train than cattle or horses, and would be more likely to save themselves by flight when a whistle is sounded. As already said, they have less intelligence to perceive the danger of an approaching train, and would be more easily frightened by the sudden sharp blow of the whistle. They can escape, too, more quickly by the use of wings. It cannot be denied that there was evidence of negligence in failing to sound the whistle when the turkeys were seen, or should have been seen. It is true it is necessary for the jury to find

not only negligence on the part of the defendant, but further that such negligence was the proximate cause of the injury, and that if the whistle had been blown the turkeys would probably have flown in time. From the well-known characteristics of these fowls, the jury would have been justified in inferring from this evidence that the failure to blow the whistle was the proximate cause of their being killed, and that they would have removed themselves promptly by flight if the whistle had been sharply blown.

Upon a nonsuit, the evidence must be taken in the light most favorable to the plaintiff, and with all the inferences which may be reasonably drawn therefrom in his favor.

In *Missouri P. R. Co. v. Wilson*, 28 Kan. 641, it is said: "The idea is not tolerable that an injury may be inflicted which, by ordinary care and diligence, may be avoided. This is the rule in the ordinary affairs of life, and is as applicable to corporations as to individuals. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 425; *Rockford, R. I. & St. L. R. Co. v. Lewis*, 58 Ill. 49; *Central Branch R. Co. v. Phillipi*, 20 Kan. 9; *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426. Although the drove of cattle could have been seen from the train approaching the crossing, no attempt was made by the sounding of the whistle to frighten the cattle and make them run away, and no attempt was made to slacken the speed of the train or prevent it from

discovered, from exercising ordinary care to prevent injuring them." 33 Cyc. 1161, 1224.

In *Nashville & K. R. Co. v. Davis*, — Tenn. —, 78 S. W. 1050, where geese which were permitted to run at large were killed by a train near a public crossing, and the evidence showed that the engineer blew the whistle and rang the bell for the crossing, but did not show whether alarms were sounded for the purpose of frightening the geese, it was held that there was no evidence of common-law negligence.

It was also held in *Nashville & K. R. Co. v. Davis*, supra, that a goose was not an "animal or obstruction" within the meaning of a statute requiring the whistle to be sounded, the brakes put down, and every possible means employed to stop the train to prevent an accident when an animal or obstruction appears on the track. The court said that it was evident that this provision was designed not only to protect animals on the track, but also passengers and employees upon the train, from accidents and injuries; and while in the broadest sense a goose was an animal, the statute was not intended to require the stopping of trains to prevent their running over birds, such as geese, chickens, etc.; that it is presumed that such birds will use their wings to remove themselves quickly from

danger. In case of recklessness and common-law negligence, it was said, however, that the railroad company might be liable.

In *Wilson v. Wilmington & M. R. Co.* 10 Rich. L. 52, it was said: "It would indeed be a startling doctrine, to hold that a train of cars, whether freighted with produce or with passengers, and charged with the transportation of the government mail, should be arrested in its progress, and compelled, at the hazard of responsibility, to come to a dead halt whenever a domestic fowl, or perchance a yelping cur, should happen to take its stand upon the track, in defiance of the loud warning which is proclaimed by the motion of the train and the action of the machinery." In that instance, however, the action was to recover damages for the killing of a dog.

Also, in *Richardson v. Florida C. & P. R. Co.* 55 S. C. 334, 33 S. E. 466, where the action was for damages for the killing of a dog, it was said that the reasoning of the court in *Wilson v. Wilmington & M. R. Co.* supra, would logically lead to the conclusion that the owner of a domestic fowl or dog cannot claim that it is a duty owed him by a railroad company, when such fowl or dog is upon the track, to bring the train, if possible, to a halt.

R. E. H.

running into the drove. Therefore there was evidence to go before the jury as to the negligence and careless operation of the train by the railroad company, and also evidence that the heifer was thrown from the track through the result of such negligence." This and many other cases to same effect are cited. 3 Elliott, Railroads, § 1207.

In *Moore v. Charlotte Electric R. Light & P. Co.* 136 N. C. 554, 67 L.R.A. 470, 48 S. E. 822, relied upon by the defendant, it was held that "the killing of a dog by a street railroad is not prima facie evidence of negligence;" the court saying that dogs are of superior intelligence, and "are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety." The use of the whistle is more necessary and would be more effective with a drove of turkeys than with a drove of cattle or hogs. The case should have been submitted to the jury, together with such evidence, if any, as the defendant may see fit to offer in rebuttal.

Reversed.

NORTH DAKOTA SUPREME COURT.

S. M. THORNLEY, Appt.,
v.

O. G. LAWBAUGH, Resp't.

(— N. D. —, 143 N. W. 348.)

Attachment — denial of title to defeat jurisdiction.

In an action to recover damages, plaintiff caused an attachment to issue, and a levy

Headnote by Goss, J.

Note. — Attachment: nonownership of attached property as ground for dissolution.

This note does not discuss the question whether an attaching defendant may move to vacate an attachment on other grounds, notwithstanding he disclaims any interest in the property attached.

Attachment not relied on as basis of jurisdiction.

The rule is well settled, at least where the attachment is merely a provisional remedy, and is not relied upon as the basis of the court's jurisdiction, that the defendant cannot obtain a dissolution of it upon the ground that he is not the owner of the attached property. *Tidrick v. Sulgrove*, 38 Iowa, 339; *Mitchell v. Skinner*, 17 Kan. 47 L.R.A.(N.S.)

was made upon land in McLean county as belonging to defendant, a nonresident, who, under special appearance, subsequently moved to discharge the attachment and dismiss the action for want of jurisdiction in the court of person or property of the defendant. Substituted service of the summons and complaint had been made upon defendant without the state. Held, that defendant cannot be heard to deny his ownership of the property attached to defeat the limited jurisdiction of the court, proceeding quasi *in rem* against the attached property. He cannot set up title in a stranger to defeat the attachment levy as upon his property.

(September 22, 1913.)

A PPEAL by plaintiff from an order of the District Court for McLean County, quashing an attachment and dismissing an action brought to recover damages alleged to have been sustained because of alleged fraud and deceit of defendant in procuring the discharge of a real estate mortgage upon certain land for less than its face value. Reversed.

The facts are stated in the opinion.

Messrs. Hyland & Nuessle for appellant.

Messrs. Newton, Dullam, & Young and Shelby L. Large, for respondent:

Although real property is transferred by a conveyance, absolute in form, the transfer may be held to have been made in trust, and the grantee to have been a trustee, where the prior or contemporaneous acts, declarations, and agreements of the parties evidence an intent and understanding that the grantee was to take and hold the property for a just purpose.

39 Cyc. 60; *Ellison v. Ganiard*, 167 Ind. 471, 79 N. E. 450.

The trust agreement between grantors and respondent was made through written correspondence. Exhibits A, B, C, and D

563; *McKinley v. Fowler*, 67 How. Pr. 388; *Langdon v. Conklin*, 10 Ohio St. 439; *Emerson v. Love*, 2 Ohio Dec. Reprint, 348; *Bank of Winnemucca v. Mullaney*, 29 Or. 268, 45 Pac. 796; *Quebec Bank v. Carroll*, 1 S. D. 372, 47 N. W. 397 (attachment not relied on as basis of jurisdiction, although defendant was a nonresident, since he was personally served within the state); *Wise v. Ferguson*, — Tex. Civ. App. —, 138 S. W. 816.

Thus, it is said that an attachment debtor cannot demand in his own interest that the attachment be dissolved, upon the ground that the property attached no longer belongs to him, for that would only be on his part a gratuitous and officious assertion of the rights of others for whom he shows no authority to speak. So, to allow him to move for a discharge of the at-

were sufficient to satisfy the requirements of § 4821, Revised Codes of 1905.

Wiggs v. Winn, 127 Ala. 621, 29 So. 96; Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; Nolan v. Garrison, 151 Mich. 138, 115 N. W. 58.

The grantee of a prior unrecorded deed is entitled to priority over attaching creditors, and this is especially true where the attaching creditor has secured no judgment lien upon the premises.

Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66; Murphy v. Plankinton Bank, 13 S. D. 501, 83 N. W. 575; Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408; 4 Cyc. 639.

That attaching creditor is not a purchas-

er or encumbrancer in good faith and without notice, as he comes in under the respondent in the attachment suit, and simply acquires the title that such respondent had at the time the attachment proceedings were instituted.

Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Norton v. Williams, 9 Iowa, 523; Plant v. Smythe, 45 Cal. 161; Drake, Attachment, 6th ed. 223.

Where the only ground of attachment is the nonresidence of the respondent, it becomes very important for the respondent to set up a lack of interest in the property to show an improper issuance of the attachment for lack of jurisdiction.

4 Cyc. 775; Schlater v. Broadbuss, 3 Mart. N. S. 321; Harris v. Taylor, 3 Sneed, 536,

attachment on account of his assignment of the attached property, and as a means of protecting the assigned estate, is a plain invasion of the rights and province of the assignee; at least, where the assignment of the property and the selection of an assignee were the private and voluntary acts of the parties interested, of which the court took no cognizance and had no jurisdiction. It might be that in case of assignment or other sequestration by order of the court, when the property was clearly *in custodia legis*, such suggestion might come from any party interested, or even from an *amicus curiæ*. Quebec Bank v. Carroll, 1 S. D. 372, 47 N. W. 397.

And in Kelly v. Baker, 26 App. Div. 217, 49 N. Y. Supp. 973, it was held that where the defendant had received a sum of money and undertaken to deal with it as her own, and it was standing in her name in the bank, an attachment levied thereon in an action against such defendant should not be vacated merely on her showing that she did not own the money personally, but was bound to account to some other person or estate for it.

Also in Johnstone v. Kelly, 7 Penn. (Del.) 119, 74 Atl. 1099 (a petition for the discharge of attached property), the court said that in that proceeding it had nothing to do with the question as to the ownership of the goods attached, but that question could be properly determined by a verdict of the jury in an action of replevin.

And a Code provision that a motion may be made to discharge the attachment for a cause making it apparent of record that the writ should not have been levied on all or some part of the property does not authorize a motion to discharge an attachment because of nonownership of the property attached. Tidrick v. Sulgrove, 38 Iowa, 339. Such a statute does not authorize the defendant thus summarily to cut off the plaintiff's right to contest the title of the property, especially when the third party alleged to be the owner has not asked to be made a party, and has made no claim to the property in any legal manner.

But such a statute embraces all questions 47 L.R.A. (N.S.)

as to the right to levy upon the property which may properly be determined by motion; and if the title to the property is not in dispute between the parties upon the facts, and if the motion is not denied, and the simple question to be determined is whether the land is liable to the attachment, motion to discharge the attachment upon the ground of nonownership is competent. Rausch v. Moore, 48 Iowa, 611 30 Am. Rep. 412.

It is not for the attachment defendant to attempt thus to protect the property of others not being proceeded against, and who will not be bound by the judgment *in rem* upon the basis of his ownership. Emerson v. Love, 2 Ohio Dec. Reprint, 348; Bank of Winnemucca v. Mullaney, 29 Or. 268, 45 Pac. 796.

And so, in Kountze v. Scott, 49 Neb. 253, 68 N. W. 479, it was held that an attachment debtor who, before the attachment issued, transferred to another all his interest in the property attached, cannot be permitted in his own name to establish the validity of such transfer on motion to dissolve the attachment.

And in King v. Bucks, 11 Ala. 217, and Sims v. Jacobson, 51 Ala. 186, although the attachment seems to have been relied upon as the basis of jurisdiction over a non-resident, it was held that the attachment debtor could not plead in abatement of the suit that he was not the owner of the attached property, upon the ground, however, that the return was to be considered conclusive and a matter of record not thus to be contradicted.

Attachment relied on as basis of jurisdiction—for judgment *in personam*.

From the point of view of a court that assumes that jurisdiction to render a judgment *in personam* may rest upon an attachment of property and constructive service, it is apparent the defendant is interested in having the attachment dissolved if he does not own the property the attachment of which is the basis of the jurisdiction. It is now thoroughly established that juris-

67 Am. Dec. 576; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A. (N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261.

Where the attachment is essential to the jurisdiction of the court, the dissolution will carry with it the main suit; especially where the respondent is a nonresident and has never been served with process.

4 Cyc. 806; Lawrence v. Steadman, 49 Ill. 270.

An attachment is an extraordinary and summary remedy in derogation of the common law; and, in such cases, the court construes the statutes strictly in favor of those against whom the proceeding is employed.

William Deering & Co. v. Warren, 1 S. D. 35, 44 N. W. 1068.

diction to render a judgment *in personam* cannot, consistently with due process of law, rest upon the attachment of property within the state; at least, if defendant is a nonresident. (See note in 50 L.R.A. 577.) It is still a question, however, whether attachment with constructive service of process will not support a judgment *in personam* against a resident. (See note in 35 L.R.A. (N.S.) 292.) In the cases cited in this subdivision, holding that nonownership of the property was a ground for dissolution of the attachment, it either appears that the defendant was a resident, or, if a nonresident, that the case was decided before the establishment of the rule that jurisdiction to render a judgment *in personam* cannot rest upon constructive service and attachment of the property of a nonresident.

Under a statute permitting the commencement of a suit by attachment of the defendant's property so as to warrant a judgment *in personam* against the defendant, where an attachment is made of "all the rights, title, and interest which the defendant had in the real estate described," without averring that he had any interest therein, or that any estate of the defendant was attached, the defendant may plead in abatement that, at the time of the pretended service of the writ of attachment, the property in the land attached was not in him, but in someone else. Gardner v. James, 5 R. I. 235. Such a plea in no wise contradicts anything averred in the officer's return, but in substance says that, in attaching all the defendant's interest, nothing of his was in fact attached. The defendant is not to be held by attaching the estate of another; and if it appears that the estate was not his, the service must be defective and insufficient.

But in two Alabama cases, where the attachment seems to have been relied upon as the basis of jurisdiction over a nonresident, it was held that the attachment debtor could not plead in abatement of the suit that he was not the owner of the attached property, this decision being placed upon the ground that the officer's return is to be considered conclusive and a matter of 47 L.R.A. (N.S.)

Goss, J., delivered the opinion of the court:

This is an action for damages for the recovery of \$1,071, alleged to have been sustained because of alleged fraud and deceit of defendant in procuring for the sum of \$1,925 the discharge of a real estate mortgage of the face value of \$2,996 upon a half section of land in McLean county. The discharge is pleaded to have been obtained through the alleged misrepresentation of defendant, and through the error, mistake, and ignorance of the plaintiff, known to the defendant to be such. The propriety of the attachment in the particular action is not challenged, and we do not pass thereon. The only questions before us arise upon a motion to dissolve the attachment, made by the

record, and not to be contradicted. King v. Bucks, 11 Ala. 217; Sims v. Jacobson, 51 Ala. 186.

Thus, it is said, the levy of an attachment is equivalent to the personal service of process; that is, it has the same effect to give jurisdiction to the court, and entitles it to hear and determine the cause. Its effect is to bring defendant before the court, and the return is quite as much a matter of record and as conclusive as is the return of the service of process. If one cannot be controverted, it is difficult to perceive upon what grounds the other may be disputed, though perhaps, where the levy falsely affirms the property levied on to be the defendant's, for the purpose of enabling the plaintiff to proceed in his suit, redress may be obtained by having such levy set aside by the court. King v. Bucks, *supra*.

However, since attachment is a means provided by law for legal or constructive notice to a defendant so as to authorize the rendition of judgment against him where it is impracticable to effect personal service upon him, care must be taken that the property levied upon is the property of the defendant; for if the plaintiff makes a simulated levy on property to which the defendant has no claim of right, this will not have the effect of constructive notice so as to authorize the court to proceed to judgment. Grier v. Campbell, 21 Ala. 327.

A good example of a simulated and colorable attachment such as to work a fraud upon the jurisdiction of the court is found in the last case cited, where an attachment was levied upon a brass candlestick in the possession of the counsel for the plaintiff, in order to get jurisdiction of a nonresident defendant, and upon proof of these facts it was held that the levy was not real, but colorable merely, and that the judgment founded upon it was wholly unwarranted, and an injunction was granted against execution based thereon.

Thus, where, in an action against a nonresident, attachment duly and legally executed stands in place of citation, the credit, goods, and effects of the defendant

purpose of motion only. Upon the purported cause of action, upon an affidavit for attachment in regular form, reciting the non-residence of defendant and usual bond, a warrant of attachment was issued, and a levy made upon the land. After the filing of an affidavit for publication of summons, reciting defendant's ownership of property in this state, personal service of the summons, complaint, affidavit, undertaking, warrant, and notice of attachment was had upon the defendant at Rockford, Illinois, at which place defendant has at all times resided. The defendant then moved "for an order setting aside and dismissing the attachment proceedings, and that the action be dismissed on the ground that the court

of the defendant, and has not acquired jurisdiction over any of the property of this defendant." This motion was based upon six affidavits, and upon "the summons, complaint, attachment proceedings, and all the files herein," and was made under a notice "that the undersigned appears specially in this action for the defendant above named for the purposes of this motion only, and for no other purpose." The affidavits are uncontroverted, and, together with the correspondence and documents exhibited therewith, prima facie establish that the real estate attached, and upon which the discharge of the mortgage was procured by the defendant, though standing in his name upon the records of McLean county at the

for the purpose of bringing him into court represent his person; and if they are not actually levied on, he is not legally before the tribunal any more than he would be in an ordinary action where citation was not served. On the ground, therefore, that such a defendant has a right to show that the fact on which alone the court can assume jurisdiction does not exist, such a defendant has a right, on the trial of the action, to show that the property attached did not belong to him. *Schlater v. Broadus*, 3 Mart. N. S. 321.

And in *Rhine v. Logwood*, 10 La. Ann. 585, it was assumed for the purpose of that case that an attachment debtor, being a nonresident, may avoid judgment on the ground of nonownership of the attached property; but it was held that he had not established with reasonable certainty his absence of interest in the property, and the attachment was enforced.

And in *Campbell v. Morris*, 3 Harr. & McH. 535, it was said that since an attachment is a summary proceeding, every fact is cognizable by the court which will show that the attachment issued irregularly, or which will show that the property attached does not belong to the defendant; and for this purpose evidence extrinsic to the proceedings may be resorted to, and the proof is to be made to the court because the proceeding is summary and without the intervention of a jury. These statements are embodied in a full discussion of the whole question by the general court, and although their judgment was reversed by the court of appeals, no grounds for the reversal are given, and the judgment of the general court has since been followed in that jurisdiction. Thus, in *Howard v. Oppenheimer*, 25 Md. 350, it was said that this opinion of the general court on the point in question and in all its parts has been so recognized by that court in various decisions in more recent cases, and has become so interwoven with the attachment law and practice in that state that it can be no longer questioned as settled law. And in *Kilpatrick v. O'Connell*, 62 Md. 403, it was said that the *Campbell* Case 47 L.R.A.(N.S.)

establishes without doubt the rule that a motion to quash the attachment may be based on a denial of the defendant's property in the goods attached.

Again, in *Guild v. Richardson*, 6 Pick. 364, an action against a nonresident, the officer returned that he had attached all the right and title of the defendant in a certain parcel of land, and the defendant pleaded by attorney that he had no right, title, or interest in the property attached, and asked that the writ might abate; and it was held that this was a plea to the writ, and not to the jurisdiction of the court. The plea would not be good as a plea to the jurisdiction, for such a plea should aver not only that the property attached was not the property of the defendant, but that he had no other property within the jurisdiction of the court. But as a plea to the writ, it was good, since the defendant was not estopped to deny the truth of the return, for the return did not show that the property was the property of the defendant. The plea was held valid.

So, where an attachment on land is based on an affidavit that the defendant has assigned or disposed of, or was about to assign and dispose of, his property, with intent to defraud his creditors, and the defendant filed his plea in abatement, traversing the several averments of this affidavit, evidence offered by the defendant to show that the lands attached were the property of his wife is competent under the issue, and proper to be taken into view by the jury upon the question of the alleged intent of the defendant to dispose of "his" property. *Barney v. Scherling*, 40 Miss. 320.

And where attachment is a proceeding to enforce the appearance of the defendant, and, for the purpose of bringing him into court, it is substituted for the ordinary writ or summons, the defendant, upon appearing, may plead in abatement as if brought into court upon ordinary process; and as it is alone by seizure of his property that the court can acquire jurisdiction of his person, he may show in abatement of the attachment that the property on which the attachment was levied is not his, and

time of the attachment, was in fact the property of a brother and sister-in-law of the defendant, and had been by them transferred to defendant that he might for convenience and the accommodation of the owners reconvey title or mortgage, and thereby secure means to meet a past-due mortgage upon said land held by a third party, and that the defendant did, without notice of the attachment, but subsequent thereto, so convey title, in fact as a mortgage, to another party, thereby procuring the money necessary to pay such past-due mortgage, and satisfied the same; that the party holding the title thus conveyed from the defendant in fact holds the same as security only, and as a mortgage for the amount advanced, and in trust for the real owners,

the brother and sister-in-law, resident in Salem, Oregon, and that this defendant, at the time of the attachment, was likewise a trustee of said real owners, having himself no beneficial interest in the property, and possessing the bare legal title only in trust for the real and equitable owners. The good faith of the defendant, in thus acting for his brother and the brother's wife, appears *prima facie* established, and the facts so recited by affidavits are not controverted. Upon the hearing the motion was granted, the attachment vacated, and the action dismissed, "for the reason that the court has not acquired jurisdiction over the person of the defendant or over any property of the defendant," to which order an exception was granted, *supersedeas* was allowed, and this

therefore that he is not before the court. *Harris v. Taylor*, 3 Sneed, 536, 67 Am. Dec. 576.

And in *Keaton v. Forrester*, 63 Ga. 206, where the levy as entered on the *fi. fa.* was upon one half of a certain lot of land, without specifying which half, or whether divided or undivided, and where the evidence failed to establish title or possession in the defendant, the levy was held rightly dismissed for uncertainty.

—for judgment *in rem*.

Upon the establishment of the principle that jurisdiction to render a judgment against a nonresident who does not appear cannot constitutionally rest upon the attachment of his property and publication of process (see note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 577), the most potent reason for permitting a dissolution of the attachment at the instance of a nonresident, on the ground of nonownership of the property, disappeared. And since the establishment of that general principle, a majority of the courts hold with *THORNLEY v. LAWBAUGH* that nonownership of the property is not a ground for dissolution of the attachment, when relied on as a basis of jurisdiction over a nonresident, since the judgment is at most only *in rem*, and therefore the defendant is not affected thereby if he does not own the property. *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 So. 814; *Kneeland v. Weigley*, 76 Neb. 276, 107 N. W. 574; *Vogelman v. Lewit*, 48 Misc. 625, 96 N. Y. Supp. 207; *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770; *THORNLEY v. LAWBAUGH*; *Cartmell v. Rudolph Wurlitzer Co.* 5 Ohio N. P. N. S. 604, 18 Ohio S. & C. P. Dec. 380.

So if the levy of an attachment be not fictitious, merely colorable, a fraud on the jurisdiction of the court, the defendant may not, as ground for abating or dissolving the attachment, or discharging or vacating the levy, traverse the ownership of the property on which the levy is made, or deny that he has therein a leviable interest. Such traverse is not within the 47 L.R.A. (N.S.)

scope of the issues for which the statute provides. It is founded on matter *dehors* or extrinsic to the attachment; presents an issue essentially collateral only, in disputation of the return made by the officer, and which, if sustained, would be triable by the court alone. And the levy, in order to be fictitious or colorable so as to be a fraud on the jurisdiction of the court within the meaning of those terms as here used, must be feigned or unreal; there must be deceit, a want of good faith imputable to the plaintiff in the process, or to the officer in making the levy from which the plaintiff claims benefit, or in which he participates. There must be knowledge that the property is not the property of the defendant, and with that knowledge the levy must be made with the intent to confer jurisdiction on the court. *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 So. 814.

And where substituted service is had upon a nonresident, and land attached as his is levied on, he cannot, under special appearance, by a motion to discharge the attachment upon the ground of his nonownership of the property attached, invoke the power of the court to try such fact of ownership, and to annul the proceedings *in rem* against the property. *THORNLEY v. LAWBAUGH*.

And on the trial for the discharge of an attachment, the defendant is not entitled to have the issue submitted to the jury as to whether he was the owner of the attached property; that is a question which could be raised only by an intervener who might claim the property as his own, and have it tried in an issue collateral to the main action. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770.

It is not for the defendant in such a case to attempt so to protect the property of others not being proceeded against, and who will not be bound by the judgment *in rem*, entered upon the basis of his ownership. *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 So. 814; *THORNLEY v. LAWBAUGH*; *Cartmell v. Rudolph Wurlitzer Co.* 5 Ohio N. P. N. S. 604, 18 Ohio S. & C. P. Dec. 380.

It is unsatisfactory and uncertain at best

order is asked.

Section 6850, Rev. Codes 1905, provides that, "from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." As the affidavit for and proceedings to obtain the attachment were regular, and on their face sufficient, and a compliance with law governing the issuance of the warrant of attachment, upon its issuance the court was clothed with jurisdiction under § 6850, Rev. Code 1905, over any property of the defendant subsequently attached, and was authorized by virtue of the attachment to proceed *in rem* against such property, and, as a step in such proceedings *in rem* substituted service, the equivalent of service by publication (Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341), was made by the personal service of the summons and complaint without the state after the filing of the affidavit for publication. After this was done the court had, as against the property attached, and so far as any rights of the defendant were concerned, the jurisdiction conferred by statute to proceed *in rem* against such property levied upon and held as the property of the defendant. With such power in the court, and at such stage of the proceedings, the defendant, under a special appearance, by a motion to discharge the attachment upon the ground of his nonownership of the property attached, invokes the power of the court to try such fact of ownership of the property attached, and to annul the proceedings *in rem* against the property. Whether this can be done is the question involved. We have nothing to do with the vacation of an attachment because of defects or falsity in the affidavit or proceeding upon which the attachment is based. Under § 6938, Rev. Codes, 1905, it is not required that the affidavit for attachment upon which the warrant issues shall contain as an essential any statement that the defendant has property, real or personal, within the state subject to levy. Defendant is seeking to litigate by his motion not one of the mat-

and which may be controverted under § 6962, Rev. Codes 1905, but is endeavoring to controvert an alleged fact brought into the case not by the issuance of the attachment alone, but by the levy. He is not, then, moving to discharge the attachment proper because of falsity or defect in the attachment proceedings prior to levy, but instead is litigating the legality of the levy. Jurisdiction depends upon a levy upon defendant's property, and in a sense the motion thus goes to jurisdiction of subject-matter.

Research discloses a division of the authorities upon this particular question. The general rule is thus stated in 4 Cyc. 775: "As seizure of property which he does not own can do an attachment defendant no possible injury, it naturally follows that courts have refused to allow defendant to move to quash on the ground that he has no interest in the attached property; but, although the reason applies with equal force to foreign attachments, a nonresident defendant has been allowed to show lack of interest in the attached property to oust the court of jurisdiction,"—citing Schlatter v. Broadbuss, 3 Mart. N. S. 321; Harris v. Taylor, 3 Sneed, 536, 67 Am. Dec. 576. And this statement in the text has been taken as the author's opinion in the more recent case of Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261, vacating an attachment on the ground here urged. We do not, however, understand the author as announcing such a rule. One of the best considered cases on the subject is that of Exchange Nat. Bank v. Clement, 109 Ala. 270, 19 So. 814, on all fours in facts and procedure with ours, denying a defendant such relief. See, also, the recent case of Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574, following the earlier case of Darnell v. Mack, 46 Neb. 740, 65 N. W. 805, and modifying Welch v. Ayres, 43 Neb. 326, 61 N. W. 635, also citing McCord v. Bowen, 51 Neb. 247, 70 N. W. 950; Cooper v. Reynolds, 10 Wall. 303, 19 L. ed. 931; and Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. See

thus to attempt to try title to real property upon *ex parte* affidavits. THORNLEY v. LAWBAUGH.

However, it was held in one recent case that nonownership of the property is a good ground for dissolution of an attachment relied on as a basis of jurisdiction in a suit against a nonresident. Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261. It was there said that the reason for the general rule does not apply

where the court obtains jurisdiction of a nonresident only by virtue of the attachment of his property in the state of the trial. In such case the jurisdiction and the validity of the attachment depend upon the defendant having property in the state; and if this fact does not appear, it is fatal.

A similar opinion was expressed in Welch v. Ayres, 43 Neb. 326, 61 N. W. 635, which was, however, characterized as *obiter* and overruled in Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574. H. C. Sh.

Kelly v. Baker, 26 App. Div. 217, 49 N. Y. Supp. 973; Vogelmann v. Lewit, 48 Misc. 625, 96 N. Y. Supp. 207; Mitchell v. Skinner, 17 Kan. 563; Langdon v. Conklin, 10 Ohio St. 439; Drake, Attachm. § 418; Century Dig. title "Attachment," § 800; and Decen. Dig. under "Attachment," § 235. As is said in Wise v. Ferguson, — Tex. Civ. App. —, 138 S. W. 816-819: "It will be time enough to determine their (third parties) rights, if any, when the court's power to do so is properly invoked." In short, if defendant is not the owner, and has no interest in this property attached, the jurisdiction of the court being limited to declaring a lien thereon and the disposal of such property thereunder, it being without power to render a personal judgment against a nonresident not personally served, and not voluntarily appearing, he can remain without the jurisdiction of the court uninjured in property, as no property of his is taken, and as no valid personal judgment can be rendered against him. It is not for him to attempt to so protect the property of others not being proceeded against, and who will not be bound by the judgment *in rem* entered upon the basis of defendant's ownership thereof. Besides, it is unsatisfactory and uncertain at best to attempt to try title to real property upon affidavits, and, were it permissible, sufficient doubt as to ownership exists on the record made to warrant that question being determined upon a fuller hearing than is possible upon a hearing upon *ex parte* affidavits. Western Grocer Co. v. Alleman, 81 Kan. 543, 27 L.R.A. (N.S.) 620, 135 Am. St. Rep. 398, 106 Pac. 460. And such is held in a similar case in Rhine v. Logwood, 10 La. Ann. 585, a jurisdiction where want of ownership is ground for vacation of the attachment and dismissal of suit where jurisdiction depends thereon.

The motion should have been denied. It is therefore ordered that the District Court of McLean County vacate its order dismissing the attachment and the action, and that plaintiff recover judgment against defendant for the costs and disbursements on this appeal.

Case remanded for further proceedings.

Bruce, J., specially concurring:

I concur in the result of the above opinion, but do not wish to express an opinion on all of the questions involved and discussed. I have no doubt that as a general proposition "a defendant in an attachment case cannot set up title in a stranger to defeat the attachment levy as on his property." I am in doubt, however, whether such a rule applies where the defendant holds such property, or claims to hold such

property, as a trustee for another. The reason I concur in the opinion is that the question of the ownership is one of the main issues presented by the complaint, and I do not believe that such issue should be allowed to be tried on affidavits and on a motion to quash the attachment.

OKLAHOMA SUPREME COURT.

LUTHER JAMISON, Plff. in Err.,

v.

A. W. GILBERT et al.

(— Okla. —, 135 Pac. 342.)

Appeal — matters reviewable — custody of infant.

1. This court has jurisdiction on appeal to review an order of the district court awarding the custody of a minor child to one of the parties in a habeas corpus proceeding brought for the purpose of determining who has the right to the custody and control of such minor.

Infants — right to custody of — unfitness of parent.

2. The unfitness which will deprive a parent of the right to the custody of his minor child must be positive, and not comparative; and the mere fact that his minor child might be better cared for by a third person is not sufficient to deprive the parent of his right to its custody.

Same.

3. It is not sufficient, to establish the unfitness of a parent for the custody and control of his minor child, to show that he has some faults of character or bad habits; it must be shown that his condition in life or his character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at the parent's hands.

(September 9, 1913.)

ERROR to the District Court for Atoka County to review an order denying a writ of habeas corpus to plaintiff and awarding the custody and care of his minor child to defendants. Reversed.

Statement by Hayes, Ch. J.:

This action is for writ of habeas corpus, brought in the court below by Willie Green

Headnotes by HAYES, Ch. J.

Note. — For denial of custody of child to parent for its well-being, see note to Re Pryce, 41 L.R.A. (N.S.) 564. And see later case Re Lee, 45 L.R.A. (N.S.) 91.

As to validity of contract for transfer of parental responsibility or authority, see note to Wilkinson v. Lee, 42 L.R.A. (N.S.) 1013.

his father, against defendants in error, who are the maternal grandparents of said infant, to determine the right to the custody and control of said child. There were two hearings upon the petition in the court below. At the conclusion of the first hearing the court refused to grant the writ, and awarded the custody of the child to defendants in error, who had theretofore been in possession of him, but granted leave to the plaintiff in error to reopen the case at a later time, which was done. At the second hearing the trial court found that when the said Willie Green Jamison was a very small child, he was given by his father, plaintiff in error, to the child's grandparents on his mother's side, defendants in error, and that since said time said child has been in the custody and control of defendants in error; that they have properly clothed and fed him, and given him good training; that after plaintiff in error placed the child in possession of his grandparents he married a second time, and is now the head of a family, and has living with him a son, the brother of the child in controversy, and two children the fruits of his second marriage; that during the time the child was in the possession of his grandparents, plaintiff in error contributed practically nothing toward its support; and he further found that defendants in error have in all things looked after the the best interests of the child, and that they are in a better position to look after his welfare than is plaintiff in error, his father. Upon these findings of fact, the court made an order denying the writ and awarding the custody and care of the child to defendants in error. To reverse this order, this proceeding in error is prosecuted.

Messrs. Charles E. McPherrren, Charles B. Cochran, and Charles P. Abbott, for plaintiff in error:

The finding that the defendants "have been and are in a better position to look after the welfare" of the son than is the father, if supported by testimony, is not sufficient to warrant a judgment denying a father the custody of his son.

Barnes v. Long, 54 Or. 548, 25 L.R.A. (N.S.) 172, 104 Pac. 296, 21 Ann. Cas. 465; Swarens v. Swarens, 78 Kan. 682, 97 Pac. 968; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; Wilson v. Mitchell, 48 Colo. 454, 30 L.R.A. (N.S.) 507, 111 Pac. 21; Lovell v. House of the Good Shepherd, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 661; State ex rel. Mayne v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 399; Carey v. Hertel, 37 Wash. 27, 79 Pac. 482; Weir v. Marley, 99 Mo. 494 6 L.R.A. 672, 12 S. W. 798; Clarke v. Lyon, 82 Neb. 47 L.R.A. (N.S.)

State ex rel. Lehman v. Martin, 95 Minn. 121, 103 N. W. 888; Van Auker v. Wieman, 128 Iowa, 476, 104 N. W. 464; Parker v. Wiggins, — Tex. Civ. App. —, 86 S. W. 788; Re Galleher, 2 Cal. App. 364, 84 Pac. 352; Wohlford v. Burckhardt, 141 Ill. App. 321.

Messrs. J. W. Clark and Gray & McVay, for defendants in error:

The trial court had a wide discretion in awarding the custody of the child; and the decision will not be reversed in the absence of evidence of an abuse thereof.

Bonnett ex rel. Newmeyer v. Bonnett, 6 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91. McDonald v. Stitt, 118 Iowa, 199, 91 N. W. 1032; Lindsey v. Lindsey, 14 Ga. 657; Ex parte Reed, 19 S. C. 604.

Appellate courts will not consider the weight of the evidence in habeas corpus. This is the general rule on appeal.

Ex parte King, 56 Tex. Crim. Rep. 63. 118 S. W. 1032; Lundstrum v. State, 141 Wis. 141, 121 N. W. 883; People ex rel. Dickinson v. Van DeCarr, 87 App. Div. 336. 84 N. Y. Supp. 461; Starr v. Barton, 34 Ga. 99; Ex parte Newsom, — Miss. —, 58 So. 539.

The rights of parents must yield in all cases to the welfare of the child, which is the chief point of inquiry wherever the right to custody is involved. The moral and educational welfare of the child is considered, as well as his material advantages.

Battershall, Dom. Rel. pp. 375, 378; Schouler, Dom. Rel. 5th ed. § 248; Spencer, Dom. Rel. §§ 480, 481; Rodgers, Dom. Rel. §§ 562, 573; Coulter v. Sybert, 78 Ark. 193. 95 S. W. 457; Re Brown, 117 Ill. App. 332; Burke v. Crutcher, 4 Ky. L. Rep. 251; Proctor v. Rhoads, 4 Ky. L. Rep. 453; Home of the Friendless v. Berry, 79 Mo. App. 566; Re Gates, 95 Cal. 461, 30 Pac. 596; People ex rel. Curley v. Porter, 23 Ill. App. 196. Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321; Re Reynolds, 28 N. Y. S. R. 538. 8 N. Y. Supp. 172; Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Jones v. Darnall, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229; Sturtevant v. State, 15 Neb. 459. 48 Am. Rep. 349, 19 N. W. 617; Re Paddock. 57 Hun, 591, 32 N. Y. S. R. 925, 10 N. Y. Supp. 710.

Hayes, Ch. J., delivered the opinion of the court:

The first question presented by this proceeding is whether the order sought to be reversed is an appealable order. It has been decided several times in this jurisdiction that from an order in an habeas corpus proceeding brought by a party imprisoned or restrained of his liberty, no appeal lies

to this court. *Wisener v. Burrell*, 28 Okla. 546, 34 L.R.A. (N.S.) 755, 118 Pac. 999, Ann. Cas. 1912 D, 356; *Williams v. Sale*, 33 Okla. 659, 126 Pac. 800; *Ex parte Johnson*, 1 Okla. Crim. Rep. 414, 98 Pac. 461. In adopting the rule announced in the foregoing cases, the court recognized the sharp conflict among the authorities upon the question, but adopted the rule that in a proceeding for habeas corpus brought by a person to release him from restraint, where he is held under some purported criminal charge, the order of the court releasing or remanding the prisoner is not such an order as to constitute a final order from which an appeal may be taken under statutes similar to the one in this jurisdiction, granting appeals from the final order or judgment in a cause. The rule adopted by this court in those cases is based upon the reason that in such proceedings for habeas corpus a decision therein is not *res judicata*; but an examination of the authorities convinces us that the weight of authority holds that there is a distinction between a habeas corpus proceeding brought to secure the release of a person from restraint, and from a similar proceeding instituted to determine the right to the custody of children. In the former class of cases a decision on one writ is not a bar to the issuance of and proceedings upon a second writ; but an order in a proceeding to determine the right to the custody of a child, where the facts in the proceedings are the same as the first, is *res judicata*. The rule has been stated by one court as follows: "In a proceeding in habeas corpus, where a controversy arises over the custody of a child, the real issue is one between private parties contesting a question of private right in which there arises no question of personal liberty, and, in consequence, all matters in issue arising upon the same state of facts determined in a prior proceeding should be regarded as settled and concluded. However, where many facts appear to be presented by the record which may not have been presented to the judge at the former hearing, and where possibly other facts have occurred since the former hearing, this court will examine the entire matter." *Re Hamilton*, 66 Kan. 754, 71 Pac. 817; *Bleakley v. Barclay*, 75 Kan. 402, 10 L.R.A. (N.S.) 230, 89 Pac. 906. It follows as a result of such a rule that since the judgment rendered upon the facts existing at the time of the trial is binding and conclusive, and bars a subsequent proceeding by the parties thereto upon the same facts, the order made thereon is a final order, so far as the facts existing at the time of the institution of the case and trial are involved; and such an order is final within the meaning of the statutes 47 L.R.A. (N.S.)

for the purpose of review. *Bleakley v. Smart*, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125; *Cormack v. Marshall*, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; *Hall v. Whipple*, — Tex. Civ. App. —, 145 S. W. 308.

The grounds upon which a reversal of the judgment of the trial court urged are that the judgment is not supported by the evidence and is contrary to the law. If the trial court meant, by finding that plaintiff in error had given his child to the defendants in error, to find thereby that he contracted with them to surrender or transfer the custody or control of his child to them permanently, we think there is merit in the contention that the finding of the trial court is not supported by the evidence. There is by no means harmony among authorities as to whether such a contract is valid. Many of the courts declare such contract void as being against public policy. That question is not presented here. In those jurisdictions where such contracts are sustained, the rule is that a parent will not be held to have surrendered the custody and control of his child permanently to a stranger, unless it clearly appears that such was his intention; and it will be presumed that the surrender of the custody of the child by his parent is intended to be temporary, unless the contrary clearly appears. 29 Cyc. 1593. It is not sufficient that the person having temporary custody of the child understood that the parent had granted to him permanent custody; but it must be clear that there was a corresponding understanding on the part of the parent. *Miller v. Miller*, 123 Iowa, 165, 98 N. W. 631.

The evidence in this case establishes that plaintiff in error's first wife died when the child in controversy was about eight months old; that he also had another child by his deceased wife, about three years older. After the death of the mother of said children, they were kept by the mother of plaintiff in error in Texas, and cared for a period of about one year, after which time the plaintiff in error's mother became so weak that she was unable to care for the children, and they were returned to plaintiff in error. Upon the advice of plaintiff in error's mother, and with the consent of defendants in error, the younger child was left with defendants in error to care for. At the time he was turned over to them by plaintiff in error he stated that he could not care for it, and asked them to raise the child. Plaintiff in error lived 30 or 40 miles from the residence of defendants in error. He visited the child while it was with its grandparents once or twice a year, and during the time it was with them con-

credited about \$12 toward its support. The remainder of the expenses of its support was paid by the grandparents. Some few months after the second marriage of plaintiff in error, he went after the child and took it to his home, where it was kept for a time, and thereupon was permitted to visit its grandparents, the defendants in error. When plaintiff in error went to get the child at the end of this visit, the grandparents refused to permit him to take it and ordered him out of the house. He thereafter secretly obtained possession of the child and carried it to his home, where it remained for some time. He again consented to its visiting its grandparents, upon the assurance that the child would be permitted to return to his home, and the child was so permitted to return, where, after a time, it was again permitted to visit the grandparents, who have since said time refused to surrender it to plaintiff in error.

The foregoing constitutes, in substance, all the evidence relative to any contract on the part of the father surrendering the permanent custody and control of the child; and, in our opinion, it falls short of establishing clearly any agreement on his part that the grandparents should have the permanent custody of it. The trial court seems to have been controlled in his judgment principally by the impression that the child should be awarded to the party who was most able to provide for and care for it. A general rule of law, often stated in the cases, is that the welfare of the child is the paramount consideration in determining who shall have its possession; but this broad statement usually occurs in cases where the controversy is between the mother and the father, and frequently in cases where the right of the parents against each other have been by statute made equal, and the custody of the children is to be determined according to the exigencies of the particular case, without regard to the superior right of either parent. The rule of law, we think, applicable to this case is stated in 29 Cyc. 1590, in the following language: "A parent who is of good character and a proper person to have the custody of the child, and reasonably able to provide for it, is entitled to the custody as against other persons, although such others are much attached to the child, and the child is attached to them, and they are in all respects suitable to have the custody of the child and able to support and care for it, and even though they are of larger fortune or able to provide for the child more comfortably than the parent, or to care for it better, or to 47 L.R.A.(N.S.)

can afford."

In the case of *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373, it was said: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary."

In another case from the same court it was held that the unfitness which deprived a parent of the right to the custody of the children must be positive, and not comparative; and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody. *Clarke v. Lyon*, 82 Neb. 625, 20 L.R.A.(N.S.) 171, 118 N. W. 472.

However poor and unable a father may be, if of good moral character and able to support the child in his own style of life, he cannot be deprived of that privilege by any stranger, however brilliant the advantage he may offer. *Verser v. Ford*, 37 Ark. 27; *Hernandez v. Thomas*, 50 Fla. 522, 2 L.R.A.(N.S.) 203, 111 Am. St. Rep. 137, 39 So. 641, 7 Ann. Cas. 446; *State ex rel. Kearney v. Steel*, 121 La. 215, 16 L.R.A.(N.S.) 1004, 46 So. 215.

A great number of witnesses, including plaintiff in error's near neighbors, ministers, and bankers, testified, on behalf of the father in this case, that he was a man of good, moral character, a law-abiding citizen, and highly respected by his neighbors. He is a farmer, and owns a farm of 80 acres, with a substantial residence thereon. He owns several teams of work horses, a few head of cattle, and hogs, has a small sum of money, and owes no debts. He has always taken care of his obligations promptly, and has always provided as well for his family as men of his circumstances are able to do. The evidence establishes that the other child of the first wife, who now lives with the father, is sent to school, and also

to Sunday school, as much as it is convenient for him to go, living as he does some distance from the schoolhouse. Relative to the stepmother, the evidences establishes that she is an intelligent woman, of good character, respected by all her neighbors; that she is kind and considerate of her own children and of the children of plaintiff in error by his first wife; that she is impartial in her treatment of them; that she is willing to assist her husband in caring for and rearing said children. While there is no evidence reflecting upon the good character of defendants in error, all the evidence establishes that they have less financial means than plaintiff in error. They own no home and are tenants. They own but little personal property, consisting possibly of a team. The evidence also establishes that the grandfather has in the past had difficulty in meeting the obligations of his own family; that during the recent years he has been sick a great part of the time, and is unable to labor, and is dependent to a certain extent upon a grown son and another son almost grown for assistance to support his family.

An effort was made by defendants in error to establish that plaintiff in error is a dissipated man and possesses other immoral habits; but all the evidence in this respect is that sometimes plaintiff in error takes a drink of intoxicating liquors, which, according to his own testimony, occurs about Christmas time. All the testimony is to the effect that he never drinks to excess, and all his neighbors testified that he is an industrious man and good to his family. The evidence also establishes that he sometimes swears, and that he has in a few instances sworn in the presence of his family, and that he has played cards at his own home, but that he never gambles. The trial court does not find that the father is unfit to have the custody and care of his child, and upon the evidence before us such a finding could not be sustained. The presumption is that the father is a suitable person to have the custody, care, and rearing of his child. Courts are reluctant to decree the separation of parent and child, and will do so only when the proof of a parent's unfitness is clear and convincing.

In *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269, it was said: "To separate a child from its parent is therefore a very strong measure, justified only by convincing proof of the parent's unfitness. No inflexible rule can be laid down by which unfitness may be determined. Each case must be decided on its own peculiar facts; but manifestly it is not sufficient to prove the poverty of the parent, and that financial benefit will come to the child from separation, or that the

parent has faults of disposition and behavior somewhat unusual and trying. The condition in life, or the character and habits of the parent, must be shown to be such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at his hands."

The few alleged faults of plaintiff in error stated above, and relied upon by defendants in error as establishing the unfitness of plaintiff in error, in our opinion, show no such deterioration of moral force and character as to render him an unsuitable person to have the custody of his child. Public opinion would be very largely divided upon whether taking a drink as seldom as the evidence establishes the father does in this case, or playing of cards for amusement only, constitutes any immorality whatever; and, while the swearing by a parent in the presence of his family, even in moments of excitement or of anger, is a fault that cannot be commended by anyone, that fault alone cannot be said, when accompanied by the many other virtues it is shown this father possesses, to so deprave his character as to render him an immoral man and an unsafe person to care for his child. The law does not require the parent to be perfect. Of the standard which the law fixes for the parent, it is said in *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660: "There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child."

In *Re Crocheron*, 16 Idaho, 441, 33 L.R.A. (N.S.) 868, 101 Pac. 741, it was held that the mere fact that a father sometimes drank and at times became a little hilarious was not sufficient to render him unsuitable to act as guardian for his two minor children. Nor is proof that a father for a considerable period owed meat and grocery bills and for medical attendance and burial expenses of his deceased wife sufficient to deprive him of the right conferred by statute to be appointed guardian of his children. *Re Gal-leher*, 2 Cal. App. 364, 84 Pac. 352.

If the right of the father in this case to the custody of his child was made to turn solely upon in whose hands the child will

receive the best care and treatment, and upon where its welfare will be best promoted, the correctness of the decision of the learned trial court is very questionable. Both the child in controversy, who at the time was about six years of age, and his brother, who at the time was about nine years of age, and who lives with his father, testified at the trial. The child in controversy testified that he preferred to live with his grandparents; that he did not want to live with his father; that he was a mean man; and that he did not love him. His brother testified that he was living with his father, his stepmother, and his little sister; that he preferred to live with his father; that his father was good to him, although he punished him when he did not obey. When asked relative to his grandparents, he said that he liked to visit his grandparents, and he loved them, but he preferred to live with his father.

Courts sometimes heed the expressed wish of an infant as to its custody; but the worthlessness of such an expression by a child of six years of age is clearly shown by this case. His aversion to his father is clearly the outgrowth of this contest between his father and his grandparents; and the enmity now in his heart against his natural parent has been instilled there for the purpose of affecting this case, rather than due to any judgment of the child as to the virtues of his father. No other explanation can be made of his feelings and statement, in view of the great number of neighbors of the father who testified as to his good character and of his kind treatment of his family. The grandparents are past middle life, and in the course of nature in all probability will die before this child is old enough to sustain himself; and in all probability, if left with his grandparents, in early youth he would find himself robbed of their care and attention by death; and at a time when the good counsel and restraint of parents are most essential in his life, he would be without the love of a mother and without the counsel and restraint of a considerate father. There would be nothing, then, between him and complete orphanage, except a father from whom by that time he would be irrevocably estranged, and against whom his heart would be deeply embittered. Under such circumstances, it is of great importance to protect, as far as possible, the welfare and happiness of this child of tender years from the effect of loss of respect and affection for his father.

We can sympathize with the grandparents in their distress at the prospects of being separated from a child to whom they have become deeply attached because of natural ties and association, but sympathy cannot

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be permitted to enter in the determination of the rights of this father, whom the voice of nature makes the natural guardian of his child, or into the consideration of the permanent welfare of this child, who for many years yet must have a protector and a provider. These families, so far as this record appears, until this controversy arose lived in peaceful relation to each other, and each entertained the highest respect and regard for the other. It is only since this contest that things derogatory to the good character of each have been sought and have been expressed. The aid defendants in error have rendered the father in caring for this child at a time when his circumstances were such that he was unable to give it personal attention is highly commendable, and may seem to them to merit their further custody and control of the child; but in calmer moments, when they have fully considered the matter and remember the love and affection for their own children and the pleasure and pride they took in rearing them, and realizing what a loss it would have been to them to have surrendered their own children to others permanently, we think they will then conclude that they should do as they would be done by, and be willing that this father should have given to him that which is his own.

The judgment of the trial court is reversed, and the cause remanded, with direction to grant the writ and award the custody of the child to plaintiff in error.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

RICHARD F. PARKER, Appt.,
v.
CITY OF FAIRMONT.

(— W. Va. —, 79 S. E. 660.)

Nuisance — abatement by municipality.

1. Under the provision of the charter of the city of Fairmont, same as Code 1906, chap. 47, § 28, that "the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance," the council may abate only that as a nuisance.

Headnotes by ROBINSON, J.

Note. — For municipal control over smoke as a public nuisance, see notes to *St. Louis v. Edward Heitzberg Packing & Provision Co.* 39 L.R.A. 551; *Atlantic City v. France*, 18 L.R.A.(N.S.) 156; and *Rochester v. Macauley-Fien Mill Co.* 32 L.R.A.(N.S.) 554.

sance which is recognized as such *per se*, or branded as such by lawful statute or ordinance.

Same — smoke.

2. The production and emission of smoke from the plant of a lawful business cannot be abated by the city of Fairmont under its mere charter powers to abate nuisances and to prevent injury and annoyance, in the absence of a reasonable ordinance applicable alike to all of a class, making such production and emission unlawful.

Injunction — illegal municipal action.

3. Equity will restrain a municipal corporation from proceeding under illegal and invalid order or resolution to remove an alleged nuisance, where private rights are unlawfully encroached upon and irreparable injury will ensue.

(September 23, 1913.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County dismissing his bill filed to enjoin defendant from interfering with his business. Reversed.

The facts are stated in the opinion.

Messrs. French McCray and Charles E. Hogg, for appellant:

Defendant should have declared the emission of smoke a nuisance by general ordinance.

Lake v. Aberdeen, 57 Miss. 260; Denver v. Rogers, 46 Colo. 470, 25 L.R.A.(N.S.) 247, 104 Pac. 1042; Elkhart v. Murray, 165 Ind. 304, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A.(N.S.) 494, 130 N. W. 545, Ann. Cas. 1012B, 1030; People v. Lewis, 86 Mich. 273, 49 N. W. 140.

The authorities of a municipal corporation must not, by ordinance or otherwise, discriminate against any part of the citizens thereof in the use of their property, or place themselves in a situation to do so.

Little Chute v. Van Camp, 136 Wis. 526, 128 Am. St. Rep. 1100, 117 N. W. 1012; Hagerstown v. Baltimore & O. R. Co. 107 Md. 178, 126 Am. St. Rep. 382, 68 Atl. 490; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; Montgomery v. West, 149 Ala. 311, 9 L.R.A.(N.S.) 659, 123 Am. St. Rep. 33, 42 So. 1000, 13 Ann. Cas. 651; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Fulton v. Norteman, 60 W. Va. 562, 9 L.R.A.(N.S.) 1196, 55 S. E. 658.

A mere declaration that a thing is a nuisance does not make it one, and does not preclude the courts from reviewing the action of the authorities of a city or town making such declaration.

2 Smith, Modern Law of Mun. Corp. § 1110; Tissot v. Great Southern Teleg. & 47 L.R.A.(N.S.)

Teleph. Co. 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261; Des Plaines v. Poyer, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677; Ex parte O'Leary, 65 Miss. 80, 7 Am. St. Rep. 640, 3 So. 144; Harmison v. Lewistown, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; Grossman v. Oakland, 30 Or. 478, 36 L.R.A. 593, 60 Am. St. Rep. 832, 41 Pac. 5; St. Louis v. Schnuckelberg, 7 Mo. App. 536; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Atlantic City v. France, 75 N. J. L. 910, 18 L.R.A.(N.S.) 156, 70 Atl. 103; Re Junqua, 10 Cal. App. 602, 103 Pac. 159; Gulf, C. & S. F. R. Co. v. Belton, 57 Tex. Civ. App. 460, 122 S. W. 413; Denver v. Rogers, 46 Colo. 470, 25 L.R.A.(N.S.) 247, 104 Pac. 1042; Chicago v. Weber, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; Miller v. Syracuse, 168 Ind. 230, 8 L.R.A.(N.S.) 471, 120 Am. St. Rep. 366, 80 N. E. 411; Smith v. New Albany, 175 Ind. 279, 93 N. E. 73; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984.

An injunction will lie to restrain the appellee, city of Fairmont, from interfering with the use of appellant's property, which has not been lawfully ascertained and declared to be a nuisance.

Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; Pieri v. Shieldsboro, 42 Miss. 493; Everett v. Council Bluffs, 40 Iowa, 66; Quintini v. Bay St. Louis, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; Manchester Cotton Mills v. Manchester, 25 Gratt. 825; New Orleans Baseball & Amusement Co. v. New Orleans, 118 La. 228, 7 L.R.A.(N.S.) 1014, 118 Am. St. Rep. 366, 42 So. 784, 10 Ann. Cas. 757; Gould & Co. v. Atlanta, 55 Ga. 678; Schoen Bros. v. Atlanta, 97 Ga. 697, 33 L.R.A. 804, 25 S. E. 380; Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718; Rushville v. Rushville Natural Gas Co. 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Harper's Appeal, 109 Pa. 9, 1 Atl. 791; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; Montgomery v. Louisville & N. R. Co. 84 Ala. 127, 4 So. 626; Stevens v. St. Mary's Training School, 144 Ill. 336, 18 L.R.A. 832, 36 Am. St. Rep. 443, 32 N. E. 962; Barthet v. New Orleans, 24 Fed. 563; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 4 L.R.A.(N.S.) 321, 52 S. E. 499; Teass v. St. Albans, 38 W. Va. 1, 19

L.R.A. 802, 1 S. E. 400; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

Mr. Harry Shaw also for appellant.

Messrs. Walter R. Haggerty and Tusca Morris, for appellee:

Plaintiff's dye and cleaning establishment is a nuisance.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329, 27 L. ed. 739, 743, 2 Sup. Ct. Rep. 719; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669, 24 L. ed. 1036, 1039; 29 Cyc. 1156, 1172; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

Certiorari is the proper remedy to review the action of a city council.

County Ct. v. Boreman, 34 W. Va. 366, 12 S. E. 490; Davis v. Filler, 47 W. Va. 413, 35 S. E. 6; Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; 6 Cyc. 751; Merrick v. Arbela Twp. 41 Mich. 630, 2 N. W. 923; Re Lauterjung, 16 Jones & S. 308; Robinson v. Sacramento, 16 Cal. 208; Shields v. Paterson, 55 N. J. L. 495, 27 Atl. 803; Macon v. Shaw, 16 Ga. 172; Re Fay, 15 Pick. 243; Christie v. Bayonne, 64 N. J. L. 191, 44 Atl. 887; 6 Cyc. 753, note; People ex rel. Huntting v. Highway Comrs. 30 N. Y. 72; Gilbert v. Police & Fire Comrs. 11 Utah, 378, 40 Pac. 264.

Robinson, J., delivered the opinion of the court:

Parker was summoned before the municipal council of the city of Fairmont to show cause why his dye works, located in a residence section of that city, should not be declared a nuisance by reason of the coal smoke and soot produced and emitted therefrom. Upon a hearing of the matter, the dye works was declared to be such a nuisance, and the mayor was ordered to proceed to abate the same. Thereupon Parker by this suit sought to enjoin the city authorities from proceeding further toward interfering with his business, on the ground that the proposed interference was without warrant of law and would irreparably damage him. He obtained a preliminary injunction, but upon a hearing the same was dissolved and his bill dismissed. From the decree in the premises he has appealed.

The city authorities claim power to make the order which they did under provisions of the city charter and an ordinance of the city, which are as follows: "The council shall have power within the said city . . . to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome; . . . to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance." Acts 1899, chap. 11. "Whenever any out-

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house, privy, hogpen, stable, or other building within said city shall be, by a majority of the whole council, declared a nuisance or injurious to the health or comfort of any person or persons, the owner, agent, or lessee of the property shall be notified by the mayor to abate the nuisance by removal or keeping in proper order such building; and in case of refusal or neglect to comply with such notice, the mayor shall direct the proper officer of the city to have the same put in order or removed, and report his proceeding and costs incurred by him to the mayor," etc. Municipal Code of the City of Fairmont, chap. 27, § 36.

Plaintiff's business—his use of the premises—is not *per se* a nuisance. It is a lawful one. The provisions which we have quoted do not brand it as unlawful. Those provisions do not forbid smoke and soot from being produced and emitted. It would seem that, under the charter power "to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome," the city authorities could make a just and reasonable regulation as to the production and emission of smoke and soot, applicable to all alike of the same class, and not merely directed toward the property and business of one person. But we find no power in the city to strike directly at plaintiff alone. Plainly the ordinance quoted as relied upon does not apply to the production and emission of smoke and soot. It is an ordinance most apparently directed wholly against buildings of a very distinct class. Nor can the granted power "to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance," be properly viewed as authorizing the council to single out and condemn as to any sole individual that which is ordinarily lawful. That provision cannot rightly be construed to mean that the council may determine that to be a nuisance which is not such by the common law, by statute, or by ordinance. It gives power to abate nuisances, not to determine what shall be considered nuisances. It plainly relates to nuisances *per se*, those primarily branded as such by the law. Dillon Mun. Corp. 5th ed. §§ 690, 694; St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49. The charter provision grants a police power of abatement; not an arbitrary power of determining that something is a nuisance which by no law is known to be such. It is not reasonable to presume that the legislature meant to grant such arbitrary power to the municipal authorities. True, the opinion of the majority of the whole council is called for by the provision. But that opinion is to be applied in discerning that the thing complained of

comes within the category of nuisances pronounced to be such by law. Clearly the power granted is to abate what the law holds to be a nuisance, not to enact that any particular thing is a nuisance. In this view we are confirmed by the forceful writing of Judge Dent in *Davis v. Davis*, 40 W. Va. 474, 21 S. E. 906.

Such a power as is claimed by the city herein cannot be upheld. The municipal authorities of Fairmont may, by the power in the city charter, abate *per se* nuisances; or under other powers granted by the charter, it may pass reasonable ordinances preventing injury or annoyance to the citizens. All that is quite different from arbitrarily singling out a lawful business of one individual and making a law applicable to him alone, which is the substance of the city's action as to the plaintiff herein. The council must proceed under established law, not under arbitrary rule. It must ordain and publish law which relates to all alike that are similarly situated, and then enforce the same. It cannot make the law and enforce it at the same time in individual cases. Such a power, it is said generally, cannot be tolerated. *Lake v. Aberdeen*, 57 Miss. 260. It may be that the smoke and soot from plaintiff's dye works should be abated; but the city of Fairmont has not power to proceed simply against that smoke and soot. It must proceed uniformly as to that and all other similarly produced and emitted smoke and soot. Recognition and adherence to this rule is worth more indeed than any good that might come to the citizens complaining of plaintiff's dye works in this particular case. Only the even administration of the law produces ultimate public good. It is dangerous ever to ignore the principle, or to open the door for its disregard. Mr. Justice Miller, in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." It seems unnecessary to cite authorities for this principle. Reason impresses it. The books abound in its justification.

We are firmly of the opinion that, though the city of Fairmont had the power to enact laws regulating the production and emission of smoke and soot, at the time of the procedure against plaintiff's business neither the

city charter nor any ordinance passed in pursuance thereof warranted the order to abate that business as a nuisance.

What was plaintiff's remedy to prevent the city's unwarranted interference with his lawful business, or use of the premises? Clearly, that which he chose, injunction. That the threatened invasion of plaintiff's private rights under the illegal and invalid resolution of the council, if allowed to be carried out, would affect the very substance of plaintiff's estate and produce irreparable damage, is boldly apparent from the nature and circumstances of the case. That plaintiff has no adequate remedy at law is equally clear. The case comes plainly within the rule allowing equity cognizance. "Injunction will lie to restrain proceedings of a municipal corporation to remove an alleged nuisance, where private rights are encroached upon and irreparable injury will ensue." *Smith, Mun. Corp.* § 1629; *High on Injunctions*, § 1243; 118 Am. St. Rep. 376, note; *Bristol Door & Lumber Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783, 33 S. E. 588.

As to the public represented by the municipal authorities, plaintiff's use of his premises is not shown to be a nuisance. We repeat that use is ordinarily lawful, and in behalf of the public it has not been branded as unlawful by an enactment within the power of the city. This being true, the city, by its answer in the cause, cannot justify its act against plaintiff. It cannot say merely by its answer that the use is in fact a nuisance. It must first say that by general and uniform ordinance. Of course, plaintiff's use may be a private nuisance of which some individual may complain in equity regardless of city ordinance. But we have only the question of the right of the city to complain.

The decree is erroneous. It will be reversed. The court should not have dissolved the injunction, but perpetuated it. That which the Circuit Court should have done will now be done here.

KANSAS SUPREME COURT.

LINDSAY L. HILL, Appt.,

v.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY.

(81 Kan. 379, 105 Pac. 447.)

Master — liability — injuries to servant — defective but not dangerous appliance.

1. In the absence of wanton or inten-

Headnotes by BENSON, J.

tional wrongdoing, an employer who furnishes defective instrumentalities is liable to an employee only when danger would reasonably be apprehended from their use. Same — danger not anticipated — effect on liability.

2. If persons of ordinary caution and prudence would not, in the light of the attendant circumstances, anticipate danger in using a defective appliance, and danger was not a natural and probable consequence of such use, liability to an employee for negligence in furnishing it does not arise against the employer.

(Benson, J., dissents.)

(December 11, 1909.)

A PPEAL by plaintiff from a judgment of the District Court for Sumner County

Note. — Liability of master for injuries caused by defective conditions or appliances which are not dangerous.

In the foregoing case the court enunciates a principle which is beyond question, namely, that a master cannot be held liable where the danger is one which cannot reasonably be anticipated, although possibly there may be some defects in the instrumentalities furnished by the master. There may, of course, be conflict in the application of this principle to any particular state of facts, but the principle itself has been approved in a large body of decisions.

It would be impracticable, if not impossible, to gather all of the cases in which this principle has been applied or enunciated. It is the purpose of this note, rather, to call attention to some of the situations in which it has been applied.

One of these is where a servant is injured by reason of a defect in a simple tool, and liability is denied upon the ground that such an injury could not have been anticipated.

Thus, the master may assume that the employees using simple tools will discover defects therein. *O'Brien v. Missouri*, K. & T. R. Co. 36 Tex. Civ. App. 528, 82 S. W. 319.

And in *Garnett v. Phoenix Bridge Co.* 98 Fed. 192, the master was held not liable for injuries caused by the servant's using a defective wrench, since such injuries could not have been anticipated. See also *House v. Southern R. Co.* 152 N. C. 397, 67 S. E. 981.

Upon the general question of the liability of master for defects in simple tools, see notes to *Vanderpool v. Partridge*, 13 L.R.A. (N.S.) 668; *Sheridan v. Gorham Mfg. Co.* 13 L.R.A. (N.S.) 687; and *Parker v. William C. Wood Lumber Co.* 40 L.R.A. (N.S.) 832.

Another situation in which the general rule stated above is applicable is where the master has promised to repair some instrumentality which, although possibly defective, is not dangerous for the servant to use in that condition. As to the master's 47 L.R.A. (N.S.)

Statement by Benson, J.:

The plaintiff, a fireman, slipped from the steps of his engine as he was going down to turn a switch. His left leg was caught under the wheels of the engine and crushed, so as to require amputation. He alleged that the cause of his injury was a coating of ice upon the step, caused by a leak in the tank hose. On the evening of December 12th the plaintiff and the engineer of this locomotive had taken it to the roundhouse at La Junta. This hose was then leaking; the leak being caused by a hole worn through the hose by contact with a metal pipe. The

promise to repair not made with reference to the servant's safety, see note to *Dunphy v. Farr & B. Mfg. Co.* 45 L.R.A. (N.S.) 363. Upon the question of the master's promise to remedy conditions or to furnish other appliances where they were already reasonably safe, see note to *Coin v. John H. Talge Lounge Co.* 25 L.R.A. (N.S.) 1179.

In both of the situations suggested by the titles to the foregoing notes, the master is, as a general rule, held not liable for injuries following a breach of the promise. It is to be noted that in *Hill v. Atchison, T. & S. F. R. Co.* there was a promise to repair, and the court pointed out that the promise was not made with reference to the servant's safety; and furthermore it may be said that, as the court held that the situation was not dangerous, the promise could have no effect on the question of the master's liability, since, as was pointed out in the note in 25 L.R.A. (N.S.) 1179, the promise to repair has no effect unless the conditions with reference to which the promise was made were negligent.

Again, the master is generally held not to be liable for injuries where such injuries are caused by an accident of an exceptional character.

Thus, in *Labatt on Master & Servant*, 2d ed. vol. 3, § 1045, the author says: "A principle frequently applied is that in certain states of the evidence a court is entitled to declare as a matter of law that the catastrophe in question, though a natural and possible result of the conditions which existed, was so 'rare and peculiar' (*McNally v. Savannah, F. & W. R. Co.* 86 Ga. 262, 12 S. E. 351), or so far 'outside the range of ordinary experience' (*Allison Mfg. Co. v. McCormick*, 118 Pa. 519, 4 Am. St. Rep. 613, 12 Atl. 273, and *Cook v. United States Smelting Co.* 34 Utah, 190, 97 Pac. 28), or 'out of the common course' (*Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 53 Am. Rep. 881, 31 N. W. 321), or extraordinary (*Emrich Furniture Co. v. Byrnes*, 44 Ind. App. 341, 87 N. E. 1042 and *Foley v. McMahon*, 114 Mo. App. 442, 90 S. W. 113), or had never occurred before 'in years of

engineer reported this defect by an entry upon a book at the office kept for such reports. The next morning they found the hose still leaking. They called upon the roundhouse foreman for a new hose, and were given a requisition upon the storehouse for one, but there was none in stock, and the foreman wrapped the defective hose with rubber, thereby stopping the leak, and directed them to go out upon their trip with the engine, which they accordingly did. They returned with the engine to La Junta on December 17th, when they again called the foreman's attention to this defective hose, and were told that a new one would be supplied as soon as it could be obtained, but that there was none on hand yet. The engineer said there should be a new hose, as that one was liable to leak or break. The

engine was again taken out and worked by these two men, until December 22d, when they were ordered to run it without any cars attached backward from Garden City to Dodge City. This they did arriving at Dodge City about 10 P. M. Down to the time they left Garden City the hose had not leaked to their knowledge. The position of the hose was behind the steps, and about 10 inches from them, and, as the engine was moving east that night, it was north of the steps. The wind was blowing from the north, and the night was cold. When slowly approaching the switch leading to the roundhouse at Dodge City, the plaintiff, with his lantern swung upon his arm and his switch key in hand, stood with one foot upon the lower step, and the other upon the step above, holding to the rails of the cab

human experience' (*Stefanowski v. Chain Belt Co.* 129 Wis. 484, 7 L.R.A.(N.S.) 955, 109 N. W. 532), that the master could not reasonably be expected to conduct his business in such a manner as to eliminate the risk of its occurrence."

So, it is error to charge a jury that a master who might have known, by the use of ordinary care and diligence, that a tool furnished his servant for use was defective, is liable for the injury resulting from its use, "irrespective of any probability of harm or danger in using it." *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 602, 13 Am. Neg. Cas. 256.

Compare the statement that there may be defects, and these may have been known, and yet they may have been such as no amount of care and caution on the part of the employer would have disclosed to be dangerous, so that they should have been guarded against as dangerous. *Morris v. Gleason*, 1 Ill. App. 510.

The master cannot be held to the duty of anticipating that a worn place in a floor 8 or 10 inches long, 1 to 1½ inches wide, and ½ to ¾ inches deep, would to deflect a wheelbarrow as to cause injuries to his servants. *Landrigan v. Taylor-Goodwin Co.* 197 Mass. 582, 84 N. E. 314.

Where a teaspoonful of molten iron fell upon a damp floor, exploded, and a portion flew up and struck plaintiff in the eye, it was held that the master was not liable, as danger from such a source was but a remote contingency. *Nowakowski v. Detroit Stove Works*, 130 Mich. 308, 89 N. W. 956.

Again, it has been held that where accidents occurred from defects which could not have been reasonably anticipated, the defect in question could not be considered the proximate cause of the injury.

This principle is illustrated by the following cases:

A defect in an engine which caused a train to stop is not the proximate cause of a collision due to a following train running into it, if the collision would not have happened if proper signals had been displayed 47 L.R.A.(N.S.)

or observed. *Louisville & N. R. Co. v. Keifer*, 132 Ky. 419, 113 S. W. 433.

The binding of the side curtain of a summer street car in the crevice in which it runs is not the proximate cause of injury to a conductor who, in collecting fares, attempts to raise the curtain to reach passengers in a seat behind it, and, because it does not work properly, falls from the car. *Rich v. Asheville Electric Co.* 152 N. C. 689, 30 L.R.A.(N.S.) 428, 68 S. E. 232.

If the accident was caused by the breaking of a shaft, and the defect proved is the deficiency of a journal, there can be no recovery, unless the proof shows that the deficiency had a tendency to cause the break, and that such tendency was sufficient to charge the master with notice. *Breen v. St. Louis Cooperage Co.* 50 Mo. App. 202.

A defect in the throttle of an engine cannot be said to be the proximate cause of an injury to a servant, due to the engine's moving, if the engineer had control of it, and it moved solely in response to his moving the lever. *Atchison, T. & S. F. R. Co. v. Seeger*, 44 Tex. Civ. App. 534, 98 S. W. 892.

The circumstance of a conductor's loosing his hold of a heavy box which he is helping the plaintiff to unload from a car, owing to his accidentally putting his foot through a hole in the floor of the car, is not the proximate cause of an injury which the plaintiff receives through the falling of the box. *Louisville, N. A. & C. R. Co. v. Southwick*, 16 Ind. App. 486, 44 N. E. 263 (peculiar and unusual accident, not to have been anticipated). Generally, as to anticipation as an element of proximate cause, see note to *Kreigh v. Westinghouse*, C. K. & Co. 11 L.R.A.(N.S.) 684.

A master is not bound to give warning and instructions to a young and inexperienced servant concerning dangers of the employment, where they are of such a nature as to render injury very improbable, and they come only from negligence which the master has no reason to expect. *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969.

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to turn the switch his foot slipped from the lower step, and he was injured as already stated. It was then discovered that the hose was leaking, and that the step was covered with ice.

On cross-examination the plaintiff testified:

Well, the hose was wrapped and stopped the leaking, but it was liable to break at any time, and we kept talking to them about it, wanting them to keep their minds on it so as when they got one they would put it on.

Q. Is that the reason that you went in and called for the hose after it had been wrapped?

A. Yes, sir.

The court sustained a demurer to the evidence, and this is the ruling complained of.

Mr. W. W. Schwinn, for appellant:

If the servant calls the master's attention to a defect in any tool or appliance with which he is to work, and the master repairs the same and tells the servant to go on and work with it, and promises him a new one as soon as it can be procured, the servant may go on and work under the assumption that the defective appliance has been so repaired as to make it safe, and may continue to work until he has actual notice that it is unsafe.

Atchison, T. & S. F. R. Co. v. Midgett, 1 Kan. App. 138, 40 Pac. 995; *Atchison, T. & S. F. R. Co. v. Sadler*, 38 Kan. 128, 5 Am. St. Rep. 729, 16 Pac. 46; *Southern Kansas R. Co. v. Croker*, 41 Kan. 747, 13 Am. St. Rep. 320, 21 Pac. 785; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *Missouri, K. & T. R. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631.

Messrs. W. R. Smith, O. J. Wood, and Alfred A. Scott, for appellee:

The master is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to his employees reasonably safe machinery and instrumentalities for performance of the work.

Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204, 15 Am. Neg. Cas. 19.

Where the servant has as full knowledge of the facts and is as capable of appreciating the danger arising therefrom, if any, as the master, he assumes the risk and cannot recover.

Rush v. Missouri P. R. Co. 36 Kan. 137, 12 Pac. 582; *Atchison, T. & S. F. R. Co. v. Stone*, 77 Kan. 642, 95 Pac. 1049; 4 Thomp. Neg. § 4632.

The testimony of the plaintiff that the defendant had promised to make certain re-
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upon that promise as will rebut the presumption of an acceptance of the risk, where there is no evidence that plaintiff complained of the defect as making his work more dangerous, or that he ever thought of quitting his job unless repairs were made.

Bodwell v. Nashua Mfg. Co. 70 N. H. 390, 47 Atl. 613; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567; *Hayball v. Detroit, G. H. & M. R. Co.* 114 Mich. 135, 72 N. W. 145; 11 Labatt, Mast. & S. § 421; *Erdman v. Illinois Steel Co.* 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993, 1 Am. Neg. Rep. 199.

Benson, J., delivered the opinion of the court:

It is stated by counsel that the demurrer was sustained upon the ground that the danger from the leaky hose was one of the risks assumed by the plaintiff in continuing in the service after he had acquired knowledge of the defect. If this were the only reason for the ruling, it could not be sustained. As we view the evidence, the complaints made concerning the defective hose, and the promise given to replace it, presented questions of fact concerning the assumption of risk, proper for the findings of a jury. *Southern Kansas R. Co. v. Croker*, 41 Kan. 747, 13 Am. St. Rep. 320, 21 Pac. 785; *Andrecsik v. New Jersey Tube Co.* 73 N. J. L. 664, 4 L.R.A. (N.S.) 913, 63 Atl. 719, 9 Ann. Cas. 1006, 20 Am. Neg. Rep. 414; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612.

The vital question is whether, in requiring the use of this appliance after notice of its defective condition, the defendant was guilty of such negligence as afforded the plaintiff a right of recovery for the injuries suffered. In the absence of wanton or intentional wrongdoing, an employer who furnishes defective instrumentalities is liable only where danger to the employee would reasonably be apprehended from their use. If persons of ordinary caution and prudence would not, in the light of the attendant circumstances, anticipate danger from the use of a defective appliance, and danger was not a natural and probable consequence of such use, liability to an employee for furnishing such appliance does not arise. On the other hand, it is held that negligence is a ground of action for an injury where it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Schwarzchild & S. Co. v. Weeks*, 72 Kan. 190, 4 L.R.A. (N.S.) 515, 83 Pac. 406, 19 Am. Neg. Rep. 242. It is also held, however, that it is not necessary that the specific injury should

have been foreseen; but only an injury of some character. *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. These general principles are supported by other decisions of this court and the courts of other states, and are stated by text writers. *Cleghorn v. Thompson*, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A. (N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Leonard v. Collins*, 70 N. Y. 90; *McCallum v. McCallum*, 58 Minn. 288, 59 N. W. 1019; *Williams v. Southern R. Co.* 119 N. C. 746, 26 S. E. 32; 1 *Labatt, Mast. & S.* § 142; *Thomp. Neg.* §§ 57-59; *Bishop, Noncontract Law*, § 691.

The hose was used to conduct water from the tank to the injector to supply the boiler. If through leakage it should become inadequate for this purpose, an insufficient supply might result, and the natural and probable consequences of such insufficiency would be foreseen; but it does not seem reasonable to the court that the formation of ice upon the steps from the spray borne by the wind from the leak was a consequence which, in the exercise of reasonable care and caution, ought also to have been foreseen or anticipated. The hose was under the floor of the cab and about 10 inches behind the steps. Unless blown aside by the wind or affected by the movement of the engine, water issuing from the aperture would have fallen harmlessly to the ground. The contention is, and the evidence tended to support it, that the action of the wind upon the water thus leaking from the hose, combined with the freezing temperature, caused the ice to form upon the steps, and that this ice caused the plaintiff to fall. It does not appear that the plaintiff or the engineer apprehended danger to themselves from the imperfect hose, at least they did not refer to such danger in making their complaint, and it seems fair to presume that they apprehended only loss of power, inconvenience, and delay, or other like consequences from the failure of the appliance to serve its purpose, and not physical harm; nor can it be held that such harm ought to have been apprehended by the defendant or its officers having charge of such matters. The conclusion is that a case was not presented upon which a finding for the plaintiff could have been sustained, and that the court did not err in sustaining the demurrer.

The judgment is affirmed.

Benson, J., dissenting:

I am constrained to dissent from the conclusion of the court. The syllabus embodies correct principles of law, but in my opinion 47 L.R.A. (N.S.)

the question whether the defendant exercised reasonable care and caution in requiring the use of the leaky hose was one of fact for the jury upon the evidence. The care required must be considered in view of the probable perils of the service, and the condition of the appliance in connection with its use and the place of duty of the enginemen. They were in hazardous service, and reasonable prudence required the exercise of corresponding care in furnishing them with appliances. Dangers from a defective hose must obviously depend upon the use made of it, and its connection with other instrumentalities, and other circumstances. That a leak in a hose used as this one was would cause water to escape; that this was liable to become spray to be borne aside by the wind and cast upon near-by surfaces such as these steps; that ice would be formed therefrom in December in this climate; and that this would be dangerous to those whose duty required the use of the steps,—are consequences not so rare, peculiar, improbable, or abnormal as to preclude the jury from considering whether they would have been apprehended by the company if reasonable care and foresight had been exercised. 1 *Labatt, Mast. & S.* § 145. Besides, it was not necessary that this peculiar combination of circumstances should have been foreseen, but only that danger to its servants should have been reasonably apprehended. *Siegel, C. & Co. v. Trcka*, 218 Ill. 559, 2 L.R.A. (N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166; *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. In *Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 232, 103 Fed. 265, 268, the court of appeals passed upon this question upon a similar state of facts. It appeared in that case that a valve stem, which, when turned by a wheel at the upper end, opened a valve below to let water pass out of the tank, was out of place, and that a wooden plug had been substituted. This permitted the water to splash, producing spray which was carried by the wind upon the apron connecting the engine and tender, creating thereon an icy covering upon which the fireman fell, and from thence fell out of the cab, and was severely injured. The fireman alleged that the company was negligent in furnishing this defective appliance. The circuit court submitted the question of the negligence of the company to the jury, and the correctness of this ruling was presented for review. The court of appeals (Day, J.) said: "We cannot say that the testimony made a case so palpably for the plaintiff in error that it should be resolved in its favor as a matter of law. Questions of this character must be decided upon the facts of each particular

case. The company might have known that it was dangerous in the winter to permit water to escape on the apron, where the employee was constantly obliged to step, and particularly where the track was rough, as it is shown to be in the present case," p. 232. The principles upon which the perplexing boundary between the duties of the judge and jury should be determined have been frequently stated by this court, and need not be repeated here. Without quoting further from the opinion just cited, it seems to me fairly to illustrate and apply these principles. If this be true, the district court in the case at bar trespassed upon the functions of the jury. *Doyle v. Chicago, St. P. & K. C. R. Co.* 77 Iowa, 607, 4 L.R.A. 420, 42 N. W. 555; *Oil City Gas Co. v. Robinson*, 99 Pa. 1.

A further review of the multitude of cases wherein the courts have considered this subject is not thought to be necessary in this dissent.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

JOHN TANNYHILL et al., Appts.

(90 Kan. 598, 135 Pac. 674.)

Obstructing justice — what constitutes — effect of motive.

Where an officer seizes personal property upon attachment and delivers it to a cus-

Headnote by MASON, J.

Note. — Obstructing justice: claiming or taking possession of property from officer who has seized it under a writ.

IN *STATE V. TANNYHILL*, the court assumes that cases where the resistance was offered before the officer had full and actual possession of the property are authority for cases where the property was taken from the officer after he had taken possession. There are some direct holdings which show that courts are not in harmony on the point. Only the latter class of cases, however, are within the scope of this note.

Since the usual remedy for interfering with property in the custody of the law is an attachment for contempt of court (see 9 Cyc. 15), and the same is true of preventing, delaying, or interfering with execution of legal process (see 9 Cyc. 20), there are not many cases within the scope of this note, which is limited to prosecutions for obstructing justice.

It was held in *United States v. McDonald*, 8 Biss. 439, Fed. Cas. No. 15,667, that, under U. S. Rev. Stat. § 5308, U. S. Comp. Stat. 1901, p. 3655, which provides that "every person who knowingly and wilfully obstructs, resists, or opposes any officer of

todayan to be held subject to his order, a stranger to the writ who claims to own the property, and makes demand for it upon the custodian, is not guilty of obstructing the execution of process, whatever his motives may have been, where he employs no deceit, and the property is voluntarily delivered in response to his demand.

(October 11, 1913.)

A PPEAL by defendants from a judgment of the District Court of Shawnee County convicting them of obstructing the execution of process. Reversed.

The facts are stated in the opinion.

Messrs. Crane & Woodburn for appellants.

Messrs. John S. Dawson, Attorney General, and W. E. Atchison, for appellee:

The obstructing of the officer in the execution of his office may be accomplished by means other than by violence to the officer himself.

Campf v. State, 80 Ohio St. 329, 88 N. E. 887.

Force is not necessary to constitute the offense of resisting an officer.

State v. Scott, 17 Ann. Cas. 402, note; *United States v. McDonald*, 8 Biss. 439, Fed. Cas. No. 15,667; *Woodworth v. State*, 26 Ohio St. 196; *United States v. Lukins*, 3 Wash. C. C. 335, Fed. Cas. No. 15,639; *Mitchell v. State*, 101 Ga. 578, 28 S. E. 916.

Mason, J., delivered the opinion of the court:

John Tannyhill and Robert Keller appeal from a conviction under the statute making

the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process," shall be punished, etc., one who has taken property out of the possession of an officer who holds the same by virtue of a legal attachment cannot successfully defend against an indictment charging him with "obstructing and resisting an officer of the United States in the service and execution of process," on the theory that the execution of the process was completed prior to the time when the taking occurred, even though the levy had previously been made and the writ returned to the clerk of the court in legal form. This holding was based upon the theory that holding the property under the levy upon the attachment was part of the process of executing the writ, and so long as the property remained subject to the lien of the levy and in the officers's possession, the process of executing the writ was not complete.

To obstruct justice is to interpose obstacles or impediments, to hinder, to impede, or in any manner interrupt or prevent, and this does not necessarily imply

it a misdemeanor to "wilfully obstruct, resist, or oppose any sheriff or any other ministerial officer in the service or execution, or in the attempt to serve or execute, any writ, warrant, or process." Gen. Stat. 1909, § 2657. The complaint upon which the conviction was had charged that the defendants wilfully resisted, obstructed, and opposed the marshal of the court of Topeka in executing a writ of attachment, "by forcibly and violently taking from the possession and control of one Jerry Estes, duly appointed and designated by this affiant (the marshal) to hold possession of said property for this affiant as the marshal of said court, three head of horses, . . . which were theretofore attached by said marshal through his deputies as the property of

John Tannyhill, and held by Jerry Estes as custodian for this affiant as said marshal, without the consent of this affiant and under the protest of said Jerry Estes."

The evidence seems to establish the following facts beyond substantial controversy: Under an order of attachment against John Tannyhill, the marshal seized three horses as his property and left them in charge of Jerry Estes. Robert Keller claimed to own the horses. He went with Tannyhill to a justice of the peace and asked for a writ of replevin to recover them. He gave a cost bond and a replevin bond and made a replevin affidavit. The justice issued an order of delivery against Estes and gave it to a constable, but said that before it was served a demand for the return

the employment of direct force or the exercise of direct means. It includes any passive, indirect, or circuitous impediments to the execution of the process. *United States v. McDonald*, *supra*, court's instruction to the jury.

The owner of cattle legally impounded by the supervisor of roads, who breaks the inclosure and takes away the cattle against the protest of the officer, though without physical force as against the person of the officer, is liable to indictment under Ohio Rev. Stat. § 6908, which provides: "Whoever abuses any judge or justice of the peace in the execution of his office, or knowingly and wilfully resists, obstructs, or abuses any sheriff, constable, or other officer in the execution of his office, shall be fined," etc. (*Camp v. State*, 80 Ohio St. 321, 88 N. E. 887.

And in *People v. Smith*, 131 Mich. 70, 90 N. W. 666, where it was held that forcibly taking property from the possession of the treasurer constitutes the offense of resisting an officer, the court said: "Upon the first point counsel for respondent relies upon *People v. Clements*, 68 Mich. 655, 13 Am. St. Rep. 373, 36 N. W. 792. In that case a sheriff levied upon exempt property, and it was held that the debtor was not compelled to submit to a trespass without reasonable resistance. That case does not apply to property not exempt, and which is seized by virtue of a tax warrant, and the officer has already seized and is in possession of the property. The treasurer in this case loaded the property, and was in the public highway in the act of removing it when the respondent forcibly interfered. Under *Sears v. Cottrell*, 5 Mich. 251, the levy was lawful."

On the other hand, it was held in *Rome v. Omburg*, 22 Ga. 67, that the owner of a cow that had been legally impounded by the city marshal under an ordinance authorizing the act and providing the manner of disposing of impounded animals, who broke the pound and took away the cow, did not thereby violate an ordinance which prohibited "any person from opposing or interrupting any city officer in the execution of the 47 L.R.A. (N.S.)

ordinances of said city," and the court said: "The cow had been impounded without opposition or interruption. The act had been completed, and the ordinance executed, before the defendant committed the act which is alleged to have constituted the offense. The breach of the pound was no opposition or interruption of the officer in the execution of the ordinance."

And *Rome v. Omburg*, *supra*, was cited and followed in *Farris v. State*, 14 Lea, 295, where it was held that a statute which provided that "any person who knowingly and wilfully opposes or resists an officer of the state or other authorized person, in serving or attempting to serve or execute any legal writ or process, shall be guilty of a misdemeanor," is not violated by taking, under a valid claim of ownership, without actual physical force against the officer, property which he has in his possession under a valid execution and levy.

And in *Davis v. State*, 76 Ga. 721, where one claiming oxen which the sheriff had taken under a levy and left in the care of an agent privately took the oxen away to another county in the absence of the sheriff, it was held that there was no violation of a statute which provided that "if any person shall knowingly and wilfully obstruct, resist, or oppose any sheriff, coroner, or other officer of the state, or other person duly authorized, in serving or attempting to serve or execute any lawful process," etc. The court said that the plaintiff in error did not oppose the officer, but only defeated the execution of the process by an act of simple larceny.

And in *State v. Sotherlen*, Harp. L. 414, it was held that at common law "an indictment will not lie for rescuing goods taken in execution, out of the possession of a constable, there being no assault on the constable."

From the cases cited herein it appears that in some states no indictment for obstructing justice will lie, if the property is taken from the custody of the officer without violence toward his person, while in others the same principles apply as would apply if the accused had prevented the

of the property should be made. The stable, Tannyhill, and Keller then went to the home of Estes. Keller demanded the horses of Estes, stating that he owned them and wanted them. Estes asked if he had "the papers" for them, and Keller said he had; that he had given bond for them. Keller and Tannyhill then took the horses and drove them away. Estes either affirmatively consented that they should do so or remained passive, there being a conflict of testimony on this point; he did not object or protest.

The jury were instructed to convict if they found that the defendants wilfully obstructed the marshal in the execution of the writ; that is, that they removed the horses with the intention of obstructing the officer in the discharge of his duty. In a different state of the evidence this instruction might

officer from seizing the property. (See cases, supra.) It has been held that no indictment will lie where the levy is made, but no one is placed in possession (*United States v. Seeley*, infra); or where the officer's act in seizing the property is illegal (see *Bryant v. State*, infra); or the levy could not legally bind the property, and no personal violence was involved (see *State v. Hartley* and *State v. Miller*, infra); and that the question turns upon the good faith of the officer and the title to the property (*United States v. McDonald*, infra).

It was held in *United States v. Seeley*, Fed. Cas. No. 16,248a, that, under the act of March 2, 1831 (4 Stat. at L. 487, chap. 99, U. S. Comp. Stat. 1901, p. 583), which provides punishment for anyone who "shall corruptly, or by threats or force, obstruct or impede or endeavor to obstruct or impede the due administration of justice," neither the owner of a vessel nor a third person who takes her away after she has been attached by the marshal, but while she is in only constructive, but not in actual, possession of the marshal or his agent, can be convicted on a charge of impeding or obstructing justice. It was held that the act referred more especially to the punishment for contempt, as is shown by its title and the preceding section, but it was further held that even if the statute is to be construed as creating a new offense, neither the owner nor a third person could be convicted under it, unless by corrupt or forcible means they took the property from the actual possession of the officer or his agent.

In *Bryant v. State*, 16 Neb. 651, 21 N. W. 406, it was held that since the seizure of property by the sheriff on Sunday under a writ of replevin is illegal, the recapture of the property on the same day by force is not a resistance of an officer in the discharge of his duties.

Where the attachment was invalid in that the property was by statute exempt from attachment, and the agent of the owner used no physical force to take it from the 47 L.R.A. (N.S.)

But here we think a more specific statement was necessary to insure a proper conception of the issues by the jury. Under all the testimony there was room to find that the defendants purposely misled Estes into the belief that the horses were being taken from him upon legal process; but there was also room to find that Estes was informed that Keller had obtained a writ of replevin, under which the horses would be taken unless he gave them up voluntarily, and that he surrendered them with a full understanding of the actual situation. The defendants admitted demanding and receiving the horses from Estes, and this act, in a sense, resulted in obstructing the execution of the attachment. To justify a conviction, however, it was incumbent upon the state to prove further, not only that the defendants were

officer's possession, it was held in *State v. Hartley*, 75 Conn. 104, 52 Atl. 615, that an indictment for resisting an officer could not be sustained.

In *State v. Miller*, 12 Vt. 437, it was held that the owner of property attached and taken as the property of another may take it from the custody of the officer if he does so without personal violence to the officer, without being liable to indictment for hindering or impeding the officer; but he runs the risk of his inability to prove title to the property.

It has been held that the owner's act of forcibly taking his property from the custody of an officer who holds it under attachment as the property of a third person is or is not indictable as obstructing or resisting an officer, according to the good or bad faith of the officer in the matter. *United States v. McDonald*, 8 Biss. 439, Fed. Cas. No. 15,667. But the bad faith of the officer could not shield the defendant in the attachment proceedings, if he took the property. See same case, supra, for wording of the statute.

Taking away property from a barn where the sheriff had it stored after a levy upon execution, in the absence of the officer, is a violation of § 83 of the Penal Code of New York, which provides: "A person who takes from the custody of an officer or other person, personal property in charge of the latter under any process of law, or who wilfully injures or destroys such property, is guilty of a misdemeanor," and it makes no difference as to the ownership of the property so taken. *People v. Booth*, 52 Misc. 340, 102 N. Y. Supp. 62.

Some act of aggression on the part of the accused, from which a reasonable inference of forcible interference with the execution of a civil warrant can be drawn, must be shown in order to support an indictment for resisting an officer in the discharge of his official duty by attempting to take property he is holding upon levy on execution. *Cummins v. State*, 6 Okla. Crim. Rep. 130, 117 Pac. 1099.

J. W. M.

actuated by a purpose to obstruct the execution of the writ, but also either that Estes did not consent to the removal of the horses, or that his consent, if given, was procured by fraud or duress. The trial court refused an instruction requested by the defendants in these words: "If you find from the evidence that the defendant Robert Keller was the owner of the horses attached, and that he brought a replevin action in justice court to recover the possession of them; that he went to make a demand for them from the party then in possession before the service of summons was made upon the defendant in the replevin action, and that the party in possession turned over the horses to the defendant pursuant to such demand,—then you must acquit the defendants." We think such an instruction or its equivalent should have been given, possibly with the qualification that acquiescence in the demand should not have been induced by fraud or duress. In some jurisdictions it is held that the owner of personal property which is seized under a writ in a proceeding to which he is not a party may regain possession if he can do so without a breach of the peace. 2 Freeman, Executions, 3d ed. § 254, p. 1419.

But the usual and better rule is that, at least where the officer is acting in good faith and upon reasonable grounds, any forcible interference with his possession, even on the part of the real owner of the property, who is a stranger to the writ, constitutes the offense of obstructing the execution of legal process. 29 Cyc. 1330; 2 Freeman, Executions, 3d ed. § 254, pp. 1420–1421; note in 75 Am. Dec. 176, 180; reference notes in 24 Am. St. Rep. 747, and in 49 L.R.A. 773. Public policy requires, in the interest of the orderly settlement of disputes, that an officer's possession of property, even when wrongful, shall not be forcibly interfered with. But no such consideration forbids the owner of property which has been wrongfully taken as that of another, to demand its possession from the person in immediate control, or to accept it if the demand is acceded to by the custodian.

The jury was properly instructed that, if Keller had obtained possession of the property by replevin, this could not have been made the foundation of a criminal prosecution, although it resulted in obstructing the marshal, because such procedure would be lawful and regular. We think the defendants were also entitled to an instruction that possession obtained by demand made upon the custodian, without deceit or duress, and acquiesced in by him, would stand upon the same footing. The jury were told in substance that, if a demand was made on Estes, and he surrendered the horses in pursuance of instructions from the marshal, 47 L.R.A. (N.S.)

this would constitute a defense. We think the effect would be the same, irrespective of the instructions given by the marshal. The owner of goods seized on a writ against someone else may maintain replevin against the individual in whose hands he finds them, without joining the officer. *Engel v. Dado*, 66 Neb. 400, 92 N. W. 629; *Cobbey, Replevin*, 2d ed. § 443. "The action must be brought against the person having the actual, physical possession of the property, although he may be keeping it for another person." *Shinn, Replevin*, § 164. A demand on the defendant is a proper, if not necessary, preliminary to the action, and if it is acceded to, there can be no occasion for serving an order of delivery.

The judgment is reversed, and the cause remanded for further proceedings.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,
v.

DIANA HOBBS.

(155 Ky. 130, 159 S. W. 682.)

Carrier — path used by passengers — duty to keep safe.

1. A railroad company owes no duty to light or guard an excavation on its property near a pathway on its right of way which has to its knowledge been used by the public generally for many years, so as to render it liable to one who, after alighting from its train on a dark night, attempts to follow such pathway, and falls into the excavation, to his injury, if the excavation is some distance from the depot grounds.

Negligence — unsafe premises — duty to protect path for licensees.

2. A railroad company is under no obligation to light and guard an excavation near a path which it has permitted the public to use along its right of way for many years, if the excavation is far enough from

Note. — Right of passenger using as approach to station a way not provided by carrier.

The earlier cases on this question are presented in the note to *Legge v. New York, N. H. & H. R. Co.* 23 L.R.A. (N.S.) 633.

In *Woods v. White Star Line*, 160 Mich. 540, 27 L.R.A. (N.S.) 992, 125 N. W. 396, it was held that a carrier is not bound to improve and maintain in a safe condition every cross or short cut over neighboring property which individuals may adopt in reaching its station or landing, although the use is sufficient to create a visible path, if it does nothing to induce the public to

with perfect safety so long as they remain in it.

(October 7, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Nelson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. John S. Kelley and Benjamin D. Warfield, for appellant:

The court erred in overruling defendant's demurrer to the petition, and in failing to instruct the jury peremptorily to find for it on that ground.

Louisville & N. R. Co. v. Paynter, 26 Ky. L. Rep. 761, 82 S. W. 412; Louisville & P. Canal Co. v. Murphy, 9 Bush, 527; Louisville, C. & L. R. Co. v. Case, 9 Bush, 732; Stivers v. Baker, 87 Ky. 508, 9 S. W. 491; Combs v. Pridmore, 19 Ky. L. Rep. 1936, 43 S. W. 681, 44 S. W. 107.

Testimony for plaintiff to the effect that at certain times there was considerable trespassing on defendant's railroad tracks at or near the point where plaintiff claimed to have been injured was not admissible, where her petition did not aver that, at the time she was injured, she was walking where people were accustomed to walk, with the knowledge or acquiescence of the railroad company.

believe that it has provided the path, or that it holds it out as safe.

In Carter v. Rockford & Interurban R. Co. 147 Wis. 86, 132 N. W. 598, it was said that it is immaterial how many ways of ingress or egress a carrier maintains or suffers to be maintained to and from its station; that it is bound to keep each in a reasonably safe state of repair, and cannot escape liability by saying it had another safe way, if a defective one is open to use, and the injured person is guilty of no negligence in taking it.

In St. Louis & S. F. R. Co. v. Caldwell, 93 Ark. 286, 124 S. W. 1034, it was held that the mere fact that the municipal authorities had constructed the passageway which was an approach to the station did not absolve the railroad company from the duty of exercising ordinary care in freeing it from danger, where it appeared that it was on the railroad right of way, and was habitually used by its patrons in passing to and from the station.

In Clyde v. Brooklyn Union Elev. R. Co. 148 App. Div. 705, 133 N. Y. Supp. 1, it was held that a railroad company maintaining its station at the intersection of two streets, where the concrete sidewalk extended from the station to the curb at the corner and on both streets for a considerable space, was not liable for injuries sus-

256, 3 L.R.A.(N.S.) 1190, 91 S. W. 692; Illinois C. R. Co. v. Johnson R. Co. 30 Ky. L. Rep. 142, 97 S. W. 745; Chesapeake & O. R. Co. v. Barbour, 29 Ky. L. Rep. 339, 93 S. W. 24; Southern R. Co. v. King, 217 U. S. 536, 54 L. ed. 872, 30 Sup. Ct. Rep. 594.

Although people may have been in the habit of trespassing upon defendant's right of way near the turntable pit, this did not make it the duty of defendant to put a railing or guard around the pit and a light thereon at night, in order to keep people from falling into the pit, which was 15 feet or more from defendant's track.

Johnson v. Paducah Laundry Co. 122 Ky. 369, 5 L.R.A.(N.S.) 733, 92 S. W. 330; 2 Shearm. & Redf. Neg. § 715; 1 Thomp. Neg. §§ 945, 946, 1228; Union Stock Yards & Transit Co. v. Rourke, 10 Ill. App. 474; Stone v. Jackson, 32 Eng. L. & Eq. Rep. 349; Benson v. Baltimore Traction Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Brinkley Car Works & Mfg. Co. v. Cooper, 70 Ark. 331, 57 L.R.A. 724, 67 S. W. 752; Louisville & N. R. Co. v. Turner, 137 Ky. 730, 136 Am. St. Rep. 317, 126 S. W. 372; Southern R. Co. v. Sanders, 145 Ky. 679, 141 S. W. 77; Sturgis v. Detroit. G. H. & M. R. Co. 72 Mich. 619, 40 N. W. 914, 4 Am. Neg. Cas. 76; Davis v. Houston, E. & W. T. R. Co. 29 Tex. Civ. App. 42, 68 S. W. 733; Holcombe v. Southern R. Co. 66 S. C.

tained to one seeking entrance at a side door, by falling over a wire stretched along the curb, where a path had been worn across the grass plot which extended between the sidewalk and the curb at that point, and was occasionally used by the patrons of the company, but not owned by it or recognized as a way of access to its station.

In Carleton v. Rockland, T. & C. Street R. Co. — Me. —, 86 Atl. 334, it was held that a street railroad company which adopted a platform along its track as a regular stopping place was liable for injuries to a passenger, caused by the defective condition of the steps leading from the platform to the adjoining sidewalk at that point, though it did not maintain the steps or cause them to be out of repair. The court said that defendant's liability did not cease when it had deposited the passenger on the platform, resting on the side of the embankment and several feet below the sidewalk, but included a reasonably safe exit from that platform to the sidewalk above; that the ownership of the steps is not the sole test, as that is a fact which the traveling public cannot know or be bound by; but that the true test is whether the carrier invited its patrons to use the steps; and if so, a liability attaches for injury resulting because of their defective condition,

6, 44 S. E. 68; Louisville & N. R. Co. v. Ricketts, 93 Ky. 116, 19 S. W. 182, 96 Ky. 44, 27 S. W. 860, 18 Ky. L. Rep. 687, 37 S. W. 952, 21 Ky. L. Rep. 662, 52 S. W. 939.

Messrs. N. W. Halstead and P. J. Beard for appellee.

Carroll, J., delivered the opinion of the court:

The appellee, a colored woman, owned and lived in a small house about 525 feet north of the depot of appellant in the little town of Bloomfield, Kentucky. The house was situated about 60 feet west of appellant's right of way, and appellee had been occupying it as her home for thirty years or more. On the opposite side of the railroad from appellee's house, and about 345 feet north of the depot, the appellant company had a turntable which had been in use for probably twenty-five or thirty years, and that was operated in an excavation about 60 feet in diameter and about 5 feet deep. From the rail nearest to the turntable to the edge of the turntable was 15½ feet. There was a well-defined path or passway between the railroad track and the turntable, extending from the depot to a point beyond the turntable, over which a large number of people who lived or were engaged in business in the neighborhood of appellee's house traveled in going to and from the depot, and to and from the town, school, and other places. This passway, which was on the right of way of the railroad, had been so used by

the general public for perhaps thirty years, with the knowledge and acquiescence, if not the consent, of the railroad company, and so it may safely be said that persons using this passway were licensees and entitled to the protection afforded this class of travelers. On December 29, 1910, appellee arrived at the Bloomfield station on a passenger train about 8 o'clock at night. The night was very dark, and a drizzling rain was falling. There were no lights about the depot except the lanterns of the trainmen, the lights in the cars and in the station building, nor were there any lights between the depot and the turntable, or between the depot and appellee's residence. When appellee got off of the train, she started, in the usual way, to go to her home, and in so doing walked on the passway or path, as she and others who lived in her vicinity had been for years in the habit of doing. When she reached a point opposite the turntable, she lost her bearings and got out of the well-beaten pathway and fell into the turntable excavation, which was not protected by lights or barriers of any kind, thereby receiving severe injuries. To recover damages for the injuries so sustained, she brought this suit, and on the trial recovered a judgment for \$1,500. A reversal of this judgment is asked chiefly upon the ground that the jury should have been directed to return a verdict in favor of the appellant company.

For appellee the argument is made that

independent of original ownership or subsequent maintenance.

And in *Carter v. Rockford & Interurban R. Co.* 147 Wis. 86, 132 N. W. 598, it was held that a street railroad company which adopted a platform along its right of way about 4 feet above the level of the street as a regular stopping place to take on or let off passengers was liable for injuries to a passenger, caused by the defective condition of the steps leading from the platform to the street, which furnished the only practical way to reach the street, and which were neither intended nor used for any other purpose, although the platform and steps were built and maintained by others, and the company never assumed any control over them, since it owed the nondelegable duty to its passengers to see that a necessary, convenient, and accustomed passage to and from its right of way, where it stopped to take on and let off passengers, was reasonably safe.

The defendant sought to escape liability, in the above case, on two grounds: First, because it was in no way responsible for the condition of the steps, having neither built nor repaired them, nor assumed any control over them; and, second, because the plaintiff had ceased his relations with it as passenger when he had safely alighted upon the platform; but the court said: "Neither 47 L.R.A.(N.S.)

ground is well taken. In order to board a car at Everett's Landing, it was necessary to pass from the street up onto the defendant's right of way. This could be done by using the steps or by going up the bank along a steep path. The steps were placed there for the convenience of patrons of the defendant's road and for no other purpose. The defendant permitted the use of its right of way for the platform, and at least a portion of the steps. That the greater portion of the steps was in the street is of no consequence, for they were not put there for street purposes. The defendant received the beneficial use of both the steps and platform, and practically adopted them as its own. They were necessary to enable passengers of the defendant to get to and from the street, and were so used with the knowledge and acquiescence of the defendant. That being so, the fact that it had neglected its duty to repair them cannot discharge it from liability. It owed the duty to its patrons to see that a necessary, convenient, and accustomed passage of egress and ingress from and to its right of way, where it stopped to take on and let off passengers, to the street, was kept in a reasonable safe state of repair. This duty it could not delegate to others, either specifically or by permitting them to make repairs."

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from which she alighted a few minutes before the accident, and was on her way home from the depot, walking on a path that was used by the public generally and by persons going to and from the depot on business, she was yet a passenger, and entitled to the protection afforded passengers, and therefore it was the duty of the company to have its track and premises at the place where she was injured reasonably lighted, or to have its turntable pit reasonably protected for her safety.

If appellee, at the time she received the injuries complained of, occupied the attitude of a passenger, there would be much force in the argument that the company should have protected in some reasonably sufficient way the turntable excavation, as it is well settled that a railroad company is under a duty to maintain its depot grounds and premises, as well as approaches thereto, in reasonably safe condition for use by persons who hold the relation to it of passengers. 3 *Thomp. Neg.* §§ 2678-2716; 2 *Hutchinson, Carr.* §§ 935-937; *Southern R. Co. v. Goddard*, 121 Ky. 567, 89 S. W. 675, 12 *Ann. Cas.* 116; *Louisville & N. R. Co. v. Turner*, 137 Ky. 730, 136 *Am. St. Rep.* 317, 126 S. W. 372.

But we think it clear that when appellee received the injuries complained of she was not a passenger, and therefore the company did not owe her the duty that it owed to passengers. She had safely alighted from the train at the station, and was 345 feet from the station on her way home when injured, and was not walking on a way set apart for the use of passengers. Under these circumstances her rights as a passenger, and the duty that the railroad company owed her as a passenger, terminated when she left the depot grounds and premises. *Glenn v. Lake Erie & W. R. Co.* 165 *Ind.* 659, 2 *L.R.A.(N.S.)* 872, 112 *Am. St. Rep.* 255, 75 N. E. 282, 6 *Ann. Cas.* 1032, 19 *Am. Neg. Rep.* 7; *Sturgis v. Detroit, G. H. & M. R. Co.* 72 *Mich.* 619, 40 N. W. 914, 4 *Am. Neg. Cas.* 76; *Sokktowe v. Oregon Short Line & U. N. R. Co.* 22 *Or.* 430, 16 *L.R.A.* 593, 30 *Pac.* 222.

The turntable was not on the depot premises or adjacent thereto, or on grounds set aside by the company for the use of the depot or of persons going to the depot to take trains, or coming from the depot after leaving trains. If it had been a mile from the depot, and situated, as in this case, by the side of a much used passway on the right of way of the company, the duty and liability of the company would be the same as it is in this case,—no greater and no less. In other words, the company owed her no higher duty than it would have owed 47 *L.R.A.(N.S.)*

train, but had been on her way home from a visit to a neighbor, or from attendance on some other errand of business or pleasure.

A different rule would be applied if the company had established and set apart this passway as a route leading to its depot for the use and benefit of persons having occasion to go to and from its depot, and had thereby extended to them an invitation to use the way for this purpose. When a company has set aside or established an approach to its depot for the use of the public having business with it, it assumes the duty of keeping the same reasonably safe for the uses to which it was dedicated. In other words, its duty is substantially the same as it is in relation to its station and station grounds. We so held in *Cheapeake & O. R. Co. v. Meyer*, — Ky. — 119 S. W. 183, in which we said, in speaking of the right of a person having business with the company to recover damages occasioned by its failure to keep an approach to its station free from defects: "Having provided this road for the use of passengers and other persons having business with the company that authorized them to use it, it was under a duty to keep it in a reasonably safe condition for travel." See also 2 *Hutchinson, Carr.* § 937; *Cross v. Lake Shore & M. S. R. Co.* 69 *Mich.* 363, 13 *Am. St. Rep.* 399, 37 N. W. 361, 9 *Am. Neg. Cas.* 464. But no part of the path appellee was traveling, after she left the premises immediately about the depot, had been set apart by the company for the use of the public, or for the use of persons having business at its depot buildings, nor had it invited the public to use this passway. It was used by people generally in going to stores, to school, in visiting, and on other purposes of business and pleasure, as well as by persons in going to and from the depot. The use of this way by the public was in its origin a trespass, but by continually using it without objection on the part of the company, the public using it came to have what is called a license to use it, and the company thereby became charged with the duty railroad companies owe to licensees.

And so we think that appellee's right to recover, if any there be, must rest entirely on the naked grounds that the company, on account of the long-continued and habitual use of this passway by the general public, assumed the duty of keeping it lighted in some way, or of having the turntable protected by lights or barriers, so that persons using the passway might not thoughtlessly or inadvertently fall into the excavation as appellee did. If the company did not owe

she is not entitled to a recovery.

Reverting for a moment to the facts, we find that there was ample room between the track and the turntable to walk with perfect safety, and the well-beaten path used by travelers was probably 6 or 8 feet from the edge of the turntable. Appellee had walked on this path for many years, and was thoroughly well acquainted with the location of the turntable, in which no change had been made since it was built. Under these circumstances, if the railroad company owed to appellee the duty of having its premises at this place lighted or its turntable protected by barriers, it would likewise owe a duty to every licensee using its tracks and premises at any place on its line of road to protect them from the danger of falling into long-established or existing pits or excavations that might happen to be near the line of travel, however remote the place might be from stations and premises set apart by the company for the use of persons having business with it as passengers or otherwise.

It will be readily perceived that to impose a duty like this on a railroad company would virtually require them to protect all places of possible danger along every part of the right of way that was used by such a number of the public as to charge the company with the duty of taking notice of their presence, and would subject the company to the care and expense of keeping its premises in repair for the use of persons having no business with it, but who had become entitled by acquiescent use to a certain measure of protection, to be later referred to. In *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, in speaking of the rights of licensees and the measure of protection the licensor is under a duty to afford, the court said: "So a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure. . . . The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license

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tate will not create a obligation on the part of son in possession to p danger of accident. sive acquiescence by an in a certain use of his volves no liability; but i implication induces perso pass over his premises, l an obligation that they a tion, suitable for such us of this obligation he is li a person injured thereby announced in this instru proved by this court in J Laundry Co. 122 Ky. 36 733, 92 S. W. 330, and ag Co. v. Mobley, 134 Ky. 82 497, 121 S. W. 657, in wh reviewing a number of c licensee in entering upon another does so at his p the premises being liable resulting from wilful act

In *Fox v. Warner-Qu* 204 N. Y. 240, 38 L.R.A. E. 497, Ann. Cas. 1913 case very much like this. injured by falling, in th an unguarded gravel pit side of the route over wh been accustomed to trav vehicles for a number of matter of right, but as l passive consent or acquies of the premises. The lic against the owner of the cover damages for the i and in denying his right court said: "The princ settled by repeated adju country and in England, son goes upon the premis out invitation, but simply and the owner of the p acquiesces in his coming, sustained by reason of a premises, the owner is no gence; for such person h risk upon himself." To th *Evansville & T. H. R. Co.* 221, 50 Am. Rep. 783; M California R. Co. 144 C 1001, 1 Ann. Cas. 206, 17 Many other like cases mi these are sufficient to il vailing rule to which, so f gation has extended, there Nor do we perceive any these general principles,

trains, should not be applied in treating of the rights of licensees on railroad tracks and premises, where the tracks and premises are not set apart or dedicated by the railroad company to the use of persons doing business with it at stations or other places. If the public generally, for their own convenience, use the tracks and premises of a railroad company without any legal right to do so, but merely by the sufferance of the company, and this use continues for such length of time as to put upon the company in the movement of its trains the duty to anticipate their presence and exercise care not to harm them by what may be termed affirmative acts, this, we think, should be the full extent of the duty assumed by the company in protecting them from accidents that result from their own thoughtlessness, inadvertence, or want of care. The company should not be required to safeguard every place of possible danger on its right of way for the protection of persons who must generally take the premises as they find them, nor should it be liable for an accident that happens to a mere licensee who accidentally or thoughtlessly falls into some defective or exposed place on its premises.

There is, however, one exception recognized by the courts, and especially by this court, to the general rule that the licensor owes to the licensee no duty except to avoid wanton injury to him, and that is the duty incumbent upon railroad companies in the movement of their trains to take notice of the general and habitual use that the public make at certain places of their tracks and premises, and to take care not to harm them by the failure to keep a lookout and to give timely warning of the movement of their trains. The case of *Southern R. Co. v. Sanders*, 145 Ky. 679, 141 S. W. 77, may be referred to as an illustrative case on the subject of the rights of licensees on railroad tracks and premises, and the obligation the company owes to them in the operation of its trains. But there is no similarity between that class of cases and this one. There is quite a difference between affirmative or positive acts of negligence springing from a failure to discharge a duty in the operation of trains, and mere passive or negative acts of negligence that grow out of the failure to protect against dangers that may befall a licensee who walks or falls into a pit or excavation that the company has made for use in the conduct of its business, and with the location of which the licensee is familiar. For ex-

ample, if a licensee is injured by the movement of a train that was being operated without lights or signals or warning of its approach, it might well be said that the company should be required to respond in damages, because the long-continued use of the premises by the public carried with it the duty on the part of the company to prevent affirmative injury by the movement of trains or cars. In such a case the recovery is allowed upon the grounds that the person injured has not committed an act of negligence, and the injury was caused by the negligence of the company.

The licensor who has on his premises a stationary object that might inflict injury upon a careless or inattentive licensee who came in contact with it, or who has on his premises an excavation or pit used in connection with his business, into which a thoughtless licensee might fall, is not to be held to the same degree of care, or burdened with the same duty, as the licensor who uses in his business a dangerous, movable agency like an engine or cars, the immediate presence of which the licensee cannot many times know of in the absence of notice or warning, and it is well that a distinction should be made in the particular named between the duty and liability of a railroad company in the movement of its trains to licensees, and its duty toward them in other respects not connected with the operation of its trains or any other movable agency.

Here the turntable into which appellee fell was stationary and had been there many years in the same condition. Appellee was not injured by any affirmative act of negligence on the part of the company, or because, in the construction of the turntable or its operation, the company did anything it was not authorized to do. Her injuries resulted from her own want of care,—from her failure to take notice of conditions she had long been familiar with.

The case of *Rager v. Louisville & N. R. Co.* 137 Ky. 811, 127 S. W. 155, relied on by appellee, is not in conflict with the views we have expressed, as, under the facts stated in the opinion, it comes within the line of cases holding railroad companies liable for affirmative acts of negligence in dealing with licensees.

We think the appellee failed to make out a case of actionable negligence on the part of the company, and therefore the court should have directed a verdict in its favor. The judgment is reversed, with directions to proceed in conformity with this opinion if there is a retrial.

LOUISIANA SUPREME COURT.

VICKSBURG, SHREVEPORT, & PACIFIC
RAILWAY COMPANY, Appt.,

v.

WEBSTER SAND, GRAVEL, & CON-
STRUCTION COMPANY et al.

(132 La. 1051, 62 So. 140.)

**Appeal — inadequate report of testi-
mony — effect.**

1. An appeal will not be dismissed for imperfection in the stenographer's report of the testimony, where it does not appear that appellant was more to blame for it than appellee.

Same — denial of injunction — when lies.

2. As an appeal will lie from an order of court dissolving a prohibitory injunction against a disturbance of possession of immovable property, even though a bond be required to protect the plaintiff in the writ, *a fortiori* will it lie when such injunction is, in effect, dissolved, and the status which it was intended to preserve is disturbed by the illegal act of the defendant, and the court by which it was issued denies plain-

Headnotes by MONROE, J.

Note. — Right to mandatory injunction to restore status existing prior to violation of prohibitory injunction.

Although the court states in VICKSBURG, S. & P. R. Co. v. WEBSTER SAND, GRAVEL, & CONSTR. Co. that it is well established that a mandatory injunction may be issued to restore the status intended to be preserved by a prohibitory injunction which has been disturbed by a violation of that injunction, that statement appears to be based upon cases holding that a mandatory injunction may be issued to restore a condition which should have existed before the issuance of a prohibitory injunction.

But while VICKSBURG, S. & P. R. Co. v. WEBSTER SAND, GRAVEL, & CONSTR. Co. is the only case found in which a mandatory injunction was issued to restore the status which had been disturbed by the violation of a prohibitory injunction, the same result has been accomplished in other ways in a number of cases.

Thus, in *Murphy v. Harker*, 115 Ga. 77, 41 S. E. 585, the court, in granting a temporary injunction against the erection of an obstruction, also passed an order requiring that defendant restore the property to the condition it was in at the time of filing the petition, where he knew of the issuance of a restraining order and rushed the work before notice was formally served upon him, it being held that he was bound to obey the restraining order from the time he received notice of its issuance, though he was not yet formally served with it.

In *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 381, third parties who interfered, by erecting a fence, with the *status quo* in-

tiff's application for a mandatory injunction to compel defendant to restore the status as it existed before the disturbance.

Same — final decree.

3. Where the possession of immovable property is disturbed, and the possessor invokes the action of the court by way of a mandatory injunction, for his immediate relief, the judgment of the court refusing to grant the immediate relief is so far final as to entitle the applicant to an appeal.

Contempt — violation of injunction — enforcement — review.

4. Whether a defendant in injunction who violates the same should be punished for the contempt shown the court concerns the court in the matter of the maintenance of its dignity and authority; but whether, by coercive or punitive measures, such defendant should be compelled to obey the writ, issued by a competent court for the preservation of a civil right asserted by the plaintiff, concerns the plaintiff, and the action of the trial court upon that question may be subject to review in this court on appeal.

Injunction — mandatory — when granted.

5. It is well established under our law and jurisprudence, and is a rule of well-nigh universal acceptance, that where the

tended to be preserved by an injunction until the rights of the parties should be finally determined were ordered, upon petition and prayer for an attachment against them, to remove the portion of fence erected by them.

In *State ex rel. Hoefs v. District Ct.* 113 Minn. 304, 12 N. W. 583, the court, in a proceeding for contempt for violation of a permanent injunction restraining defendant from constructing a ditch, required him to fill up the ditch, saying there could be no serious question of the power of the court to do so.

In *Ashby v. Ashby*, 62 N. J. Eq. 618, 50 Atl. 473, which was a proceeding by petition to punish defendant for violating a permanent injunction restraining him from removing certain fixtures from a mill, the court required him to restore the fixtures in so far as that would remedy the injury, and to compensate plaintiff in money for the balance of the injury.

And in *Kempson v. Kempson*, 63 N. J. Eq. 783, 58 L.R.A. 484, 92 Am. St. Rep. 682, 52 Atl. 360, modifying 61 N. J. Eq. 303, 48 Atl. 244, defendant, who violated an injunction against the prosecution in another state of a suit for divorce from his wife, and obtained the divorce on fraudulent allegation of residence there, was required to present the matter truthfully to the court of the other state, and endeavor in good faith to have the divorce decree set aside, the court modifying in this respect the order of the lower court that defendant procure the setting aside of the decree, as it was within the discretion of the court of the other state as to whether the decree would be set aside.

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hibitory injunction is changed or disturbed by the defendant in violation of that writ, such defendant may be compelled by a mandatory injunction issued before the trial on the merits, to restore such status. In fact, the authorities hold that a mandatory injunction may in some cases issue preliminarily and *ex parte*, and not only to restore a pre-existing status, but to compel affirmative action in the establishment of a status which should have existed.

Appeal — remand for evidence.

6. A case will be remanded for further evidence where the interests of justice appear to require it.

(May 12, 1913.)

APPEAL by plaintiff from a judgment of the District Court for the Parish of Webster in defendants' favor in a proceeding to compel the restoration of a portion of plaintiff's track which was alleged to have been removed by defendants. Reversed.

The facts are stated in the opinion.

Messrs. Stubbs, Russell, & Theus, for appellant:

Actual knowledge of the existence of a writ of injunction on the part of an agent or employee of defendant gravel company is sufficient notice to authorize his punishment for contempt of court in violating the injunction.

State ex rel. Alverson v. Sommerville, 105 La. 273, 29 So. 705; Junius Hart Piano House v. Ingman, 119 La. 1022, 44 So. 850; Blaise v. Security Brewing Co. 124 La. 979, 50 So. 816.

All acts which amount to a trespass or change of possession of immovable property are irreparable.

State ex rel. Sigur v. Nineteenth Judicial Dist. Judge, 33 La. Ann. 133; Torres v. Falgoust, 33 La. Ann. 560; Jefferson & L. P. R. Co. v. New Orleans, 30 La. Ann. 970; Boedicker v. East, 24 La. Ann. 154; Marion v. Johnson, 22 La. Ann. 512.

A punishment by ordering the restoration of the roadbed and tracks as prayed for in this case would be remedial, rather than punitive in character, intended to secure a civil right to the plaintiff during the pendency of the suit, and, as the injury is of an irreparable nature, this case is appealable.

State ex rel. Alverson v. Sommerville, 105 La. 280, 29 So. 705; Re Debs, 158 U. S. 596, 39 L. ed. 1107, 15 Sup. Ct. Rep. 900; Re Chiles (Texas v. White) 22 Wall. 168, 22 L. ed. 823; Bessette v. W. B. Conkey Co. 194 U. S. 327, 48 L. ed. 1001, 24 Sup. Ct. Rep. 665; Re Reese, 47 C. C. A. 87, 107 Fed. 945, 14 Am. Crim. Rep. 253; State ex rel. Heffner v. First Judicial Dist. Judge, 47 L.R.A. (N.S.)

New Orleans Waterworks Co. v. Levy, 38 La. Ann. 942.

Messrs. Stewart & Stewart and L. E. Watkins, for appellees:

No appeal will lie from a judgment on a rule for contempt.

State ex rel. Barthet v. Civil Dist. Judge. 40 La. Ann. 434, 4 So. 131; State ex rel. O'Malley v. Houston, 35 La. Ann. 1197; Blaise v. Security Brewing Co. 124 La. 979, 50 So. 816; State v. Shay, 30 La. Ann. 116; Sallabah v. Marsh, 34 La. Ann. 1055; Bayly v. Weil, 28 La. Ann. 264; State ex rel. De Buys v. Orleans Parish, 32 La. Ann. 1225.

The function of the writ of injunction is prohibitive, and not mandatory, and it is only in exceptional cases that the writ in the mandatory form will be issued.

Petite Anse Drainage Dist. v. Iberia & V. R. Co. 117 La. 940, 42 So. 433; Itzkovitch v. Whitaker, 115 La. 499, 1 L.R.A. (N.S.) 1147, 112 Am. St. Rep. 272, 39 So. 499; New Iberia Rice Mill. Co. v. Romero, 105 La. 439, 29 So. 876; Black v. Good-Intent Tow-Boat Co. 31 La. Ann. 497; Barrett v. New Orleans, 33 La. Ann. 544; Koehler v. Civil Dist. Judge, 54 La. Ann. 1493, 14 So. 352; Central Trust Co. v. Moran, 56 Minn. 188, 29 L.R.A. 212, 57 N. W. 471; Walkley v. Muscatine, 6 Wall. 483, 18 L. ed. 930.

Monroe, J., delivered the opinion of the court:

Plaintiff prosecutes this appeal from a judgment wherein the district court holds defendant and certain of its officers and employees guilty of contempt, and imposes fines upon them for having violated a writ of injunction by removing portions of the roadbed and rails, and thereby interfering with plaintiff's possession of a certain "spur track," and whereby the court denies its (plaintiff's) prayer for a mandatory injunction ordering defendant to restore said track to the condition that it was in prior to said disturbance by defendant. The facts of the case are as follows:

Plaintiff brought this suit in July, 1910, alleging that it had been in actual and undisturbed possession, with the consent of the owners, for more than two years, of the right of way over which its spur track is built, and had used said track as part of its interstate railway system; that about July 27th defendant took forcible possession of 1,800 feet of said track and removed the rails therefrom, was then detaining the same, thereby preventing plaintiff from operating its trains, and was threatening to remove additional rails; and that plaintiff had been, and would continue to be, damaged thereby; and it prayed for a pro-

hibitory injunction against further trespass, and a mandatory injunction to compel defendant to restore the *status quo*, and for damages. The prohibitory injunction was issued preliminary, "restraining and prohibiting said defendants [the defendant company and certain named officers and employees] from trespassing upon, or interfering with plaintiff's possession of, its spur track, . . . and from operating trains or other vehicles over said track or right of way or any part thereof;" and defendant was ordered to show cause why the mandatory injunction should not issue as prayed for.

Defendants filed various exceptions and an answer, and counsel for plaintiff now make the statement in the brief filed by them, and which does not appear to be denied, that "under verbal agreements not in the record, the track which had been removed was rebuilt by defendant, and the prohibitory injunction remained in full force and effect," etc.

In the meanwhile, defendant had brought a petitory action, praying to be decreed the owner of the strip of land in question, and that plaintiff be ordered to remove its tracks therefrom, and, as it was pressed to trial and brought by appeal to this court, plaintiff's injunction suit was allowed to remain in abeyance, probably, to await the outcome of that litigation. The petitory action was disposed of in this court in January, 1912 (rehearing refused February 12, 1912), by a judgment in which it was held and decreed as follows:

"The judgment of the district court decrees the title to the strip of land in question to be in plaintiff; 'that the injunction herein sued out . . . be maintained and perpetuated; and that the . . . railway company be ordered, within twenty days, to remove their spur track off of said strip of land, . . . so as to leave the land unobstructed. . . .'

"We have not been able to find any petition or order for or any writ of injunction in the record, and, for the reasons stated, are of opinion that there is error in the judgment referred to, in so far as it purports to enjoin the defendant from continuing to use its spur track and orders the removal of the same. It is therefore . . . decreed that the judgment appealed from be . . . reversed, in so far as it orders defendant to remove its spur track off the strip of land, . . . or otherwise interferes with defendant in the use of said strip, for the purposes of said spur track." Webster Sand, Gravel & Constr. Co. v. Vicksburg, S. & P. R. Co. 129 La. 1096, 57 So. 520.

In May following the rendition of the 47 L.R.A.(N.S.)

above-quoted judgment, plaintiff filed a petition in this case, alleging "that the said F. H. Drake, president of said [defendant] company, did, on or about the 24th day of April, 1912, personally direct and cause . . . 458 feet of steel rails and 233 feet of petitioner's said branch or spur tracks to be removed, and did on said date, and has continuously since then, caused the crew of said company, operating a steam shovel to excavate the grounds, or a portion thereof, on which said . . . spur track is constructed, and took . . . unlawful possession of petitioner's right of way, off of which said track was removed, and has . . . converted to its own use said 458 feet of steel rails, . . . all in flagrant defiance and contempt of this honorable court, its orders, and writ of injunction," etc.

And, agreeably to the prayer of the petition, the defendant company and its president were ordered to show cause why they should not be punished for contempt, and why a mandatory injunction should not issue commanding them forthwith to "restore said steel rails and restore said spur tracks to the condition that they were in prior to said trespass."

The transcript shows that, when the rule came on to be heard, it was discontinued, at the instance of plaintiff, on defendant's paying costs, and it is alleged, and apparently conceded, that the reason for the action so taken was that defendant's president appeared in court and stated that the acts complained of were done inadvertently, and agreed to repair the resulting damage and abstain from further trespass.

Thereafter, however, on August 1st, plaintiff filed the petition and rule, from the judgment on which this appeal is taken, and wherein it alleges that the defendant company, F. H. Drake, its president, and L. H. Blackman, its foreman "did, on or about the 1st day of July, 1912, . . . beginning 300 yards from the washing plant of said . . . company, excavate and remove more than 8,000 cubic yards of petitioner's right of way, which said excavations extended for a distance of more than 290 feet, and excavated from each side of said right of way, leaving a narrow and insecure strip of said right of way, with said excavation or cut on each side, for more than 290 feet, at least 13 feet deep, and undermined more than 65 feet of petitioner's railroad track used as a siding, and caused said track to fall to the bottom of said excavation for want of support, where the same now lies, totally and wholly destroyed, and on the opposite side of said right of way made a similar excavation or cut, and undermined petitioner's main line

render the same insecure for the operation of trains over the same; and on account of said trespass and excavation of its right of way and caving from underneath its main line track, it is impossible to operate even the lightest train over the same; and, in addition to the above alleged acts of trespass, said company, Drake, and Blackman excavated and removed dirt and gravel from petitioner's right of way up to the ends of the cross-ties on its other side track for a distance of fully 294 feet, which said cut or excavation is fully 13 feet in depth, and caused a wall, almost perpendicular, 13 feet high, up to the ties of said track, which renders the same wholly insecure and unsafe to operate trains or locomotives over; . . . the above alleged trespass having begun on or about the 1st day of July, 1912, and continued for each and every day up to the 21st day of July, 1912. Petitioner further shows that said . . . company and F. H. Drake have operated trains over petitioner's said tracks and right of way during every week since the issuance and service of said writ of injunction."

Plaintiff prayed that the defendant company, its said president and foreman, be required to show cause why they should not be "ordered forthwith to rebuild said destroyed track, refill the excavation, and restore said tracks and right of way to their condition prior to said alleged trespass," and further to show cause why they should not be fined and imprisoned; and the order nisi was so made. After a full hearing upon the facts and law, as presented by the parties, the court *a qua* gave judgment as follows: "That the respondents Webster Land, Gravel, & Construction Company be and are hereby adjudged in contempt of this court, and are each ordered to pay a fine of \$1 and all costs of this suit; the judgment for costs being a solidary judgment, except the costs incurred on the rule against respondent L. H. Blackman, which are taxed against relator; said L. H. Blackman being hereby dismissed, and the rule as to him being discharged. All other demands of relator are rejected. "It is further ordered and decreed that the rights of the plaintiff, if any it has, to sue for damages, be and are hereby specially reserved." Plaintiff, as we have stated, prosecutes the appeal.

On Motion to Dismiss Appeal.

The defendant company and F. H. Drake, appellees, move to dismiss the appeal on the grounds: (1) That the transcript is incomplete, the testimony having been so inaccurately transcribed as to be unintelligible; (2) that, the judgment being inter-

thereby inflicted not being irreparable, no appeal lies; (3) that no appeal lies from a judgment on a rule for contempt.

1. The clerk certifies to the correctness of so much of the transcript as contains the pleadings and documentary evidence, and with that there appears to be no cause of complaint. With regard to the oral testimony, the stenographer certifies that "the above . . . sixty pages of evidence compose, to the best of my ability, a true and correct transcript of my shorthand notes," etc.

The work of the reporter leaves much to be desired; but, as there is nothing to show that plaintiff is any more responsible for its imperfections than defendants, the appeal will not be dismissed on that account.

2. The whole purpose of this suit is to protect plaintiff in its possession and alleged right of possession of immovable property, and the purpose of the preliminary injunction was to preserve the *status quo* until the question whether such right existed could be decided. That question was decided by this court in the petitory action, and yet, notwithstanding that it was there held, contradictory with the defendant, that plaintiff has the right to maintain and use its tracks on the land in question, and notwithstanding the injunction of the district court prohibiting defendant and its officers from interfering with the enjoyment of such right, they (defendant and its officers) have so interfered and have actually dispossessed plaintiff by removing a portion of its roadbed and rails; and, by the judgment appealed from, the district court declines to order them to restore what they have removed.

The Code of Practice (article 298) provides that "the injunction must be granted: . . . (5). When the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession, or the enjoyment."

And it is well settled that "in such case the judge to whom the application is made is without discretion in the matter, and must grant the writ upon the petitioner's complying with the prescribed conditions." *Beebe v. Guinault*, 29 La. Ann. 795; *Crescent City, L. S. & S. H. Co. v. Larrieux*, 30 La. Ann. 799; *State ex rel. Behan v. Sixth Dist. Judge*, 32 La. Ann. 1276; *State ex rel. Gaynor v. Young*, 38 La. Ann. 924; *Lewis v. D'Albor*, 116 La. 684, 41 So. 31. It is equally well settled that an appeal will lie in such case from any order of court dissolving an injunction once issued,

whether on bond or otherwise, since the effect of the dissolution would be to change the possession of immovable property, and the injury, in contemplation of the law, would be irreparable. *Marion v. Johnson*, 22 La. Ann. 512; *Boedicker v. East*, 24 La. Ann. 154; *State ex rel. Sigur v. Nineteenth Judicial Dist. Judge*, 33 La. Ann. 133; *Torres v. Falgoust*, 33 La. Ann. 560; *Sheridan v. Reese*, 121 La. 227, 46 So. 218; *Bradley v. Davis*, 127 La. 371, 53 So. 653.

If, then, an appeal will lie from an order of court dissolving an injunction, even though a bond be required to protect the plaintiff in the writ, *a fortiori* will it lie when the injunction is, in effect, dissolved by the illegal act of the defendant in defying or disregarding it, and the court by which it was issued dismisses plaintiff's application to restore the *status quo*. Again, the question presented to the court *a qua* in this case was whether the plaintiff should be afforded immediate relief against an invasion of its right of possession, which right was secured by the prohibitory injunction issued by that court and by a final judgment of this court; and the judgment of the court *a qua*, to the effect that plaintiff was not entitled to such immediate relief, was final upon that question, and for that reason also the appeal lies. *McDonogh v. Calloway*, 7 Rob. (La.) 442.

3. Whether defendants should be punished for the contempt shown the court whose order they disregarded concerned the court in the matter of the maintenance of its dignity and authority; but, whether by coercive or punitive measures, they should be compelled to obey that order, issued by a competent court for the preservation of a civil right asserted by plaintiff, concerns the plaintiff, and the action of the trial court upon that question is subject to review in this court on appeal, since there is a civil right involved and a value in dispute exceeding \$2,000, exclusive of interest. The motion to dismiss the appeal is therefore overruled.

On the Merits.

Considering the case presented in its appealable aspect (that is to say, with reference to the right of the appellant to have the judgment appealed from reviewed in so far as it denies the mandatory injunction to compel defendants to restore the status established by the prohibitory injunction, and which defendants have changed in violation of that writ), we find it to be well established under our law and jurisprudence, and to be a rule of well-nigh universal acceptance, that, where the status intended to be preserved by a prohibitory

injunction is changed or disturbed by the defendant in violation of that writ, such defendant may be compelled, by a mandatory injunction, to restore it; in fact, the authorities hold that a mandatory injunction will, in some cases, issue preliminary and *ex parte*, and not only to restore a pre-existing status, but to compel affirmative action in the establishment of a status which should have existed. Thus, in 1 High on Injunctions, 4th ed. it is said:

"Sec. 2. And while a court of equity is always reluctant to grant a mandatory injunction upon an interlocutory application and before final hearing, it may yet do so in an extreme case, when the right is clearly established and the invasion of the right results in serious injury. . . . [Note to above.] In *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.)* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730, Judge Taft uses the following language: 'The office of a preliminary injunction is to preserve the *status quo* until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the *status quo* is a condition, not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits.'

"Sec. 5. A. Since the object of a preliminary injunction is to preserve the *status quo*, the court will not grant such an order where its effect would be to change the status. . . . And by *status quo*, which will be preserved by preliminary injunction, is meant the last, actual, peaceable, uncontested condition which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed status, although he succeeded in making the change before the hand of the chancellor has actually reached him. And where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him, but may, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition; and in so doing the court acts without any regard to the ultimate merits of the controversy."

In *McDonogh v. Calloway*, *supra*, a prohibitory injunction having been issued against an existing obstruction to a passageway common to the adjoining proprietors, the plaintiff, before the hearing on the merits, applied for a mandatory injunction

and, the application having been refused, he appealed to this court, where the appeal was sustained, and it was held (quoting from the syllabus): "An injunction may be directed to parties or to public officers to compel them to do certain acts, as well as to restrain them from acting. It is as effective to enforce a right as to prevent a wrong." 7 Rob. (La.) 442.

In *Pierce v. New Orleans*, 18 La. Ann. 242, a rule was taken on the city of New Orleans requiring it to show cause why it should not be enjoined and ordered to close up certain openings made by it in a wall held in common; and, the rule having been made absolute during the pendency of the suit, the city appealed to this court, where it was said: "There is a sufficient showing in the plaintiff's petition to entitle him to the equitable interference of the courts; but what we have to determine now is whether *pendente lite*, and before a trial on the merits, an order should be granted directing the performance of, as well as the restraining from, an act."

The court then refers to certain English cases holding the contrary, and, affirming the doctrine enunciated in *McDonogh v. Calloway*, concludes that the order was properly granted.

In *Black v. Good Intent Tow-Boat Co.* 31 La. Ann. 497, the court, construing the decision in *McDonogh v. Calloway* to mean that, where one is enjoined from obstructing a passageway, his maintenance of an existing obstruction is a violation of such injunction, approved the doctrine that a mandatory injunction directing the removal of the obstruction may in such case issue before a hearing on the merits; and it distinctly held that "a prohibitory writ having issued, restraining a party from obstructing the exercise of a right, the obstruction may be commanded to be removed, because its continuance effects the very injury he was prohibited from effecting."

In *State ex rel. Yale v. Duffel*, 41 La. Ann. 516, 6 So. 512, it appeared that J. E. St. Martin had obtained an injunction prohibiting the relators from operating a draining machine which threw drainage from their plantation upon his, and that relators obtained the dissolution of the writ on giving bond; that St. Martin built a levee in front of the machine, thereby destroying the effect of its operation; that relators thereupon applied for a prohibitory injunction restraining St. Martin from disturbing them in the free enjoyment of the right of drain through his plantation, and for a mandatory injunction or order commanding the sheriff to remove the obstructing levee, which applications were denied, whereupon 47 L.R.A. (N.S.)

mandamus, which was granted, directing the judge to issue the writs as prayed for.

After referring to the prohibitory injunction as falling under Code of Practice 296, "and others similar," the court said as to the duty of the trial judge in the premises: "Therefore, as to this part of the relief asked, his absolute duty to grant it was beyond dispute." And the opinion proceeds: "We consider that the additional order prayed for to remove the levee which operates the disturbance was a natural and necessary corollary . . . of the injunction against disturbance. The law in express terms authorizes the injunction when 'the defendant disturbs the plaintiff' in the possession of his real right. It is granted as a remedy for actual, as well as threatened, disturbance. It contemplates an effective relief, and manifestly the injunction would be *brutum fulmen* if the obstruction . . . complained of and enjoined were permitted to remain, and thus to paralyze its effect, and to perpetuate the disturbance which the injunction forbids. The case is on all fours with that of *McDonogh v. Calloway*, supra."

In *New Iberia Rice Mill. Co. v. Romero*, 105 La. 439, 29 So. 876, plaintiff complained that defendant had dammed its irrigating canal, and prayed for an injunction, prohibitory and mandatory, which was issued accordingly, and obeyed. As part of his defense, defendant urged that the mandatory injunction should not have issued until after a hearing on the merits, but this court said: "The injunction was issued on June 18, 1900, and, as the case is yet to be disposed of, it is evident that, if the rule invoked had been applied, the injury which the mandatory order was intended to ward off, i. e., the destruction of the rice crops, which were dependent upon the dammed up water, would long since have been sustained." And the writ was sustained.

In 22 Cyc. 742, we find: "2. . . . And a mandatory injunction may be granted although the act causing the injury has been completed before the suit is brought. The complainant may by this means be put *in statu quo*. . . . Where defendant has fully completed the act sought to be restrained, after the filing of the bill, but before the issuance of any order or decree, the court has power to compel, by mandatory injunction, the restoration of the former condition of things."

Plaintiff herein having been in possession for more than a year of the land upon which its spur track is built, and its possession having been disturbed by defendants, the matter of the issuance of the prohibitory injunction was not within the dis-

pulsory (State ex rel. Yale v. Duffell-supra), and the court was as much bound to maintain and enforce as to issue it; the manner in which that may be done being prescribed by law. Article 308 of the Code of Practice (as amended and re-enacted by act 77 of 1896) provides that " . . . the court may either cause to be destroyed whatever may have been done in contravention of the injunction, if it be practicable, or they may punish him by an imprisonment not exceeding ten days, but which may be repeatedly inflicted, until the party obeys the mandate of the court." And article 636 provides that "when the judgment orders . . . doing . . . something specified in it, if the party condemned, on demand made by the sheriff that he shall comply with it, refuses or neglects to do so, . . . the party in whose favor the judgment was rendered may obtain, on motion, an order to distrain all the property, movable and immovable, of the party who is in default, until he shall have fully satisfied the judgment."

The judge *a qua* must have found that defendants had disturbed the status intended to be preserved by his prohibitory injunction, and, having imposed a fine upon the defendant company for its disrespect in failing to obey that writ, he should, we think, have gone further and ordered the defendant company and its president, through whom it acted, and to whom also the writ was directed, to restore matters to the condition in which they were when the writ was issued, at least to the extent of the disturbance for which they were responsible. It may be, however, that, though he heard the witnesses testify, he was unable to determine, with reasonable certainty, the character and extent of what we may call the depredation committed by the defendants, which they should be compelled to repair. At all events, having only an exceedingly imperfect report of the testimony to rely on, we find ourselves in that dilemma, and have concluded to remand the case in order that the facts may be more intelligibly presented, and a basis thereby established upon which to rest a definitive judgment. As to defendant's foreman (Blackman), it would probably be out of his power to obey an order such as plaintiff prays for; but if he knew that the injunction was pending, whether it was served on him or not (which we are inclined to think was the case), some effective action should be taken to compel him to respect it, since the plaintiff is entitled, for the protection of its rights, to something more than an empty order which no one is compelled to obey, and a court of justice, for its own 47 L.R.A. (N.S.)

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erected on spiles driven into the soil of the river, and reached from the shore only by boat or a float fastened by ropes one of which is attached to a bulkhead on the shore.

(April 8, 1913.)

APPEAL by traverser from a judgment of the Criminal Court of Baltimore City, convicting him of selling intoxicating liquors without a license. Reversed.

The facts are stated in the opinion.

Messrs. George W. Lindsay and Richard B. Tippet for appellant.

Mr. William F. Broening, with Messrs. Edgar Allan Poe, Attorney-General, and Roland R. Marchant for the State.

Mobile, 64 L.R.A. 333, and Mobile Docks Co. v. Mobile, 3 L.R.A.(N.S.) 822.

As to rights of the municipality in respect to accretions to shore lands, see note in 53 L.R.A. 203.

Boundaries on navigable streams.

The earlier cases dealing with the question of boundaries of municipalities on navigable streams are collected in a note to State v. Eason, 23 L.R.A. 520.

As pointed out in the earlier notes, some cases apply to the question of boundary of a municipality on a stream the same rules that govern the boundaries of private lands. That is also true of some of the cases cited in the present note.

Thus, in Western Maryland Tidewater R. Co. v. Baltimore, 106 Md. 561, 68 Atl. 6, it was said that it is well settled that the same rules of construction will be applied to the boundaries of a municipality bordering on navigable or non-navigable waters as will be to the description in a grant to an individual of lands so situated.

The same principle was recognized and followed in Re McDonough, 30 U. C. Q. B. 288, the case being decided upon the theory that there should be no distinction in construing the terms of a grant of land and of a proclamation establishing municipal boundaries.

In Re McDonough, supra, it was held that the boundary of the city of London upon the Thames river was the middle of the river, the boundary being described in the proclamation defining the city limits, as "intersecting" the north and east branches of the river, the city to contain all the lands comprising the old and new surveys, "with the land adjoining thereto, lying between" said surveys and the river. It was said that when the limits of municipalities are defined as being bounded or divided by a river, such as the Thames, the limit of jurisdiction is the middle of the river, unless there is a manifest intention to exclude that rule and to limit the boundary to the river's edge.

In Rabb v. State, 7 Md. 483, where the 47 L.R.A.(N.S.)

court:

The traverser was indicted for the sale of intoxicating liquors in the city of Baltimore without a license. The indictment contains 13 counts, and charges that a sale was made to the persons named in the several counts of the indictment on the 21st day of July, 1912. He was tried and convicted, and fined \$5 and costs.

At the trial the traverser filed two special pleas to the jurisdiction of the criminal court of Baltimore city, alleging, in substance, that the traverser's place of business, where the sales are alleged to have occurred, is located in Baltimore county, in the state of Maryland, and not in the corporate limits of Baltimore city; that he is a

statute defining the limits of the city of Baltimore provided that they should extend "to the southern part of Whetstone point, on the main branch" of a navigable stream, and thence "run with and bounding on the said main branch" of the stream, it was held that the corporate limits did not include the stream, although the legislature had provided that every county bounding on a navigable stream should have jurisdiction to the channel of the stream.

But in Western Maryland Tidewater R. Co. v. Baltimore, 106 Md. 561, 68 Atl. 6, the court said that, without overruling Rabb v. State, it would have been inclined to have decided it otherwise, and to have held that the jurisdiction of the city of Baltimore extended to the middle of the stream, since, as the policy of the state was to extend the jurisdiction of counties to the channels of navigable streams, the same policy might be construed to apply to Baltimore city.

But while the city of Baltimore does not have jurisdiction over the waters of the navigable stream forming its boundary, if the proprietors of land fronting on the stream fill out from the shore, the land thus reclaimed, or formed as accretion to the shore by natural causes, is within the jurisdiction of the city. Western Maryland Tidewater R. Co. v. Baltimore, supra.

The city of Baltimore also has jurisdiction over piers which are extended into the stream from the reclaimed land upon the shore by driving piles into the bed of the stream and allowing the water to flow over them. Ibid. It was said that the mere fact that the piers were built on piles instead of on solid ground ought not to make any difference; that they were nevertheless permanent structures. And in answer to the contention that the law did not intend to give owners of property the power to extend the limits of the city by their acts, it was said that it certainly did not intend that the owners should be able to determine whether the limits should be extended by building a pier on piles, and thereby not extending the limits, or by making a solid wharf, and thereby extending them.

Where the statute defines the municipal

duly authorized licensee to sell liquors by the proper authorities of Baltimore county; and that the criminal court of Baltimore city has no jurisdiction over the alleged offenses. The state demurred to the pleas, and the court sustained the demurrer. The traverser was then tried before the court, adjudged guilty, and sentenced to pay a fine of \$5 and costs, and from this judgment he has appealed.

By an agreement filed in the case, all errors of pleading are waived. The single question presented by the demurrer to the special pleas on the record now before us is one entirely of jurisdiction and that is whether the pier or pavilion described in the pleas, the place where the liquor is alleged to have been sold, is within the

limits of Baltimore city, for the purposes of requiring persons who sell liquor therein to obtain a license from Baltimore city, and not in Baltimore county.

The facts upon which the determination of the question rest are set out in the special pleas, and for the purposes of the case are admitted by the demurrer. The pleas, in substance, are as follows:

First. That the court is without jurisdiction because the alleged offenses contained in the indictment were not committed in the city of Baltimore. That at the time mentioned in the indictment and a long time prior thereto the traverser was a duly authorized licensee to sell retail liquor in Baltimore county, and that the place where said liquor is said to have been sold is as

boundaries as extending "to" a navigable river, the river is not within the city, but the boundaries terminate at the edge of the river. *Thompson v. Blackwell*, 5 La. 466, holding that the boundaries of the city of New Orleans terminate at the edge of the Mississippi river, so that a steamboat lying at the wharf and floating on the river is outside the corporate limits of the city. It was said that the word "to" may be either inclusive or exclusive, according to the subject-matter; but that, in designating boundaries, it is always understood, if not accompanied by the term "inclusive," to exclude the object to which the line runs.

The same principle was adopted in *Municipality No. 2 v. Municipality No. 1*, 17 La. 573, holding that the limits of the city of New Orleans extend only to the outer edge of the levee, which is by law the bank of the Mississippi river.

It has been recognized, however, in a number of cases, that the city of New Orleans has administration of the batture. See *Remy v. Municipality No. 2*, 12 La. Ann. 500, Subsequent Appeal, 15 La. Ann. 637.

A description in the boundary of the town of Oakland, California, that it runs "from the bay of San Francisco on the north to the southerly line of San Antonio creek or estuary . . . and thence down the line of said creek or slough, to its mouth in the bay," was construed in *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277, as giving the town jurisdiction only to the line of low tide, and not to the high tide line on the opposite shore of the navigable estuary.

It was also held in *Oakland v. Oakland Water Front Co.* supra, that the line was to be followed down the creek to the bay and across the mouth of a basin which connected with the creek on the opposite side of the town, and did not extend around the edge of the basin, so as to include it within the city limits.

The above construction of the corporate limits of Oakland was rendered in a case where the question was as to the right to certain lands, which it was alleged were in-

cluded in a grant by the state to the city. The grant to the city was defined as the "lands lying within the limits aforesaid" (the corporate limits of the town as defined by the act), and the court took the position that the entire act should be strictly construed in accordance with the rule that in grants by the state out of its bounty any ambiguity or uncertainty should be solved in favor of the state, and against the grantee. The conclusion reached that the low, and not the high, water mark on the opposite side of the estuary, should be the boundary of the city, was strengthened by consideration of the injustice that would otherwise result in depriving other cities located on the opposite shore of access to the adjacent water, the principle being that a strict construction should be followed where it is more conducive to the public welfare.

It should be noted also in *Oakland v. Oakland Water Front Co.* supra, the court construed the corporate limits as defined by the act to extend only to low-water mark on the opposite side of a navigable stream, and as not including a basin connecting with the stream on such side, although, in amending the city's charter, the legislature had apparently adopted a contrary construction by providing that the boundaries should be the same as those formerly existing, and then specifically describing them as extending along the high-tide line of the stream on the opposite shore, and following all the meanderings thereof to the bay.

See, in this connection, *Western P. R. Co. v. Southern R. Co.* 80 C. C. A. 606, 151 Fed. 376, where the construction of the corporate boundaries of Oakland, adopted in the last case, were regarded as binding on the Federal court.

In *Gilchrist's Appeal*, 109 Pa. 600, cited in the note in 23 L.R.A. 520, it was held that the boundaries of Wilkes Barre upon the Susquehanna river did not extend below low-water mark. Soon after that decision was rendered a statute was passed, providing that whenever any township or city is bounded by the nearest margin of a navigable stream, and the opposite town-

follows: At a pavilion built on wooden piles in the main branch of the Patapsco river, the piles being driven in the soil, the whole structure having a length of wharf or pier front, and wholly located in the navigable waters of the river, of about 100 feet, with a width of about 50 feet, which pavilion is situated at or near the center of the entire structure, and which entire structure is located in Baltimore county, about 60 feet easterly or south of easterly from the boundary line of Baltimore city, as defined by act of assembly of Maryland of 1816, chapter 209, which act defines the limits of Baltimore city, and between the boundary line and the middle of the stream. That on the day mentioned in the indictment access to the pavilion was had in two ways, as follows. By a movable float fastened by a rope at one end to the pier on which the pavilion is built, and at the other

end by a rope to a bulkhead built on the shore within the corporate limits of Baltimore city. That the float is not attached to the soil, but is a movable boat or raft, and is moved from time to time, affording no connection whatever when so moved between the corporate limits of Baltimore city and the pavilion, but is supported by and floated by the water in which it is located: to wit, the main branch of the Patapsco river. And said pavilion is also accessible by yachts, steam and motor boats plying in the waters of the main branch of the Patapsco river along its water or pier front. And this defendant says that the circuit court of Baltimore county has exclusive jurisdiction over said alleged offenses mentioned in said indictment, and that the criminal court of Baltimore city has no jurisdiction whatever over said alleged offenses.

And for a second plea to the jurisdiction,

ship or city is also bounded by the nearest margin of the same stream, the middle of the stream shall be the boundary between such townships and cities. And in *Gilchrist v. Strong*, 167 Pa. 628, 31 Atl. 931, it was held that by this statute the boundary of the city of Wilkes Barre was extended to the middle of the Susquehanna river. While the above general statute did not expressly repeal the special act incorporating the city of Wilkes Barre and fixing the boundary at low-water mark, the intent to repeal it was regarded as so clear as to be equivalent to an express direction to that effect.

The East river between the former cities of New York and Brooklyn is within the jurisdiction of the consolidated city of New York, since it was a part of the old city of New York before the consolidation, and the new charter consolidated outlying municipalities with the old city as it then existed. *People v. Prillen*, 173 N. Y. 67, 65 N. E. 947.

An act of Congress donating an island in the Missouri river to a nearby city for park purposes exclusively, on condition that the donation be accepted within a year, and providing that the city shall have authority to adopt rules and regulations for the care of the park, does not, after acceptance by the city, extend its corporate limits, so as to give it jurisdiction to punish for an assault and battery committed therein as in violation of a city ordinance. *Chamberlain v. Putnam*, 10 S. D. 360, 73 N. W. 201.

Boundaries on navigable waters other than streams.

The terms "shore" and "coast line," as descriptive of municipal boundaries, were distinguished in *Mowat v. North Vancouver*, 9 B. C. 206, holding that where the boundaries were defined as running along the "coast line," Itala or Engle island, near 47 L.R.A. (N.S.).

North Vancouver, was within the limits of the city, although the term "shore," as used in another boundary description, was said to be defined as including generally only the land between high and low water mark.

The term "ship channel" as the boundary of a city has been construed to mean low-water mark. *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

The above construction of the term "ship channel" was adopted in *Western P. R. Co. v. Southern P. Co.* 80 C. C. A. 606, 151 Fed. 376, as binding upon the Federal court in passing upon the question.

The peninsula of San Diego, which projects into the U-shaped entrance to the harbor, is within the corporate limits of the city. *San Diego v. Granniss*, 77 Cal. 511, 19 Pac. 875; *Fisher v. San Diego Police Ct.* 86 Cal. 158, 24 Pac. 1000. The statute incorporating the city provided that it should include the original pueblo of San Diego, and that the boundaries should be fixed by the field notes of the original survey "except the water-front line on the bay, and this shall be ship's channel of the said bay; and the municipal jurisdiction shall extend to said limits, and over the waters of said bay, and into the ocean, to the extent of one marine league from the shore." The construction of this description that the peninsula was within the corporate limits of the city was aided by other provisions of the act relating to the ward in which the inhabitants of "the peninsula of San Diego" should be considered for voting purposes, and providing that the statute should not be construed as giving to the city authorities any control or title to "the land lying outside" of the original pueblo line except for municipal purposes.

In *Milne v. New Orleans*, 13 La. 68, where one who laid out a town on the margin of a lake claimed that it was not within the jurisdiction of the city of New Orleans, the court, in holding that it was within the city limits, which it said were by the law

after reciting in substance the first plea, further says: The place being a pavilion situated in the main branch of the Patapsco river, in the corporate limits of Baltimore county, and in the navigable waters of the main branch of the Patapsco river, and is built upon piles driven in the soil, and is a permanent structure connected with the soil, and has been located in its present position for at least twenty-five years, and that this defendant, at the time he became the licensee of the pavilion at which he was duly authorized to sell intoxicating liquors by the proper constituted authorities of Baltimore county, had no access whatever with the shore line of Baltimore city, but some time after obtaining his license in May, 1911, from the proper authorities of Baltimore county, to sell intoxicating liquors at the pavilion, secured the services of two floats so as to form a

means of access from the pavilion to the Baltimore city line; the floats being tied, the one to the pavilion pier and the other to a stake on the shore, and each floating upon the surface of the water, and access from one to the other being by loose boards. That thereafter this defendant used one float, and, at the time of the alleged offense contained in the indictment, access between the shore line of Baltimore city and the pavilion of this defendant was by means of a float tied with ropes at one end to the pier on which the pavilion is built, and at the other end tied by a rope to a bulkhead on the shore line of Baltimore city; there being no physical connection whatever between the soil and the said float other than that the float was tied at both ends to keep it in position with ropes, the float resting upon the surface of the waters and wholly

left vague and indefinite, relied upon the practical interpretation given by the residents of the town, who apparently considered themselves within the corporate limits by voting at the city elections and enjoying municipal privileges.

In *Russ v. Boston*, 157 Mass. 60, 31 N. E. 708, it was held that the boundaries of the cities of Boston and Hull on an island in tide water were not changed by the action of harbor and land commissioners in defining the boundaries of the towns in surrounding tide water, the commissioners having power only to make an equitable division of the tide waters, and having no power to locate boundary lines upon land.

In establishing its corporate limits, commissioners may include the harbor and navigable water in front of a city. *Smith v. Skagit County*, 45 Fed. 725. In that case the statute provided that in the incorporation of cities a petition should be presented to the county commissioners, describing the proposed boundaries, and the commissioners should establish the boundaries. The court said it was essential to the maintenance of an efficient city government that its police power and jurisdiction should extend over its harbor; that the statute placed no limit over the power of the commissioners in fixing the boundaries of cities, although it must have been considered that in all probability the jurisdiction would be so fixed as to include the harbor.

In *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183, 66 Pac. 428, it was held that the boundary of the city of Fairhaven, Washington, upon the bay, was neither the high nor low tide water mark, but was the patent or donation meander line of the claim upon which the city was laid out. The boundaries of the city were described by metes and bounds until they intersected the shores of the bay, and then as "following the shores" in a northerly direction. The decision is based upon the fact that the initial point in the description of the

boundaries of the city was on the donation meander line, and the boundaries would close only on this line.

An act providing that the "powers and jurisdictions of all incorporated cities of the state . . . having their boundaries . . . adjacent to or fronting" on the bays, rivers, or other navigable waters thereof, are extended to the middle of said waters, "in every manner and for every purpose that such powers and jurisdictions could be exercised when such cities' limits include such water or any part thereof," does not merely fix the limits of extraterritorial powers of the cities, but extends their boundaries over the water areas described in the act. *Pacific American Fisheries v. Whatcom County*, 69 Wash. 291, 124 Pac. 905.

An act which in effect extends the boundaries of the incorporated cities of the state to the middle of adjacent bays, lakes, and other navigable waters, is not void because the title states that it is "an act extending the power and jurisdiction of incorporated cities into the bays," etc. *Ibid.*

It was also held in *Pacific American Fisheries v. Whatcom County*, *supra*, that the statute extending the boundaries of incorporated cities of the state to the middle of adjacent navigable waters did not violate a constitutional provision that corporations for municipal purposes should not be created by special laws, but that the legislature by general laws should provide for the incorporation, organization, and classification of cities.

Upon the principle that the boundaries of a burgh, fixed by statute at low-water mark, follow that line as it varies, either by natural fluctuations or artificial additions to the shore, it was held in *Leith Harbour & D. Comrs. v. Leith*, 48 Scot. L. R. 919 [1911] S. C. 1139, that piers built of solid stonework were within the jurisdiction of the burgh.

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within the corporate limits of Baltimore county.

The controlling and indeed the only question which the record presents arises on the demurrer, and it is this: Is the pavilion described in the pleas, the place where the liquor is alleged to have been sold, situate within the limits of Baltimore city, or in Baltimore county? The statute provides that the license for the sale of liquor shall be obtained in the city or county where the place is located, and it is admitted that the appellant in this case secured a license from the proper authorities of Baltimore county, but did not have a license from Baltimore city.

The pavilion is described by the plea as a structure built on wooden piles in the main branch of the Patapsco river. The piles are driven in the soil, and the whole pier is located in the navigable waters of the river. The length of the wharf or pier front is about 100 feet, with a width of about 50 feet. It is situate to the east of the Baltimore city end of the Light street bridge, about 50 or 60 feet south from the north shore of the main branch of the Patapsco river. The entire pier or pavilion is between the Baltimore city shore line and the middle of the stream. It has been located in its present position for at least twenty-five years, and access to it is had by a movable float or scow, one end of which is tied by a rope to the pavilion and the other end to a stake or bulkhead on the shore.

The act of 1816 (chap. 209) defines and fixes the boundaries of the city of Baltimore, and it is conceded that the pier and pavilion are constructed and located in the main branch of the Patapsco river, outside of and beyond the limits of the city. Raab v. State, 7 Md. 483; Act of 1816, chap. 209; Western Maryland Tidewater R. Co. v. Baltimore, 106 Md. 562, 68 Atl. 6. But it is contended upon the part of the state that a structure built as the one described in the pleas, and to which access is gained by means of a float or boat attached to the bulkhead on the shore of the city, is within the limits of the city, within the meaning of the law requiring persons who sell liquor to obtain a license from the city within which the place is located, and the float or boat attached to the shore is an extension of the city limits for purposes of jurisdiction.

It is now well settled that the boundaries of a municipality bordering on navigable waters may be extended for purposes of jurisdiction by the building of wharves, piers, or structures, permanently filled in with earth, and extending into the water; or it may be extended by natural accretions or gain of soil by alluvion, or the filling out

from the shore and reclaiming the land from the inundation of the water. Giraud v. Hughes, 1 Gill & J. 249; Hess v. Muir, 65 Md. 603, 5 Atl. 540, 6 Atl. 673; Casey v. Inloes, 1 Gill, 430, 39 Am. Dec. 658; Linticum v. Coan, 64 Md. 453, 54 Am. Rep. 775, 2 Atl. 826; Goodsell v. Lawson, 42 Md. 373; Jacob Tome Institute v. Crothers, 87 Md. 584, 40 Atl. 261. The cases just cited are fully reviewed by Chief Judge Boyd in Western Maryland Tidewater R. Co. v. Baltimore, 106 Md. 561, 68 Atl. 6, and where this court held that the jurisdiction of Baltimore city was extended over piers constructed and located as the piers in that case were for the purposes of taxation, police, and fire protection. In that case, however, the piers were constructed and projected out from the bulkhead line into the water to the pierhead line, and were held to be permanent structures and a projection of the land for the purposes of jurisdiction.

In the case at bar, the pier on which the pavilion is located is in the main branch of the Patapsco river, and at least 50 to 60 feet from the Baltimore city line. There is no permanent connection whatever between it and the mainland; and it is difficult to see upon what legal principle a floating scow or boat, such as is described in the plea in this case, can extend the corporate limits of Baltimore city. The movable float or boat is not of a permanent nature, nor permanently affixed or attached to the soil, and in no sense a permanent structure such as were the piers in the Western Maryland Case, supra. According to the pleas, the movable float is fastened by a rope at one end to the pier and at the other end by a rope to the bulkhead built on the shore; that it is not attached to the soil, but is a movable boat or raft, and is moved from time to time, affording no connection whatever when so moved between Baltimore and the pavilion, but is supported by and floating on the water, and wholly within the corporate limits of Baltimore county.

The second plea alleges that the two floats are tied one to the pavilion, and the other to a stake on the shore, and each floating upon the surface of the water, and access from one to the other being by loose boards, there being no physical connection between the soil and the float, and they were tied at both ends with ropes to keep them in position; the float resting upon the surface of the water and within the limits of Baltimore county. It will be thus seen from the averment of the plea that the pavilion and pier have no permanent connection with the corporate limits of Baltimore city; and there is no permanent means of access be-

in navigable waters, and can be reached by boats and the floating scow.

We have been referred to no case where the jurisdiction of a municipality has been extended upon facts similar to those in this case, or that would sustain the appellee's contention on this record. On the contrary, the courts here and in other jurisdictions have held that floating piers and floating vessels fastened to the docks would not extend the limits or line of jurisdiction of towns and cities, and they distinguish between a floating pier and an immovable one. The Haxby (D. C.) 94 Fed. 1016; Howard v. Skinner, 87 Md. 556, 40 L.R.A. 753, 40 Atl. 379; 22 Am. & Eng. Enc. Law, 812; Western Maryland Tidewater R. Co. v. Baltimore, 106 Md. 570, 68 Atl. 6; Stryker v. New York, 19 Johns, 179; State v. Eason, 23 L.R.A. 520. The cases upon the subject will be found fully collected and cited in a note to the North Carolina Case, supra, and we need not review them here. The cases all hold that the improvement or structure to extend the jurisdiction must be of a fixed nature, extending out from the soil and land, and in the nature of a permanent structure, such as wharves, piers, warehouses, or the filling out from the shore and reclaiming the land from the inundation of the water.

The pier or pavilion in this case clearly does not answer any of these requirements, and for this reason cannot be held to extend the jurisdiction of Baltimore city for the purposes claimed by the state. We think the plea distinctly shows that the pier or pavilion is located in Baltimore county, and not in the corporate limits of Baltimore city. The state's demurrer to the pleas should have been overruled, and the traverser's pleas to the jurisdiction should have been sustained.

It follows that the judgment must be reversed, and the cause remanded.

MARYLAND COURT OF APPEALS.

PHILIP D. LAIRD et al., Public Service Commission,

v.

BALTIMORE & OHIO RAILROAD COMPANY, Appt.

(— Md. —, 88 Atl. 348.)

Railroad — issuance of security — control by public service commission.

1. The mere fact that an interstate railroad company is organized and has its principal office in a certain state does not empower such state to require the corporation to secure the consent of its public serv- 47 L.R.A. (N.S.)

for the improvement of the road if only a small percent of the road is located in improvements are made in other states.

Contracts — impair — railroad charter public service commission.

2. In the absence of a company whose charter gives it power to determine its location and bond indebtedness required to obtain the service commission to issue outstanding indebtedness for transportation facilities.

Public service commission — fix price of securities.

3. Power cannot be exercised by public service commission to fix the price of securities which securities of a corporation shall be placed

(June 25)

CROSS APPEALS from the Circuit Court, No. 1, subjecting the Baltimore Company, as regards as to the jurisdiction of the Commission of Maryland, appealing from so much

Note. — Power and authorities to control securities by public utilities.

In addition to the case to People ex rel. New Willcox, 45 L.R.A. (N.S.) requiring the consent of public authorities, general commissions, as a prerequisite of securities by public utilities, have been construed as to the power or duty to control the issuance.

Under a statute providing that a public utility shall mortgage its property, franchise rights, without the approval of public utility commission, any bonds payable in whole from the date thereof first obtained authority for such proposed issue shall be the duty of the commission, to approve of an issue when satisfied that the issue is in accordance with the public interest, it is the duty of the commission not only the object of the bonds payable more than the date thereof, "but also which it is to be made in the environment of the conditions, and the project it may encounter in the

jected them in any respect to the jurisdiction of the complainants; and complainants appealing from so much as granted them less jurisdiction than was demanded. Remanded for modification.

The facts are stated in the opinion.

Messrs. Hugh L. Bond, Jr., Herbert R. Preston, and R. Marsden Smith, for Baltimore & O. R. Co.:

One of the legislative purposes in the enactment of the public service commissions law was to enable the commission to prevent the issue of such stock and bonds if, upon an investigation of the facts, it is found that they were not for the purposes of the corporations enumerated by the statute, and reasonably required therefor; but it does not make the commissioners the financial managers of the corporation, or empower them to substitute their judgment for that of the board of directors as to the wisdom of a transaction.

People ex rel. Delaware & H. R. Co. v. Stevens, 197 N. Y. 1, 90 N. E. 60; Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; People

ex rel. Third Ave. R. Co. v. Public Service Commission, 203 N. Y. 299, 96 N. E. 1011; People ex rel. Binghamton Light, Heat & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 386, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527.

Section 27 of the public service commission law cannot apply to the Baltimore & Ohio Railroad Company, as an exercise of the powers conferred thereby would infringe rights granted by the defendant's charter.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 274, 53 L. ed. 183, 29 Sup. Ct. Rep. 50; Baltimore v. Baltimore & O. R. Co. 21 Md. 50; Baltimore & O. R. Co. v. Waters, 105 Md. 396, 12 L.R.A.(N.S.) 326, 66 Atl. 685.

Messrs. W. Cabell Bruce and Albert C. Ritchie, for Public Service Commission: The charter of the Baltimore & Ohio Railroad Company contains no contract whereby the state of Maryland surrendered its power to regulate the issue of securities by

tory, to meet the financial demands that the proposed burden is likely to impose upon it;" in other words, "not only the legality, but practically the public policy and equity of a proposed bond issue." And the court will not, upon certiorari, set aside an order of the board, refusing permission to a public service corporation to issue certain bonds, or, by mandamus, compel the board to reverse its action, although, upon a review of the evidence taken, the court may differ from the conclusion of the board as to the propriety or correctness of its order; unless there was no evidence before the board to support its order, or the same was without the jurisdiction of the board, in which cases the court has express statutory power to review the order. Interstate Teleph. & Teleg. Co. v. Public Utility Comrs. — N. J. L. —, 86 Atl. 363.

So, under a statute providing that no public service corporation shall issue any stock, stock certificates, bonds, or any other evidences of indebtedness payable in more than one year from date, until it shall have first obtained authority for such issue from the railroad commission, and stating what shall be the proceedings to obtain a certificate of such authority from the commission, and the conditions of its being granted by that body,—the commission has jurisdiction and authority to pass upon the competency of a railroad corporation to increase its capital stock, as tested by its charter, and to refuse permission to make such an increase in case the articles of incorporation shall not have been properly amended to that end, and an authenticated copy of the amendment filed with the secretary of state. State ex rel. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 137 Wis. 80, 117 N. W. 846, 47 L.R.A.(N.S.)

And under a statute providing that an electric corporation may issue stocks, bonds, etc., payable more than twelve months after date, when necessary for the acquisition of property, the construction, completion, extension, or improvement of its plant or distributing system, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, provided that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof,—it is the duty of the commission to determine whether the stock and bonds proposed by an electric corporation are necessary for the proper purposes of the corporation, are authorized by law, and are to be used in a proper manner; and if the commission determines that they are to secure money to pay floating indebtedness incurred in the ordinary running expenses of the corporation, it is the duty of the commission to withhold its order authorizing the issue; and in so determining it does not unlawfully substitute its judgment for the judgment of the directors of the corporation in the management of its affairs. People ex rel. Binghamton Light, Heat, & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114.

But under § 55 of the New York public service commissions law, providing that common carriers and railroad corporations are authorized to issue stocks, bonds, etc., when necessary for the acquisition of property and the construction and improvement of their facilities, provided, and not otherwise, that there shall have been secured from the proper commission an order authorizing such issue and the amount thereof, etc.; and under the provisions of the stock corporation law, relative to the reorganiza-

the company whenever the state considered that such regulation was desirable in the public interest; and therefore the public service commission law which provides for such regulation does not impair the obligation of any contract.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 215, 38 L. ed. 962, 967, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 658, 39 L. ed. 567, 570, 15 Sup. Ct. Rep. 484; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 370, 48 L. ed. 217, 224, 24 Sup. Ct. Rep. 82; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 436, 437, 47 L. ed. 887, 890, 891, 23 Sup. Ct. Rep. 531; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep.

493; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; St. Louis v. United R. Co. 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Murray v. Pocatello, 226 U. S. 318, 323, 57 L. ed. 239, 242, 33 Sup. Ct. Rep. 107; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 536, 48 L. ed. 1102, 1108, 24 Sup. Ct. Rep. 756; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; Westminster Water Co. v. Westminster, 98 Md. 556, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Baltimore & O. R. Co. v. Waters, 105 Md. 396, 12 L.R.A.(N.S.) 326, 66 Atl.

tion of corporations,—the public service commission is not justified in refusing, upon the application of a street railway company formed pursuant to a reorganization agreement, after a foreclosure sale of the property and franchises of a like corporation, to authorize the said new or reorganized corporation to issue stocks and bonds to an amount not exceeding the amount of outstanding securities of the old company and the additional money to be paid to the new corporation, merely on the ground that, in the opinion of the commission, the amount of such proposed new securities exceeds the present actual value of the property to be acquired by the new or reorganized corporation. *People ex rel. Third Ave. R. Co. v. Public Service Commission*, 203 N. Y. 299, 96 N. E. 1011.

Under statutes providing that "no corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation;" that stock or bonds shall not be issued by any corporation to be formed which is subject to the supervision of the gas commission, until the commission shall certify in writing as to the amount of stock or bonds reasonably required for the purposes of the corporation, and that an existing corporation shall not increase its capital stock or bonded indebtedness without the consent in writing of the gas commission; and that for the purposes of this provision the commission may take and hear testimony and examine the books and papers of the corporation, and require verified statements from the officers thereof pertaining to the value of the property and franchises owned and operated by such corporation,—the gas commission "is

charged with the duty, when its consent is asked for the issue of new stock or bonds, of determining whether such stock and bonds are to be issued for property, labor done, or money, and for the reasonable requirements of the company. The duties of the commission are administrative to enforce upon the companies the observance of the provisions of the law." *Re Watertown Gaslight Co.* 127 App. Div. 462, 111 N. Y. Supp. 486.

And a statute purporting to commit the whole subject of the increase of capital stock by railway corporations to the judgment and discretion of a railroad and warehouse commission, with power to determine whether or not there shall be an increase of the capital stock of a corporation in any case, and to prescribe the manner in which and the terms on which the same may be made, if allowed, is unconstitutional as an attempt to delegate legislative power to an administrative body. *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289. In this case, however, the court said that the legislature might enact a statute providing generally for what purposes and upon what terms, conditions, and limitations an increase of capital stock may be made, and confer upon a commission the duty of supervising any proposed increase, or delegate to it the duty of finding the facts in each particular case, and authorize and require it, if it finds the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise, to refuse it.

Generally, as to delegation of legislative power to regulate internal management of corporations, see note to this case, 10 L.R.A.(N.S.) 251.

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Williams, 9 Gill & J. 365, 31 Am. Dec. 72; State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289.

Legislation which is intended to prevent any character of fraud or wrongdoing may, of course, be referred to the police power.

House v. Mayes, 219 U. S. 270, 284, 55 L. ed. 213, 218, 31 Sup. Ct. Rep. 234; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; Shallenberger v. First Nat. Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 211, 31 Sup. Ct. Rep. 238; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148; Manigault v. Springs, 199 U. S. 473, 481, 50 L. ed. 274, 279, 26 Sup. Ct. Rep. 127; Downs v. Swann, 111 Md. 53, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586, 73 Atl. 653; Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co. 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105; Rossberg v. State, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581; Schultz v. State, 112 Md. 211, 76 Atl. 592; State v. Caspare, 115 Md. 7, 80 Atl. 606; State v. Potomac Valley Coal Co. 116 Md. 380, 81 Atl. 686; State v. Loden, 117 Md. 373, 40 L.R.A.(N.S.) 193, 83 Atl. 564; Postal Teleg. Cable Co. v. State, 110 Md. 608, 73 Atl. 679.

The proposed issue of securities is subject to regulation by the public service commission.

1 Ops. Atty. Gen. p. 659; Atty. Gen. v. Massachusetts Pipe Line Gas Co. 179 Mass. 15, 60 N. E. 389; Falmouth v. Falmouth Water Co. 180 Mass. 325, 62 N. E. 255; State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; State ex rel. Railroad & Warehouse Commission v. Chicago, M. & St. P. R. Co. 38 Minn. 281, 37 N. W. 782, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Interstate Teleph. & Teleg. Co. v. Public Utility Comrs. — N. 47 L.R.A.(N.S.)

203 N. Y. 299, 96 N. E. 1011; Re Watertown Gaslight Co. 127 App. Div. 462, 111 N. Y. Supp. 486; Saratoga Springs v. Saratoga Gas. El. Heat & P. Co. 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; People v. New York C. & H. R. R. Co. 138 App. Div. 601, 123 N. Y. Supp. 125, affirmed in 199 N. Y. 539, 92 N. E. 1096; Goldan v. Delaware & E. R. Co. 144 App. Div. 78, 128 N. Y. Supp. 936; People ex rel. Binghamton Light, Heat & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114; People ex rel. New York Edison Co. v. Wilcox, 207 N. Y. 86, 45 L.R.A.(N.S.) 629, 100 N. E. 705; Galveston, B. & S. W. R. Co. v. Fontaine, 203 Tex. Civ. App. 519, 57 S. W. 872; United States & M. Trust Co. v. Delaware Western Constr. Co. — Tex. Civ. App. —, 112 S. W. 447; State ex rel. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 137 Wis. 80, 117 N. W. 846.

Stockbridge, J., delivered the opinion of the court:

Under date of January 9, 1913, the Baltimore & Ohio Railroad Company issued a circular letter to its stockholders. From this it appeared that the company proposed to issue as of March 1, 1913, \$63,250,000 gold bonds of the company, which were to run for twenty years from their date of issue, and to bear interest at the rate of 4½ per cent per annum. The circular further stated that these bonds so to be issued were to be convertible into common stock of the company on the basis of \$110 per share at any time prior to February 28, 1923, and that thereafter, by giving ninety days' previous notice, the company should be entitled to redeem the bonds on any interest date at 102½ per cent. While the circular latter was not explicit as to the property which was to be pledged by way of mortgage to secure the proposed issue, by inference it was to cover the main lines upon which there had been issued what was termed its prior lien mortgage, the Pittsburg Junction and Middle Division, the Southwestern Division, the Pittsburg, Lake Erie, & West Virginia System, and all of the lines of railroad owned by any company and stock of which is pledged or assigned under any of the mortgages already placed upon any of the above-named divisions. The bonds which the company thus proposed to issue were offered to the stockholders at 95½ and accrued interest. Prior to the issue of this circular letter, no application had been made to the public service commission of the state for its order authorizing and approving of this issue. Accordingly, on February 19, 1913, the public

service commission of this state, acting under the provisions of § 28 of the public service act of 1910, filed a bill in the circuit court No. 2 of Baltimore city, praying for an injunction restraining the railroad company from issuing the proposed bonds, or any of them, "until such time as there shall have been secured from the public service commission an order authorizing such issue."

Two days after the bill was filed, the railroad company answered fully, setting up the various provisions of its charter, denying that it was a corporation subject to the provisions of the public service commission act, setting out the act of the legislature of Virginia of 1827, confirming the act of incorporation passed by the general assembly of this state, averring that it owned and operated 281 miles of railroad in this state, 996 in the state of West Virginia, and through the other lines forming its system and extending through a number of states, a total mileage of 4,450. The answer further sets out that the issue of the bonds was necessary for the acquisition of property, the construction, completion, extension, improvement, and maintenance of its facilities and its service, and the discharge and lawful refunding of its obligations; that the balance of the moneys raised by the said issue of bonds, after the refunding of such obligations as were to be refunded, was to be expended largely in West Virginia. This answer was sworn to, and the case was heard in the first instance upon the bill, answer, and exhibits. The case thus presents two subjects for consideration: First, whether the Baltimore & Ohio Railroad Company is subject in any respect to the jurisdiction of the public service commission of Maryland; and, secondly, if it is, how far or to what extent does that jurisdiction extend?

It is not attempted to be denied that, both before and after the passage of the public service commission act in 1910, the company was subject to the police power of the state. This might be, as was the case prior to 1910, exercised directly by the state, and, in so far as the exercise of those powers was by the act conferred upon the public service commission, might be exercised by it. Many of the cases cited in the brief filed on behalf of the commission, and specially those from Massachusetts, illustrate this aspect of the case.

In addition to this power derived from the police power of the state, the commission has conferred on it, in the interest of the general public, certain other powers in connection with the conduct of public service corporations doing business within the state. These will be found collected in 7 L.R.A. (N.S.)

§ 3 of the act, and, so far as this case is concerned, must come under one of the following enumerations: "(1) To railroads and street railroads lying within this state, and to the person or corporation owning, leasing, operating, or controlling the same. . . . (3) To such portion of the lines of any other railroad as lie within this state, and to the person or corporation owning, leasing, operating, and controlling the same, so far as concerns the construction, maintenance, equipment, terminal facilities, and local transportation facilities, and local transportation of persons or property within the state. (4) To any common carrier operating or doing business within the state." Through all of these runs the same fundamental idea that the power and control of the commission exists as to matters of service, transportation, and rates within the state, and full power over that is expressly given to the commission. This necessarily includes many matters which are not the subject-matter of an exercise of the police power. Thus, questions of tariffs or fares, or the adequacy or inadequacy of service, or facilities with regard to business conducted wholly within the state, may properly come within the jurisdiction of the commission. In this connection the three opinions by the late Chief Justice Waite in the cases of *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; and *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99, are directly in point. In the first case the Chicago, Burlington, & Quincy Railroad was operating as lessee the Missouri River Railroad Company, which latter was operated solely within the state of Iowa. The legislature of Iowa passed an act establishing a maximum rate for railroads in that state. The decision held that the statute was applicable to that portion of the Chicago, Burlington, & Quincy Railroad located in Iowa, upon the principle enunciated in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, which dealt with the rates to be charged for storage of grain in a warehouse situate in Illinois. And it is the same doctrine which is involved in the two other cases cited. It therefore follows that the Baltimore & Ohio Railroad Company is subject to the jurisdiction of the public service commission of this state, both in respect to those matters which, coming under the police power of the state, have been confided to the commission, and to business conducted wholly within this state.

The present bill of complaint claims for the commission a far wider jurisdiction. By reason of the location of the home office

of the company in Maryland, it claims to possess a right to control the expenditure of moneys, the creating and issue of evidences of indebtedness, the prices at which such bonds or debentures shall be marketed, the necessity and expediency of the creation of this indebtedness; in general, to direct the entire physical and fiscal policy of one of the great common carriers of this country over its entire system of 4,450 miles of railroad, of which but 281 are within the state and 4,169 located without the state, and one of which other states (West Virginia) might with equal propriety, by reason of the confirmatory act of Virginia of 1827 and the far greater amount of mileage in that state, make a similar claim. The statement of the claim, taken with the terms of the act of 1910, would seem to afford a conclusive answer to the proposition. When the act is carefully limited by its very terms to operations within this state, any line of reasoning which aims to extend it beyond is alike in flat contradiction of the act and entirely beyond the power of the state to adopt. The commission makes this extraordinary claim of power under the following provisions of § 27 of the act: "§ 27. And be it further enacted, that a common carrier, railroad corporation, street railroad corporation, or other corporation subject to the provisions of this act, organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of Maryland, may issue stocks, bonds, notes, or other evidence of indebtedness, payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension, or improvement of its facilities, or for the improvement or maintenance . . . of its service, or the discharge or lawful refunding of its obligations: Provided, and not otherwise, that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stocks, bonds, or other evidence of indebtedness is reasonably required for the said purposes of the common carrier, railroad corporation, street railroad corporation, or such corporations; but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage, or to the lawful issue of bonds thereunder, before the time when this act becomes a law. For the purpose of enabling it to determine whether it should issue such an order the commission shall make such inquiry or investigation, hold such hearings, and examine such witnesses, books, papers, documents, or

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enabling it to reach a determination. Such common carrier may issue notes for proper corporate purposes, and not in violation of any provision of this or any other act, payable at periods of not more than twelve months, without such consent; but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds, or by any evidence of indebtedness running for more than twelve months, without the consent of the commission." This section is almost a verbatim copy of § 55 of the similar act passed at New York to regulate public service corporations (Consol. Laws 1910, chap. 48). It was given its fullest effect and scope in the case of the People ex rel. Binghamton Light, Heat, & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114, where all of the property to be affected by the proposed bond issue, and the expenditure of the money so raised, and the conduct of the business of the corporation, were all within the state of New York; yet even there it was said: "The discretion of a public service commission cannot override the discretion of the officers of a corporation in the management of its affairs, or the provisions of the statute . . . in which securities are permitted to be issued."

The evils which this section was intended to correct are perfectly well recognized and understood. That issues of stocks and bonds have been made fraudulently and palmed off on a credulous public to their ultimate serious loss is matter of common knowledge. Facts in relation to such issues, especially with regard to local public utilities, have been difficult, if not impossible, to obtain, leaving it to the stimulated imagination of some broker or syndicate who, actuated by a heavy commission to be realized by creating a market until such stock or bond could be unloaded, have reaped a reward in dollars and cents at the cost of those who were induced to give full faith and credit to their representations. The legislatures of many states have therefore, through the media of public service commissions, seen fit to establish a quasi guardianship over prospective investors. It is, of course, true that in such a condition many legitimate enterprises should come under the same sort of suspicion which attaches to the more hazardous schemes devised and carried on for the improper enrichment of a few individuals. As a check upon such wild financing it is entirely proper, even upon the basis of the exercise of the police power, to require all corporations conducting public utilities to lay before the local public service commission the facts relating to any such issue of stocks and bonds or de-

bentures or certificates of indebtedness, thus placing such facts where they will be readily obtainable by anyone who has an interest therein other than mere idle curiosity. Such statements as indicated in the acts passed should include the amount of the issue, in a general way the purposes for which it is desired to be made, and, where the enterprise is one to be conducted wholly within a single state, it may well be, as the decisions seem to indicate, that the commission may sanction or disapprove of the proposition.

Is now the case the same when we come to deal with an interstate carrier? It may, as laid down by Chief Justice Waite, be made subject to the control of each state as to matters affecting the operations of the company in such state, but, beyond that, state legislation is powerless without striking at the very fundamentals of rights as recognized in our government. So far as the issue of securities is concerned, the state may, by virtue of its police power, require such applications, reports, and statements to be filed as have a tendency to show whether the proposed issues are bona fide and for value; but the determination of the aggregate capitalization or bonded indebtedness is a power which was in terms conferred on the Baltimore & Ohio Railroad by its charter (Acts 1826, chap. 123), § 13, and the act of 1845 (Acts 1845, chap. 313), and which the state has not the power to detract from or annul. The rules for our guidance in thus treating the charter are fully set forth in *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 297, 48 Am. Dec. 531, and *Baltimore v. Baltimore & O. R. Co.* 21 Md. 50. For acts fraudulent in their nature, the state may intervene to the same extent and no further. In this case there is no pretense that the company either perpetrated or contemplated the commission of a fraud. The answer of the company distinctly alleges the purposes for which the proposed issue was intended, and they are only such as are included as proper purposes by the act. These come mainly under two heads: The refunding of outstanding obligations of the company, or the maintenance, extension, or improvement of its facilities or terminals located for the most part in other states. So far as the funds to be raised by the proposed bond issue are to be applied to the refunding of existing indebtedness now due or about to mature, the question of its extinguishment by payment or its extension by refunding is, in the absence of fraud, a matter calling peculiarly for the exercise of the discretion of the directors. The bill of complaint neither alleges nor suggests any taint of fraud or any equitable ground other than

the phraseology of the statute why the determination of the fiscal policy of the railroad company should be wrenched away from the officers of the company in whom it was vested by the charter, and confided to such a body as the public service commission.

The case of *People ex rel. Delaware & H. Co. v. Stevens*, 197 N. Y. 1, 90 N. E. 60, presents many points of similarity to the questions now under consideration, and in some of its aspects a far stronger case to support the jurisdiction of the commission. In that case it was proposed to issue bonds of a railroad company for the purpose of completion of the purchase of an electric line and of a tract of coal land, but the properties thus to be purchased were not to be included in the mortgage about to be given to secure the proposed bond issue. The public service commissioners of New York had refused to sanction the issue, but upon appeal the rule to control in such cases was laid down as follows: "The paramount purpose of the enactment of the public service commissions law was the protection and enforcement of the rights of the public. . . . For a generation or more the public has been frequently imposed upon by the issues of stocks and bonds of public service corporations for improper purposes, without actual consideration therefor, by company officers seeking to enrich themselves at the expense of innocent and confiding investors. One of the legislative purposes in the enactment of this statute was to correct this evil by enabling the commission to prevent the issue of such stock and bonds, if, upon an investigation of the facts, it is found that they were not for the purposes of the corporation enumerated by the statute and reasonably required therefor. We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes. . . . If . . . the purpose and intent of the statute" was to substitute the commissioners for the directors as financial managers, "a doubt might arise with reference to its constitutionality; for ordinarily the ownership of property carries with it the right of occupancy and management; and, should a statute deprive the owner of the right to manage, it would, under ordinary circumstances, undermine his right to protect and make his property.

remunerative. Lord v. Equitable Life Assurance Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443. . . . It was therefore evidently the legislative intent in the enactment of this provision that the commissioners should have supervision over the issuing of long-time bonds to the extent of determining whether they were issued under and in conformity with the provisions of the statute for the purposes mentioned therein, or whether they were issued for the discharge of the actual, and not the fictitious, debts of the company, or whether they were issued for the refunding of its actual obligations, and not for the inflation of its stocks or bonds. Beyond this it appears to us that the power of the commissioners does not extend."

It appears from the answer in the present case, which is supported by affidavit, that some or a considerable portion of the moneys now to be raised are to be expended beyond the limits of the state of Maryland in the acquisition, extension, improvement, or maintenance of the facilities or terminals of the railroad. Manifestly the public service commission of this state is not and could not be invested by the legislature of this state with any supervisory powers over the expenditure of moneys in other states, nor the apportionment of the expenditure of its moneys as between different states, nor could it pass upon to approve or condemn the wisdom or unwisdom of construction work to be performed in Virginia, West Virginia, Ohio, Indiana, Illinois, Missouri, Delaware, and other states. These are questions upon which the most experienced engineers frequently differ,—honestly differ in their judgment. The final decision of matters of this nature must rest with the officers and directors of the corporation. Nor is there any warrant to be found in the act for the maintenance in other states of a corps of engineers and inspectors of the public service commission of Maryland, assuming, *ex gratia*, that the other states would permit it.

What has been said already applies equally well to the increase of capital stock or the convertibility of bonds into stock upon stipulated terms and conditions and need not be further discussed. The same general principles apply to the price at which the securities are to be marketed. The abundance or scarcity of money in the great financial centers, a prevailing public sentiment as to business conditions, act closely akin to the law of supply and demand in regulating the rate at which a large loan can be effected. Many elements enter into such a matter, of fluctuating importance at different times. It is a condition beyond the control of legislation. What the law-

making power may do, the extent of what it can do, is to say that the public service commission shall have presented to it the price at which bonds about to be issued have been agreed to be disposed of, or have been disposed of, so that the investing public may know the value that has gone into the company for the furtherance of its operations, and that the bonds which they are being asked to purchase represent a bona fide, honest transaction in which the company has received value instead of a doubtful, diluted issue not created and put forth in good faith.

It may well be that the time will come when the jurisdiction of the Interstate Commerce Commission will be so broadened as to confer upon it a power to regulate in some measure the fiscal management of the great interstate carriers of this country, and enable them to prevent in the future some of the ill-advised and unfortunate policies of the past. But the fact that such a power has not yet been conferred cannot authorize a state to grasp a jurisdiction it was never intended it should exercise. As was well said in *People ex rel. New York, N. H. & H. R. Co. v. Willcox*, 200 N. Y. 431, 94 N. E. 215, in speaking generally of the power of public service commissions: "The commissions were given extensive powers, but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits, when directed against the management or the operations of railroads, and the commissions cannot enforce a provision of law, unless the authority to do so can be found in the statute."

By the decree of the circuit court No. 2, from which the appeal in the present case was taken, it was provided that the railroad company should file with the public service commission "an application or report stating fully the facts in relation to the proposed issues of bonds and stock mentioned in the proceedings, and the purposes of the same, together with such other facts as the commission may require, so as to enable the commission to know or ascertain whether the said issue of bonds and stock are or are not made in accordance with § 27 of the public service commission law as interpreted in said opinion herein." The form was somewhat unfortunate, for the reason that it was apparently the purpose thereby to incorporate some portion or portions of the opinion in the decree, and yet what portions were not definitely indicated. For that reason, in the *per curiam* opinion heretofore filed [— Md. —, 88 Atl. 347] it was said: "It is proper to require the Baltimore & Ohio Railroad Company

to file an application or report with the public service commission, stating with reasonable fullness such facts as may be requisite to enable the commission and those legitimately interested therein to ascertain whether any proposed issue or issues of bonds or certificates of indebtedness is or are in fact bona fide and for value; but beyond that it is not subject to the jurisdiction of said commission as to the financing of the system known as the Baltimore & Ohio Railroad Company, extending through a number of states, either in respect to determining the aggregate amount of its capital stock, bonded indebtedness, the prices at which its bonds or certificates of indebtedness shall be sold, or where or how the moneys realized from the sale thereof shall be expended."

And by the decree of this court, filed at the same time as the *per curiam* opinion, the case was remanded for the reforming of the decree as above indicated.

OKLAHOMA CRIMINAL COURT OF APPEALS.

BATES B. BURNETT et al., Plffs. in Err.,
v.

STATE OF OKLAHOMA EX REL.
CHARLES WEST, Attorney General,
et al.

(8 Okla. Crim. Rep. 639, 129 Pac. 1110.)

Appeal — criminal — court.

1. Under the Constitution (article 7, § 2

Headnotes by DOYLE, J.

Note. — *Right of corporation, corporate officer, or other person having custody of its books and papers, to refuse to produce them on the ground that they may tend to incriminate.*

The question of incriminating evidence furnished by defendant under compulsion is treated in the note to *State v. Turner*, 32 L.R.A.(N.S.) 772.

And as to merely demanding that accused produce incriminating document as violation of his privilege, see note to *Gillespie v. State*, 35 L.R.A.(N.S.) 1171.

As to use in criminal proceedings of books which one has been required to produce in another proceeding, as violation of his right against self-incrimination, see note to *Johnson v. United States*, ante, 263.

While in England the principle, *nemo tenetur se ipsum accusare*, is merely a rule of evidence, "the Constitution of the United States and of most of the states provide in somewhat varying language that no person accused of crime shall be compelled to be a witness against himself, or to give

and the statute §§ 1916 and 1917, Snyder's Comp. Laws, 1909), the criminal court of appeals has exclusive appellate jurisdiction in criminal cases; and a proceeding and judgment for criminal contempt is reviewable on appeal to this court.

Contempt — criminal.

2. "Criminal contempts" are all those acts or conduct in disrespect of the court or its process, or which obstruct the due administration of justice, or tend to bring the court into disrepute.

Same — power to punish.

3. The power to punish contempts is inherent in all courts of justice, and is expressly conferred upon them by the Constitution. § 25, Bill of Rights. The exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order; and, second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.

Same — answer — effect.

4. In proceedings for contempt for disobedience to an order of court, the sworn answer of the party charged with contempt is evidence to purge him thereof; but it is not conclusive. It may be contradicted and supported by other evidence, and the question whether or not the party charged has purged himself of the contempt is for the determination of the court, upon the consideration of all the evidence adduced for and against him; and if, upon such hearing, the court is satisfied that it is within the power of the contemner to comply with its order, the court should enforce the order by appropriate punishment.

Same — interference with subject-matter of suit.

5. A party to a suit who wilfully destroys, removes, conceals, or disposes of its subject-matter pending the proceeding, with intent

evidence against himself, and these provisions render inadmissible all evidence incriminating the accused and obtained from him by compulsion." 12 Cyc. 400.

This principle, however, does not seem applicable to the present question for the reason, in the case of the corporation itself, that it is a creature of the state and therefore subject to the power of the state, and in the case of an officer or agent, that the privilege is personal and merely protects one against the production of personal or private books and papers.

As a matter of fact, there has been a slight conflict of authority upon the question presented, but it may now be regarded as fairly well settled, in America at least, that neither the corporation itself nor the officers and agents thereof can claim the protection of the various constitutional provisions relating to self-incrimination, as against a demand for the production of corporate books which might tend to incriminate.

Thus, it has been held that an officer of a corporation having possession of books

court, and to render futile any order or decree concerning it, unavoidably defies the power and offends the dignity of the court, and thereby renders himself liable to punishment for "criminal contempt."

Bank — records — property of state.

6. Under the act "creating a state banking board, establishing a depositors' guaranty fund to insure depositors against loss when the bank becomes insolvent," etc., all of the books, records, and papers of the failed or insolvent bank taken over by the bank commissioner are public records, and become the property of the state.

of the corporation cannot refuse to produce them on the ground that they might tend to incriminate him, as they are the books of the corporation, a creature of the state, and not his private property. *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558 (quoted in *BURNETT v. STATE*); *Dreir v. United States*, 221 U. S. 394, 55 L. ed. 784, 31 Sup. Ct. Rep. 550; *Pray v. C. A. Blanchard Co.* 95 App. Div. 423, 88 N. Y. Supp. 650 (the actual decision was merely that the officer could not refuse to produce the books, pursuant to a previous order from which no appeal was taken). See also *BURNETT v. STATE* and *McElree v. Darlington*, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456. And this has been held true even though the proceeding in which the production of the books was sought was not directed to the corporation itself. *Wilson v. United States*, supra.

And the rule that officers of a corporation cannot refuse to produce corporate papers, etc., on the ground that they may tend to incriminate them, has been held to apply to former officers of a dissolved corporation, so that they cannot refuse to produce books and papers of such corporation which had been transferred to them before dissolution, and are still in their possession. *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158, holding that the rule of privilege as to one's own books and papers does not obtain in such cases.

So, in *Grant v. United States*, 227 U. S. 74, 57 L. ed. 423, 33 Sup. Ct. Rep. 190, it was held that a stockholder in a defunct corporation cannot invoke his constitutional privilege against self-incrimination to justify his refusal to produce the corporate books and papers in his possession, although the legal title to such books and papers is in him.

And in *Re Moser*, 138 Mich. 302, 101 N. W. 588, 5 Ann. Cas. 31, it was held that an officer of a corporation cannot claim the constitutional privilege against self-incrimination as to corporate books which were compiled before he became connected with the corporation and with which he had nothing to do.

And an employee of a corporation, even though he is not the legal custodian of the corporate books, etc., cannot lawfully re-
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7. The officers of an insolvent state bank cannot disobey, on the ground of the constitutional protection against self-incrimination, the order to produce and deliver the books, records, and papers of such bank to the state bank commissioner.

Same — bank records — production.

8. The privilege against self-incrimination afforded by § 21 of the Bill of Rights, "that no person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided," does not protect the officers of an insolvent state bank in resisting the com-

fuse, under the constitutional provision against self-incrimination, to produce them when legally ordered to do so, if they are in his possession, but not in any sense his private property. *Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737, 13 Ann. Cas. 1173.

So, of course, an officer or employee of a corporation cannot refuse to produce books or papers of such corporation on the ground that they might tend to incriminate him, where full immunity from prosecution on account of such production of documents is afforded by the statute under which the proceeding in which their production was demanded, was brought. *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. See also *Cumberland Teleph. & Tel. Co. v. State*, 98 Miss. 159, 53 So. 489; and *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902.

And, of course, an officer or agent of a corporation cannot refuse to produce corporate books or papers on the ground that they might tend to incriminate the corporation, since the privilege afforded by the various constitutional provisions is purely personal. *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *McAlister v. Henkel*, 201 U. S. 90, 50 L. ed. 671, 26 Sup. Ct. Rep. 385; *Re Peasley*, 3 Inters. Com. Rep. 333, 44 Fed. 271; *United States Exp. Co. v. Henderson*, 69 Iowa, 40, 28 N. W. 426; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902. And see *Meade v. Southern Tier Masonic Relief Asso.* 119 App. Div. 761, 39 N. Y. Civ. Proc. Rep. 33, 104 N. Y. Supp. 523. Nor can an officer, agent, or employee of a corporation claim privilege as to corporate books, etc., for the protection of former or fellow officers of the corporation. *Re Moser*, supra.

And it has been held that a corporation or agent or employee of a corporation cannot claim privilege as to corporate books and documents, where it or he has neither appeared, nor produced the books or documents demanded, since the privilege is personal and must be claimed in court after production of the documents for the use of the court, in inquiring into the validity of the objection as to incrimination. *Re Consolidated Rendering Co.* 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1069, affirmed in 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658.

Nor can a corporation itself resist, upon

pulsory production of its books, records, and papers because such documents may tend to incriminate them. And such officers may be compelled, in a judicial proceeding, to produce the books, records, and papers of such bank for inspection, even though to do so would tend to incriminate them.

(February 15, 1913.)

ERROR to the District Court for Creek County to review a judgment convicting defendants of criminal contempt. Affirmed.

the ground of the constitutional protection against self-crimination, the compulsory production or admission in evidence of its books and papers. *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558 (quoted in *BURNETT v. STATE*); *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676; *Re American Sugar Ref. Co.* 178 Fed. 109; *Re Bornn Hat Co.* 184 Fed. 506; *Cumberland Teleph. & Teleg. Co. v. State*, 98 Miss. 159, 53 So. 489; *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, 116 S. W. 902. And for a better reason the constitutional privilege cannot be claimed by a corporation as to documents which its officers have been subpoenaed to produce, where it is required by law that such documents be posted in a conspicuous place. *Louisville & N. R. Co. v. Com.* 21 Ky. L. Rep. 239, 51 S. W. 167. But see *Bank of Utica v. Hillard*, 5 Cow. 419, which seems to lay down a contrary rule.

And it has been held that a corporation cannot avail itself of the objection that incriminating books and papers were required to be produced under a state statute without extending immunity from criminal prosecution, where it has prevented the court from inquiring into the validity of the objection by absolutely refusing to produce, for the inspection of the court, the books and papers called for. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658.

In a few instances it has been held that an officer or employee having the custody of corporate books may plead the constitutional privilege against self-incrimination as against a demand for the production of such books, but in the main the decisions to that effect, with the exception of a few early English cases, are either distinguishable or in effect overruled.

Thus, in *Ex parte Chapman*, 153 Fed. 371, it was held that a stockholder and resident manager of a foreign corporation, having possession of corporate books, could refuse to produce such books on the ground that they would tend to incriminate him, where they showed both the commission of a criminal offense by the corporation and his complicity therein. This decision was upon the ground that it was inferable 47 L.R.A. (N.S.)

Statement by Doyle, J.:

On the 7th day of October, 1912, an action was commenced in the district court of Creek county entitled "The State of Oklahoma, on relation of Chas. West, Attorney General, and J. D. Lankford, Bank Commissioner of the State of Oklahoma, Plaintiffs, v. Farmers & Merchants' Bank of Sapulpa, a Banking Corporation, Bates B. Burnett, Birch C. Burnett, A. P. Crawford, S. C. Nigh, Thomas Wills, Charles W. Willis, the Big Pond Oil Company, the Boggy Oil Company, the Brown Real Estate Company, the Creek County Investment

from the decisions to the effect that privilege cannot be claimed where there is an express statutory grant of immunity, that such privilege could always be claimed in the absence thereof. But, as before shown, the United States Supreme Court has since laid down a different rule, so that the Chapman Case must be regarded as overruled. And the same is true of *United States v. National Lead Co.* 75 Fed. 94, wherein it was held in effect that the officers of a corporation cannot be required to produce corporate books, where such books tend to incriminate them, the court evidently regarding corporate books in the same light as if they were the private books of the officers of the corporation. And the court in *Manning v. Mercantile Securities Co.* 242 Ill. 584, 30 L.R.A. (N.S.) 725, 90 N. E. 238, seems to have proceeded upon the assumption that an officer of a corporation could generally claim privilege as to corporate books in his possession, where they contained material which might incriminate him, in holding that such an officer cannot refuse to comply with an order of an equity court to turn over its books to a receiver because they may have a tendency to incriminate him, upon the ground that in such case the books merely go into the custody of the court, and the constitutional protection does not apply because the court can protect the officer from the use of the books against him in any criminal proceeding. The actual decision in this case distinguishes it from those cases which involve the production of books in a criminal proceeding for use as evidence. (See upon the question of turning corporate books over to a receiver, the discussion and analogous cases set out in the note to the L.R.A. report of the Manning Case.)

As before stated, there are a few early English cases to the effect that corporate books cannot be inspected or their production compelled in criminal proceedings against corporation officers, the ground being that such procedure would be in effect obliging such officers to furnish evidence against themselves. *Rex v. Cornelius*, 2 Strange, 1210; *Rex v. Purnell*, 1 W. Bl. 37; *Rex v. Worsenham*, 1 J.d. Raym. 705; *Reg. v. Mead*, 2 Ld. Raym. 927; *R. v. Granatelli*, 7 State Tr. N. S. 979, as set out in 3 Wigmore, Ev. p. 3116.

G. J. C.

Company, Elbert Oil & Gas Company, the Sapulpa Interurban Railway Company, and Dannie Ross Burnett, Defendants."

The petition, among other things, alleges that the Farmers & Merchants' Bank of Sapulpa, prior to September 9, 1912, was conducting a general banking business at Sapulpa as a state bank, on which said date said bank was taken over by the state bank commissioner; that the defendants Bates B. Burnett and Birch C. Burnett are stockholders of said bank.

Listed among the assets of said bank, among bills and notes, as alleged in the petition, are the following items:

Big Pond Oil & Gas Co.....	\$ 10,000 00
Brown Real Estate Co.....	29,753 75
Creek County Investment Co...	40,986 00
Elbert Oil & Gas Co.....	9,250 00
Sapulpa Interurban Ry.....	107,402 56
Wade S. Stanfield.....	3,815 82

Paragraph 3 of said petition is as follows: "(3) That the defendants the Big Pond Oil Company, the Boggy Oil Company, the Brown Real Estate Company, the Creek County Investment Company, and the Elbert Oil & Gas Company are oil and gas and real estate corporations controlled and operated, in whole or in part, by the officers, directors, and stockholders of said Farmers & Merchants' Bank, and have been financed, in whole or in part, from the funds and assets of said Farmers & Merchants' Bank; and at the close of business on September 9, 1912, there was listed among the assets of said Farmers & Merchants' Bank notes and bills aggregating \$90,989, given by said companies, which are now held by the bank commissioner of the state of Oklahoma as the property of the state of Oklahoma, for the use and benefit of the bank guaranty fund of said state. That said bills and notes represent funds of the said Farmers & Merchants' Bank which were advanced to said companies in violation of law, and with the intent that the stockholders of said bank would profit personally, to the injury of the bank."

Paragraphs 6 and 7 are as follows:

"(6) That the property, assets, and business of the defendants, the Big Pond Oil Company, the Boggy Oil Company, the Brown Real Estate Company, the Creek County Investment Company, the Sapulpa Interurban Railway Company, and the Elbert Oil & Gas Company, which are in fact the property and assets of the Farmers & Merchants' Bank, are being mismanaged and mishandled by the persons in control of same, and are in imminent danger of being entirely lost, and will be dissipated, unless prevented by the appointment of a receiver for all of said defendant corporations by

this court in this action, to take charge of all the property and assets of said defendants, and to hold and manage same under the orders and direction of this court.

"(7) That the books of said Farmers & Merchants' Bank, including the daily statement of resources and liabilities from February, 1908, to September 3, 1912, all remittance records for the years 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the personal accounts in the individual ledger of B. C. Burnett, B. B. Burnett, and the companies in which they are interested, have all been taken from the building occupied by said bank, and although demand has been made on the officers, directors, and stockholders of said bank that they return said books to the bank commissioner, they have failed and refused, and still fail and refuse, so to do. That it is believed by relator that said books are now in the custody and under the control of the persons acting as officers and directors of said Farmers & Merchants' Bank when same were taken over by the bank commissioner on September 9, 1912, and are being secreted in order to hinder and embarrass the state in administering the affairs of said Farmers & Merchants' Bank."

The prayer of the petition is that the court appoint the bank commissioner of the state of Oklahoma as receiver for said defendants the Farmers & Merchants' Bank and the corporations named, and then pray for judgment against certain stockholders for an amount equal to the par value of the shares of stock held by each, and that the court order and direct that the officers and directors of said Farmers & Merchants' Bank turn over to the state bank commissioner all books, records, and papers pertaining to the business and affairs of said Farmers & Merchants' Bank, and that the plaintiff have such other and further relief in the premises as may be deemed proper.

The record shows that on the 11th day of October, in said case, in open court, the following order was made:

Order to produce books, etc.

The above cause coming on to be heard upon the application of the plaintiff for the appointment of a receiver for the defendant the Farmers & Merchants' Bank, and for an order directing that the officers, directors, and employees of the defendant the Farmers & Merchants' Bank, at the time same was taken over by the bank commissioner, turn over and deliver to the bank commissioner of the state of Oklahoma all

books, records, and papers belonging to said bank, and the plaintiff being represented by W. C. Reeves, assistant attorney general of the state of Oklahoma, and the defendants being represented by Messrs Rutherford and Lawrence, their attorneys, and the court being fully advised in the premises:

It is ordered and adjudged that the application for a receiver for said Farmers & Merchants' Bank be denied, to which order and judgment the plaintiff excepts.

It is further ordered and adjudged that the petition and application herein shall be treated by the court as in the nature of a bill of discovery, for the purpose of securing the books and property which should be delivered over to the bank commissioner by the officers, directors, and employees of said Farmers & Merchants' Bank as the books and property of said bank at the time said bank was taken over by the bank commissioner of said state of Oklahoma.

It is further ordered and adjudged that the officers, directors, and employees of the Farmers & Merchants' Bank of Sapulpa produce and deliver to the bank commissioner of the state of Oklahoma all property, books, and papers of said Farmers & Merchants' Bank, and pertaining to the business and affairs of said Farmers & Merchants' Bank, prior to the time said bank was taken over by said bank commissioner, including the daily statement of resources and liabilities of said bank from February, 1908, to September 3, 1912, all remittance records for the years 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the individual ledger, showing the personal accounts of B. C. Burnett, the Big Pond Oil Company, Boggy Oil & Gas Company, the Brown Real Estate Company, the Creek County Investment Company, the Elbert Oil & Gas Company, and the Sapulpa Interurban Railway Company, or show cause to the contrary on or before Monday, October 14, 1912, at 9 o'clock A. M.

Wade S. Stanfield, Judge.

The record further shows that on said day the sheriff of Creek county served said court order by delivering a true copy to Bates B. Burnett, as president, and Birch C. Burnett, as cashier, of the Farmers & Merchants' Bank of Sapulpa.

October 12th there was filed a stipulation signed by W. C. Reeves, assistant attorney general, for plaintiff, and Rutherford & Lawrence and Stuart, Cruce, & Gilbert for the defendants, wherein it is stipulated and agreed that further hearing of said case shall be continued until a district judge is assigned to Creek county in place of 47 L.R.A. (N.S.)

Hon. Wade S. Stanfield, who is disqualified to sit in said cause. October 16th the chief justice assigned Hon. Tom D. McKeown, of the seventh judicial district, to hold court at Sapulpa, in the twenty-second judicial district, on October 18th and 19th.

October 18th the attorney general filed an information duly verified by L. H. Patton, assistant bank commissioner, which, omitting the formal parts, is as follows:

"Information."

"Comes now Chas. West, attorney general of the state of Oklahoma, and gives the court to know and be informed that, in the course of certain interlocutory proceedings in this action, an order was duly made by this court, requiring the officers, directors, and employees of the Farmers & Merchants' Bank, one of the defendants in said cause, to turn over and deliver to the bank commissioner of the state of Oklahoma certain books pertaining to the business of said Farmers & Merchants' Bank, or show cause to the contrary on or before October 14, 1912, at 9 o'clock A. M., which order was duly served on Bates B. Burnett, Birch C. Burnett, two of the officers of said Farmers & Merchants' Bank, on the 11th day of October, 1912, and on Brooks G. Burnett, an employee of said bank, on the 12th day of October, 1912, a copy of which order is attached hereto as a part hereof and marked 'Exhibit A;' that said Bates B. Burnett, Birch C. Burnett, and Brooks G. Burnett, and each of them, wholly failed and refused, and still fail and refuse, to obey said order, and refuse to deliver to said bank commissioner of the state of Oklahoma any of the books described in said order. Wherefore plaintiff prays that said Bates B. Burnett, Birch C. Burnett, and Brooks G. Burnett be committed to the county jail of Creek county, Oklahoma, until they fully comply with said order, and that they be adjudged to pay the costs of this proceeding."

On said day the defendants, appearing specially, filed a motion to quash the writ issued on the information, because said writ was issued without authority of law, and because no sufficient showing had been made to authorize the issuance of the said writ. The motion was by the court overruled, and on the same day the defendants filed their special demurrer, on the ground "that there is a defect as to parties plaintiff in this, to wit, because of the failure to make the bank commissioner of the state of Oklahoma a party plaintiff." The court sustained the demurrer, with permission to the plaintiff to amend by making the bank commissioner an additional party plaintiff.

that the matters, things, and facts alleged in defendants' purported answer to the rule of court requiring them to produce certain books herein, do not state facts sufficient in law to relieve said defendants from the operation and effect of said rule; that at the last examination by the state bank examiner had of the condition of the Farmers & Merchants' Bank of Sapulpa, prior to September 9, 1912, the books referred to in the court's order were in the possession and under the control of said Farmers & Merchants' Bank and its officers, and that the bank commissioner of the state of Oklahoma took charge of said bank on the 9th day of September, 1912, and on that date and at that time said books were not found in said bank, and at the time that said bank commissioner took charge of said bank on, to wit, the 9th day of September, 1912, said books, nor any of them, were in said bank, and said books, nor any of them, have ever come into the possession or under the custody and control of your petitioner, or of said bank commissioner; that, in order that the condition of said bank, as relates to its assets and liabilities, may be understood and ascertained, your petitioner states that it is absolutely necessary for your petitioner to have the custody and control of said books.

Charles West, Attorney General,

W. C. Reeves,

McDougal & Lytle,

Attorneys for Plaintiff.

State of Oklahoma, County of Creek—as.:

Comes now L. H. Patton, who, being first duly sworn, on his oath, deposes and says that he is assistant bank commissioner for the state of Oklahoma; that he has heard read the above and foregoing reply on the part of the petitioner made, well acquainted with the facts therein contained, and that said facts are true.

L. H. Patton.

Subscribed and sworn to before me this 14th day of January, 1913.

Ruth Snyder, Notary Public. [Seal.]

My commission expires October 9, 1916.

The defendants thereupon filed their verified application for a continuance, which was overruled, and the court proceeded to hear the evidence.

The following named witnesses testified on behalf of the state: The defendant Chas. W. Wills, R. Herman Killebrew, bookkeeper in said bank, the defendant S. C. Nigh, L. H. Patton, assistant bank commissioner of the state, and M. R. Garnett, state bank examiner; also Brooks Burnett. When the state rested, the defendants called W. C. Reeves, assistant attorney general, 47 L.R.A.(N.S.)

as a witness. No other testimony was offered on behalf of the defendants.

The findings of the court, as shown by the record, are as follows:

By the court: In this case, as I recall this petition, it alleges the insolvency of the bank (I think it alleges that), and alleges the use of the funds of the bank in the financing of several corporations, and asks for a receiver for the bank and for the various corporations, and then asks for judgment against certain stockholders named; that is, to recover the double liability provided by statute. That, in substance, is the range of this petition as I get it, isn't it?

By Mr. Reeves: I think so.

By the court: After that petition was filed, the presiding judge refused the application contained therein for the appointment of a receiver, either for the bank or these other corporations.

By Mr. Reeves: The order just relates to the application in regard to the bank.

By the court: And an opinion was expressed by the judge that he would deny that application for a receiver,—whether he passed on the question as to whether the plaintiff was entitled to the judgment or not, perhaps not,—and said something or other in the opinion that it should be retained or proceeded with in the nature of a bill of discovery. It is not like the opinion of any other court. This is the same court, as it is the rule here a court may be composed of several judges, one acting at a time at different times; it is all the same court. I would not be disposed, after other judges had held the court for a time and made any rulings, to go back of those. Whether they are right or wrong may be determined by the supreme court, but not by me. Even if I had an opinion that they were, I should not reverse them, because I would assume that if there was any error in them, the party injured could save his exceptions and test the case on them in the supreme court. Whether it is in the nature of a bill in equity or a bill of discovery or not, it has not been a ruling. Of course, he suggested that in an opinion. I am not concerned much with what it is. I don't care what you call it. Here is a suit pending, and in this suit an order is made. Now, whether, in the opinion of one judge, the case itself is in the nature of a bill of discovery, or what it is, the fact that that might have been his opinion would not invalidate the order made, if he had a right to make it. Now, it is said that, pursuing it logically, which I think the counsel ingeniously did, that is a suit in equity, and that a suit in equity cannot

quite remedy at law; and the adequate remedy at law suggested is an action in replevin. I do not think that is an adequate remedy. What good would be a judgment of replevin for the recovery of the account books if the officers couldn't find them? And a judgment for the value of them, which has been suggested, would be practically nothing. They are of no value themselves, except to use as the bank commissioner requires; they wouldn't have any value as articles of commerce. They might be of inestimable value to the bank commissioner to enable him to settle up the affairs of the bank; but, so far as being able to do anything with them, to dispose of them, nothing could be done all, so a judgment for their value would be no adequate remedy.

Perhaps a more serious point is that urged that a demurrer to the petition, the first pleading filed, was this petition. On that petition this order was made. Later a demurrer to the petition was filed, and one of the judges sustained that demurrer; and it was therefore argued, logically too, that with the sustaining of that demurrer the petition itself fell, and when it went down everything else went with it. It might not have been necessary to have demurred to procure all that was procured in this case. An application to have another party made or joined would have had the same effect. No demurrer was sustained because of the insufficiency of the petition upon its merits; it didn't fall in that way; it still stands, so far as the allegations therein are concerned, but another party was joined as a party plaintiff. Technically, taking the argument on the technicalities, the argument that has been made is reasonable. Can the court regard that? It has been said by some of the old English judges that when the technicalities of the law tend to justice, then the court should make much of it; and when they do not, the court should not make very much of them. The bare fact that another party was asked to be joined, and he was joined, would not, in fact and in effect, interfere with the order of the judge made, ordering the production of these books. Now a special arm of the state government is brought in, and, because the court held it was necessary to bring him in, to hold that invalidated the order theretofore made, requiring the parties to produce these books, it seems to me, would be sacrificing the real for the shadow of things.

The only thing left is the evidence produced upon this hearing. As a reason for not producing them, they file an answer, saying they haven't got them. Of course, 47 L.R.A.(N.S.)

they can't; but the court act upon the bare statement of that kind, connected with the statement that they ought not to be required to produce them anyway, because it might incriminate them? The testimony is that these books were there in the bank; that they were officers of the bank; they exercised full control, under this evidence. The witness Wills, acting as assistant cashier, and Mr. Nigh, were directors somewhat to their doubt. They didn't seem to know whether they were directors or not. Evidently they didn't have anything to do with the control. Even Brooks Burnett didn't know that he was a director. That is the five. The president and cashier ran this bank, and it is the testimony of Brooks Burnett that he merely went there with the keys and handed them over to the bank examiner on the direction of either Bates or Birch. He was acting then for those who were actually in charge, for those who were running, operating, and controlling that bank. I don't know anything about this, except what I have heard in the evidence. I didn't know what case I was coming over to try, so I could not be influenced by anything else. From this evidence I am convinced that these two gentlemen are the ones that were in full control of this bank. Being in full control of the bank, they were in control of its records, books, and papers. If they were not there when the bank examiner took charge, and unless there was some burglary, which isn't attempted to be alleged, why they must know where they are. They may have put them beyond their reach temporarily; they possibly may have destroyed them. There is nothing alleged though; there is nothing said. If they are destroyed so as to relieve them from producing them, they must show it. Perhaps the weakest part in the plaintiff's proposition is that the order itself runs to the bank officers, naming nobody. I think the individuals should have been named; but these individuals were served personally, and the evidence is they were bank officers, the president and cashier. These two are the highest bank officers, and they were the persons that were served. That was away back in October some time. Now, from that time to this they have had notice: it was their place to produce these books. They don't say they are destroyed; they say they haven't them in their control. They say nothing in their answer as to how they got away from their possession. If there was some sort of a reasonable explanation from the time they had them, that at some time the bank was robbed, or that someone else was in the bank, who had possession of these books, and went away, something

to reasonably show to the court that these books got away from them without their connivance and without their consent, the court might consider it. Under this evidence the court can only find that they themselves knew what became of them. It still might be true, if they got rid of them, that they wouldn't know where they are now. They might have given them to somebody else, or somebody else removed them elsewhere; they might still swear they don't know where they were, and they were not under their control. The court must believe they can get them under their control again. The arm of the law ought not to be so weak that it can't deal with situations of this kind.

The state has a system of bank examinations by a bank commissioner, whose duty it is to come and take charge of banks in failing circumstances and wind up their affairs. Is it possible to defeat and delay the banking officers by taking the books out of the banking house that are necessary to do that, and then come up to the court and say: "You can't do that; the court is not strong enough to handle me. Proceed in some more orderly, lengthy way." I don't think that is the intention of the law at all.

Come forward, Mr. Bates B. Burnett and Birch C. Burnett. You have been heretofore directed by this court to produce certain described books and papers of the Farmers & Merchants' Bank of Sapulpa, or show cause why you did not produce them. You have filed an answer. You failed to produce them, but you filed an answer, saying you did not know where they were. Your answer has been held to be insufficient by the court. Have either of you anything further to say why you should not be punished for contempt of court in failing to obey the order, Mr. Bates B. Burnett?

By Mr. Bates B. Burnett: No, sir.

By the court: Mr. Birch C. Burnett?

By Mr. Birch C. Burnett: No, sir.

By the court: It is the judgment of the court that you have failed to obey the order of the court in not producing the books of the bank described in the order, and that you have failed to show sufficient cause why you have not done so; and it is the judgment of the court that you be imprisoned in the county jail of this county until such time as you shall produce these books and papers. I shall not grant a supersedeas of the order, but will stay the order for the period of ten days upon the giving of the bond of \$3,000 each, and will stay the order after the giving of the bond for the period of ten days, to enable you to lodge your petitions in error, or any proceeding you want, and there ask for the stay. I don't

think in this character of a case the trial court should grant a supersedeas. I have had several of that kind of cases, and I want the supreme court to have a chance to grant the supersedeas themselves. The defendants will be placed in custody of the sheriff until these bonds are given.

The judgment and sentence was rendered and entered January 15, 1913, and contains the following recital: "It is therefore ordered and adjudged that said defendants, Bates B. Burnett and Birch C. Burnett, be confined and imprisoned in the county jail of Creek county, Oklahoma, until they shall deliver and turn over, or cause to be delivered and turned over, to the bank commissioner of the state of Oklahoma the following books and property of the Farmers & Merchants' Bank, now in process of liquidation by said bank commissioner, to wit, daily statement of resources and liabilities of said bank from February, 1908, to September 3, 1912, all remittance records for the year 1910, 1911, and 1912, journal of daily business in detail from 1910 to September 3, 1912, note register, and the individual ledger, showing the personal account of B. C. Burnett, B. B. Burnett, the Big Pond Oil Company, Boggy Oil & Gas Company, the Brown Real Estate Company, the Creek County Investment Company, the Elbert Oil & Gas Company, and the Sapulpa Interurban Railway Company, to which judgment defendants and each of them except. It is further ordered and adjudged that said defendants, Bates B. Burnett and Birch C. Burnett, be held in the custody of the sheriff of said county of Creek until they each give bond in the sum of three thousand (\$3,000) dollars, with good and sufficient sureties, said bond to be approved by the clerk of the district court, conditioned that they file their petition in error in the proper appellate court of this state, and obtain therein an order of supersedeas within ten (10) days from this date; and upon the giving and approval of such bond, then execution herein be stayed for a period of ten (10) days from this date; and should said defendants fail to obtain a supersedeas in said appellate court within said period of ten (10) days, then said sheriff of Creek county will proceed to carry out the judgment and commitment of this court,—to all of which orders, ruling, and judgments defendants and each of them at the time duly excepted."

An appeal to this court was duly perfected by filing, January 25th, a petition in error with case made, at which time an application for supersedeas was allowed and an order made, fixing \$5,000 as the amount of the bond for each defendant;

also an order that the cause be advanced and set for argument and final submission on February 7th, at which time it was argued and submitted.

Messrs. J. B. Rutherford, J. F. Lawrence, and Stuart, Cruce, & Gilbert for plaintiffs in error.

Messrs. Charles West, Attorney General, and W. C. Reeves, Assistant Attorney General, for defendants in error:

This is a civil proceeding, and this court has no jurisdiction to review the judgment of the lower court.

Flathers v. State, 7 Okla. Crim. Rep. 668, 125 Pac. 902; Ex parte Gudenoge, 2 Okla. Crim. Rep. 111, 100 Pac. 39.

The depositors' guaranty fund of the state and the funds and property of a state bank in the hands of the bank commissioner, are the funds and property of the state, the title to which is in the state.

State ex rel. Taylor v. Crockrell, 27 Okla. 630, 112 Pac. 1000.

The right to trial by jury declared inviolate by § 19, article 2, of the Constitution except as modified by the Constitution itself, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution.

Re Byrd, 31 Okla. 549, 122 Pac. 516.

The party accused has no right to a trial by jury in a contempt proceeding.

Burke v. Territory, 2 Okla. 499, 37 Pac. 829.

The books in controversy having been traced to the recent possession or control of plaintiffs in error, they are presumed to have remained there until they satisfactorily account to the court for their disposition or disappearance.

Boyd v. Glucklich, 53 C. C. A. 451, 116 Fed. 131; Re Alphin & L. Cotton Co. 134 Fed. 477; Re Rogowski, 166 Fed. 165.

Doyle, J., delivered the opinion of the court:

The statement of facts has been made somewhat full in order that, by exhibiting the various proceedings in detail, the errors assigned and relied upon for a reversal of the judgment may be at once clearly understood and deprived of any seeming force.

We are confronted at the threshold of the cause with the contention of the attorney general "that this is a civil proceeding, and that this court has no jurisdiction to review the judgment of the lower court," citing the case of Flathers v. State, 7 Okla. Crim. Rep. 668, 125 Pac. 902, and cases therein cited.

While the attorney general may have proceeded upon the theory that the proceeding was remedial and the contempt civil, it is 47 L.R.A. (N.S.)

evident from the records that this court very properly considered the defendants' contumacy a "direct" or "public," and therefore a criminal, contempt; and, though the proceedings were had to compel a compliance by the defendants with an order of the court, the punishment was primarily in the interest of public justice to vindicate the authority and the dignity of the court from the disrespect shown to it and to its order by the defendants.

We think this case is clearly distinguished from the Flathers Case, wherein this court held that a refusal and neglect to pay alimony constituted a civil contempt. In the opinion in that case the following language is used: "Contempts of court are of two kinds, civil and criminal. Much confusion exists in judicial decisions as to whether or not contempt proceedings are civil or criminal. As a general rule, these designations must be considered with reference to the specific question before the court. . . . In the absence of a statutory classification, it is impracticable to state a general rule by which, in all cases, to distinguish these two classes, in the one or the other of which every act of contempt must be classified."

When the state bank commissioner, in the name of the state of Oklahoma, through its attorney general, asked that the books and records of the Farmers & Merchants' Bank of Sapulpa be produced, it was for the purpose of protecting the interest of the state and the rights of the public, not the interest of an individual litigant.

One of the provisions of the bank guaranty law (§ 324, Snyder's Comp. Laws, 1909) is that "the bank commissioner shall take possession of the books, records, and assets of every description of such bank or trust company, collect debts, dues, and claims belonging to it, and upon order of the district court or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the stockholders, officers, and directors; provided, however, that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers, and directors."

The power to punish contempts is inherent in all courts of justice, and is expressly conferred upon them by the Constitution. Article 2, § 25, Bill of Rights. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and decrees

entitle a junior mortgagee to a decree of foreclosure.

Same — sale — payment of mortgage — subrogation.

2. When the vendee, in payment of the purchase price of real estate, pays the indebtedness secured by a first mortgage, he is not subrogated to the lien of that mortgage as against a second mortgagee whose mortgage is duly recorded at the time of purchase.

(April 5, 1913.)

ERROR to the Pontotoc County Court to review a judgment in defendants' favor in an action brought to foreclose a mortgage. Reversed.

The facts are stated in the commissioner's opinion.

Messrs. Bullock & Kerr, for plaintiff in error:

The doctrine of subrogation applies only when a person not primarily liable for a debt pays the debt, without legal obligation, to protect his interest. A person primarily liable for the debt is never subrogated, so that he may take advantage of the security held by the creditors as against junior encumbrances.

3 Pom. Eq. Jur. § 1213; Tiedeman, Real Prop. §§ 336, 337; Kuhn v. National Bank, 74 Kan. 456, 118 Am. St. Rep. 332, 87 Pac. 551; McDowell v. M. T. Jones Lumber Co.

Note. — Revival of, or subrogation to, discharged mortgage in favor of assignee of equity of redemption, who pays it, as against junior lien.

But few cases have passed upon this question since the compilation of the note to Capital Nat. Bank v. Holmes, 16 L.R.A. (N.S.) 470, wherein the earlier cases are treated. The principles involved and the rules applied by the courts are so fully stated in the earlier note that it is considered superfluous to do more than present the later decisions.

The decision in KAHN v. MCCONNELL is directly supported by the case of Ragan v. Standard Scale Co. 128 Ga. 544, 58 S. E. 31, wherein one purchased property against which there were two recorded mortgages, and paid the senior mortgage out of the purchase money, and it was canceled; and it was held that the purchaser could not, in the absence of an agreement to that effect, be subrogated to the rights of the senior mortgagee as against the holder of the junior encumbrance, the court applying the rule that since the purchaser had constructive if not actual notice of the junior mortgage, subrogation must be denied in the absence of an agreement therefor with either the debtor or the creditor.

And in Avon-by-the-Sea Land & Improv. Co. v. McDowell, 71 N. J. Eq. 116, 62 Atl. 865, where a purchaser of property subject to several encumbrances paid off a prior 47 L.R.A. (N.S.)

42 Tex. Civ. App. 260, 93 S. W. 476; Cohn v. Hoffman, 45 Ark. 376.

Messrs. Crawford & Bolen for defendants in error.

Ames, C., filed the following opinion:

A. A. McConnell and A. M. McConnell owned the land. There was a first mortgage on it to secure an indebtedness to the First National Bank of Roff. There was a second mortgage to secure the indebtedness of the plaintiff. The defendant Wright approached McConnell with reference to a purchase of the land. McConnell referred him to the First National Bank, stating that, if he could satisfy the bank concerning his indebtedness, he would convey the land. Wright ascertained from the bank the amount due, paid a part of it, and gave his note for the balance, which was later paid. He took McConnell's canceled notes to him, and thereupon McConnell executed a deed conveying the land to him. The plaintiff's mortgage during all these times was of record, although it may be that Wright had no actual knowledge of it.

In the suit by the plaintiff to foreclose, and under these facts, the court held that Wright was subrogated to the lien of the bank's first mortgage, found that the land was worth less than the amount of the first mortgage, and refused the plaintiff's prayer

for a decree of foreclosure. The court, in holding that equity would not revive the prior encumbrance as against subsequent ones by application of the doctrine of subrogation, said: "The law is settled that where the owner or purchaser of property subject to several encumbrances pays off a prior encumbrance by his own money, the payment inures to the benefit of the subsequent encumbrances, and as against them the prior encumbrances cannot be kept alive for the owner's benefit, even by express agreement. . . . A fortiori on such payment by the owner, without any agreement for subrogation or keeping the security alive, a court of equity will not revive the prior encumbrance against subsequent encumbrances by the application of the equitable doctrine of subrogation in favor of the owner."

So, in Sowder v. North Texas State Bank, — Tex. Civ. App. —, 155 S. W. 971, where a purchaser of property paid a chattel mortgage with a part of the purchase money and discharged it with the intention to release the lien, it was held that the purchaser was not entitled to subrogation to the lien of the original mortgage as against a junior chattel mortgage.

As to merger of mortgage by conveyance from mortgagor to mortgagee or revival thereof after such conveyance where there are intermediate encumbrances upon the property, see note to Pugh v. Sample, 39 L.R.A. (N.S.) 834. G. J. C.

for a foreclosure. This was error. Under no circumstances should the plaintiff have been denied his right to foreclose. But under the facts of this case, Wright, the purchaser from McConnell, was not subrogated to the lien of the bank. The plaintiff's mortgage was of record. Wright had constructive notice of it, although it may not have been actual. It could have been ascertained by the exercise of reasonable diligence on his part in the examination of the records. He therefore bought the land charged with notice of the plaintiff's mortgage. The fact that he assumed the indebtedness to the bank and paid it did not give him the right of subrogation. In the matter of that payment he was a volunteer. He was under no duty to buy the land. He was under no duty to pay the first mortgage. He was negligent in doing so without examining the records, and cannot escape the consequence of his own negligence by an appeal to the equitable doctrine of subrogation. *Vigilantibus non dormientibus æquitas subvenit*. In *Campbell v. Hamilton*, — Tenn. —, 39 S. W. 895, it is said in the syllabus: "The fact that a purchaser who paid a mortgage on the land as part of the consideration, and secured the release thereof, did so at the time of the purchase, made it none the less a case of assumption of the mortgage, disentitling him to subrogation." In *Stastny v. Pease*, 124 Iowa, 587, 100 N. W. 482, it is said in the syllabus: "The purchaser of real property has constructive notice of an existing judgment lien; and, where by agreement with his grantor he discharges prior liens in part payment of the purchase price, the judgment becomes a first lien upon the property, and neither the doctrine of equitable assignment nor subrogation applies."

The following cases support the same conclusion: *Goodyear v. Goodyear*, 72 Iowa, 329, 33 N. W. 142; *Afton First Nat. Bank v. Thompson*, 72 Iowa, 417, 34 N. W. 184; *Kellogg v. Colby*, 83 Iowa, 513, 49 N. W. 1001; *Hubbard v. Le Barron*, 110 Iowa, 443, 81 N. W. 681; *McDowell v. M. T. Jones Lumber Co.* 42 Tex. Civ. App. 260, 93 S. W. 476; *Kuhn v. National Bank*, 74 Kan. 456, 118 Am. St. Rep. 332, 87 Pac. 551; *Hargis v. Robinson*, 63 Kan. 686, 66 Pac. 988; *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920; *Gulling v. Washoe County Bank*, 24 Nev. 477, 56 Pac. 580; *Avon-by-the-Sea Land & Improv. Co. v. McDowell*, 71 N. J. Eq. 116, 62 Atl. 865; *Demourelle v. Piazza*, 77 Miss. 433, 27 So. 623; *Browder v. Hill*, 69 C. C. A. 499, 136 Fed. 821; *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Menefee v. Marge*, 1 Va. Dec. 644, 4 S. E. 726.

The rule in Ohio seems to be otherwise (*Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 47 L.R.A.(N.S.)

900), while Louisiana and Indiana seem to have decided this question both ways (*Hobgood v. Schuler*, 44 La. Ann. 537, 10 So. 812; *Abbeville Rice Mill v. Shambaugh*, 115 La. 1047, 40 So. 457; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Caley v. Morgan*, 114 Ind. 350, 357, 16 N. E. 790).

On the case as presented by this record, the judgment of the trial court should be reversed, and the cause remanded.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT. (Division No. 2.)

ÆTNA INSURANCE COMPANY, Plff. in
Err.,
v.

J. A. JESTER.

(— Okla. —, 132 Pac. 130.)

Insurance — arbitration — right to introduce evidence.

1. Where a fire insurance policy provides that in the event of loss, if the insured and the company fail to agree as to the amount of loss, it shall "be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the

Headnotes by ROSSE, C.

Note. — Right to introduce evidence before insurance appraisers.

Introduction.

The general rules applicable to the right to introduce evidence before insurance appraisers are well shown by the statements in *Carlston v. St. Paul F. & M. Ins. Co.* 37 Mont. 118, 127 Am. St. Rep. 715, 94 Pac. 756, where the cases of appraisal were divided into three classes: First, those where appraisers have been appointed to estimate the value of a building before its destruction and are experts, in which it is held that a hearing need not be granted; second, those where the building has been partially destroyed and sufficient remains to disclose the size, general character of architecture, and the quality of the materials used, in which it is held that no hearing need be granted; and, third, those where there has been a total destruction of the property, in which it is held that evidence is admissible as to its value, and that a hearing should be granted.

It has been held that the rules applicable to arbitration and award do not apply to the proceedings of insurance appraisers. *Kent & P. Paint Co. v. Ætna Ins. Co.* 165 Mo. App. 30, 146 S. W. 78; *Royal Ins. Co. v. Ries*, 80 Ohio St. 272, 88 N. E. 638.

appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss"—the insured has the right, if he demands it, to introduce evidence before the appraisers as to the extent of his loss, and, where he is refused permission, upon demand, to introduce evidence the award is not binding upon him.

Same — waiver of second submission.

2. An insurance company, by asserting the validity of an award of appraisers, waives its right to have the loss again appraised when the first award is set aside for invalidity.

(January 21, 1913.)

It is the duty of the insured, when he knows that the appraisers are in session considering the matters submitted to them, to lay his evidence before them, and offer such oral testimony as he may deem proper to assist them to arrive at a just conclusion; and it is not the duty of the arbitrators to send to him, from time to time, for such evidence as he may desire to submit, and where he simply intimates to one of the appraisers that he has evidence which he desires them to consider, but never offers it, he cannot claim that the arbitrators rejected material evidence. *VanWinkle v. Continental F. Ins. Co.* 55 W. Va. 286, 47 S. E. 82.

And in *Stemmer v. Scottish Ins. Co.* 33 Or. 65, 53 Pac. 498, it was held that the insured's statement that he was willing to produce witnesses showing the effect of the fire upon certain goods was not an offer to produce such testimony, and did not invalidate the award where he did not actually produce the witnesses for examination. The court said: "It is claimed that Fisher and White excluded evidence which tended to show the amount of damage sustained, thereby denying to plaintiff a hearing on the merits of the controversy and rendering the award invalid. The rule is quite general that the exclusion of pertinent and material testimony by the appraisers is usually fatal to the award. . . . An exception to this rule seems to be that if the persons selected as appraisers possess peculiar skill or knowledge concerning the subject-matter, and it appears that the parties to the submission intended to rely upon such skill or knowledge, the appraisers will be justified in refusing to hear evidence; . . . but, however this may be, it is admitted that neither of said appraisers possessed any peculiar knowledge of skins or other material used in manufacturing gloves, so that, if they be regarded in the light of ordinary arbitrators and rejected material evidence to plaintiff's prejudice, it necessarily follows that the award should be set aside. The evidence tends to show that plaintiff was present when Fisher and White examined the stock

known to the District Court for Washington County to review a judgment in plaintiff's favor in an action on a fire insurance policy. Affirmed.

The facts are stated in the commissioner's opinion.

Messrs. Massingale & Duff and Burwell, Crockett, & Johnson for plaintiff in error.

Mr. Richard A. Billups for defendant in error.

Rosser, C., filed the following opinion:

This is an action by J. A. Jester against the Aetna Insurance Company, brought on a fire insurance policy to recover for the loss of certain property by fire. The policy sued on contained the usual appraisal

and manufactured goods that had been injured by the fire, but he was not permitted to volunteer any information concerning his loss, his answers being confined to such questions as were propounded to him by the appraisers. He was not permitted to know what amount of damages the appraisers placed upon any of the stock of goods until the award was made, whereupon he stated to the appraisers that he would not accept the amount awarded, and notified them that he intended to offer further testimony. . . . Stemmer, referring to what he said to Fisher and White when they were appraising this material, testified as follows: 'I told them time and time again I was willing to bring in any information from people that were capable, and understood that class of goods, to give them information;' to which he says the appraisers replied that 'if we need to, we will get them ourselves.' Godfrey Fisher, one of the appraisers, in his deposition, states that 'Mr. Stemmer never, to my knowledge, offered to produce any evidence which we rejected.' While plaintiff may have been willing to have brought in persons who would have testified concerning the amount of his damage, he did not produce a single witness; and such being the case, it cannot be said that the appraisers rejected material testimony. Testimony must be offered before it can be rejected, and a statement of a party's willingness to bring in witnesses is not a production of testimony. As we understand it, the appraisers simply refused to permit plaintiff to participate in their deliberations when making a memorandum of the losses upon which the award was based. In other words, they declined to listen to the advice of counsel, but we are unable to find, from a careful perusal of the testimony, that the appraisers rejected any evidence that was offered."

The burden of proof is upon the insured to show that pertinent and material evidence offered by him as to the amount of his loss was rejected and excluded by the appraisers, but no more than a fair preponderance of evidence is required to show

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that it is not necessary for the appraisers to hear parties, but no case has been found where the appraisal was upheld when the appraisers had refused to hear the parties, or one of them. In the case of *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356, relied upon by the plaintiff, the appraisal was upheld. One of the grounds urged against the appraisal was that the appraisers refused to hear plaintiff's evidence. The court said: "The plaintiff accompanied the appraisers during the examination, described to them the rooms, informed them regarding the construction of the building, was freely inquired of by the appraisers respecting matters involved in their examination, and was permitted to give all the information which he offered to give. Before the making of their award, the appraisers denied the plaintiff no opportunity to appear before them and give any information or evidence respecting the subject of the appraisal."

In the case of *Vincent v. German Ins. Co.* 120 Iowa, 272, 94 N. W. 458, also relied upon by plaintiff in error, one of the

grounds of objection to the award was because Clarke was not notified of the hearing, and did not participate in the award. The court said: "With reference to failure to give notice, plaintiff has shown that no notice was given him, but it is undisputed that he told the appraiser appointed . . . that he did not want anything to do with it. This arbitrator also testified that he asked plaintiff to attend the arbitration, but that plaintiff refused to do so. This clearly amounted to a waiver of notice, and authorized the arbitrators to proceed without plaintiff's presence. . . . We have left but one question, and that the alleged mistake and misconduct of the arbitrators. Claim is made that they refused to hear evidence. It is true that they did not take testimony, but they were not selected for that purpose. They were to ascertain and appraise 'the sound value of, and the loss upon, the property damaged.' To appraise is to estimate value, and we have no doubt that these arbitrators or appraisers were selected to make an appraisal, and not to hear evidence. The men selected by the

been of peculiar value, since it clearly appeared that the arbitrators were not experts in the valuation of such property as that destroyed, and knew little about it.

And in *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 13 N. W. 252, where the extent of the injury to the insured furniture, fixtures, and photographic apparatus does not appear, it was held that where arbitrators are appointed under a policy providing that in cases of differences as to the loss the amount shall be referred to two disinterested and competent men,—one to be selected by each party,—who should ascertain, estimate, and appraise the loss, whether the proceeding was considered as a common-law arbitration or a submission under Rev. Stat. p. 892, chap. 153, the insured was entitled to introduce evidence as to the value of the property involved, and the exclusion of such testimony was held to be fatal to the award, whether it was due to the act of the insurer or the arbitrators.

The extent of the loss in *Chenoweth v. Phoenix Ins. Co.* 12 Ky. L. Rep. 232, does not appear, but where the insured had notified the arbitrators appointed to ascertain the loss through the destruction of a building by fire, that in case there was a disagreement the parties were to be notified so that they might introduce evidence and be heard, and the arbitrators had agreed that they would do so, it was held that a disregard of the request of the arbitrator representing the insured, upon a disagreement, that the insured be notified and allowed to give evidence, vitiated the award.

In *Townsend v. Greenwich Ins. Co.* 86 App. Div. 323, 83 N. Y. Supp. 909, affirmed without opinion in 178 N. Y. 634, 71 N. E. 1140, where it is not clear whether the insured building was totally destroyed, ap- 47 L.R.A.(N.S.)

praisers were appointed in accordance with the terms of a fire policy providing that in the event of a disagreement the amount of the loss should be determined by "two competent and disinterested appraisers, the insured and this company selecting one, and the two so chosen shall first select a competent and disinterested umpire," and it was held that, in the absence of bad faith, the mere fact that the parties were not given notice of the meetings of the appraisers did not affect the validity of their proceedings; the court holding that the appraiser selected by the insured was his representative chosen for the purpose of guarding his rights, and that, in the absence of evidence to the contrary, it must be assumed that he discharged this duty, and that the insured had an opportunity of being heard if such a hearing was necessary to the preservation of his rights.

While it would be proper for appraisers appointed to determine the loss occasioned by a fire, to examine the insured's books of account to determine the amount of stock which he had on hand at the time of the fire, yet these books are not the only evidence of that fact; and if the insured did not produce these books, or if the appraisers were of the opinion that they did not show the correct amount of merchandise on hand at the time of the fire, the appraisers may properly resort to other evidence to determine this fact; and if they fully investigate the question of the amount of merchandise, a court of equity will not set aside their award, because they did not examine the insured's books of account, which they believed were incorrect. *Tyblewski v. Svea Fire & Life Assur. Co.* 250 Ill. 436, 77 N. E. 196, affirming 121 Ill. App. 528.

J. T. W.

parties were experienced contractors and builders, and the terms of the contract clearly indicate that an appraisal only was contemplated. That such an agreement is good, and that no notice to the parties is required in such cases, see *James v. Schroeder*, 61 Mich. 28, 27 N. W. 850; *Cobb v. Dolphin Mfg. Co.* 108 N. Y. 463, 15 N. E. 438. We are not to be understood as holding that such arbitrators may not take evidence. All that we now decide is that their failure to do so under such a state of facts as are here presented, will not avoid the award. The testimony leaves no doubt in our minds that neither party expected or intended to introduce evidence before the arbitrators." It will be observed that there is a great difference in the facts of that case and this. In that case only damaged property was to be appraised. In that case there was no request for permission to introduce evidence. In this case there was a demand for permission to introduce evidence. The appraisers had something more to do than to look at the property and to appraise the damage. Some of it had been totally destroyed.

The company seems to take the position that, if the award first made was invalid, it is entitled to another appraisal. This position cannot be maintained. The company asserted the legality of the award and put upon plaintiff the burden of its invalidity. It thereby waived its right to an appraisal. *American F. Ins. Co. v. Bell*, 33 Tex. Civ. App. 11, 75 S. W. 319; *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855; *Coffin v. German F. Ins. Co.* 142 Mo. App. 295, 126 S. W. 253.

The judgment should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied May 13, 1913.

WEST VIRGINIA SUPREME COURT OF APPEALS.

FRANCES G. REILLY

v.

WILLIAM T. NICOLL et al., Plffs. in Err.

(— W. Va. —, 77 S. E. 897.)

Appeal — error in instructions — prejudice.

1. Errors in the giving and refusal of instructions in a case in which the verdict is the only one that could have been given under the evidence, owing to its conclu-

siveness, are not prejudicial, and may be disregarded as being harmless.

Trial — negligence — question for court.

2. If the evidence in an action for damages for a personal injury is so conclusive of the defendants' negligence as to leave no room for a reasonable conclusion or finding to the contrary, the court may declare it as matter of law in passing on a motion to set aside the verdict conforming to the evidence, and disregard erroneous rulings in the trial on instructions as harmless errors, and render judgment accordingly.

Master and servant — unsafe working place — trapdoor.

3. A trapdoor in a step in a stairway used by a servant, to be opened only for purposes of sweeping dust, waste paper, and other *débris* from the floor, and not intended to be left open and unattended by the servant so using it, is a hidden danger to a servant who is ignorant of its existence, and renders the place of work unsafe as to him.

Proximate cause — concurring negligence.

4. The proximate cause of an injury to a servant hurt by stepping into such a trapdoor while left open by another servant is the concurrent negligence of the servant leaving it open and the master, for which the latter is liable.

Master and servant — fellow servant — assumption of risk.

5. Under the law of fellow servantry, a servant is deemed to have assumed only the ordinary risks incident to the work in which he is engaged, and is not precluded from recovery for injuries resulting from extraordinary risks of which he had no knowledge, and was not warned.

(March 11, 1913.)

Note. — Right of court to declare defendant negligent as a matter of law.

It is not intended to consider herein the question as to what constitutes negligence on the part of the defendant, and the only question discussed is whether the court under any circumstances may declare the defendant guilty of negligence as matter of law, and if so, when. Of course, cases are excluded which pass upon the right of the court to declare the plaintiff guilty of contributory negligence as matter of law.

In general.

As compared with cases of contributory negligence, it is infrequent that the court directs the jury as a matter of law that the defendant has been guilty of actionable negligence entitling the plaintiff to recover in the action. On this point, as on the question of contributory negligence, some confusion exists as to when the court may properly instruct the jury in this regard.

ERROR to the Circuit Court for Ohio County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. **Affirmed.**

The facts are stated in the opinion.

Messrs. Handlan & Reymann and G. T. Knote for plaintiffs in error.

Mr. John J. Coniff for defendant in error.

Poffenbarger, P., delivered the opinion of the court:

Frances G. Reilly, a saleslady employed in a certain store in the city of Wheeling owned and conducted by Wm. G. Nicoll, Edward L. Nicoll, Grace L. Nicoll, and

The confusion is caused by general statements relative to the law applicable where there is no controversy as to the facts, to the effect that where the facts are undisputed the question of negligence is one of law for the court, thus inducing the belief that whether the question of negligence was one of law depended upon the existence or nonexistence of a dispute as to the facts. This, however, is not the case, and the question whether the court should take the case from the jury as regards the negligence of the defendant is the same whether the facts are conceded or in controversy. In either case, the question of negligence is one of inference to be drawn from the facts. And if the facts are fairly subject to different inferences, the case should be submitted to the jury, since it is their province to say which inference shall be drawn. In other words, the question of due care and prudence, even where the facts are undisputed, is an inference to be drawn therefrom by the jury where these facts are properly susceptible to different inferences. Of course, if there is no controversy as to the facts, and they are susceptible of but one inference, and that is that the defendant has been guilty of negligence as a matter of law, the court may properly so instruct the jury; but as stated this is not the case where more than one inference as to negligence or due care and prudence may properly be drawn from the facts.

Russell v. Carolina C. R. Co. 118 N. C. 1098, 24 S. E. 512, contains a very excellent statement of the law relative to the right of the court to instruct the jury on the question of negligence, and it is stated as applicable in cases both of negligence and contributory negligence. The court declares the following rules:

"1. Where the facts are undisputed, and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one, or the concurrent negligence of both of the parties.

"2. Where the testimony is conflicting upon any material point, or more than one inference may be drawn from it, it is the 47 L.R.A. (N.S.)

Mary N. Kirkpatrick, and called "Nicoll's Art Store," recovered a judgment against her employers for the sum of \$1,260 as damages for a personal injury sustained by her as a consequence of their alleged negligence respecting the safety of the place in which she worked. As ground for reversal of the judgment they rely upon the insufficiency of the evidence to sustain the verdict, and alleged errors in the giving and refusal of instructions.

The business of the employers was conducted on the first floor of a certain building and in the basement thereof, connected by a stairway, in the top step of which there was a trapdoor, opened as occasion required to permit the sweeping of dust, waste paper, and other *débris* from the

province of the jury to find the facts or make deductions.

"3. It is the duty of the judge to tell the jury, at the request of counsel, whether in any given phase of contradictory evidence, or in case an inference fairly deducible from the testimony, or any aspect of it, should be drawn by them, either of the parties would be deemed in law culpable.

"4. Where the testimony is conflicting, or fair minds may deduce more than one conclusion from it, it is the province of the jury, after hearing such instructions as may be submitted by the court for their guidance, to determine whether either of the parties charged with negligent omission failed to exercise reasonable care, or to use such diligence as a prudent man in the conduct of his own affairs would have exercised under all of the surrounding circumstances."

Signifying as it does the doing of some act without exercising ordinary or due care and prudence, or the omission to do some act or perform some duty which ordinary care or prudence requires to be done, negligence is necessarily a relative term, and necessarily varies according to the circumstances presented in each particular case. Usually it is a mixed question of law and fact, and while the court may define the term, yet, under ordinary circumstances where the question is not affected by statute or ordinance, it is for the jury to say whether the evidence in a given case shows negligence on the part of the defendant which was the proximate cause of the injury complained of, hence it is improper for the court to charge the jury that the defendant is guilty of negligence, whether the facts are in controversy or not, where the question of negligence is one as to which different conclusions may properly be drawn from the facts.

Ga.—Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co. 135 Ga. 113, 68 S. E. 1039; Augusta R. & Electric Co. v. Weekly, 124 Ga. 384, 52 S. E. 444; Macon R. & Light Co. v. Vining, 123 Ga. 770, 51 S. E. 719; Augusta R. & Electric Co. v. Smith, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. Rep. 33;

floor through the stairway into a box under it. This door having been left open momentarily by the boy whose business it was to do the sweeping, the plaintiff stepped into the hole thus made in the step while engaged in her work, and thereby sustained the injuries complained of. The box had become full of trash and *débris* so as to close up the opening and preclude further sweeping through it, and the boy had gone into the basement for the purpose of making some disposition of it, leaving the door open. On the wall just over the stairway there were shelves on which certain goods were kept, and, having occasion to obtain some of these, the plaintiff went to the stairway and stepped down onto the first or top step so she could reach the shelves,

and thus stepped into the opening. This trapdoor was on a hinge, and covered from one half to one third of the step. Though witnesses say both rooms were well lighted, it was nevertheless in an obscure place, not being in the floor, but in a step of the stairway. The accident occurred on the first day of the plaintiff's employment at the store, though she had worked there about two weeks on a former occasion, some months prior. But there is no proof that she had any knowledge of this trapdoor at any time prior to the accident, and there was nothing to warn her of its presence. The boy had been instructed never to leave it open at any time during his absence therefrom, but the plaintiff had no knowledge of this instruction.

Alabama Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655; Portner Brewing Co. v. Cooper, 116 Ga. 171, 42 S. E. 408, 12 Am. Neg. Rep. 227; Savannah, F. & W. R. Co. v. Evans, 115 Ga. 315, 90 Am. St. Rep. 116, 41 S. E. 631; West End & A. S. R. Co. v. Mozely, 79 Ga. 463, 4 S. E. 324, 2 Am. Neg. Cas. 401.

Ill.—West Chicago Street R. Co. v. Winters, 107 Ill. App. 221.

Ind.—Pennsylvania R. Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188.

Ky.—Richmond & L. Turnp. Road Co. v. Foley, 5 Ky. L. Rep. 425.

N. Y.—Pelzel v. Schepp, 83 App. Div. 444, 82 N. Y. Supp. 423.

N. D.—Pyke v. Jamestown, 15 N. D. 167, 107 N. W. 359.

Tex.—Garteiser v. Galveston, H. & S. A. R. Co. 2 Tex. Civ. App. 230, 21 S. W. 631; Gulf, C. & S. F. R. Co. v. Bagley, 3 Tex. Civ. App. 207, 22 S. W. 68, 6 Am. Neg. Cas. 637; Houston & T. C. R. Co. v. Burns, — Tex. Civ. App. —, 63 S. W. 1035; Northern Texas Traction Co. v. Moberly, — Tex. Civ. App. —, 109 S. W. 483; Commerce Cotton Oil Co. v. Camp, — Tex. Civ. App. —, 129 S. W. 852.

It has been said that negligence is generally a mixed question of law and fact, and the court should, by a special question submitted to the jury, ascertain all the disputed and undisputed facts, and in such case upon the special verdict thus brought in, the question of negligence becomes exclusively a question of law. Pittsburgh, Ft. W. & C. R. Co. v. Evans, 53 Pa. 250.

In the case of a gratuitous bailee, who can be held only for gross negligence, whether the proper degree of care has been observed by him is a question of fact for the jury, and not one of law for the court. Carrington v. Ficklin, 32 Gratt. 670.

Instructing that certain facts constitute negligence.

Since it is the existence of negligence that creates the liability, and negligent acts may or may not constitute negligence, ordinarily 47 L.R.A.(N.S.)

it is erroneous for the court to instruct the jury that if the plaintiff in an action for damages for injuries caused by the alleged negligent acts of the defendant has proved the acts, defendant is guilty of negligence. Swift & Co. v. Griffin, 109 Ill. App. 414.

Whenever a conclusion of negligence necessarily results from the facts which the evidence in the case tends to establish, the court may say as a matter of law that such facts if established show negligence on the part of the defendant. Crauf v. Chicago City R. Co. 235 Ill. 262, 85 N. E. 235.

Negligence being a mixed question of law and fact, the court may define the term, but it is for the jury to say whether the facts proved are sufficient to show negligence. Hence, it is improper for the court, especially when the facts are in dispute, to charge the jury that certain facts show negligence on the part of the defendant. Jones v. Charleston & W. C. R. Co. 61 S. C. 556, 39 S. E. 758.

Where the plaintiff was suing for damages received in boarding a street car which defendant's servant started too quickly, it was held error to instruct the jury that if they believed the plaintiff's witnesses, the act of the conductor was negligent and constituted a cause of action in favor of the plaintiff, since the standard by which defendant's acts were to be judged was a question of fact, and whether the acts proved came up to or were below that standard was peculiarly a question for the jury. Kellegher v. Forty-Second Street, M. & St. N. Ave. R. Co. 171 N. Y. 309, 63 N. E. 1096.

While the court may not instruct the jury that particular facts in evidence constitute negligence on the part of the defendant, it may instruct them as to what does constitute negligence, and this instruction may be given by defining the duty resting upon the defendant, and stating the consequences of the failure to perform it. Houston & T. C. R. Co. v. Hubbard, — Tex. Civ. App. —, 37 S. W. 25.

It is not permissible to instruct the jury that certain acts of the defendant constitute negligence, unless they are of such a

to sustain the verdict and judgment, it is necessary to say the evidence was so one sided and conclusive of the defendants' negligence as to leave no ground for instructions favorable to them, and that an erroneous instruction for the plaintiff can be disregarded as harmless, for instructions given for the plaintiff do not properly state the measure of the defendants' duty, and several requested by the defendants were refused. Two of those given for the plaintiff make it the duty of the master to furnish the servant a safe place in which to work, not merely to exercise only reasonable and ordinary care, but, under the circumstances, to provide the servant with a reasonably safe place in which to work, agreeably to principles declared in *Johnson v. Chesapeake &*

O. R. Co. 38 W. Va. 206, 211, 18 S. E. 513; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 386, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722; *McCreery v. Ohio River R. Co.* 43 W. Va. 110, 27 S. E. 327, 2 Am. Neg. Rep. 83; *Flannegan v. Chesapeake & O. R. Co.* 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028; *Robinson v. West Virginia & P. R. Co.* 40 W. Va. 583, 21 S. E. 727. As applied to machinery and instrumentalities with which servants are required to work, the rule is the same. *Whorley v. Raleigh Lumber Co.* 70 W. Va. 122, 73 S. E. 263; *Soward v. American Car Co.* 66 W. Va. 266, 66 S. E. 329; *Mitchell v. United States Coal & Coke Co.* 67 W. Va. 480, 68 S. E. 366. Violation of this rule in the statement of the measure of duty

character as to constitute negligence *per se*. *Alabama Midland R. Co. v. Guilford*. 119 Ga. 523, 46 S. E. 655; *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171, 42 S. E. 408, 12 Am. Neg. Rep. 227.

And it has been said that unless the act of defendant is unlawful, the question whether the defendant is thereby guilty of negligence is for the jury, and not for the court. *Dillingham v. Parker*, 80 Tex. 572, 16 S. W. 335, 12 Am. Neg. Cas. 595.

Where the act complained of as a matter of law constitutes negligence, the court may properly instruct the jury that if they find the existence of the act, the defendant is guilty of negligence. *Bente v. Metropolitan Street R. Co.* 90 App. Div. 213, 76 N. Y. Supp. 85, affirmed in 180 N. Y. 519, 72 N. E. 1139.

It is not reversible error to submit to the jury a series of palpably negligent acts which would constitute negligence as a matter of law, and direct them that, if they find that these acts were committed by the servants of the defendant, their finding shall be for the plaintiff. *Prash v. Wabash R. Co.* 151 Mo. App. 410, 132 S. W. 57.

In *Johnson v. Detroit & M. R. Co.* 135 Mich. 353, 97 N. W. 760, instructions to the jury were sustained although they were thereby required to find defendant guilty of negligence if they found certain facts to be true as to which evidence had been received.

In *Newcomb v. New York C. & H. R. R. Co.* 182 Mo. 687, 81 S. W. 1069, an instruction that if certain facts were proved, the defendant's negligence was thereby established, was sustained. To the same effect is *Bullington v. Newport News & M. Valley Co.* 32 W. Va. 436, 9 S. E. 876.

And in *Indiana Union Traction Co. v. Langley*, — Ind. —, 98 N. E. 728, an instruction to the jury was upheld, although they were thereby instructed that the defendant was guilty of negligence entitling the plaintiff to recover for injuries received by the derailment of one of its cars in which he was riding as a passenger, if the motorman operating the same failed to keep a diligent lookout for obstructions 47 L.R.A. (N.S.)

on the track, and the failure to do so caused the derailment.

Where, in an action to recover the value of stock killed on a railroad, the only issue was whether the stock was killed at night or in the daytime, and no evidence was offered by the railroad company as to due care in operating the train alleged by the plaintiff to have killed the stock in the daytime, it was held that the court properly instructed the jury that, if they found that the stock was killed in the daytime, the defendant was guilty of such negligence as to render it liable to plaintiff. *Southern R. Co. v. Chitwood*, 119 Ga. 28, 45 S. E. 706.

Where no controversy as to evidence exists.

It is only where it clearly appears from the undisputed facts judged in the light of that common knowledge and experience of which courts are bound to take notice, that the defendant has not exercised such care as men of common prudence usually exercise in a position of like exposure, and the evidence is of such a conclusive character that the court will be compelled to set aside a verdict rendered in opposition to it, that it may take the case from the jury and determine the question of negligence as a question of law. The question of negligence is one of law only where the facts are such that all reasonable men must draw the same conclusion from them. *Northern Texas Traction Co. v. Moberly*. — Tex. Civ. App. —, 109 S. W. 483.

Or where from the undisputed facts no other conclusion but that of the defendant's negligence can reasonably be drawn, the court may instruct the jury that the acts complained of, if proved, constitute negligence. *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761; *Dallas Consol. Electric Street R. Co. v. Chambers*, 55 Tex. Civ. App. 331, 118 S. W. 851.

In *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, it is said that where there is no controversy about the leading facts, and the defendant is guilty of negligence, it is not

often results in reversal. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Atlantic & D. R. Co. v. West*, 101 Va. 13, 42 S. E. 914; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467. Consistency with legal principles necessitates such a result, for error in the giving or refusal of instructions is presumed to have been prejudicial, and to overcome this presumption it is necessary for the court to be able to see that no injury was done. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488; *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582; *Clay v. Robinson*, 7 W. Va. 348; *Beaty v. Baltimore & O. R. Co.* 6 W. Va. 388. Here, for the reasons stated, the rulings on instructions will necessitate reversal, unless the evidence is conclusive of plaintiff's right to recover.

error for the trial court so to declare, since, the facts being undisputed and showing negligence upon the part of the defendant, which was the primary substantial cause of the injury complained of, the question of liability upon the ground of negligence is one of law.

It must be patent to every reasonable mind that the act of neglect or omission complained of was negligence on the part of the defendant, in order to authorize the court to instruct the jury that such act or omission constitutes negligence which will render the defendant liable to the plaintiff for injuries caused thereby. *Campbell v. Stanberry*, 85 Mo. App. 159.

Negligence, or the absence of care, is always a question for the jury when there is a reasonable doubt as to the facts, or the inferences to be drawn from them; but when the facts are either admitted or established by undisputed testimony, it is the duty of the court to declare the law applicable to them. *Henderson Trust Co. v. Stuart*, 108 Ky. 167, 48 L.R.A. 49, 55 S. W. 1082.

In North Carolina what constitutes negligence or reasonable diligence is a question of law for the court. If the evidence is all to the same effect, the court may instruct the jury that if they believe the evidence, there is or is not negligence as the case may be. *Pleasants v. Raleigh & A. Air Line R. Co.* 95 N. C. 195. But this rule is modified by the later cases. See the cases *infra*, and also *Russell v. Carolina C. R. Co.* 118 N. C. 1098, 24 S. E. 512, *supra*.

Where the plaintiff makes out such a clear case of negligence that there can be no two opinions on the question among men of fair minds, the court may properly instruct the jury that as a matter of law the defendant is guilty of negligence. *Brown v. Durham*, 141 N. C. 249, 53 S. E. 513.

It has, however, been asserted that it is a mistake to say that when the facts are undisputed, the question of negligence is for the court, for this is generally true only of that class of cases where the defendant has failed in the performance of a clear legal duty. When the question

An erroneous instruction is not prejudicial if the evidence is conclusive by reason of its character or the force and effect of uncontroverted facts, so as to leave no possible room for any verdict other than the one rendered. *Wiggin v. Dillon*, 66 W. Va. 313, 66 S. E. 689; *Mercer Academy v. Rusk*, 8 W. Va. 373; *Colvin v. Menefee*, 11 Gratt. 87. The evidence is almost entirely free from conflict regarding the vital questions in the case. Though the rooms were well lighted on the ground floor and in the basement, and the stairway itself had considerable light from both sources, the trap-door was in a secluded place in which necessarily it could not have been readily observed by one ignorant of its location. The plaintiff had no knowledge of it. It was

arises upon a state of facts as to which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be certain or incontrovertible, or they cannot be decided by the court, and negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ. *Carrington v. Ficklin*, 32 Gratt. 670 (action against gratuitous bailee for negligence).

And it has been held that even though there is no controversy in respect to the facts, the question of negligence of the defendant should be submitted to the jury for their consideration as to whether, in view of all the circumstances, the defendant has exercised that degree of care which the rules of law require. *Shobert v. May*, 40 Or. 68, 55 L.R.A. 810, 91 Am. St. Rep. 453, 66 Pac. 466.

Where the facts are not in controversy, but the question in dispute is whether they constitute negligence on the part of the defendant, and whether the acts of the latter caused the action of the plaintiff's intestate which resulted in his injury and death, the question of negligence is for the jury, and not for the court. *Illinois C. R. Co. v. Johnson*, 221 Ill. 42, 77 N. E. 592.

In *Mobile & O. R. Co. v. Coerver*, 50 C. C. A. 360, 112 Fed. 489, it was held error to instruct the jury that the defendant railroad company was guilty of negligence as a matter of law, if a brakeman was not on the rear or hindmost car of a train which was being backed across the highway, without submitting to their consideration the question as to the environment of the parties, and the exercise of care both on the part of the person injured at the crossing and the parties operating the train.

And in *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 So. 561, it was held error for the court to instruct the jury that, having regard to its construction and situation, a turntable, if left unfastened or unguarded, was likely to attract the inter-

not guarded in any way, and there was nothing to warn her of its presence. She had occasion in the course of her employment to make use of the stairway in going from the ground floor to the basement, and might also properly use it in reaching to the wall or shelves on it for articles called for by customers. The boy who did the sweeping had orders never to leave it open except when he was actually sweeping dust, waste paper, and other *débris* through it, but the plaintiff had no knowledge of this instruction. To her, therefore, the danger was a hidden and secret one.

Though there was no design on the part of her employers that the trapdoor should ever be left open except at intervals for the performance of a particular duty, it

ference of children, and that this danger was so apparent that the defendant, in the exercise of ordinary prudence, ought to anticipate that children would resort to it and be injured by it if it was so left, since that was a question for the jury.

Where defendant fails to perform some duty.

When the measure of duty is not unvarying, when a higher degree of care is required under some circumstances than under others, and when both the duty and the extent of the performance are to be ascertained as facts, the jury alone are authorized to determine defendant's negligence. *Arnold v. Pennsylvania R. Co.* 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213.

Unless there is a law declaring the duty of defendant under the circumstances presented in a particular case, it is error for the court to charge the jury that failure of the defendant to perform this duty constitutes negligence on its part. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, 6 Am. Neg. Cas. 462; *Missouri P. R. Co. v. Lee*, 70 Tex. 501, 7 S. W. 857; *International & G. N. R. Co. v. Dyer*, 76 Tex. 160, 13 S. W. 377; *Gulf, C. & S. F. R. Co. v. Anderson*, 76 Tex. 244, 13 S. W. 196; *Texas & P. R. Co. v. Roberts*, 2 Tex. Civ. App. 111, 20 S. W. 960.

So, an instruction is erroneous which defines certain duties of the defendant and then charges that the failure to perform the same constitutes negligence. *Ft. Worth & R. G. R. Co. v. Dial*, 38 Tex. Civ. App. 260, 85 S. W. 22.

Or which declares that the defendant is guilty of negligence if the accident which caused the injury complained of might have been avoided by its employees by the use of any and all means in their power. *Austin & N. W. R. Co. v. McSween*, — Tex. Civ. App. —, 32 S. W. 376.

It is erroneous to instruct the jury that the defendant is guilty of negligence if it failed, within a reasonable time, to take steps to remedy the dangerous condition
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was incumbent upon them to give her warning of its presence and use. *Falardeau v. Hoar*, 192 Mass. 263, 78 N. E. 456; *Thomp. Neg.* § 4059; *Brown v. Ann Arbor R. Co.* 118 Mich. 205, 76 N. W. 407; *Barker v. Ohio River R. Co.* 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148, 12 Am. Neg. Rep. 880; *Bailey, Personal Injuries*, § 121, p. 307. The danger from this trapdoor and the use made of it to a servant ignorant of its location is perfectly obvious, and should have been provided against in some way. A busy clerk or saleswoman ignorant of its presence, in the hurry incident to her attention to customers, might easily walk into it while open and used in exact conformity with the directions given to the boy. Probability of his leaving it open momen-

of its premises caused by the freezing of ice on the edge of the platform to the station located thereon. *Olopp v. Interborough Rapid Transit Co.* 69 Misc. 595, 126 N. Y. Supp. 184.

But the court may declare as a matter of law that an omission on the part of the defendant to perform some duty constitutes negligence where the precise measure of the duty is determined and clearly defined. *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Empire Transp. Co. v. Wamsutta Oil Ref. & Min. Co.* 63 Pa. 14, 3 Am. Rep. 515, approved in *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219.

In *Pennsylvania R. Co. v. Tansil*, 70 Ind. 569, 36 Am. Rep. 188, it is said that "the cases in which the question of negligence can be thus withdrawn from the jury are of comparatively rare occurrence. It is only when the circumstances of a case are such that the standard of duty is fixed and certain, or when the measure of duty is defined by law and is the same under all circumstances, or when the negligence is so clearly defined and palpable that no verdict could make it otherwise, that the court is authorized to make the question of negligence one of law, and not of fact."

Where defendant has violated a statute or ordinance.

Generally, as to violation of police ordinance as ground for private action, see note in 5 L.R.A.(N.S.) 186; and as to violation of statute, see note in 9 L.R.A.(N.S.) 338.

It is not erroneous to instruct the jury that if they find the act of the defendant was in violation of a statute or ordinance, and this act was the proximate cause of the injury complained of, it constitutes negligence rendering him liable for the injuries occasioned thereby.

Colo.—*Colorado Midland R. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371.

Ga.—*Augusta R. & Electric Co. v. Smith*, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. Rep. 33.

tarily, as he did, might well have been foreseen and contemplated also.

It is unusual to hold a master guilty of negligence upon facts adduced in evidence as matter of law, but to do so is not inconsistent with law. On the contrary, it accords perfectly with the principles upon which the courts deny recovery on the ground of contributory negligence, when the state of the evidence is such as to permit only one reasonable conclusion or opinion. Ordinarily the courts are not called upon to exercise this power on behalf of the plaintiff. He generally insists upon submitting his side of the case to the jury, and the court interferes at the instance of the defendant, on the ground of conclusiveness of the evidence. Hence precedents for the ap-

plication of the principle in favor of the plaintiff and against the defendant are few. "No doubt can be entertained that this court recognizes the principle that there is such a thing as negligence *per se* or legal negligence, just as there is such a thing as legal fraud. In cases where the common experience of mankind and the common consensus of prudent persons have recognized that to do or omit to do certain acts is prolific of danger, we may call the doing or omission of them legal negligence." *Carri-co v. West Virginia, C. & P. R. Co.* 35 W. Va. 389, 397, 14 S. E. 12, 15, 10 Am. Neg. Cas. 420. "If negligence and the necessary damage proximately flowing from it are so clearly proved, both in fact and inference, that there is no room for an honest differ-

Mo.—*Owens v. Hannibal & St. J. R. Co.* 58 Mo. 386.

Ohio.—*Cincinnati Street R. Co. v. Murray*, 53 Ohio St. 570, 30 L.R.A. 508, 42 N. E. 596, 12 Am. Neg. Cas. 442.

Tex.—*Dallas Consol. Electric Street R. Co. v. Chambers*, 55 Tex. Civ. App. 331, 118 S. W. 551; *Galveston, H. & H. R. Co. v. Levy*, 35 Tex. Civ. App. 107, 79 S. W. 879; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416; *San Antonio & A. P. R. Co. v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499, 10 Am. Neg. Cas. 305.

Utah.—*Smith v. Mine & Smelter Supply Co.* — Utah, —, 88 Pac. 683.

In the latter case it is said that where the standard of duty or care is fixed by law or ordinance, and such law or ordinance is with reference to the safety of life, limb, or property, then, as a matter of necessity, the violation of such law or ordinance constitutes negligence which is actionable if it is the proximate cause of the injury.

Of course, unless the violation of the statute or ordinance is the proximate cause of the injury, it is error for the court to instruct the jury that the violation constitutes actionable negligence. *Texas C. R. Co. v. Mallard*, — Tex. Civ. App. —, 127 S. W. 1117.

And on the theory that, although the violation of a village ordinance constitutes negligence, it is not actionable negligence unless such violation is the proximate cause of the injury, it has been suggested that the better plan is for the court to submit the question of legal negligence to the jury, together with the question of negligence in fact. *International & G. N. R. Co. v. Jackson*, 41 Tex. Civ. App. 51, 90 S. W. 918.

And the rule does not apply where animals are killed on a railroad crossing by a train, although the train is running at a rate of speed prohibited by ordinance, or the whistle of the locomotive is not sounded or the bell rung as required by law, where the animals killed are on the highway in violation of a city ordinance. *Houston & T. C. R. Co. v. Jones*, 16 Tex. Civ. App. 179, 40 S. W. 745.

Where the question whether the defend-

ant, in furnishing equipment for its employees, has failed to furnish the same in accordance with requirements of an act of Congress, depends upon the existence of certain facts, including the want of due care in furnishing the equipment, it is error for the court to instruct the jury that the defendant is liable if the equipment did not comply with the requirements of the act of Congress. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

Where certain duties are imposed upon common carriers by statute, the question whether in a proper case the conditions are such as to require performance is one of fact for the jury, and it is error for the court to instruct the jury that the failure to perform constitutes negligence. *Missouri, K. & T. R. Co. v. Williams*, — Tex. Civ. App. —, 133 S. W. 499.

Right of court to assume defendant's negligence.

An instruction is erroneous where it assumes the negligence of the defendants, and merely leaves to the jury the question of whether such negligence was the proximate cause of the injury complained of.

Ala.—*Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495, 11 Am. Neg. Cas. 9.

Ill.—*Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Anderson v. Moore*, 108 Ill. App. 106; *William Graver Tank Works v. McGee*, 58 Ill. App. 250; *LaSalle v. Thorndike*, 7 Ill. App. 282.

Mo.—*Lukamiski v. American Steel Foundries*, 162 Mo. App. 631, 142 S. W. 1093.

Tex.—*Texas & P. R. Co. v. Felker*, 42 Tex. Civ. App. 256, 93 S. W. 477; *St. Louis S. W. R. Co. v. Gentry*, — Tex. Civ. App. —, 74 S. W. 607; *Missouri, K. & T. R. Co. v. Wood*, — Tex. Civ. App. —, 81 S. W. 1187.

It is not error, however, for the court in an instruction to the jury to assume the negligence of the defendant where, from the undisputed evidence, the negligence of the defendant appears, and no attempt is made

of opinion between reasonable men, the court should direct a verdict for the plaintiff." Shearm. & Redf. Neg. § 56; Hogan v. Manhattan R. Co. 149 N. Y. 23, 43 N. E. 403.

In most cases of this class, there is evidence of contributory negligence sufficient to carry them to a jury. *Brown v. Ann Arbor R. Co.* 118 Mich. 205, 76 N. W. 407; *Bateman v. New York C. & H. R. R. Co.* 178 N. Y. 84, 70 N. E. 109, 16 Am. Neg. Rep. 162; *Debus v. Armour & Co.* 84 Neb. 224, 120 N. W. 1110. But here we have no evidence at all of contributory negligence, and are called upon to say whether the undisputed facts make a clear case of negligence on the part of the defendants, and we are of opinion that they do. This class of cases does not fall within the law of fellow servantcy, because the risks are extraordinary and not assumed unless known. *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561; *Kolb v. Sandwich Enterprise Co.* 36 Ill. App. 419; *Wannamaker v. Burke*, 111 Pa. 423, 2 Atl. 500; *Balle v. Detroit Leather Co.* 73 Mich. 158, 41 N. W. 216; *Whatley v. Block*, 95 Ga. 15, 21 S. E. 985, 14 Am. Neg. Cas. 34; *Browne v. Siegel, C. & Co.* 191 Ill. 226, 60 N. E. 815; *Johnson v. Tacoma Mill Co.* 22 Wash. 88, 60 Pac. 53. "A principle which has been formulated and applied so frequently as to have become axiomatic is that a servant is *prima facie* not chargeable with an assumption of extraordinary risks,—risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part." 1 Labatt, Mast. & S. § 270. "In statements of the general principle enunciated in the last sec-

tion there are still found words which recognize, in the form of an exceptive limitation, the existence of the principle which declares, as will presently be shown, the circumstances under which a risk, though extraordinary, is deemed to have been assumed. An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and comprehended by the servant, or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and comprehension of the risk." Id. § 271; *Bailey, Personal Injuries*, § 367, pp. 972, 1008. The rule exonerating employers from liability to their servants for injuries by acts of fellow servants, on the theory of an assumption of such risks by fellow servants themselves, as stated in our own decisions, limits the assumption to ordinary risks incident to the business. *Beuhring v. Chesapeake & O. R. Co.* 37 W. Va. 502, 16 S. E. 435; *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep. 304; *Young v. West Virginia, C. & P. R. Co.* 42 W. Va. 112, 24 S. E. 615; *Core v. Ohio River R. Co.* 38 W. Va. 466, 18 S. E. 596. The risk of injury encountered by the plaintiff here was obviously an extraordinary one, because it did not result from the act of the fellow servant alone. The instrumentality provided for his use, when properly operated, was dangerous to a person ignorant of its presence and use. Plaintiff's injury was the result of the concurrent action of the employer and the fellow servant, and the case is governed by a principle declared in

by the latter to explain or excuse the same. *Morris v. O'Brien*, 81 Ill. App. 202.

And even though such an instruction is erroneous, if no just conclusion can be arrived at by the jury other than that the plaintiff was injured through the negligence of the defendant, a verdict in favor of the plaintiff will be sustained. *Missouri, K. & T. R. Co. v. Stone*, — Tex. Civ. App. —, 125 S. W. 587.

Right of court on appeal to declare defendant negligent.

Where the defendant's negligence is clear, and no just conclusion can be arrived at by a jury other than that the plaintiff was injured by the negligence of the defendant, a verdict in favor of the plaintiff will be sustained on appeal, although the trial court erroneously instructed the jury. *Ibid.* And see *REILLY v. NICOLL*.

An erroneous instruction as to the degree of negligence which will authorize a recovery against defendant will not entitle defendant to a reversal of the case where, under the undisputed facts, the defendant is 47 L.R.A. (N.S.)

prima facie guilty of negligence, and there is no evidence introduced tending to free it. *Magrane v. St. Louis & S. R. Co.* 183 Mo. 119, 81 S. W. 1158.

Where the negligence of the defendant is clearly established by undisputed evidence, on appeal the court will not reverse a judgment for the plaintiff for errors in submitting the question of negligence to the jury, since on this point the question should have been taken from the jury entirely. *Grimm v. Omaha Electric Light & P. Co.* 79 Neb. 387, 112 N. W. 620, 114 N. W. 769.

Where, on appeal from the trial court to a court of inferior jurisdiction, in an action to recover damages for injuries received by the plaintiff through the alleged negligent act of the defendant, the latter court set aside the verdict on the ground that the defendant was *per se* guilty of negligence, on appeal from this action to a higher court the order granting a new trial will be set aside where the question whether the act complained of was negligence was properly for the jury. *Locke v. Waldron*, 75 App. Div. 152, 77 N. Y. Supp. 405. A. G. S.

Lay v. Elk Ridge Coal & Coke Co. 64 W. Va. 288, 61 S. E. 156.

In this state of the evidence the inaccuracies of the instructions given for the plaintiff are harmless, and the court was justified in refusing certain instructions requested by the defendants, invoking the law of fellow servantry and endeavoring to obtain findings as to whether the defendants had exercised due care in providing a safe place for work by the plaintiff. Under the evidence, no proper instruction exonerating the defendant on the theory of assumption of risk could have been given, nor was there any basis in it for an instruction as to reasonable care on the part of the defendant.

For the reasons stated, the judgment will be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

ALLEN B. NOLL

v.

R. W. DAILEY, Judge.

(— W. Va. —, 79 S. E. 668.)

Indictment — validity — illegal evidence.

1. An indictment cannot be quashed because it was found upon illegal evidence.

Headnotes by WILLIAMS, J.

Note. — Improper evidence as ground for quashing indictment.

I. General rule, 1207.

II. Where only part of evidence is improper.

a. In general, 1209.

b. Testimony of incompetent witness, 1210.

III. Where accused compelled to testify against himself, 1210.

IV. New York rules, 1211.

As to competency of evidence before grand jury, generally, see note to Com. v. Hayden, 28 L.R.A. 318.

As to sufficiency of evidence before grand jury to sustain indictment, see note to State v. Peterson, 28 L.R.A. 324.

As to the right of an indicted person to inspect the minutes of the grand jury, see note to State v. Rhoads, 27 L.R.A.(N.S.) 558.

I. General rule.

In accordance with the uniform rule, often recognized by statute, that a grand jury ought to receive only competent legal evidence (20 Cyc. 1346), it seems that, in some jurisdictions, while the court cannot inquire into the sufficiency of the evidence before a grand jury, it may inquire into the legality of such evidence, and if it is 47 L.R.A.(N.S.)

Prohibition — to prevent entertainment of plea.

2. Prohibition lies to prevent a trial court from entertaining a plea to an indictment, challenging the legality or sufficiency of the evidence on which it was found.

(Poffenbarger and Miller, JJ., dissent.)

(May 20, 1913.)

APPPLICATION for a writ of prohibition to prevent the judge of the Circuit Court of Berkeley County from proceeding to try matters arising on the filing of pleas in abatement of an indictment against Claude W. Stewart for felony. Writ awarded.

The facts are stated in the opinion.

Messrs. Allen B. Noll and Forrest W. Brown for petitioner.

Williams, J., delivered the opinion of the court:

Claude W. Stewart, who was indicted for felony at the January term of the circuit court of Berkeley county, appeared in court and tendered three several pleas in abatement, averring that there was no legal evidence before the grand jury on which they could find the indictments. The attorney prosecuting for the state objected to the filing of the pleas, and moved the court to require defendant to plead or demur to the indictments. The court overruled the motion

plainly illegal and incompetent, as a whole, should quash the indictment. Royce v. Territory, 5 Okla. 61, 47 Pac. 1083.

As said in State v. Logan, 1 Nev. 509: "If there be nothing to support the bill but evidence clearly incompetent, and which would not be admissible at the trial, as the sole testimony of a person rendered incompetent by conviction of an infamous crime, the indictment may be quashed before plea."

So, an indictment should be quashed where the only evidence before the grand jury as to an essential element of the offense charged was illegal, hearsay and secondary evidence. Royce v. Territory, supra.

And in State v. Fellows, 3 N. C. (2 Hayw.) 340, it was held that an indictment should be quashed if found solely on the testimony of an incompetent witness, although there is other testimony ready to support it on the trial.

Likewise, "in extreme cases, when the court can see that the finding of a grand jury is based upon . . . such palpably incompetent evidence as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment." United States v. Farrington, 5 Fed. 343. In this case the court further said: "If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of

the pleas in abatement should be determined; and the attorney general and the attorney appointed to prosecute the case in the court below have applied to this court, on behalf of the state, for a writ of prohibition to prohibit R. W. Daly, judge of said court, from proceeding to try the matters set up in said pleas.

The law of this state does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency. "An indictment cannot be quashed because it rests, in whole or part, on incompetent evidence," is the rule that was declared in *State v. Woodrow*, 58 W. Va. 527, 2 L.R.A.(N.S.) 862, 112 Am. St.

That was the first case to come before this court involving the question. Woodrow had filed a plea in abatement, alleging that the indictment was found against him on the testimony of his wife, an incompetent witness. The court rejected his plea and refused to quash the indictment, and this court sustained that ruling.

The practice in this respect, however, is not uniform throughout the country; some of the courts holding that, if the indictment is found entirely upon illegal evidence, it may be quashed upon plea in abatement. 22 Cyc. 205; 10 Enc. Pl. & Pr. 395. But a number of states, including Virginia and West Virginia, hold that an indictment returned by a grand jury, properly consti-

hearsay and otherwise incompetent testimony, that it was impossible for the jury to distinguish it; and it would be expecting too much of a body untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter."

And in *Com. v. Price*, 3 Pa. Co. Ct. 175, it is held that an indictment will be quashed if found by the grand jury in whole or in part upon the testimony or statement of a witness before them who was not sworn. The court said: "We cannot tell whether the grand jury found the indictment upon the testimony of this witness alone, or upon that of others; nor can we inquire into that. He was before the grand jury, made his statement, and was not legally sworn, although he may have supposed he was. . . . It may be the defendant is not prejudiced by this, but the forms of law are important to be maintained, and no witness should make a statement before the grand jury upon which an indictment is to be returned without being sworn to make it. This is a rule of law that is proper and ought to be maintained."

This rule, that the court may inquire into the legality of the evidence before a grand jury, upon which that body has returned an indictment, finds some support, also,—inferentially, at least,—in many of the cases cited below under subdivision II., "Where only part of evidence is improper," as such cases, in holding that an indictment cannot be quashed merely on the ground that there was some illegal evidence before the grand jury, where there was also other and legal evidence, seems to imply that the court has the power to inquire into the legality of the evidence before that body, upon a motion to quash the indictment.

On the other hand, it has been held, as in *NOLL v. DAILEY*, that the court cannot go behind an indictment to inquire into the character of the evidence before the grand jury, with a view to the quashing of the indictment found thereupon (*United States v. Swift*, 186 Fed. 1002; *State v. Boyd*, 2 47 L.R.A.(N.S.)

Hill, L. 283, 27 Am. Dec. 376; *Wadley v. Com.* 98 Va. 804, 35 S. E. 452; *State v. Woodrow*, 58 W. Va. 527, 2 L.R.A.(N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 Ann. Cas. 180); and that an indictment cannot be quashed because it rests wholly or in part on illegal or incompetent evidence (*United States v. Swift*, *supra*; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *Wadley v. Com.* and *State v. Woodrow*, *supra*).

So, in *State v. Fasset*, 16 Conn. 457, it was held that, on a motion to quash an indictment, no evidence is admissible as to the nature of the evidence given before the grand jury, upon which the indictment was based; and even if illegal evidence was so given, it is no ground for quashing the indictment.

And in *State v. Roberts*, — Del. —, 78 Atl. 305, it is held that, in the absence of any allegation or averment of fraud or corruption on the part of the grand jury, the court will not grant a motion permitting an accused to offer testimony to show that the indictment against him was found upon illegal and improper testimony.

Likewise, in California, where a statute prescribes the grounds of a motion to quash or set aside an indictment, and omits as one of them the question of competency of the evidence presented to and received by the grand jury, it is held that the question whether or not the grand jury found an indictment on illegal evidence, contrary to the mandate of the Penal Code, is not one which can be considered on a motion to set aside the indictment. *Borello v. Superior Ct.* 8 Cal. App. 215, 96 Pac. 404; *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1037.

As said in *People v. Hatch*, *supra*: "The law contemplates that only competent evidence be received by the grand jury; yet if it should receive incompetent evidence and found an indictment thereon, there is no method of reviewing its action in so doing. An indictment is but an accusatory paper, and it was never intended that, on a motion to dismiss, irregularities in the proceedings before the grand jury should be

tuted, cannot be attacked for want of legal evidence before the grand jury to support it. The law in these two states, on this subject, seems to have been so generally and so well understood that their courts of last resort were not called upon to pass upon it, until within very recent years. Woodrow's Case, *supra*, and Wadley's Case, 98 Va. 804, 35 S. E. 452, appear to be the first cases in the supreme courts of the two states, respectively. A similar question arose in Massachusetts in 1830, upon a motion by counsel for accused, requesting the court to instruct the grand jury in regard to the nature of the evidence proper to be received by them, and the motion was overruled. Says Parker, Ch. J., in his opinion in that case (Anonymous, 9 Pick. 495): "Accord-

ing to my recollection, this is the first attempt of the kind in this commonwealth. It is to be presumed that only proper evidence will be laid before the jury. . . . If anything improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury."

Of course, an indictment ought not to be found upon illegal evidence. But the impracticability of showing that it was found upon such evidence renders a plea in abatement or motion to quash on that ground improper. The testimony of a grand juror will not be received to impeach the indictment. 2 Bishop, New Crim. Proc. § 874. And in case a number of witnesses are examined by the grand jury, it would be im-

reviewed, except as expressly provided in the statute."

And in Utah, where the statute specifies four grounds for setting aside an indictment, none of them embracing the ground that the indictment was found solely upon the testimony of an incompetent witness, an indictment cannot be quashed on such ground. United States v. Cutler, 5 Utah, 608, 19 Pac. 145.

II. Where only part of evidence is incompetent.

a. In general.

As the court, in most, if not all, jurisdictions, aside from New York, cannot inquire into the sufficiency of the evidence before the grand jury to sustain the finding of an indictment, the mere fact that some illegal evidence was received by that body is no ground for quashing the indictment, there having been other and legal evidence, the sufficiency of which, apart from the illegal evidence, cannot be questioned. McGregor v. United States, 69 C. C. A. 477, 134 Fed. 187; United States v. Haskell, 169 Fed. 440; Jones v. State, 150 Ala. 54, 43 So. 179; State v. Clark, 64 W. Va. 625, 63 S. E. 402.

"Where there is the slightest legal evidence, the court cannot inquire into its sufficiency, or set it aside, because some illegal evidence was received with it." State v. Logan, 1 Nev. 599.

As said in State v. Coates, 130 N. C. 701, 41 S. E. 706: "The law is uniformly held by many decisions, . . . as follows: When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom were disqualified, the bill will be quashed; but when some of the testimony or some of the witnesses before the grand jury, were incompetent, the court will not go into the barren inquiry how far such testimony or such witnesses contributed to finding the bill, which is merely a charge, but will admit the competent witnesses or testimony on the trial before the petit jury, and, if sufficient to 47 L.R.A.(N.S.)

satisfy the jury, beyond a reasonable doubt, of the prisoner's guilt, the judgment will not be arrested, for such verdict establishes in the most conclusive mode that the incompetent evidence was mere surplusage in making out a prima facie case before the grand jury, and works no prejudice to the prisoner."

And in Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 225: "We are aware of no rule of law which would nullify the action of a grand jury merely because, as a part of the case, they received improper . . . evidence. We are not prepared to say that an indictment found wholly upon illegal evidence would not be as invalid as one based upon no evidence at all, the matter not being one which may be found exclusively upon the knowledge of the grand jurors. . . . But . . . the mere fact that illegal evidence was heard, if there was any substantial competent evidence upon which that body might lawfully base their indictment . . . is not enough to justify the setting aside of an indictment."

So, an indictment cannot be quashed on the ground that evidence in its nature competent, but made incompetent by circumstances,—such as evidence of admissions by the accused, improperly obtained,—was considered by the grand jury along with other evidence. Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138.

And the submission to the grand jury of evidence competent in itself, but which has been rendered incompetent by reason of the circumstances under which it was obtained,—such as private books and papers of the accused, wrongfully seized,—is no ground for the quashing of an indictment which may have been found on other evidence before the grand jury,—especially where such books and papers do not tend to prove the allegations against, or to incriminate, the accused. Hillman v. United States, 112 C. C. A. 522, 192 Fed. 264.

In State v. Logan, *supra*, it was held that the mere admission of some incompetent evidence by a grand jury is no ground

possible to ascertain by the grand jury were influenced. It is the body intrusted with the power to say when a crime has been committed, and when a prosecution should be begun against the person whom the evidence before them leads them to believe is probably the guilty party. According to our judicial system they are the tribunal representing the people, for the purpose of charging crime and designating the criminal. The evidence that satisfies them that probable cause exists for the prosecution of a certain person for a designated crime might not be enough to satisfy the court or a petit jury; and to permit the court to inquire into the legality or sufficiency of the evidence on which the grand jury acted would be to substitute, in a

of the grand jury, and would ultimately lead to the destruction of the grand jury system. Such proceeding would also furnish opportunity for long and unnecessary delay in the trial of criminal cases, and would be a useless encumbrance upon criminal procedure. Because the matter can be inquired into as well upon the trial of the indictment as upon the plea in abatement; and if it is made to appear that the indictment was found either upon illegal evidence, or without any evidence, and the state produces no other evidence at the trial than what was before the grand jury, the prisoner will be vindicated as fully by an acquittal as he would be by quashing the indictment. But the state is entitled to pro-

for quashing an indictment upon the finding of which such evidence was received, although the law provides that "the grand jury shall receive none but legal evidence, and best in degree, to the exclusion of hearsay or secondary evidence," and that an indictment shall be set aside by the court, on the motion of defendant, where it is not found, indorsed, and presented in the manner prescribed by the criminal procedure act.

And in Oklahoma, an indictment cannot be quashed on account of the reception by the grand jury of hearsay or secondary evidence, where there was other evidence before them upon which they were fully justified in returning the indictment,—such reception of evidence not being one of the grounds for which, by express statutory provision, the indictment must be set aside on motion,—although it is provided that an indictment must be set aside by the court where it is not found as prescribed by the statutes of the territory, and another section provides that "the grand jury may not receive hearsay or secondary evidence." *Robinson v. Territory*, 16 Okla. 241, 85 Pac. 451, reversed on other grounds in 78 C. C. A. 520, 148 Fed. 830.

b. Testimony of incompetent witness.

It is no ground for quashing an indictment that an incompetent witness testified before the grand jury, where there was, at least, another competent witness. *State v. Shreve*, 137 Mo. 1, 38 S. W. 548.

And in *State v. Walsh*, 76 N. H. 581, 84 Atl. 42, where defendant had excepted to a denial of his motion to quash an indictment on the ground that a witness who testified before the grand jury was incompetent, the court said: "It is not customary for the court to quash an indictment merely because it may have been produced by the testimony of an incompetent witness."

As said in *State v. DeGroate*, 122 Iowa, 661, 98 N. W. 495: "While it is the general rule that an indictment must be founded on legal evidence, it is also the general rule that the incompetency of one of several wit-

nesses will not sustain a motion to quash the indictment, 'since it cannot be shown what weight, if any, the testimony of this one had with the grand jury.'"

This rule has been most frequently applied where the incompetent witness before the grand jury was the wife of the accused; and it has been uniformly held that the indictment cannot be quashed merely on the ground that she was examined before that body, there having been other and competent evidence against the accused (*State v. DeGroate*, supra; *People v. Bladdek*, 259 Ill. 69, 102 N. E. 243; *State v. Tucker*, 20 Iowa, 508; *Hammond v. State*, 74 Miss. 214, 21 So. 149; *State v. Coates*, 130 N. C. 701, 41 S. E. 706; *Dockery v. State*, 35 Tex. Crim. Rep. 487, 34 S. W. 281; *State v. Woodrow*, 58 W. Va. 527, 2 L.R.A.(N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 Ann. Cas. 180),—especially where the causes for which an indictment may be set aside are enumerated by statute, and do not include the reception by the grand jury of the testimony of an incompetent witness (*State v. DeGroate*, supra); though "if the bill had been returned upon her testimony alone, the motion to quash should have been sustained" (*People v. Bladdek*, supra).

III. Where accused compelled to testify against himself.

Cases in which the accused has been compelled to testify against himself before the grand jury present a somewhat different question. As said in *United States v. Swift*, 186 Fed. 1002, in the cases in which indictments have been quashed because the accused was called before the grand jury and examined, the indictments were thus quashed, not because incompetent evidence was received, but because the proceedings of the grand jury were unconstitutional and unlawful. "It is one thing to quash an indictment because the accused, in violation of his constitutional right, is brought before the grand jury and browbeaten or maltreated. . . . and quite another thing to quash an indictment because a witness is

duce at the trial new and additional evidence of guilt. It may not have had all its evidence before the grand jury. But if the indictment is to be quashed for want of proper evidence before the grand jury, it would cut off this right.

Speaking of proceedings by grand juries, Judge Harrison, in *Wadley's Case*, supra, says: "It is the policy of the law, in the interest of justice, that this preliminary hearing should be conducted with closed doors. This secrecy is not only consistent with, but essential to, the nature of the institution. The sufficiency of the proof cannot be inquired into to invalidate an indictment found by a lawfully constituted grand jury. The presumption is that every indictment is found upon proper evidence. If

anything improper is given in evidence before a grand jury, it can be corrected on the trial before the petit jury."

Quoting from the opinion of Judge Brannon in *State v. Woodrow*, supra, 58 W. Va. page 533, 2 L.R.A.(N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 547, 6 Ann. Cas. 180: "It would be very bad practice—endless inconvenience—to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the accused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial? Therefore we conclude that the plea in abatement was properly rejected."

asked concerning facts which mayhap do not tend to prove the charge which the grand jury is to inquire into. The one reaches to the organization or fundamental power of the grand jury to act; the other, . . . involves the proposition that it acted upon incompetent evidence, and therefore reached an irrational conclusion."

And accordingly, it has been held, regardless of the question whether there was other and competent evidence before the grand jury, that an indictment must be set aside where the accused was required by the grand jury to testify, and, in pursuance of such requisition, did testify before that body, touching the charge and matters set forth in the indictment against him. *State v. Froiseth*, 16 Minn. 298, Gil. 260.

And an indictment should be quashed where the accused was taken from jail and examined as a witness before the grand jury that found the indictment against him, and was compelled to testify before that body regarding his guilt or innocence. *Boone v. People*, 148 Ill. 440, 36 N. E. 99.

And under a statute providing that no person shall be excused from testifying before a grand jury on the ground that the testimony required of him may tend to incriminate him, but that no person shall be prosecuted for or on account of any transaction concerning which he may testify before the grand jury; and any person who shall neglect or refuse so to testify shall be guilty of a misdemeanor,—an indictment should be quashed where the accused was subpoenaed and taken before the grand jury, and there compelled to testify regarding his guilt or innocence touching the very matter on which the grand jury found the indictment. *State v. Bramlett*, — Miss. —, 47 So. 433.

In Texas, however, where the Code of Criminal Procedure authorizes a motion to set aside an indictment upon two grounds only, neither of which is that the accused has been compelled to be a witness against himself, the court of criminal appeals has said: "That the accused was carried before the grand jury, and there testified to facts criminative of himself, if he in fact

did, cannot be made the ground of a motion to quash the indictment." *Menheca v. State*, — Tex. Crim. Rep. —, 28 S. W. 203.

And in *Spearman v. State*, 34 Tex. Crim. Rep. 279, 30 S. W. 229, also, it was intimated that an indictment cannot be quashed, even on the ground that the accused was compelled, against his will, and while under arrest, by officers of the law, to appear before the grand jury and make a statement and give evidence of and concerning the offense with which he is charged.

IV. New York rules.

It should be stated here that this subdivision deals with the question whether an indictment may be quashed upon the ground that some of the evidence was incompetent, notwithstanding that some of it was competent, assuming that the latter was insufficient to support the indictment, but does not deal with the general question as to the power to quash on the ground of insufficiency of the evidence.

In New York, § 313 of the Code of Criminal Procedure provides that an indictment "must" be set aside by the court, upon the motion of the defendant, in either of two cases, not involving the question of illegal evidence, "but in no other." § 671 provides that "the court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed." And "the power of the court to entertain, and under certain conditions to grant, the motion [to quash or dismiss an indictment], is found in §§ 313 and 671 of the Code of Criminal Procedure, and in its inherent power to entertain and grant the motion upon constitutional grounds,—that is to say, upon grounds predicated upon a violation of the defendant's constitutional rights." *People v. Acritelli*, 57 Misc. 574, 110 N. Y. Supp. 430.

These constitutional grounds are in part recognized in, and protected by, the statutory provisions that "the grand jury can receive none but legal evidence" (Code

The following cases are also in accord with the law as we find it in Virginia and West Virginia, viz.: *State v. Fasset*, 16 Conn. 457; *Brobeck v. Superior Ct.* 152 Cal. 289, 92 Pac. 646; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *State v. Boyd*, 2 Hill, L. 288, 27 Am. Dec. 376; *Stewart v. State*, 24 Ind. 142; *Smith v. State*, 61 Miss. 754; *Cotton v. State*, 43 Tex. 169; *Clark v. State*, — Tex. Crim. Rep. —, 43 S. W. 522; *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983; *United States v. Cutler*, 5 Utah, 608, 19 Pac. 145.

Seeing that the court is without authority of law to make preliminary investigation of the evidence that was before the grand jury, it follows that, in attempting to

do so, it is exceeding its legitimate powers, and can be prohibited. Section 1, chap. 110, Code of West Virginia (1906), says: "The writ of prohibition shall lie as a matter of right, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

By entertaining the pleas, the court is adopting a method of procedure not authorized or recognized by the law of this state. It is therefore exceeding its legitimate powers. It is more than mere error of judgment, because the court has no right to try the question; it does not have jurisdiction for that purpose, notwithstanding its juris-

Crim. Proc. § 256); and that "the grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained or uncontradicted, warrant a conviction by a trial jury" (Code Crim. Proc. § 258); etc. *Ibid.*

In this state, under these provisions, it seems, also, that the court will look into, not only the legality, but also the sufficiency, of the evidence before a grand jury; and "these statutory provisions and the general constitutional rights of the defendant permit a defendant to assail, by motion to dismiss, an indictment which is not founded upon legal evidence, or which is not sustained by a sufficiency of [legal] evidence, or which it can be seen is found solely as the result of the reception of incompetent evidence." *Ibid.*

The exclusiveness, however, of §§ 313 and 671, and the extent of the inherent power of the court to protect the "general constitutional rights" of the defendant, have been subjects of some difference of opinion among the judges and courts of the state. In *People v. Rutherford*, 47 App. Div. 209, 62 N. Y. Supp. 224, an appeal from an order denying a motion to dismiss and set aside an indictment on the grounds that the evidence was insufficient to support it, and that improper and illegal evidence was admitted before the grand jury,—although the appeal was dismissed because it was improperly brought,—the court said that, under § 313 of the Code of Criminal Procedure, it saw "no escape from the conclusion that, on a motion to set aside an indictment, no other grounds than those specified can be considered."

On the other hand, in *People v. Thomas*, 32 Misc. 170, 66 N. Y. Supp. 191, it was held that, where an indictment has been found wholly upon illegal evidence, the court has power to dismiss it under § 671, at least, though not obliged to do so under § 313; and the court further said that it might do so, in such a case, notwithstanding the wording of § 313, and without reference to § 671,—that is, that § 313 is not exclusive, and does not take away the court's inherent control over its records. 47 L.R.A. (N.S.)

Regarding this case, however, *Forbes, J.*, said, in *People v. Montgomery*, 36 Misc. 326, 73 N. Y. Supp. 535: "The learned justice seems to have overlooked that fact that the power [under § 671] is to be exercised by the court on its own motion, which precludes the idea, in my judgment, of entertaining a motion on the part of the defendant, for that purpose, since that section limits the exercise of power to the court, or on motion of the district attorney."

And in *People v. Montgomery*, *supra*, it was held that, under the New York Code, an indictment cannot be set aside, upon motion of the defendant, on the ground that illegal and incompetent evidence was given against him before the grand jury.

But in *People v. Willis*, 23 Misc. 568, 52 N. Y. Supp. 808, a motion to set aside an indictment on the ground (among others) that the grand jury received and acted upon illegal evidence in finding it, the court said that the addition by the legislature of the words "but in no other" to the phrase "in either of the following cases," in § 313 of the Code of Criminal Procedure, "would seem to establish the restriction of this motion to set aside or quash to the grounds specified, excepting constitutional defects," though if the defect was constitutional the court would be bound to take notice of it, even if the statute assumed to preclude the raising of the objection.

And in *People v. Sexton*, 187 N. Y. 495, 116 Am. St. Rep. 621, 80 N. E. 396, although it was held that the record clearly supported the decision of the trial court, that the evidence before the grand jury was sufficient to sustain the indictment, and that none of it was illegal, the court said that, although the Code of Criminal Procedure specifies grounds, purporting to be exclusive, upon which an indictment must be set aside by the court on motion, and these grounds do not include the introduction of illegal evidence before the grand jury, yet, whenever it clearly appears that the legal evidence received by a grand jury is insufficient to support an indictment, or that illegal evidence is the sole basis for an indictment, the accused has a constitutional right to make a motion to dis-

diction to try the indictment. Where the court, although having jurisdiction of the cause, during the trial of it, exceeds its powers in some matter pertaining thereto, for which there is no adequate remedy by the ordinary course of proceeding, the writ of prohibition lies, under the general principles of law, as well as under the statute, which, in respect to this case, is but declaratory of the common law; the state being given no other remedy.

In *McConiha v. Guthrie*, 21 W. Va. 134, the circuit court was prohibited from proceeding to condemn land for railroad purposes, which could not be lawfully taken, notwithstanding it had jurisdiction of the

cause, and notwithstanding the remedy, in that case, by writ of error.

In the following cases inferior courts were prohibited from exceeding their legitimate powers, in causes of which they had general jurisdiction: *Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782; *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152; *West Virginia Central Gas Co. v. Holt*, 66 W. Va. 516, 68 S. E. 717; *Culpepper County v. Gorrell*, 20 Gratt. 484; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121.

We award the writ.

Poffenbarger and Miller, JJ., dissent.

miss, as the Code provision was not intended to affect, and could not curtail, any of his constitutional rights,—though the mere fact that some incompetent evidence was received in common with competent evidence, or an incompetent witness examined, is not ground for quashing an indictment.

So, it has been held that an indictment may be set aside because of the reception by the grand jury of illegal evidence, where the indictment is founded solely upon such evidence, or to such an extent as to indicate that the indictment resulted from prejudice or was found in wilful disregard of the rights of the accused; the court, however, saying: "On the other hand, the mere reception of some improper or illegal evidence will not vitiate an indictment where there is sufficient competent evidence to sustain it, unless it clearly appears that the illegal evidence received improperly influenced the minds of the grand jurors. In other words, it would seem that where the grand jury have had before them enough competent evidence to sustain an indictment, the burden is thrown upon one who seeks to have such an indictment dismissed because of the reception of incompetent evidence of showing that he was prejudiced by the reception of such incompetent evidence." *People v. Acritelli*, supra.

And in *People v. Bills*, 44 Misc. 348, 89 N. Y. Supp. 1091, it was held that an indictment should be dismissed and set aside when founded upon illegal evidence to such an extent that the legal evidence presented before the grand jury was not sufficient to warrant that body in finding the indictment, as an indictment so founded upon illegal evidence violates the constitutional prerogatives of the accused, and it is the inherent right and duty of the court to protect the citizen in such prerogatives, and to prevent oppression or persecution.

Likewise in *People v. Phifer*, 59 Misc. 339, 112 N. Y. Supp. 285, a motion for leave to inspect the minutes of the grand jury, the court said: "The motion in this case, so far as it is in aid of a motion to set aside the indictment as not founded upon sufficient legal evidence, and as founded upon incompetent and illegal testimony, is in aid

of such a motion upon constitutional grounds, and not upon grounds embraced within and governed by § 313 of the Code of Criminal Procedure."

And in *People v. Molineux*, 27 Misc. 79, 58 N. Y. Supp. 155, a motion to discharge an indictment on the ground that other than legal evidence was given before the grand jury, and that sufficient legal evidence was not given to authorize the finding of the indictment,—the court, assuming, without discussion, that it had power to grant the relief asked for, if the grounds of the motion were satisfactorily established, discharged the indictment, after a review of the evidence, on the ground that other than legal evidence was received and considered by the grand jury, which, the court said, it could hardly say was of so little importance as not to have influenced the grand jury to indict, when they would not have so determined had such evidence been omitted.

And in *People v. Booth*, 52 Misc. 340, 102 N. Y. Supp. 62, the court said: "Of course, if the indictment had been found upon evidence which was wholly incompetent, then it would clearly be the duty of the court to set it aside."

And in *People v. Sexton*, 42 Misc. 312, 86 N. Y. Supp. 517: "In cases where the court can see that the indictment was based wholly upon incompetent evidence, then it should be set aside."

As conceded in some of the above cases, however, an indictment cannot be quashed on the ground merely that some illegal evidence was received by the grand jury, where there was sufficient legal evidence to justify the finding of the indictment. *People v. Booth*, supra. The court said: "I do not see where any constitutional right of this defendant was violated; and that being so, the receiving of incompetent evidence by the grand jury is not among the grounds authorizing the court to set aside an indictment."

As incompetent evidence is no ground for setting aside an indictment, unless there has been some invasion of a constitutional right of the accused, an indictment will not be set aside merely because the grand

jury received incompetent evidence, where there was sufficient legal evidence to sustain it, with the illegal evidence stricken out. *People v. Sexton*, supra.

And in *People v. Willis*, supra, the court, after considering all the evidence in this case, held that the legal evidence, uninfluenced by any illegal evidence, fully sustained the indictment, and justified the grand jury in reaching the conclusion that the legal evidence, if unexplained and uncontradicted, would warrant a conviction by a trial jury,—so that there was no constitutional defect in the indictment by reason merely of the admission of some illegal evidence.

While the Code provides that grand jurors are to receive none but legal evidence, an indictment should not be dismissed merely because of some illegal evidence, if there was sufficient legal evidence given which, if unexplained, would warrant a conviction. *People v. Winant*, 24 Misc. 361, 53 N. Y. Supp. 695.

So, in *People v. Gresser*, 124 N. Y. Supp. 581, the court said: "Of the first ground [illegal evidence] of the motion [to set aside the indictment] it may be said that if illegal evidence was considered by the grand jury, yet if there is sufficient legal evidence to sustain the indictment, it will not be set aside because of the illegal evidence." But the indictment was set aside in this case because the legal evidence received by the grand jury was insufficient to support it.

And it has been held that an indictment should be quashed where the wife of the accused, without his knowledge or consent, was sworn as a witness against him before the grand jury, on the investigation of the charge upon which the indictment was found, and gave material and important testimony against him, without which the indictment might not have been found (*People v. Briggs*, 60 How. Pr. 17; *People v. Moore*, 65 How. Pr. 177); though in the *Briggs* Case it is said that not every indictment should be set aside merely because some illegal evidence was admitted, where there is sufficient legal evidence to warrant the finding of a bill, and it is apparent that the technical illegality did not and could not have influenced the action taken.

The soundness of some of the above cases is questioned in *People v. Steinhart*, 47 Misc. 252, 93 N. Y. Supp. 1028, a motion for the inspection of grand jury minutes, where the court, in considering the grounds upon which a defendant may move to quash an indictment, and after reviewing several of the New York cases, said: "I cannot reconcile myself to the soundness of the cases which decide that the court is authorized to review the sufficiency of the evidence upon which the indictment is based. This is in effect substituting the judgment of the court for that of the grand jury, and thus destroying the character of that body as an independent judicial institution. Nor do I approve of the principle laid down 47 L.R.A. (N.S.)

in some of the above cases that, assuming there is sufficient competent evidence to sustain the charge, the court has the power to determine whether some illegal evidence which has been received has not improperly influenced the finding of an indictment. The latter ruling applies the principle adopted by the appellate courts in reviewing a judgment of conviction, and entirely loses sight of the fact that the grand jury is an investigating and accusing body against whose finding the presumption of innocence still prevails. If these right rules are to be applied to the proceedings before a grand jury, its usefulness as an investigating tribunal is greatly impaired. I take it, then, that the inherent power of the court to set aside indictments is limited to cases where the indictment is found without evidence, or wholly upon illegal and incompetent testimony, and to cases where the indictment is based in part upon the testimony of the defendant, compelled to be a witness in violation of his constitutional right."

There seems to be no doubt, however, as to the power of the court where an indictment is based, either wholly or in part, upon the testimony of the accused, compelled to be a witness against himself; and it has been held that, notwithstanding the purported exclusiveness of § 313, an indictment should be set aside and quashed where the grand jury violated the accused's constitutional right in compelling him to give evidence or to be a witness before them against himself, upon the investigation of a charge of crime against him. *People v. Singer*, 5 N. Y. Crim. Rep. 1; *People v. Haines*, 6 N. Y. Crim. Rep. 100. 1 N. Y. Supp. 55. A. C. W.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

JOHN B. STEVENS & COMPANY

FRANKFORT MARINE, ACCIDENT, & PLATE GLASS INSURANCE COMPANY.

(— C. C. A. —, 207 Fed. 757.)

Insurance — employers' liability — time of notice.

1. The holder of an employers' liability

Note. — Delay in giving notice of claim under employers' indemnity policy.

The early cases upon the question here considered are gathered in the note appended to *Hope Spoke Co. v. Maryland Casualty Co.* 38 L.R.A. (N.S.) 62.

A provision for notice in an employers' liability policy is of the essence of the contract, and a breach of such provision by the insured will prevent a recovery under the policy, not on the ground of forfeiture, but on the ground of nonperformance of a con-

insurance policy which provides that, upon occurrence of an accident, he shall give notice thereof to the insurer immediately, and at the latest within ten days, is not required to give such notice before he himself receives it.

Same — expenses of defending suit — costs on appeal.

2. The cost and expenses on appeal, as well as those incurred on the trial, by the holder of an employers' liability insurance policy in defense of an action against him by an injured employee, are recoverable from the insurer in case it refuses to conduct the defense, under a provision in the policy that if any proceedings are taken to enforce a claim, the insurer shall, at its own cost, undertake the defense.

(September 8, 1913.)

CROSS WRITS of error to review a judgment of the District Court of the United States for the Southern Division of the Western District of Washington in an action on a policy of employers' liability insurance; plaintiff seeking review of the part of the judgment with respect to its

dition precedent. *National Paper Box Co. v. Aetna L. Ins. Co.* 170 Mo. App. 361, 156 S. W. 740.

The term "immediate notice" as used in employers' liability policies is liberally construed, and means notice given with due diligence and within a reasonable time, due regard being had to the attending circumstances. *Ibid.*

And the words "at once" as used in an employers' liability policy providing that, on the occurrence of an accident in respect of which a claim can be made, written notice shall at once be given, are synonymous with "immediately," and mean within a reasonable time, having in view all the circumstances of the case. *Empire State Surety Co. v. Northwest Lumber Co.* 121 C. C. A. 527, 203 Fed. 419. The court said: "The clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not. The assured is, however, charged with an active, not merely a passive, duty in the exercise of reasonable care and diligence in the management, supervision, and ordering of his business, so that he may be readily informed of accidents out of which claims for damages may arise. He should adopt such measures, and promulgate and require the enforcement of such rules and regulations, as are reasonably calculated to insure his obtaining prompt and definite information, and when he has acquired information of the fact, then his policy requires that he shall give notice 'at once,' to the surety company."

It cannot be said, as a matter of law, from the mere fact that an employee of the insured was the foreman of a gang at a lumber camp where another employee was working when injured, and nothing else, that

right to recover the amount paid in satisfaction of the injured employee's judgment and costs of appeal; and defendant seeking review of the part of the judgment allowing recovery of the costs incurred in the lower court. Reversed as to plaintiff.

The facts are stated in the opinion.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Messrs. J. W. Quick and L. B. Da Ponte, for plaintiff:

Notice must be given within a reasonable time under the circumstances, taking into consideration the knowledge which the assured had or did not have of the accident, as well as the effect which the lack of such notice had on the rights of the insurer, as to whether it was prejudiced by not having notice sooner.

Empire State Surety Co. v. Northwest Lumber Co. 121 C. C. A. 527, 203 Fed. 419; *Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 545; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep.

the duty was imposed upon him to inform the insured of the injury to the employee, or that his employment in such a capacity carried with it the obligation or responsibility of apprising his employer or principal of all accidents occurring about the work within his knowledge; and where there is testimony tending to show that neither the superintendent of the insured, who was located near the place where the accident occurred, nor the secretary and treasurer of the company, who resided at a distance, had any personal knowledge of the occurrence of the accident, or gave any notice of it until the service of summons was made upon the company, some eleven months after the occurrence of the accident, when notice was immediately given, the question whether notice was given "at once" as required by the policy is for the jury. *Ibid.*

The provision of an employers' liability policy that upon the occurrence of an accident the insured shall give immediate written notice thereof is not complied with where the insured's superintendent was near by and received immediate notice that both of an employee's feet were run over and injured by a heavy truck under circumstances which suggested that the employer's negligence was the proximate cause of the injury, and, although at first there was no indication of a permanent injury and the employee did not stop work for three days, yet at the end of that time he gradually grew worse, remained at home under the care of a physician, and blood poisoning and gangrene set in and both of his legs were amputated, one about three months after the injury and the other about nine months thereafter, and it appeared that the employer's superintendent kept in-

552; *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833; *Ward v. Maryland Casualty Co.* 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; *Mandell v. Fidelity & C. Co.* 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110; *Insurance Companies v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *Edgefield Mfg. Co. v. Maryland Casualty Co.* 78 S. C. 73, 58 S. E. 969; *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L.R.A. 291, 89 Am. St. Rep. 777, 87 N. W. 546; *Phillips v. United States Benev. Soc.* 120 Mich. 142, 79 N. W. 1.

Whether notice was given in time or not is immaterial unless the company was prejudiced by not having notice sooner.

Frank Parmelee Co. v. Aetna L. Ins. Co. 92 C. C. A. 403, 166 Fed. 741; *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Ovington v. Aetna Indemnity Co.* 36 Wash. 473, 78 Pac. 1021; *United States use of Standard Furniture Co. v. Aetna Indemnity Co.* 40 Wash. 87, 82 Pac. 171; *Sheard v. United States Fidelity & G. Co.* 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276.

Plaintiff in error was entitled to recover the costs of appeal as well as the costs of the trial court.

Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 3/9.

formed as to the injured man's condition, and knew that he attributed his misfortune to the injury, although he did not speak of claiming damages for more than a year and a half after the occurrence, but no notice was given to the insurer until the employee had filed suit against the employer, nearly a year after the injury was received. *National Paper Box Co. v. Aetna L. Ins. Co.* supra.

And where an employers' liability policy provides that immediate notice of any accident shall be given, and that "time shall be of the essence of this condition," and further that every notice shall be given in writing, these provisions are not complied with where the insured, upon obtaining knowledge of the happening of an accident about one week after its occurrence, telephoned notice to the one who had induced him to take the policy, and sent no written notice to the insurer for about two months after the accident occurred. *Re Williams*, 51 Week. Rep. 222, 19 Times L. R. 82.

Under an employers' liability policy stipulating that "the insured, upon the occurrence of an accident, and upon the notice of any claim on account of an accident, shall give immediate notice in writing of such accident or claim," the insured company is required to give notice only after the accident has occurred and it has received notice of the claim against it on 47 L.R.A.(N.S.)

Messrs. R. S. Holt, U. E. Harmon, and Hudson, Holt, & Harmon, for defendant:

Under policy containing the same language as the one involved in this case, no right accrues to the assured thereunder until there has been a loss by him, which loss is defined by the policy to be the payment of a judgment rendered against him on account of the liability referred to in the policy.

Ford v. Aetna L. Ins. Co. 70 Wash. 29, 126 Pac. 69; *Allen v. Gilman, McN. & Co.* 137 Fed. 136; *Connolly v. Bolster*, 157 Mass. 266, 72 N. E. 981; *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; *Puget Sound Improv. Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co.* 52 Wash. 124, 100 Pac. 190; *Burke v. London Guarantee & Acci. Co.* 47 Misc. 171, 93 N. Y. Supp. 652; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Sheard v. United States Fidelity & G. Co.* 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; *Finley v. United States Casualty Co.* 113 Tenn. 597, 83 S. W. 2, 3 Ann. Cas. 962; *Frye v. Bath Gas & Electric Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Travellers Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; *Beyer v. International Aluminum Co.* 115 App. Div. 853, 101 N. Y. Supp. 83.

A condition requiring the giving of notice

account thereof. *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249.

And it was held in this case that a notice given the same day a claim was made against the employer was sufficient although it was given six months after the accident occurred. *Ibid.*

In *Re Coleman's Depositories* [1907] 2 K. B. 798, 76 L. J. K. B. N. S. 865, 97 L. T. N. S. 420, 23 Times L. R. 638, 11 Ann. Cas. 253, where an employer signed an application for an employers' liability policy on December 28th, and on January 2d an employee received an injury which at first did not appear serious, but finally resulted in his death over two months later, and no notice was given of the injury until the day before the death occurred, it was held, upon it appearing that no policy was executed until January 3d and no delivery was made of it to the employer until about January 10th, that, in the absence of evidence that the employer knew or had the opportunity of knowing that the policy contained a condition requiring immediate notice of injury to an employee, as regarded an injury which occurred before the insured had knowledge of such condition, he was not bound to comply with its terms, and that recovery might therefore be had.

J. T. W.

is a condition precedent, which must be performed before any liability exists on the part of the insurance company.

Employers' Liability Assur. Corp. v. Light, Heat & P. Co. 28 Ind. App. 437, 63 N. E. 54; *London Guarantee & Acci. Co. v. Siwy*, 35 Ind. App. 340, 66 N. E. 481; *Underwood Veneer Co. v. London Guarantee & Acci. Co.* 100 Wis. 378, 75 N. W. 996, 4 Am. Neg. Rep. 358; *Green Bros. v. Northwestern Live Stock Ins. Co.* 87 Iowa, 358, 54 N. W. 349; *California Sav. Bank v. American Surety Co.* 87 Fed. 118; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 485, 65 N. W. 635; *Woolverton v. Fidelity & C. Co.* 190 N. Y. 41, 16 L.R.A.(N.S.) 400, 82 N. E. 746; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; *Myers v. Maryland Casualty Co.* 123 Mo. App. 682, 101 S. W. 124; *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436; *Re Coleman's Depositories* [1907] 2 K. B. 798, 76 L. J. K. B. N. S. 865, 97 L. T. N. S. 420, 23 Times L. R. 638, 11 Ann. Cas. 253; 4 Cooley, Briefs, p. 3570; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 46 L.R.A. 682, 73 Am. St. Rep. 707, 55 N. E. 279.

In the case of a condition precedent where the notice is required to be given within a fixed time, the provision is strictly enforced, and the notice must be given within that time, without regard to the question of the ability of the insured to do so, or to the question of his knowledge of the accident.

Gamble v. Accident Assur. Co. Ir. Rep. 4 C. L. 204; *Patton v. Employers' Liability Assur. Co.* Ir. L. 20 C. L. 93; *Victorian Stevedoring & General Contracting Co. v. Australian Acci. Ins. & General Guarantee Co.* 19 Vict. L. R. 139; *Worsley v. Wood*, 6 T. R. 710, 2 H. Bl. 574, 3 Revised Rep. 323; *Cassel v. Lancashire & Y. Acci. Ins. Co.* 1 Times L. R. 495; *Ostrander, Ins.* § 221; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 485, 65 N. W. 635; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 157, 78 S. W. 320; *Woolverton v. Fidelity & C. Co.* 190 N. Y. 41, 16 L.R.A. (N.S.) 400, 82 N. E. 745; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662; *Stoneham v. Ocean R. & General Acci. Ins. Co.* L. R. 19 Q. B. Div. 237, 57 L. T. N. S. 236, 35 Week. Rep. 716, 51 J. P. 422.

Ross, Circuit Judge, delivered the opinion of the court:

The policy of insurance upon which this action was brought indemnified the plaintiff (plaintiff in error here), John B. Stevens & Company, a corporation, against loss arising

from legal liability for damages on account of bodily injury or death suffered by any of its employees from accidental causes, not exceeding the sum of \$5,000, and also against the costs of defending an action or actions to recover such damages. While the policy was in force one I. B. Merrill, an employee of the assured, was injured, and on October 28, 1909, commenced an action to recover damages therefor. The plaintiff immediately sent the summons and complaint in the action to the insurance company, with the request that it take the defensive proceedings provided for by the policy, which the insurance company refused to do, for which reason the plaintiff was compelled to defend the action at its own cost, incurring expense therefor in the sum of \$1,073.95. The Merrill action resulted in a judgment against the assured for \$6,100, which on appeal was affirmed by the supreme court of the state of Washington, in which state the suit was brought, and which judgment was paid, with interest and costs, by the plaintiff in the present action.

In its answer to the plaintiff's amended complaint, the insurance company set up, among other things, that the policy sued on was issued to the plaintiff in the state of Washington, and that Merrill received the injuries alleged in the complaint on or about June 15, 1909, which fact the plaintiff at the time well knew, but that, notwithstanding such knowledge, the plaintiff did not give notice of the injury, or of the accident from which it arose, in writing or otherwise, to the insurance company "until the latter part of October or the first part of November following the said accident and injury," and for that reason the defendant insurance company denied any liability to the plaintiff under the policy, and refused to undertake the defense of the action of Merrill, and further pleaded in defense of the present action that, "by reason of the failure of the said plaintiff to give the said notice, and its failure to investigate the accident and to preserve the testimony, the evidence became destroyed and the witnesses scattered, and at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter, and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible to successfully defend the said action."

In the plaintiff's reply to the insurance company's answer it admitted that the policy sued on was issued in the state of Washington, and admitted that it gave no notice of the accident or injury to Mer-

rill prior to October 19, 1909, but denied that it knew of the injuries or accident on or about June 15, 1909, or at any time prior to October 19, 1909, and alleged that, immediately upon learning thereof, it gave due notice of the same to the insurance company. In its reply the plaintiff also admitted that there was an alteration made in the structure where the accident happened, but alleged that the same was slight and immaterial, was made prior to the time that the plaintiff knew of the accident, and that it was not claimed by Merrill to have been responsible for the accident or connected therewith in any way, and that the structure was totally destroyed by fire without the plaintiff's fault prior to the time that the suit brought by Merrill was or could have been tried, and could not have been available for use as evidence in that action.

The clause of the policy in suit in respect to the giving of notice is as follows: "That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the company," etc. The policy also contains this clause: "That if any legal proceedings are taken to enforce a claim against the assured, which would be covered by this policy if the assured were legally liable in respect to such claim, the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the assured, and shall have entire control of such defense, whether legal liability on the part of the assured in respect to the claim is proven as the result of such proceedings or not. If the company shall at any time offer to pay to the assured the full amount for which the company might be liable to indemnify the assured in respect to the claim sought to be enforced, it shall not thereafter be bound to defend any legal proceedings, nor be liable for any costs or expenses which the assured may incur in defending the same; but the company shall not be responsible for any damages alleged to have been sustained by the assured in consequence of any action or omission of the company in connection with such claim or proceeding. The assured shall, at all times, under the direction of the company, render all reasonable and necessary assistance to enable the company to effect settlements, or to properly conduct a defense, or to prosecute an appeal, or to secure information or the attendance of witnesses."

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The court below on the trial of the action refused to allow the assured to prove that it had no notice of the accident or injury to Merrill until October 19, 1909, on which day it received a letter from Merrill's attorneys giving the notice and demanding a settlement for the injury, and on which day it was admitted that the assured sent the letter to the insurance company; and the trial court refused to allow the assured to prove the facts with respect to the happening of the accident, and refused to allow it to prove that the defendant insurance company "was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to the defendant of the accident."

It was stipulated at the trial: "That judgment was rendered on the 10th day of February, 1910, in the superior court of the state of Washington in and for Pierce county, against the defendant, John B. Stevens & Company, in favor of I. B. Merrill, in the sum of \$6,100, together with costs."

The plaintiff was allowed to show that the Merrill Case was appealed to the supreme court of the state, and by it affirmed, and that Stevens & Company paid the judgment, including interest and costs, aggregating \$6,539.30, and also paid \$250 to the attorney who defended the suit in the superior court of the state; but the trial court refused to allow proof of the amount paid the attorney for services rendered on the appeal of that case,—to all of which rulings the plaintiff reserved exceptions, as it did to the instructions given by the trial court to the jury, which told them "that while there could be no recovery against the defendant on account of the loss it sustained in paying the judgment which Merrill recovered, because they did not give the ten days' notice, yet that the insurance company undertook to defend that suit, regardless of whether the ten days' notice was given, and that it was its duty, when called upon, to do so, without requiring the plaintiff, John B. Stevens & Company, to release it beforehand on account of any judgment that might be obtained. So you will not concern yourselves with that part of the pleading that goes to the liability or claimed liability on account of the judgment which John B. Stevens & Company had to pay in the end. You will confine your attention to the evidence introduced here regarding those costs and expenses which the plaintiff was put to in defending the case in the superior court of Pierce county after the defendant company refused to defend it,"—but was not entitled to recover the costs and attorneys' fees incurred on the appeal of the case. For the costs

incurred in the superior court, amounting to \$286.40, the jury accordingly returned a verdict in favor of the plaintiff company.

The plaintiff duly excepted to the charge of the court to the jury, and in other respects already indicated, which rulings are the basis of the writ of error sued out by the corporation John B. Stevens & Company.

The other of the two writs here considered together was sued out by the insurance company, and challenges the action of the trial court in allowing the recovery by the plaintiff company of the costs incurred in the superior court in defense of the Merrill action,—the insurance company having moved for a peremptory instruction to the jury to find in its favor, and also for judgment notwithstanding the verdict, both of which motions were denied, and to each of which an exception was reserved; the contention of the insurance company being that the assured failed to give the notice required by the policy, which deprived it of the right to have the case defended.

It will be seen, therefore, that the controlling point in the case is whether, by the terms of the policy in question, the assured was required to give notice of the injury sustained by its employee before it had any notice of such injury. The court below held that it was, both by its rulings in respect to the plaintiff's offer of proof and in its instructions to the jury, and thereby, in our opinion, committed clear error. As said by this court in *Empire State Surety Co. v. Northwest Lumber Co.* 121 C. C. A. 527, 203 Fed. 417: "It is self-evident that a party cannot give notice of an accident in respect of which a claim can be made until he himself is informed of it, or has knowledge concerning it, and he could not be expected so to do." Nor does the clause in the policy involved in this case undertake to require the assured to give such notice, regardless of its knowledge or information on the subject. We repeat the clause: "That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the company," etc.

Not only is there here no express requirement for the impossible giving of notice of something not known to have occurred, or

concerning which the assured has no information, but the very terms in which the provision is couched indicate that no such unreasonable interpretation is permissible.

The notice is here required to be given "immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued." If the word "immediately" was not thus qualified, and stood alone, it would, under the well-established law upon the subject, be held to imply a reasonable notice in view of all of the circumstances of the case. *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833; *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Ward v. Maryland Casualty Co.* 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; *Insurance Companies v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *Mandell v. Fidelity & C. Co.* 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110; *Edgefield Mfg. Co. v. Maryland Casualty Co.* 78 S. C. 73, 58 S. E. 969; *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L.R.A. 291, 89 Am. St. Rep. 777, 87 N. W. 546; *Phillips v. United States Benev. Soc.* 120 Mich. 142, 79 N. W. 1. And that the insurance company in this instance did not mean the word "immediately" to be taken and enforced literally is conclusively shown by the fact that it immediately followed it with the words: "And at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued."

We have examined the decision of the supreme court of Victoria in the case of *Victorian Stevedoring & General Contracting Co. v. Australian Acci. Ins. & General Guarantee Co.* 19 Vict. L. R. 139, cited in the brief of the insurance company. Two of the learned judges sustained a position like that taken by the defendant in error herein. The third judge concurred in the judgment, but rested his opinion upon a different point, not material to this case. But the judge who tried the case, and who was also a judge of the supreme court of Victoria, had been of a different opinion, and wrote in part as follows: ". . . The defendants undertook to recoup to the plaintiffs any sum not exceeding £1,000, which they might have to pay for injuries caused by the negligence of their workmen

or other employees in the service of the plaintiffs or by their works to third persons. The policy recites certain facts, and then puts in the provisos which raise the questions in dispute. The first proviso that was made refers to the conditions annexed to the policy, and makes them a part of the contract; and it is contended on behalf of the defendant that those conditions are really conditions precedent to a person's title to recover, or, rather, that noncompliance with them is a bar to the right to recover. The first condition is that 'upon the occurrence of any injury notice in writing thereof shall within seven days be given by the insured to the company at their office where this policy has been issued.' Did the parties really mean, when they said that, that if notice was not given exactly within seven days—if a few minutes over the time, for instance, elapsed, or if it became impossible to give it by reason that the plaintiffs did not themselves know of the accident earlier—that their right to be reimbursed under the terms of the policy would be at an end, that they were to lose the \$1,000? Was it meant that the defendants should be entitled to say: 'You have given notice five minutes too late, and we will therefore keep your premiums and pay you nothing?' The very statement was absurd. I cannot believe that the parties intended anything of the sort. What they did intend was to place an obligation on the plaintiffs to give notice thereby entitling the defendants to compensation if they sustain any injury for want of that notice. It was never intended that the mere fact that notice was not given should be a complete answer to an action. . . . So far as relates to the first condition, I have no doubt whatever that what the parties meant was: 'You shall give me notice of the occurrence of any injury. If you don't give notice, you may be still entitled to recover; but I shall get from you any damages I may sustain from want of that notice.'

We are of the opinion that the court below was in error in holding that the policy in suit required the assured to give notice of the injury to its employees, regardless of its own knowledge or information upon the subject, and in holding that the assured was not entitled to its costs and attorneys' fee expended on the appeal of the Merrill Case, as well as to its costs and attorneys' fee paid in defense of that action in the superior court of the state of Washington.

The judgment is reversed, and cause remanded for a new trial.

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KANSAS SUPREME COURT.

AL DELMORE

v.

KANSAS CITY HARDWOOD FLOORING COMPANY, Appt.

(90 Kan. 29, 133 Pac. 151.)

Master and servant — competent fellow servant — complaint — effect.

1. Where two employees in a factory are associated in operating a machine therein, and one complains to the master that he is afraid to work with the other, and the master replies that the one complained of is incompetent and careless, and that he will place him on some work where he cannot hurt the one complaining, the one complaining may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer.

Same — liability of master.

2. In such case the master assumes liability for injuries received by the one who complained through the negligence of the other.

Trial — negligence — question for jury.

3. The question whether the appellee was guilty of contributory negligence was under the instructions for the determination of the jury, and, there being no special question submitted thereon, the general verdict in favor of appellee inferentially acquits him of such negligence.

(June 7, 1913.)

APPEAL by defendant from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be liable under the factory act. Affirmed.

The facts are stated in the opinion.

Messrs. O. L. Miller, Charles A. Miller, Frank P. Seebree, Henry S. Conrad, and John D. Wendorff, for appellant:

Plaintiff assumed the risk. Even if plaintiff was injured by the negligence of Appler, as he claims, he cannot recover because he testified he knew of Appler's negligence, and, continuing in defendant's service after he knew of Appler's negligence, he assumed the risk.

Kansas City, M. & O. R. Co. v. Loosley, 76 Kan. 103, 90 Pac. 990; Southern Kansas R. Co. v. Drake, 53 Kan. 1, 35 Pac. 825;

Headnotes by SMITH, J.

Note. — Right of servant to rely on promise of master to discharge incompetent or careless fellow servant.

The earlier cases upon this subject are collected and discussed in a note to Wil-

Rush v. Missouri P. R. Co. 36 Kan. 129, 12 Pac. 582; Creamery Package Mfg. Co. v. Daniels, 72 Kan. 418, 83 Pac. 986; Atchison & E. Bridge Co. v. Miller, 71 Kan. 13, 1 L.R.A.(N.S.) 682, 80 Pac. 18; Atchison, T. & S. F. R. Co. v. Schroeder, 47 Kan. 315, 27 Pac. 965.

Plaintiff's negligence prevents his recovery.

Johnson v. Kansas City, L. & S. K. R. Co. 31 Kan. 761, 3 Pac. 501; Libbey v. Atchison, T. & S. F. R. Co. 69 Kan. 869, 77 Pac. 541; Maupin v. Miller, 164 Mo. App. 149, 148 S. W. 141.

Plaintiff's negligence in choosing a dangerous way to perform the work when there was a safe way in which he could have performed it precludes his recovery.

Carrier v. Union P. R. Co. 61 Kan. 447, 59 Pac. 1075, 7 Am. Neg. Rep. 594; Brinkmeier v. Missouri P. R. Co. 69 Kan. 738, 77 Pac. 586, 16 Am. Neg. Rep. 351; 1 Bailey, Personal Injuries, §§ 1121, 1123.

Messrs. A. W. Little and E. O. Little for appellee.

Smith, J., delivered the opinion of the court:

This action was brought by appellee for personal injuries. A jury trial was had, and verdict and judgment were for plaintiff.

In the petition it was alleged that the appellee was injured while cleaning out with his hand shavings from the hopper of the

planer which he was operating; that Appler, a fellow workman employed by the defendant, in handling lumber about the machine, carelessly and negligently struck plaintiff's arm and knocked his right hand against the knives in the machine, and cut off two fingers thereof to plaintiff's great injury. The petition also alleged that Appler was a careless, incompetent, and unsafe workman, and that appellee had some words before the accident complained to appellant's foreman of Appler's carelessness and negligence, and that the foreman had promised to give Appler employment where he could do appellee no harm, but had failed to do so. Several other grounds of negligence and failure to comply with the requirements of the factory act are set forth in the petition. A demurrer to the petition was filed by the appellant, and was properly overruled. The appellant answered by a general denial that the accident was due to the appellee's own carelessness and negligence, and that appellee was familiar with the machine and surrounding conditions, and assumed the risk of his employment.

The appellant points out several grounds of negligence upon which there was no evidence, or upon which the evidence was insufficient, and one even where the plaintiff's own testimony seems to contradict an allegation of his petition. The appellant in several assignments of error calls attention to the allegations of the petition and also

Williams v. Kimberly & Co. 10 L.R.A.(N.S.) 1043, and the present note is supplementary thereto.

As pointed out in the earlier note, the cases which involve the question suggested by the title are not numerous, but for the most part they hold that the so-called promise to repair rule applies where a promise is made to remove an incompetent employee to the same extent and with the same limitations as where the promise is made with respect to a defective tool or appliance.

Thus, the rule that a servant who relies upon the promise of the master to remove an incompetent servant is not necessarily chargeable with assumption of risk or contributory negligence in continuing to work with the incompetent servant was adopted in Allcot v. Kirkham, 101 App. Div. 77, 91 N. Y. Supp. 775.

And the view that a servant may rely upon the promise of a master or his representative to remove an incompetent servant was apparently adopted in Galveston, H. & S. A. R. Co. v. Eckles, 25 Tex. Civ. App. 179, 60 S. W. 830, but the decision turns upon other grounds.

But in Primley v. Elbe Lumber & Shingle Co. 53 Wash. 687, 102 Pac. 763, the court was apparently inclined to take the view that the promise to repair rule applied only to "tools, appliances, and machinery." 47 L.R.A.(N.S.)

However, as the complaint was made merely because the incompetent servant would cause a loss of time, labor, and material, and not because of the personal safety of the complaining servant, the rule was held not to be applicable to the case in any event. As to the effect of promise to repair not made with reference to servant's safety, see note to Dunphy v. Farr & B. Mfg. Co. 45 L.R.A.(N.S.) 363.

In American Steel & Wire Co. v. Keefe, 91 C. C. A. 223, 165 Fed. 189, the court speaks of a complaint in regard to an incompetent fellow servant, and a promise to replace him as soon as a man could be found to do the work, as a circumstance showing that the master knew of the danger from the incompetent servant, and that the danger would continue as long as he remained in the employment.

In Cummings v. Helena & L. Smelting & Reduction Co. 26 Mont. 434, 68 Pac. 852, the court recognized the doctrine, but a recovery in this case was refused upon the ground of contributory negligence in other respects than that of working with an incompetent servant.

For notes upon the general question of the effect of a promise of the master to remedy defective conditions, see Index to L.R.A. Notes under title, Mast. & S. §§ 119, 120, 130.

W. M. G.

to the evidence, and says that there was no allegation or evidence that Appler was negligent. Words and Phrases, p. 973, Webster's New International Dictionary, and Soule's Dictionary of English Synonyms, give "negligent" as one of the synonyms of "careless." While "negligent" is probably the better word in legal pleadings and proceedings, it is evident that the word "careless" in this case was used in the sense of "negligent." There was evidence tending to show that Appler was a negligent, careless workman; that the appellant had been apprised of this fact, and knew it to be true, but that it had continued to employ him, and that Appler's negligence was the immediate cause of the injury. If the jury believed this evidence, as they apparently did, or believed the evidence in regard to one or more omissions of safeguards or precautions required by the factory act, it is sufficient to sustain the verdict in this case, and this is true even if the evidence was conflicting.

Where two employees in a factory are associated in operating a machine therein, and one complains to the master that he is afraid to work with the other, and the master replies that the one complained of is incompetent and careless, and that he will place him on some work where he cannot hurt the one complaining, the one complaining may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer. *Gray v. Red Falls Lumber Co.* 85 Minn. 24, 88 N. W. 24, 11 Am. Neg. Rep. 16. There was no evidence that the danger of injury from the incompetence or negligence of his fellow laborer was so obvious and imminent that a person of ordinary care and prudence would not incur the risk for the time reasonably necessary for the master to substitute another in the place. The question whether the appellee was guilty of contributory negligence was, under the instructions, for the determination of the jury; and, there being no special question submitted thereon, the general verdict in favor of appellee inferentially acquits him of such negligence. The appellant requested the giving of several instructions which the court refused. So far as they were proper statements of the law applicable to the case, they appear to have been covered by the instructions given by the court. In fact, the instructions given by the court seem to be very full and fair. There was evidence that a loose pulley and belt were supplied in connection with the planer, and

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that by the use thereof the appellee could have stopped the machine and cleaned out the hopper without danger; that the foreman had ordered appellee not to stop the machine, but to clean out the shavings with his hand. In response to a question if appellee could not have stopped the machine and cleaned out the hopper without danger, the jury answered, "Yes; if allowed to stop the machine." Also, in response to a question, the jury answered that he could have cleaned out the hopper with a stick. The jury also answered other questions to the effect that cleaning out the hopper with his hand was more dangerous than either of the other methods. They also found that Appler was negligent, and the appellant knew he was negligent; that Appler, through carelessness and accident, hit appellee's arm while his hand was in the hopper cleaning it out.

It is often said that where an employee selects the more dangerous of two or more ways of doing an act in the line of his duty, and is injured thereby, he cannot recover damages for the injury from the employer, but this rule is subject to the qualification that he may adopt any one of the methods which a reasonably prudent man would adopt, and not be negligent, although another way may be absolutely safe. *Brinkmeier v. Missouri P. R. Co.* 69 Kan. 738, 77 Pac. 586, 16 Am. Neg. Rep. 351. In this case, however, there is evidence, which one of the answers indicates the jury believed, that the master had selected the method of cleaning out the hopper, and had directed the appellee not to stop the machine, but to clean out the hopper with his hand. It also appears by undisputed evidence that appellee had frequently and many times cleaned out the hopper in the way he was doing at the time of the accident without injury, and that the negligent act of Appler was the proximate, if not the sole, cause of the injury.

In addition to the special findings, the jury returned a verdict in favor of appellee for \$825 damages, and the appellant filed a motion for judgment in its favor upon the special findings notwithstanding the verdict, which was overruled and judgment rendered on the verdict. Under the instructions we think the jury were justified in finding that Appler's negligence was the proximate cause of the injury; that Appler was negligent and careless; that appellant knew it, and, in effect, promised to remove him from work about the machine operated by appellee.

The judgment is affirmed.

**UNITED STATES CIRCUIT COURT
OF APPEALS EIGHTH CIRCUIT.**

**BIG FOUR IMPLEMENT COMPANY et
al., Interveners, Appts.,
v.**

**ISOM WRIGHT, Trustee, etc., of S. P.
Bell, Bankrupt.**

(— C. C. A. —, 207 Fed. 535.)

**Fraud — withholding conditional sale
contract from record.**

1. A fraudulent intent to withhold conditional sale contracts from record is not shown by the facts that they were in fact so withheld until the purchaser found himself in financial difficulties, and that in prior dealings between the parties such contracts had been executed between them,

Note. — Bankruptcy: conditional sale contract executed prior to, but filed within the four months period as a voidable preference.

BIG FOUR IMPLEMENT CO. v. WRIGHT is directly supported by *Re Farmer's Co-op. Co.* 202 Fed. 1005, wherein, in holding that the recording pursuant to state statutory requirement, of a conditional sale contract which was executed prior to the four months period, within that period, did not render it a preferential transfer within the meaning of the bankruptcy act, the court said: "By § 60a of the bankruptcy act, the contract must be judged as of the date of its filing. Because that date fell within four months of the filing of the petition, the referee held that to enforce the provisions of the conditional sales contract would secure to the plow company a preference. I am unable to concur in that view for two reasons: First, the bankrupt never had any title to the property. The title was, by the terms of the contract, reserved to the seller. . . . The only right in the property which the bankrupt secured was the right of possession. The property was not, therefore, the property of the bankrupt, and the contract could not in any aspect amount to a transfer of 'its property' within the meaning of §§ 60a and 60b. Second. The reservation of title in the contract does not amount to a transfer from the buyer to the seller. It is simply a reservation of title by the seller to himself as one of the conditions upon which possession of the property is transferred to the buyer. The contract cannot therefore be held to amount to 'a transfer' of property from the buyer to the seller."

And the same is true of *Bradley, C. & Co. v. Benson*, 93 Minn. 91, 100 N. W. 670, wherein, the court, in answer to the contention that a recording of a conditional sale contract within four months of the adjudication in bankruptcy, though executed long prior thereto, amounted in law to a preference which the trustee might avoid, said: "The bankrupt did no act by 47 L.R.A.(N.S.)

but not filed when the purchaser complied with his agreement.

Record — filing of conditional sale contracts — construction of statute.

2. Where a statute requiring filing of chattel mortgages is construed as intended to protect only those having some specific lien upon or right to the mortgaged property, the same construction will be given to statutes providing for filing of conditional sale contracts.

Bankruptcy — lien of trustee — when attaching.

3. The provision of the bankruptcy act that the trustee shall be vested with all the rights of a lien creditor speaks as of the time of the bankruptcy, and he cannot therefore assert his lien to defeat rights secured before such time.

which the plaintiff acquired a preference over his other creditors; nor was plaintiff in fact a creditor of Bisenius [the bankrupt]. Under the terms of the contract between those parties, the bankrupt never had title to any of the property involved in the action. The title remained at all times in plaintiff, and its election to reclaim the property under the terms of its contract extinguished any claim against the bankrupt for the purchase price. . . . As no title ever passed to the bankrupt, and plaintiff elected to retake the property under the power conferred by the contract, it was not a creditor of the bankrupt as to the property reclaimed, and it is clear that, by filing the contract, it acquired no preference or advantage of any kind or nature over and above those who were creditors. If plaintiff had itself been insolvent, had filed a petition in bankruptcy, and been formally adjudged a bankrupt, unquestionably this identical property, or at least all rights possessed thereto by virtue of the contract, would have passed to its trustee.

. . . It is not alleged that the purpose of the transaction between plaintiff and Bisenius was to clothe the latter with the apparent ownership of the property, and the basis upon which to obtain credit from others, or to reserve a secret lien upon the property; nor that Bisenius in fact obtained credit upon the strength or faith in his apparent ownership. For aught that appears from the answer, the contract was entered into in good faith, and was in ordinary and legitimate business transaction, without ulterior purpose or motive. That provision of the bankrupt act declaring that, where a preference consists in a transfer, the period of four months shall not expire until four months after the date of recording or registering the same, refers to transfers originally intended as preferences, or which, at the time of their execution, constituted, such as a matter of law. The transaction here involved was not for preferential purposes, nor did it, at its inception, constitute a preference, and consequently the provision of the act referred to can have no application."

Same — conditional sale contract — preference.

4. The filing within four months of bankruptcy of a conditional sale contract executed some time previously is not a preference which is avoided by the bankruptcy act.

(August 4, 1913.)

APPEAL by interveners from an order of the District Court of the United States for the District of Kansas denying their petitions for a return of certain property received by the bankrupt on conditional sale contracts. Reversed.

The facts are stated in the opinion.

Argued before Sanburn and Carland, Circuit Judges, and Willard, District Judge.

Mr. Samuel Feller for appellants.

Messrs. William Osmond and Elrick C. Cole, for appellee:

The failure to record the contracts was in itself evidence of a fraud, unless explained.

Re Hickerson, 162 Fed. 345.

An agreement to withhold a contract from record is evidence of a fraudulent intention.

Rogers v. Page, 72 C. C. A. 164, 140 Fed. 596; Re Doran, 83 C. C. A. 265, 154 Fed. 467; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. ed. 1080.

The burden is upon one withholding an instrument from record, to establish the bona fides of the transaction.

Stengel v. Boyce, 143 Ind. 642, 42 N. E. 905; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; Runyon v. Groshon, 12 N. J. Eq. 86; Groat v. Rees, 20 Barb. 26.

These instruments are void as to creditors between the time they were given and the time they were filed.

And in *John Deere Plow Co. v. Edgar Farmer Store Co.* — Wis. —, 143 N. W. 194, it was held that an unlawful preference was not created by the filing of a conditional contract of sale and the seizure of the property by writ of replevin within the four months period, the court saying that, as the bankrupt had no title, no estate was transferred, nor was anything done by way of securing any antecedent debt.

And see *Keeble v. John Deere Plow Co.* 111 C. C. A. 668, 190 Fed. 1019, wherein it was merely said, *per curiam*, that "the conditional sale was recorded before the petition in bankruptcy was filed, and therefore is prior in time to any lien the trustee may have growing out of the adjudication in bankruptcy."

But in North Carolina, where by statute a conditional sale contract is, unless recorded, void as against creditors or subsequent purchasers even with actual notice, such a contract executed before, but filed within, the four months period, was 47 L.R.A.(N.S.)

Post v. Berry, 99 C. C. A. 186, 175 ed. 564; *Re Wade*, 185 Fed. 664; *Chilberg v. Smith*, 98 C. C. A. 513, 174 Fed. 805.

The trustee takes where the instrument is void as to subsequent creditors for want of filing.

Re Schmidt, 104 C. C. A. 107, 181 Fed. 73; *Re Wade*, 185 Fed. 664; *Mattley v. Wolfe*, 175 Fed. 619; *Davis v. Crompton*, 85 C. C. A. 633, 158 Fed. 735.

The fact that a mortgage is withheld from record, and finally recorded just before the mortgagor makes an assignment for the benefit of his creditors, is a circumstance to be considered with other circumstances, as indicating fraud.

Jones, Chat. Mortg. 3d ed. § 337; *Jaffrey v. Brown*, 29 Fed. 476.

If it appears that the mortgage was withheld from record in order to enable the mortgagor to remain in possession of a stock of goods, and to deal with it as his own, and thereby enable him to purchase new goods on a false credit, the mortgagee will be estopped, as against parties so misled, from asserting the existence of a lien under his mortgage.

Jones, Chat. Mortg. 3d ed. § 3377a; *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. 566; *Crooks v. Stuart*, 2 McCrary, 13, 7 Fed. 800; *Simon v. Openheimer*, 20 Fed. 553; *Rumsey v. Town*, 20 Fed. 558; *Standard Paper Co. v. Guenther*, 67 Wis. 101, 30 N. W. 298.

These conditional sale contracts constitute a preference under the bankruptcy law as amended in 1910.

First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 34; *English v. Ross*, 140 Fed. 630; *Loefer v. Savings Deposit Bank v. T. Co.* 18 L.R.A.(N.S.) 1233, 78 C. C. A. 597, 148 Fed. 975;

held in *Re Builders' Lumber Co.* 148 Fed. 244, to constitute a preference void as to the trustee in bankruptcy.

And in *Bradley, A. & Co. v. McAfee*, 149 Fed. 254, it was held, under a statute declaring conditional sale contracts void as to all subsequent purchasers in good faith and creditors unless recorded, that the recording of a conditional sale contract after the filing of the petition, but before adjudication in bankruptcy, was insufficient to save the seller's rights to possession of the property.

As to voidability of transfer within four months period, pursuant to executory agreement antedating that period, see notes to *Godwin v. Murchison Nat. Bank*, 17 L.R.A.(N.S.) 935, and *Sexton v. Kessler & Co.* 40 L.R.A.(N.S.) 639.

As to voidability of mortgage given more than four months prior to bankruptcy, but recorded within that period, for a present loan or future advances, see 25 L.R.A.(N.S.) 149.

G. J. C.

Re Reynolds, 153 Fed. 295; Re Beckhaus, 100 C. C. A. 561, 177 Fed. 141; Mattley v. Giesler, 110 C. C. A. 90, 187 Fed. 970; Re Hammond, 188 Fed. 1020; Ragan v. Donovan, 189 Fed. 138; Re Calhoun Supply Co. 189 Fed. 537; Re Hartdagen, 189 Fed. 546; Re Bazemore, 189 Fed. 236; Re Jackson Brick & Tile Co. 189 Fed. 636.

Willard, District Judge, delivered the opinion of the court:

In this controversy between the Big Four Implement Company and the Kansas Moline Plow Company on the one hand, and Wright, the trustee of Bell, the bankrupt, on the other, the court below held that the appellants were not entitled to a return to them of certain farm implements received by the bankrupt on conditional sale contracts. The contract between the plow company and Bell was made on January 23, 1911, and filed in the proper register's office on November 11, 1911. The contract between the implement company and Bell was made on December 8, 1910, and was filed on November 9, 1911.

Within three or four days after the filing of the contracts, Bell made a trust deed for the benefit of his creditors of all his property except that covered by these contracts. A petition in bankruptcy was filed against him on February 22, 1912, and he was adjudicated a bankrupt on March 19, 1912. Some of the property delivered under these contracts came into the possession of his trustee. Appellants appeared in the bankruptcy proceeding and asked for a return to them of such property. The two cases were consolidated in the court below. The referee refused to grant the petition of the claimants, the court affirmed this ruling, and they have appealed.

The trustee claims that these contracts were fraudulent in fact, because "there was an understanding between the bankrupt and the interveners that they were not to be filed unless necessary for interveners' interests, and that the bankrupt would see that they received notice in time to protect themselves." That the mere failure to file the contracts is not sufficient to show fraudulent intent cannot be doubted. The evidence shows the following additional facts: While the contracts were made in December and January, none of the goods of the plow company were shipped until March, and most of those of the implement company not until June. The bankrupt, being pressed by the German-American Bank, one of his creditors, for security, went to Kansas City, it seems, about November 11, 1911, and saw the agents of the appellants. He then told the agent of the implement company that he could not meet his obligations.

At that time he had no talk whatever with the plow company about the filing of their contract. The agent of the implement company, however, suggested or spoke of the fact that they would file their contract. The property here in question was expressly excluded from the trust deed made on November 15th. Bell had dealt with these companies before under similar contracts which had not been filed, and had settled with them according to their terms. This is all of the evidence tending to show any agreement on the part of the companies to withhold the contracts from record, and it is in our opinion entirely insufficient to establish their fraudulent character.

Some of Bell's creditors became such after the making and before the filing of these contracts. No one of them had, however, at the time of such filing, obtained any specific lien upon the property here involved. Under the law of Kansas relating to the filing of chattel mortgages, the protection given to creditors by the law requiring such filing was intended to include only those having some specific lien upon or right to the mortgaged property, and not mere general creditors. *Youngberg v. Walsh*, 72 Kan. 220, 83 Pac. 972; *Geiser Mfg. Co. v. Murray*, — L.R.A.(N.S.) —, 84 Kan. 450, 114 Pac. 1046. The statute requiring the filing of chattel mortgages is in this respect the same as that requiring the filing of conditional sale contracts, and the same rule must apply to the latter. This case is thus distinguished therefore from *Re Wade* (D. C.) 185 Fed. 664, and *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33, both of which cases arose in Missouri.

Prior to 1910 the trustee stood in no better condition than the bankrupt, and these contracts would have been valid as to him, even though never recorded. It is said, however, by the trustee, that this condition has been changed by the amendment to §47a of the bankrupt act, made in 1910. That amendment is as follows: "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." [36 Stat. at L. 840, chap. 412, § 8, U. S. Comp. Stat. Supp. 1911, p. 1500.]

This amendment must speak as of the time of the bankruptcy. The lien which the trustee is considered as holding must be a lien attaching as of that date. There can

be no ground for saying that the lien is in existence before the bankruptcy. No case has been cited which so holds. In most of the cases referred to by the trustee the contract was never filed. In *Rock Island Plow Co. v. Reardon*, 222 U. S. 354, 56 L. ed. 231, 32 Sup. Ct. Rep. 164, the contract was not filed, yet the vendor had taken possession of the property covered by it before the bankruptcy. It appeared, however, in that case, that prior to that possession by the vendor another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors. There is no authority for holding that a trustee can, in his own right, avoid such contracts as these when they have been filed before the bankruptcy. The decisions are to the contrary. *Keeble v. John Deere Plow Co.* 111 C. C. A. 668, 190 Fed. 1019 (5th Cir.) Part of the opinion of the court below in this case is found in *Re Jacobson & Perrill* (D. C.) 29 Am. Bankr. Rep. 603, 200 Fed. 812; *Re Farmers' Co-op. Co.* (D. C.) 202 Fed. 1005; *Hart v. Emmerson-Brantingham Co.* (D. C.) 203 Fed. 60. In *Sturdivant Bank v. Schade*, 115 C. C. A. 140, 195 Fed. 188 (8th Cir.), it appeared that a deed was made in 1902, and not recorded until August 8, 1906. A petition in bankruptcy was filed on October 8, 1906, and an adjudication had on October 31, 1906. The trustee came into possession of the real estate covered by the deed. The court considered that any judgment lien which the trustee was deemed to have was created subsequent to August 8, 1906. It is not necessary to determine whether, under the amendment of 1910, the lien of the trustee attached on the filing of the petition, or on the date of the adjudication, because the filing of the papers in this case preceded both dates.

The trustee claims also that the transaction constitutes a preference, saying that these contracts are, under the laws of Kansas, nothing more than chattel mortgages, and, not having been filed until within four months of the bankruptcy, they must be set aside on that ground. *Matley v. Giesler*, 110 C. C. A. 90, 187 Fed. 970, (8th Cir.). But they are not instruments of that character. They are in the usual form of conditional sale contracts of farm machinery. The implement company's contract contains this clause: "It is also agreed that the title to and ownership of, and the right to the immediate and exclusive possession, upon demand either oral or written, of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the absolute property of, the Big Four Implement Company and

subject to their order until full payment shall have been made for the same by the purchaser in money. In case the Big Four Implement Company shall take possession of any property as provided for in this contract, they or their agent shall have the right to sell the same at public or private sale, with or without notice, and at such place as they or their agent may deem best, and the proceeds arising from such sale, after paying the expenses of the same, shall be applied to the payment of the indebtedness due to said Big Four Implement Company. The appraisal of said property to be sold is hereby waived, but nothing in this clause will release the purchaser from making payment as herein agreed."

The plow company's contract contains this clause: "It is understood and agreed that the goods sold under this contract may be resold by said party of the second part only in the ordinary course of trade at retail, and that the title to and ownership of all said goods until sold in the manner aforesaid permitted, together with the proceeds of those sold, shall be and remain in the party of the first part and subject to its order until full payment in cash shall have been made by the second party for said goods, or of said notes, and until any judgment rendered therefor or thereon shall be paid in full."

There are no other provisions in either contract limiting these clauses. They are therefore, under the rule in force in this circuit, conditional sale agreements. *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545 (8th Cir.); *Re Pierce*, 87 C. C. A. 537, 157 Fed. 755 (8th Cir.); *Monitor Drill Co. v. Mercer*, 20 L.R.A.(N.S.) 1065, 90 C. C. A. 303, 163 Fed. 943, 16 Ann. Cas. 214 (8th Cir.); *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; *Bryant v. Swofford Bros. Dry Goods Co.* 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614. Are they conditional sale contracts under the laws of Kansas? The trustee says that they are not. He relies for that statement upon a single case, *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214. It was there said: "At least since the enactment of § 4257 of the General Statutes of 1901, providing for the recording of such notes and contracts as chattel mortgages, these contracts should be regarded as on the same basis as chattel mortgages. Indeed the transaction, reserving the title and right of possession and right to retake the property, is intended and operates simply as a security for the debt. The transaction does not essentially differ from one in which the seller, at the time of making a sale, takes a promissory note for the purchase price, and at the same time, and before he has really trans-

ferred the property sold, takes a mortgage thereon to secure the payment of the note,—the purchase price. Under the law of this state such a mortgage conveys the title and right of possession to the mortgagee. In the one case the purchaser agrees unconditionally to pay a certain stated sum as the purchase price, and agrees that the seller shall hold the title to the property and right of possession until the debt is paid, and, if it be not paid, that the seller may take the property and sell it and apply the proceeds of the sale towards the payment of the note, implying that the proceeds may be less than the amount of the note. In the other case the purchaser executes a promissory note and unconditionally promises thereby to pay the purchase price, and, before he has actually received the property purchased, conveys the title and right of possession thereof to the seller, and further agrees that the seller may take possession of the property and sell it and apply the proceeds, less the expenses, toward the payment of the note. There is a theoretical distinction between the two transactions, but no practical difference."

The only question which the court decided in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property. The court said: "Authorities are cited from several states which hold that, where the contract attached to a note shows the seller retained the title and right of possession of the property until payment was made, and took possession of the property under the contract, the consideration for the note thereby failed and he cannot recover upon the note. The contract in this case, however, goes further and provides that the seller may take possession of the property, remove and sell the same, and apply the proceeds toward the payment of the note, less the expense of such removal and sale. This is a plain recognition of the obligation to pay the note after the taking of the property."

It also said on page 262 of 77 Kan.: "In the case at bar the purchaser may have had full consideration in the use of the articles purchased for the balance remaining unpaid on his notes. Under the contract attached to these notes, we hold that the plaintiff was authorized to take the property and sell it and apply the proceeds toward the payment of the notes, and that by so doing the law does not imply a revocation of the contract of sale, nor does the law imply that there remains no consideration for the payment of the balance due on the notes."

Conditional sale contracts have long been recognized in the law of Kansas. They 47 L.R.A.(N.S.)

were valid as to third persons, when there was no statute requiring them to be filed, while there was a statute requiring the filing of chattel mortgages. *Sumner v. McFarlan*, 15 Kan. 600; *Hall v. Draper*, 20 Kan. 137; *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 544, 33 Pac. 360; *Moline Plow Co. v. Witham*, 52 Kan. 185, 34 Pac. 751. The statutes of Kansas recognize the difference between a chattel mortgage and a conditional sale contract, by providing separate and different provisions for filing. The provision relating to chattel mortgages is found in § 5224 of the *Compilation of 1909*. Section 5237 relating to conditional sales is as follows: "Section 5237. Sale Notes Section 44. That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal sale of personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

Section 5226 requires a chattel mortgage to be renewed every two years. Section 5237, as is seen, provides that the effect of the filing shall continue, without renewal, until payment. Section 5232 provides for a public sale after notice under a chattel mortgage. There is no provision for such sale in the case of conditional sale contracts. The supreme court of Kansas did not, in our opinion, intend to hold in the case of *Christie v. Scott* that conditional sale contracts could not exist under the law of Kansas. So far as the effects of filing are concerned, they are similar to chattel mortgages; and this was all that was meant by what was said by this court in *National Bank v. Carbondale Mach. Co.* 115 C. C. A. 132, 195 Fed. 180.

These being contracts of conditional sale, there is no foundation for the claim that the filing of them within four months of the bankruptcy constituted a preference. There could be no preference without a transfer by the bankrupt of his property. If there were any transfer in this case it is evidenced by these instruments dated Decem-

ber 8, 1910, and January 23, 1911. But they transferred no property of Bell. They expressly refrained from transferring any to him. *Re Farmers' Co-op. Co.* (D. C.) 202 Fed. 1005. In *Hall v. Draper*, 20 Kan. 137, it was said by Judge Brewer: "In this respect such a conditional sale differs from an absolute sale with a mortgage back. In 47 L.R.A. (N.S.)

such case the vendee has everything except as limited by the terms of the mortgage. Here he has nothing except as expressed in his contract."

The orders of the court below are reversed, and the case is remanded, with directions to grant the petitions of the appellants.

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1. A cause of action on a saloon keeper's bond, by the widow of one who had been killed by a person to whom the saloon keeper had unlawfully sold intoxicating liquors, survives the death of the saloon keeper, and may be maintained against his personal representative. *Koski v. Pakkala*, 47: 183, 141 N. W. 793, 121 Minn. 450.

(Annotated)

Pendency of suit in other state.

2. The pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in the courts of another state, and this rule applies as well where the second suit is instituted by the defendant in the first suit as where the plaintiff in both actions is the same person. *Ambursen Hydraulic Constr. Co. v. Northern Contracting Co.* 47: 684, 78 S. E. 340, — Ga. —.

ABDUCTION.

Simultaneous trial for abduction and adultery, see Criminal Law, 1.

ABUTTING OWNERS.

Right to compensation for obstructing access to street, see Eminent Domain, 12.

Right of, to compensation for additional servitude, see Eminent Domain, 13.

Rights in, and title to, highway, see Highways, 1, 2.

ACCELERATION.

Of maturity of debt, see Tender.

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ACCEPTANCE.

Of redelivery of replevined property, see Replevin, 3, 4.

ACCESS.

Right of abutting owner to damages for obstructing access to street, see Eminent Domain, 12.

ACCIDENT.

As cause of injury, see Insurance, 7, 8.

Proximate cause of, see Proximate Cause.

ACCIDENT INSURANCE.

See Insurance.

ACCOMPLICE.

Instructions assuming witness was accomplice, see Trial, 11.

ACCOUNTING.

For proceeds of insurance of cargo for account of whom it may concern, see Carriers, 3.

ACTION OR SUIT.

Abatement of, see Abatement and Revival.

Appellate jurisdiction of court, see Appeal and Error.

Matters as to attachment, see Attachment.

Right of party to illegal contract to set up illegality as defense, see Contracts, 5.

Defense of contributory negligence in action for death, see Death, 2.

Suit by administrator, see Executors and Administrators, 2, 3.

Remedy of abutting owner for improper use of highway, see Highways, 2.

Action by wife for personal injuries, see Husband and Wife, 4.

Mistake as defense in libel suit, see Libel and Slander, 2.

Limitation of actions or suits, see Limitation of Actions.

Commencement of, as affecting statutes of limitation, see Limitation of Actions, 8, 9.

Mandamus proceeding, see Mandamus.

act, see Notice.
Parties to action, see Parties.
As condition precedent to action of replevin, see Replevin, 1.
Venue of action, see Venue.

ADDITIONAL SERVITUDE.

See Eminent Domain, 13.

ADJOINING OWNERS.

Compelling removal of wall by injunction, see Injunction, 1.

ADMINISTRATION.

Of decedent's estate, see Executors and Administrators.

ADULTERATIONS.

State regulation of, as affecting interstate commerce, see Commerce, 1, 2.

Validity of Federal food and drugs act, see Commerce, 5.

Under pure food laws, see Food.

ADULTERY.

Simultaneous trial for abduction and adultery, see Criminal Law, 1.

ADVANCEMENTS.

What property passes under deed conveying land from parent to child as advancement, see Deeds, 1.

Revocation of license in deed by way of advancement, see Timber, 1, 2.

ADVERSE POSSESSION.

Title acquired by, as defective or unmarketable, see Vendor and Purchaser, 3.

AFFIDAVIT OF MERITS.

On motion to vacate default judgment, see Judgment, 8, 9.

AFFIDAVITS.

Renewal of affidavit for chattel mortgage, see Chattel Mortgage.

Verification of pleading, see Pleading, 1.

For service by publication, see Writ and Process, 2, 3.

AFFINITY.

Disqualification of judge because of, see Judges.

AGENCY.

See Principal and Agent.

AGREED CASE.

A submission of the question whether or not a municipal corporation has the power to enforce its ordinances in respect to the construction of buildings by a school district organized within its territory, to the same extent that the ordinances would be enforceable against, and in respect to, any other building being built by an individual, gives the court no authority to determine the applicability of a provision 47 L.R.A.(N.S.)

Pasadena City School Dist. v. Pasadena, 47: 892, 134 Pac. 985, — Cal. —.

AGREEMENTS.

Agreements, generally, see Contracts.

AGRICULTURE.

Agricultural education, see Schools, 1.

AMENDMENT.

As affecting limitation of actions, see Limitation of Actions, 9.

Of pleadings, see Pleading, 2, 3.

AMOUNT IN CONTROVERSY.

To confer appellate jurisdiction, see Appeal and Error, 7.

ANIMALS.

Presumption as to proximate cause of injury to animals on railroad track, see Evidence, 4.

Liability for frightening horse, see Highways, 3; Negligence, 3; Railroads, 4-6.

ANNULMENT.

Of marriage, see Marriage.

APPEAL AND ERROR.

Review of order of corporation commission, see Corporation Commission, 1.

In eminent domain proceedings, see Eminent Domain, 7-9.

Costs on appeal as covered by employers' liability insurance, see Insurance, 12.

Running of limitations against unappealed judgment, see Limitation of Actions, 5.

1. An appeal lies from an order of court denying the application of the plaintiff for a mandatory injunction to compel the defendant to restore the status of immovable property which he, in violation of an injunction, has disturbed. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 1155, 62 So. 140, 132 La. 1051.

Finality of decision for purpose of appeal.

2. The judgment of a court, refusing to grant immediate relief by way of mandatory injunction to compel the restoration of the status of immovable property, is so far final as to entitle the applicant to an appeal. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 1155, 62 So. 140, 132 La. 1051.

Jurisdiction of United States Supreme Court.

3. The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no question under the full faith and credit clause of the Federal Constitution for review in the Federal Supreme Court by writ or error to a state court, where there is

no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved. *Louisville & N. R. Co. v. Melton*, 47: 84, 30 Sup. Ct. Rep. 676, 218 U. S. 36, 54 L. ed. 921.

4. The full faith and credit clause of the Federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a Federal question for review in the Federal Supreme Court by writ of error to a state court. *Louisville & N. R. Co. v. Melton*, 47: 84, 30 Sup. Ct. Rep. 676, 218 U. S. 36, 54 L. ed. 921.

5. A writ of error to review a judgment of the highest court of a state will not be dismissed on the ground that the Federal question relied upon to confer jurisdiction has been so conclusively foreclosed by prior decisions of the Federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below. *Louisville & N. R. Co. v. Melton*, 47: 84, 30 Sup. Ct. Rep. 676, 218 U. S. 36, 54 L. ed. 921.

Jurisdiction of state court.
6. The supreme court has jurisdiction on appeal to review an order of the district court, awarding the custody of a minor child to one of the parties in a habeas corpus proceeding, brought for the purpose of determining who has the right to the custody and control of such minor. *Jamison v. Gilbert*, 47: 1133, 135 Pac. 342, — Okla. —.

6a. The refusal of bank officials to produce certain books of the bank, which are in charge of a state bank commissioner, in obedience to an order of court, made for that purpose, is criminal contempt, and a conviction therefor is reviewable by the Oklahoma criminal court of appeals. *Burnett v. State ex rel. West*, 47: 1175, 129 Pac. 1110, 8 Okla. Crim. Rep. 639.

Jurisdictional amount.
7. Upon an inquiry as to whether the amount involved in a pecuniary controversy is sufficient to confer appellate jurisdiction, the amount of the claim asserted on the one side and denied on the other, not the validity thereof, is the criterion, unless the claim is obviously pretentious and made merely to confer jurisdiction. *Brown v. Brown*, 47: 995, 78 S. E. 1040, — W. Va. —.

Assignments of error.
8. Upon appeal from a judgment rendered on affidavits for possession and defense in a proceeding by a landlord to recover possession of the leasehold, assignments of error, questioning the sufficiency of the affidavits sufficiently comply with a rule requiring an assignment of errors relied upon separately and specifically stated. 47 L.R.A. (N.S.)

Nicolopole v. Love, 47: 949, 39 App. D. C. 343.

Objections and exceptions; raising questions in lower court.

Exceptions in mandamus proceedings, see *Mandamus*, 2.

9. A general exception to findings of fact and conclusions of law is not sufficient to permit the appellate court to review the evidence. *Sallaske v. Fletcher*, 47: 320, 132 Pac. 648, 73 Wash. 593.

10. An exception to an instruction in a prosecution for burglary, that "an intent to steal may be inferred from the larceny alone," as improper under the circumstances of the case, does not raise the question that the court charged that the only way intent could be determined was from the surrounding circumstances, thus excluding the testimony of accused. *State v. Lapoint*, 47: 717, 88 Atl. 523, — Vt. —.

11. An exception to a refusal to charge as requested, and to the charge given as a substitute, is too general to be of avail. *State v. Lapoint*, 47: 717, 88 Atl. 523, — Vt. —.

12. A memorandum decision by the trial court before which a case is tried without a jury cannot be considered as findings of fact and conclusions of law, to which exceptions must be filed. *Gould v. McCormick*, 47: 765, 134 Pac. 676, — Wash. —.

13. Failure to add qualifying words to an instruction involving a number of propositions cannot be questioned for the first time on appeal. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

Preliminary motions.

14. An appeal will not be dismissed for imperfection in the stenographer's report of the testimony, where it does not appear that appellant was more to blame for it than appellee. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 1155, 62 So. 140, 132 La. 1051.

Presumptions.

15. In the absence of anything in the record to the contrary, an appellate court will presume that a pardon introduced to qualify a person as a witness who had been convicted of offenses in the court in which he was to testify, which contained the date of conviction and named the court, was shown to relate to the particular offenses for which he was convicted, or that the court took judicial notice of that fact. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

16. No error will be presumed in the admission of evidence not contained in the bill of exceptions. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

17. Where the evidence is in conflict and the record shows that the trial court instructed the jury, but omits entirely to include such instructions, it will be presumed on appeal that such instructions were correct, and properly presented the law and the issues to the jury. *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47: 965, 135 N. W. 189, 22 N. D. 615.

What reviewable generally.

18. The mere presence in a case of a constitutional question does not confer jurisdiction of the whole case upon the appellate court charged with the determination of such questions. *Richey v. Cleveland, C. C. & St. L. R. Co.* 47: 121, 96 N. E. 694, 176 Ind. 542.

Discretionary matters.

19. Whether a defendant in injunction, who violates the same, should be punished for the contempt shown the court, concerns the court in the matter of the maintenance of its dignity and authority; but whether, by coercive or punitive measures, such defendant should be compelled to obey the writ, issued by a competent court, for the preservation of a civil right asserted by the plaintiff concerns the plaintiff, and the action of the trial court upon that question may be subject to review in this court on appeal. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 1155, 62 So. 140, 132 La. 1051.

20. The right to file amended pleadings in the county court, on appeal from a justice of the peace court, depends upon whether it is in furtherance of justice to permit them to be filed, and is to be determined by that court in the exercise of a sound judicial discretion. *Horton v. Early*, 47: 314, 134 Pac. 436, — Okla. —.

21. The allowance of an amendment by the county court upon an appeal from the justice court, in which the only change effected is to increase the amount of damages asked for or to add a new element of damages, is not such an abuse of discretion as will require a reversal, at least where the only objection urged arose during the trial by objection made after answers to questions propounded to the witnesses. *Horton v. Early*, 47: 314, 134 Pac. 436, — Okla. —.

22. It is within the discretion of the trial court to permit the amendment of the complaint in an action to recover damages for wrongful death so as to change the averment as to the source of plaintiff's letters of administration, by stating that they were issued in a county different from that first stated. *Chicago G. W. R. Co. v. McCormick*, 47: 18, 200 Fed. 375, 118 C. C. A. 527.

23. Error will not lie to a ruling on motion for new trial where such motion is addressed to the legal discretion of the trial court. *Philadelphia, B. & W. R. Co. v. Gatta*, 47: 932, 85 Atl. 721, — Del. —.

Questions not raised below.

See also *supra*, 13.

24. An instruction cannot be held erroneous on appeal for a cause not brought to the attention of the trial court. *Chicago G. W. R. Co. v. McCormick*, 47: 18, 200 Fed. 375, 118 C. C. A. 527.

Errors waived or cured below.

As to correctness of instructions generally, see *Trial*.

25. Claiming, on motion for new trial, that a deed was executed by an alleged grantor without consideration, waives a con-
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tention made at the trial that he did not execute it. *Herron v. Allen*, 47: 1048, 143 N. W. 283, — S. D. —.

26. Errors in the giving and refusal of instructions in a case in which the verdict is the only one that could have been given under the evidence, owing to its conclusiveness, are not prejudicial, and may be disregarded as being harmless. *Reilly v. Nicoll*, 47: 1199, 77 S. E. 987, — W. Va. —.

Review of facts.

Sufficiency of exception to finding of fact, see *supra*, 9.

27. A verdict founded upon conflicting oral testimony cannot be set aside by the court. *Lanham v. Meadows*, 47: 592, 78 S. E. 750, — W. Va. —.

Grounds for reversal.

28. Where the evidence in an action equitable in character is sufficient to authorize the finding of an auditor to whom the matter has been referred, the overruling of exceptions to the auditor's report by the presiding judge is not error. *Cowart v. Singletary*, 47: 621, 79 S. E. 196, — Ga. —.

29. A lack of specification as to the items of an open account in the report of an auditor to whom a cause is referred does not make the action of the trial court in overruling a motion for reference reversible error, where the recovery of the amount of the open account was waived. *Cowart v. Singletary*, 47: 621, 79 S. E. 196, — Ga. —.

30. Sustaining a demurrer to a good count in a declaration is not reversible error if it is so similar to a count which is sustained that plaintiff had the benefit of all evidence which could have been offered under it. *Anderson v. Robinson*, 47: 330, 62 So. 512, — Ala. —.

31. In the absence of a showing that the bloody and soiled clothing of the decedent would tend to throw light upon some material inquiry in the case the introduction of it in evidence upon the trial of the accused in a homicide case is error. *Flege v. State*, 47: 1106, 142 N. W. 276, 93 Neb. 610.

32. In an action for defamation it is not prejudicial error to exclude evidence showing the defendant's good faith and the absence of malice, where the recovery is limited by the charge of the court to compensatory damages. *Dodge v. Gilman*, 47: 1098, 142 N. W. 147, 122 Minn. 177.

33. Where a motion was made during the trial of a civil action before a jury, to strike the testimony of a certain witness given on a specified day, and the testimony given on that day by such witness was all that he gave in the case, it cannot be said on appeal that the motion to strike was directed to a part only of such evidence, and that a valid portion thereof was not understood as having been stricken, where there is nothing in the record showing that the motion was limited, so as to render the granting of the motion harmless error, as the jury must be considered as having understood that it included all the testi-

mony of such witness. *Chicago, M. & St. P. R. Co. v. Westby*, 47: 97, 178 Fed. 619, 102 C. C. A. 65.

34. Striking out the testimony of the conductor of a train upon an issue made by the pleadings, tried by the evidence, and submitted to the jury, as to whether or not such train was executing a switching movement at the time the accident complained of occurred, is reversible error. *Chicago, M. & St. P. R. Co. v. Westby*, 47: 97, 178 Fed. 619, 102 C. C. A. 65.

35. It is not reversible error to exclude evidence that it is dangerous for a running train to strike a hand car, in an action to hold a railroad company liable for injury to an engineer through the derailment of his train by a broken rail, the only notice of which was the fact that a hand car stood on the track at that place. *Chicago G. W. R. Co. v. McCormick*, 47: 18, 200 Fed. 375, 118 C. C. A. 527.

36. Where it appears from the evidence that a verdict is so clearly right that, had it been different, the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instructions. *Horton v. Early*, 47: 314, 134 Pac. 436, — Okla. —.

37. Failure to instruct in a prosecution for burglary that, in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis consistent with respondent's innocence, is not error where accused had testified to the entry and subsequent larceny. *State v. Lapoint*, 47: 717, 88 Atl. 523, — Vt. —.

38. It is prejudicial error to appoint as an assistant prosecutor in a criminal prosecution an attorney who has theretofore been employed and paid by another person suspected of the crime, and who has appeared for such person in the preliminary examination and in a former trial of the accused, taking an active part therein for the purpose of protecting his suspected client. *Flege v. State*, 47: 1106, 142 N. W. 276, 93 Neb. 610. (Annotated)

39. A true verdict in a criminal case will not be set aside because a juror was inadvertently given a wrong christian name on the slip placed in the wheel, so that defendant's counsel investigated the qualifications of the wrong man, if the occupation and residence were correctly given, and no objection was made to him. *Com. v. Potts*, 47: 714, 88 Atl. 483, 241 Pa. 325. (Annotated)

40. Under a statute rendering incompetent as a juror in a criminal prosecution one who has read the testimony of the witnesses and formed or expressed an opinion as to the guilt or innocence of the accused thereon, where such facts are made to appear, there is no discretion lodged in the court, and it is manifest error to overrule a challenge for cause on this ground. *Flege v. State*, 47: 1106, 142 N. W. 276, 93 Neb. 610.

41. Where, upon the issue of limitations, the undisputed evidence shows that plain-

tiff's cause of action is not barred by operation of the statute, it is error for the trial court to refuse a peremptory instruction to return a verdict for the plaintiff. *Fidelity & Deposit Co. v. Sheahan*, 47: 309, 133 Pac. 228, — Okla. —.

42. Where the evidence submitted in behalf of a proponent as to the due execution of an instrument offered for probate, and as to the testamentary capacity of the alleged testatrix at the time of its execution, is sufficient to make out a prima facie case for the probate of the paper as a will, and no evidence is adduced for the contestant, it is error to direct a verdict in favor of the latter. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

Judgment.

43. A case will be remanded by an appellate court for further evidence where the interests of justice appear to require it. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 1155, 62 So. 140, 132 La. 1051.

APPLIANCES.

Master's duty as to, see *Master and Servant*, 2b-10.

APPRAISAL.

Of insurance loss, see *Insurance*, 5, 6.

ARBITRATION.

Arbitration agreement as attempt to oust court of jurisdiction, see *Contracts*, 3.

Competency of commissioner in condemnation proceedings, see *Eminent Domain*, 1, 2.

Parol testimony to impeach award, see *Eminent Domain*, 4-6.

Arbitration of insurance loss, see *Insurance*, 5, 6.

Interest on award, see *Interest*, 1, 2.

ARCHITECTS.

Construction of building contract, see *Contracts*, 2.

Measure of damages for wrongful discharge, see *Damages*, 1.

Architects' liens, see *Mechanics' Liens*, 1.

ARMY AND NAVY.

Liability on bond conditioned for proper conduct of liquor business on military reservation, see *Bonds*, 1.

Estoppel to contest validity of bond conditioned for proper conduct of liquor business on military reservation, see *Estoppel*, 2.

Unlawful sale of intoxicating liquors on military reservation, see *Intoxicating Liquors*.

ARREST.

Privilege of witness from, see *Writ and Process*, 4.

ASSAULT AND BATTERY.

Liability of master for assault by servant, see *Master and Servant*, 36-38.

Of bankrupt estate, see Bankruptcy, 1.

ASSIGNMENT.

Rights of assignee of negotiable paper, see Bills and Notes, 1-4.

Civil action for violation of penal statute forbidding assignment of claim against wage earner, see Case.

Validity of statute prohibiting assignment of claim to evade exemption laws, see Constitutional Law, 8.

Of corporate stock, see Corporations, 6.

Liability of corporate transferee of assets of other corporations, see Corporations, 2.

Equitable jurisdiction of suit by corporate creditor to reach assigned claim, see Equity.

Assignment of license as revocation, see Timber, 1.

ASSIGNMENT FOR CREDITORS

As to bankruptcy matters, see Bankruptcy.

ASSIGNMENT OF ERRORS.

On appeal, see Appeal and Error, 8.

ASSOCIATIONS.

Benevolent societies, see Benevolent Societies.

ASSUMPSIT.

Remedy under *ultra vires* contract, see Corporations, 4.

ASSUMPTION OF RISK.

By servant, see Master and Servant, 11-20.

ATTACHMENT.

Matters as to garnishment, see Garnishment.

Property exempt from, see Homestead. Sale under, see Judicial Sale.

Obstructing execution of process, see Obstructing Justice.

Dismissal.

The defendant in an attachment proceeding based upon the ground of non-residence cannot be heard to deny his ownership of the property attached, to defeat the limited jurisdiction of the court, proceeding quasi *in rem* against the attached property. *Thornley v. Lawbaugh*, 47: 1127, 143 N. W. 348, — N. D. —.

(Annotated)

ATTESTING WITNESS.

See Wills, 3.

ATTORNEY IN FACT.

Special deposit by, see Banks, 3.

AUCTION.

Laches as precluding relief of unsuccessful bidder at judicial sale, see Limitation of Actions, 1.

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Admissibility of evidence under answer in action by hirer of taxicab for injuries, see Evidence, 34.

Liability of owner for injury through negligence of chauffeur, see Master and Servant, 35.

AWARD.

Competency of commissioner in condemnation proceedings, see Eminent Domain, 1, 2.

Parol testimony to impeach award, see Eminent Domain, 4-6.

Interest on, see Interest, 1, 2.

BANKRUPTCY.

Production of bankrupt's books as infringing privilege against self-crimination, see Criminal Law, 2.

Impeaching witness by showing conviction for fraudulently concealing property from trustee in bankruptcy, see Witnesses, 4.

What constitutes assets.

1. The estate of a grandchild under the will of its grandfather, which is dependent upon its surviving its father, although contingent, passes to his trustee in bankruptcy, under a statute providing that expectant estates, which include contingent future estates, in which the person to whom they are limited to take effect, remains uncertain, are descendible, devisable, and alienable. *Clowe v. Seavey*, 47: 284, 102 N. E. 521, 208 N. Y. 496. (Annotated)

Avoiding prior transfers or preferences.

2. The filing within four months of bankruptcy of a conditional sale contract executed some time previously is not a preference which is avoided by the bankruptcy act. *Big Four Implement Co. v. Wright*, 47: 1223, 207 Fed. 535, — C. C. A. —. (Annotated)

3. The provision of the bankruptcy act that the trustee shall be vested with all the rights of a lien creditor speaks as of the time of the bankruptcy, and he cannot therefore assert his lien to defeat rights secured before such time. *Big Four Implement Co. v. Wright*, 47: 1223, 207 Fed. 535, — C. C. A. —.

BANKS.

Appeal from conviction of bank officers for criminal contempt in refusing to produce books, see Appeal and Error, 6a.

Criminal contempt by bank officers for refusing to produce books, see Contempt, 1, 2.

Production of books as infringing privilege of bank officers against self-crimination, see Criminal Law, 3.

Priority as between garnishing creditor and holder of check drawn by depositor, see Garnishment, 1.

Collections.

1. The relation of debtor and creditor. and not that of principal and agent, is cre-

ated between a trust company and one who sends to it for credit to his account a check drawn by him on another bank, in favor of the trust company, so that, as between him and the bank on which the check is drawn, he must bear the loss caused by the insolvency of the trust company, where it places the check to his credit and sends it for collection to the drawee bank, which pays it without knowledge of the trust company's insolvency. *Plumas County Bank v. Bank of Rideout, Smith, & Co.* 47: 552, 131 Pac. 360, — Cal. — (Annotated)

2. The loss caused by the closing of the doors of an insolvent trust company after a check in its favor to transfer to it a deposit in another bank had been honored by this bank by a draft for the same amount against its own deposit account, somewhat smaller in amount, with the trust company, which draft was received but not carried through its books, falls upon the depositor, and not upon the bank, where the trust company placed the check to his credit and the small overdraft on the account of the bank was subsequently made good to the receiver of the trust company, although a draft on a third bank, to make good such overdraft, received by the trust company before its doors were closed, was returned by one of its agents without authority. *Plumas County Bank v. Bank of Rideout, Smith & Co.* 47: 552, 131 Pac. 360, — Cal. —

Insolvency; trusts.

Collections as affected by insolvency of bank, see *supra*, 1, 2.

3. Money delivered to a bank by an administrator and attorney in fact for heirs, to be held until receipts can be secured from them, when it is to be forwarded to them by bank draft, is a special deposit, entitled to preference when the bank goes into the hands of a receiver, although the bank commingles the money with its general funds, in cash in excess of the deposit remains in the possession of the bank at all times subsequent to the deposit, and passes into the hands of the receiver. *Carlson v. Kies*, 47: 317, 134 Pac. 808, — Wash. —

BAR.

Of limitation, see *Limitation of Actions*.

BENEFICIARIES.

In insurance policy, see *Insurance*.

BENEVOLENT SOCIETIES.

The majority of a subordinate lodge of a benevolent society cannot authorize a secession of the lodge from the parent organization, and take with them the property of the order, if the general laws of the order provide that all property and funds of a lodge shall be held exclusively as a trust fund for carrying on the fraternal and benevolent features of the order, and shall not be expended for any other purpose, and that no part of the property shall ever be divided among the members, 47 L.R.A.(N.S.)

and if any lodge, for any reason, shall cease to exist, all its property shall immediately and *ipso facto* revert to the superior lodge. *Grand Court of Washington F. of A. v. Hodel*, 47: 927, 133 Pac. 438, 74 Wash. 314, (Annotated)

BILLS AND NOTES.

As to collection of checks, see *Banks*, 1, 2.

Presumption from taking new note, see *Evidence*, 7.

Gift of, see *Gift*, 1, 2.

Place of payment, see *Payment*.

Sufficiency of complaint in action on promissory note, see *Pleading*, 7.

Extension of time for payment of note as discharging sureties, see *Principal and Surety*, 2.

Rights and liabilities of transferees.

Rights of one taking assignment of note after maturity or dishonor, see *infra*, 2-4.

1. The warranty of the seller under N. D. Rev. Codes 1905, § 5428, which provides that "one who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all parties thereto, and also warrants that he had no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause," is not the warranty of an indorser, but the warranty of a vendor, which is personal to the vendee. *McAdams v. Grand Forks Mercantile Co.* 47: 246, 140 N. W. 725, 24 N. D. 645.

Taken after maturity or dishonor.

2. The holder of a promissory note who has purchased it after its dishonor or maturity, with a number of others, and has already realized from other notes secured in the bulk purchase more than the amount paid, cannot recover on the note against an indorser. *McAdams v. Grand Forks Mercantile Co.* 47: 246, 140 N. W. 725, 24 N. D. 645. (Annotated)

3. A note which is payable on demand, and is purchased over a year after its date, will be considered to have been overdue when so purchased. *McAdams v. Grand Forks Mercantile Co.* 47: 246, 140 N. W. 725, 24 N. D. 645.

4. Where a note indorsed before maturity is by the indorser after maturity sold as a chattel with a number of other notes, for a mere nominal consideration, and under an agreement that the seller does not guarantee the solvency of any of the notes, and is not to be held as an indorser on any, the presumption of a reissue or a reindorsement is negated, and a subsequent purchaser of the note who received title by delivery only does not acquire any greater right against the indorser than the original purchaser possessed. *McAdams v. Grand Forks Mercan-*

tile Co. 47: 246, 140 N. W. 725, 25 N. D. 645.

Maturity; extension; renewal.

See also *supra*, 3.

5. A note payable on demand is due within a reasonable time after its date. *McAdams v. Grand Forks Mercantile Co.* 47: 246, 140 N. W. 725, 24 N. D. 645.

BLASTING.

Duty of master to inspect after blasting, see *Master and Servant*, 9.

BOARDING HOUSE.

Implied power of brewing corporation to construct boarding house, see *Corporations*, 3.

BONA FIDE PURCHASER.

Of bills and notes, see *Bills and Notes*.

Of corporate stock, see *Corporations*, 7.

Of property conveyed to defraud creditors, see *Fraudulent Conveyances*, 2.

Of property sold on condition, see *Sale*, 2.

BONDS.

Power of state to require consent of public service commission to issue of railroad bonds, see *Commerce*, 4.

Liability and release of sureties on, generally, see *Principal and Surety*.

Control by public service commission of issue of corporate bonds, see *Public Service Commission*.

Title bond, see *Vendor and Purchaser*, 8.

Liquor bond.

Abatement of cause of action on saloon keeper's bond, see *Abatement and Revival*, 1.

Estoppel to contest validity of, see *Estoppel*, 2.

Parties to suit on saloon keeper's bond, see *Parties*.

Release of surety on saloon keeper's bond, see *Principal and Surety*, 1.

1. A liquor tax certificate issued by a state to one intending to conduct a liquor business on a military reservation which is the property of the Federal government is a nullity, and furnishes no consideration for a bond conditioned for the proper conducting of the business. *Farley v. Scherno*, 47: 1031, 101 N. E. 891, 208 N. Y. 269.

(Annotated)

2. A saloon keeper's bond given under a statute requiring such a bond to be conditioned for the faithful observance of all laws regulating the sale of intoxicating liquors constitutes a contract on the part of the licensee and surety that unlawful sales will not be made, and a violation thereof inures to the benefit of injured third persons. *Koski v. Pakkala*, 47: 183, 141 N. W. 793, 121 Minn. 450.
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BOOKS.

Criminal contempt of officers for refusing to produce books, see *Contempt*, 1, 2.

Privilege against production of books, see *Criminal Law*, 2, 3.

BOUNDARIES.

Compelling removal of wall which projects over division line, see *Injunction*, 1.

A municipal corporation bounded by a navigable river has no jurisdiction over the sale of intoxicating liquor on a pavilion erected on spiles driven into the soil of the river, and reached from the shore only by boat or a float fastened by ropes one of which is attached to a bulkhead on the shore. *Treuth v. State*, 47: 1161, 87 Atl. 663, 120 Md. 257. (Annotated)

BROKERS.

Compensation.

Right to compensation from agent of undisclosed principal, see *Principal and Agent*, 4, 5.

1. A broker is not deprived of his right to commissions for selling property because he is authorized by his principal to secure a sum for himself from the purchaser, which he does not do. *Siler v. Perkins*, 47: 232, 149 S. W. 1060, 126 Tenn. 380.

2. A broker who has brought to his principal one ready, able, and willing to take the property on the terms offered is not deprived of his right to commissions because, after being informed that there was nothing more he could do, he was not present when the deal was consummated, and some changes were made in the details of the trade during the final negotiations. *Siler v. Perkins*, 47: 232, 149 S. W. 1060, 126 Tenn. 380.

BUILDING CONTRACTS.

Construction of, see *Contracts*, 2.

BUILDINGS.

Submission of question as to building ordinances, see *Agreed Case*.

Compelling removal of wall by injunction, see *Injunction*, 1.

Liability of landlord for injury arising out of condition of, see *Landlord and Tenant*, 4, 5.

Lien on, see *Mechanics' Liens*.

A municipal corporation may, under constitutional authority to make and enforce within its limits such police, sanitary, and other regulations as are not in conflict with general laws, compel a school district organized by the legislature within its territory to comply with its Building Code, notwithstanding the school district is organized by a general law, and its trustees are invested with power to control and manage all school property within the district. *Pasadena City School Dist. v. Pasadena*, 47: 892, 134 Pac. 985, — Cal. —.

(Annotated)

BURDEN OF PROOF.

See Evidence, 3, 6, 8.

BURGLARY.

Exceptions to instruction in prosecution for, see Appeal and Error, 10.
Failure to instruct on circumstantial evidence of intent, as reversible error, see Appeal and Error, 37.

Pushing open a car door found ajar sufficiently to effect an entrance, and the entering into the car to commit larceny, is a sufficient breaking to constitute burglary. *State v. Lapoint*, 47: 717, 88 Atl. 523, — Vt. —. (Annotated)

CANCELATION OF INSTRUMENTS.

Sufficiency of evidence to justify, see Evidence, 30.

Right to jury trial in suit to cancel trust deed, see Jury, 1.

Verdict of jury as advisory to court in suit to cancel trust deed, see Trial, 3.

CARRIERS.

Power of state to require consent of public service commission to issue of railroad bonds, see Commerce, 4.

As to powers of corporation commission, see Corporation Commission.

Injury to employee, see Master and Servant.

Liability of, generally, under Federal employers' liability act, see Master and Servant, 1-2b.

Governmental control of issue of securities, see Public Service Commission.

Who are passengers.

1. A person is not a passenger, and entitled to consideration and protection as such, who, after waiting all day in a station for a train, and discovering that he will be unable to reach his destination in time for the accomplishment of the purpose of his journey, leaves the station and goes to a hotel for supper, and then returns to such station for the purpose of sending a telegram, announcing the fact that he will be unable to make the journey, and that it is his intention not to attempt to do so. *Galehouse v. Minneapolis*, St. P. & St. Ste. M. R. Co. 47: 965, 135 N. W. 189, 22 N. D. 615.

Stations; approaches; platform.

2. A railroad company owes no duty to light or guard an excavation on its property near a pathway on its right of way which has to its knowledge been used by the public generally for many years, so as to render it liable to one who, after alighting from its train on a dark night, attempts to follow such pathway, and falls into the excavation, to his injury, if the excavation is some distance from the depot grounds. *Louisville & N. R. Co. v. Hobbs*, 47: 1149, 159 S. W. 682, 155 Ky. 130. (Annotated)

Carriers of freight; insurance agreement.

Sufficiency of complaint in action by cargo owner to recover insurance proceeds from carrier, see Pleading, 11.

3. The owner of a vessel which insures the cargo for account of whom it may concern, and collects the insurance on it, upon loss of the cargo by fire, for which he is not liable to the shippers, because of limitation of liability proceedings, must account to them for the money collected, and cannot retain the same for his own use. *Symmers v. Carroll*, 47: 196, 101 N. E. 698, 207 N. Y. 632. (Annotated)

Maintenance of station; telegraph facilities.

4. While a railway company, under the New Mexico Constitution may be required to provide and maintain adequate facilities and may, upon a proper showing, be required to maintain a telegraph station and agent for the accommodation of passengers and for receiving and delivering freight and express, it cannot, independent of its duties as a common carrier, be required to furnish telegraph facilities so that the public may commercially derive conveniences therefrom. *Woody v. Denver & R. G. R. Co.* 47: 974, 132 Pac. 250, — N. M. —. (Annotated)

CASE.

Right of action for causing death, see Death.

1. One who violates a penal statute forbidding the assigning of a claim against a wage earner out of the state for collection where employer and employee are both found in the state, and the wages are exempt from execution, is liable in a civil action for the damages thereby inflicted upon the wage earner. *Markley v. Murphy*, 47: 689, 102 N. E. 376, — Ind. —. (Annotated)

Inducing suicide.

2. A petition in an action by a widow against the stockholders of a corporation to recover damages for the tortious homicide of her husband, it being alleged that the defendants, in pursuance of a conspiracy to bring about the death of her husband, had written a letter calling upon him to resign his official position in the corporation, of which the defendants were stockholders and he was vice-president, and advising him not to inquire into the reasons for the demand; that, owing to the nervous condition of the decedent and impaired mental and physical condition, this letter, which was delivered to and read by him, had the effect of causing him to take a portion of some narcotic or drug, which caused his death; and that the defendants knew that the letter would produce this effect and bring about the death, and intended that it should, does not state a cause of action. *Stevens v. Steadman*, 47: 1009, 79 S. E. 564, — Ga. —. (Annotated)

CAUSE.

Proximate cause, see Proximate Cause.

CERTAINTY.

Of judgment suspending sentence, see Criminal Law, 6.

CHARITIES.

Parties in suit to prevent dissipation of funds of public charity, see State.

What are charities.

1. The maintenance of a church for the teaching and preaching of religious doctrines is a public charity. *People ex rel. Smith v. Braucher*, 47: 1015, 101 N. E. 944, 258 Ill. 604.

Cy près doctrine.

2. The court cannot, upon the abandonment of the use of church property purchased by funds donated by members of the society, and its attempted sale by the surviving members of the congregation, require the application of the proceeds *cy près*, if no other organization or society exists which has the same purpose and religious belief as the society to which the property belonged. *People ex rel. Smith v. Braucher*, 47: 1015, 101 N. E. 944, 258 Ill. 604. (Annotated)

CHATTEL MORTGAGE.

Chattel mortgagee as party to replevin suit, see Replevin, 2.

Filing contract of conditional sale, see Sale, 1.

Priorities.

One who has taken a chattel mortgage with knowledge of a valid subsisting lien on the property covered thereby does not become a subsequent encumbrancer in good faith for value, so as to give his lien priority over the first after the statutory period for the filing of a renewal affidavit has expired as to the first lien without such affidavit being filed. *First State Bank v. King & McCants*, 47: 668, 133 Pac. 30, — Okla. —. (Annotated)

CHATELS.

Mortgage on, see Chattel Mortgage.

Sale of, see Sale.

CHECKS.

Collection of, see Banks, 1, 2.

Priority as between garnishing creditor and holder of check, see Garnishment, 1.

CHILDREN.

In general, see Infants.

Rights of, in life insurance, see Insurance, 9.

CITIZENSHIP.

As affecting right to removal of cause, see Removal of Causes.

CITY.

See Municipal Corporations.

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CIVIL RIGHTS.

Municipal ordinance for segregation of races, see Municipal Corporations, 1, 2.

1. No unconstitutional discrimination between races occurred in prohibiting white and colored persons from moving into blocks occupied exclusively by members of the other race. *State v. Gurry*, 47: 1087, 88 Atl. 546, — Md. —. (Annotated)

2. An ordinance which prohibits a white or colored owner of property in a block wholly occupied by members of the other race, and every other member of his race, from moving into it, is such an unreasonable interference with vested property rights that it cannot be presumed that power to pass it was conferred upon the municipality by the general welfare clause of its charter. *State v. Gurry*, 47: 1087, 88 Atl. 546, — Md. —.

CLASSIFICATION.

By statute, see Constitutional Law, 4-7.

CLASS LEGISLATION.

See Constitutional Law, 4-7.

COLLATERAL CONTRACTS.

Statute of frauds as to, see Contracts, 1.

COLLECTION AGENCY.

Validity of state license of, see Commerce, 6.

COLLECTIONS.

By banks, see Banks, 1, 2.

COMMENCEMENT.

Of action as suspending running of statute of limitations, see Limitation of Actions, 8, 9.

COMMERCE.

Relevancy of evidence as to whether railroad employee was engaged in interstate commerce, see Evidence, 19.

Liability of railway company, generally, under Federal employers' liability act, see Master and Servant, 1-2b.

Exclusiveness of Federal power.

1. Permitting a sale of cans of a mixture of glucose and refiner's syrup shipped into the state only when the labels prescribed by Wis. Laws 1907, chap. 557, governing the sales of food products, are substituted for those affixed in an honest attempt to comply with the food and drugs act of June 30, 1906, is an unlawful attempt by the state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shipper, and to impair the effect of a Federal law which has been enacted under the constitutional power of Congress over the subject. *Mc-*

Dermott v. State, 47: 984, 54 L. ed. 754, 33 Sup. Ct. Rep. 431, 228 U. S. 115.

2. Congress having, by the food and drugs act of June 30, 1906, made adulterated and misbranded articles contraband of interstate commerce, could, in order to make the legislation effective, authorize, as it did in § 10 of that act, seizures for confiscation and condemnation so long as the articles remained unsold, whether in the original packages or not; and such means of enforcement may not be thwarted by state legislation, like Wis. Laws 1907, chap. 557, under which cans of a mixture of glucose and refiner's syrup which have been removed from the boxes in which they were shipped in interstate commerce, and are held upon the shelves of the importers for sale, must bear only the labels required by the state law, to the exclusion of those affixed conformably to the Federal law. **McDermott v. State**, 47: 984, 54 L. ed. 754, 33 Sup. Ct. Rep. 431, 228 U. S. 115.

(Annotated)

3. No recovery can be had under state statutes, for the death of a railroad employee under circumstances rendering applicable the Federal employers' liability act. **Illinois C. R. Co. v. Doherty**, 47: 31, 155 S. W. 1119, 153 Ky. 363.

(Annotated)

Regulating carriers and transportation.

4. The mere fact that an interstate railroad company is organized and has its principal office in a certain state does not empower such state to require the corporation to secure the consent of its public service commission to the issuance of bonds for the improvement of the road's facilities if only a small percentage of the mileage of the road is located in such state and the improvements are mostly to be made in other states. **Laird v. Baltimore & O. R. Co.** 47: 1167, 88 Atl. 348, — Md. —.

Regulating and licensing sales, etc.

State pure food law, as invalid regulation of commerce, see *supra*, 1. 2.

5. Construing the word "package" or its equivalent expression as used by Congress in the food and drugs act of June 30, 1906, §§ 7, 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, as referring to the immediate container of the article which is intended for consumption by the public and not simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, does not render the statute invalid as in excess of the power of Congress over interstate commerce. **McDermott v. State**, 47: 984, 54 L. ed. 754, 33 Sup. Ct. Rep. 431, 228 U. S. 115.

6. The business of maintaining attorneys in various sections of a state, to make collections for and furnish information to merchant customers as to the financial standing of persons in the vicinity of such attorneys, is not, although it may require the sending of letters from state to state, interstate commerce so as to exempt the proprietor from paying a license tax imposed by the state. **United States Fidelity** 47 L.R.A. (N.S.)

& **G. Co. v. Com.** 47: 648, 129 S. W. 314, 139 Ky. 27.

(Annotated)

COMMERCIAL AGENCY.

Validity of state license of, see **Commerce**, 6.

COMMISSION.

Of brokers, see **Brokers**, 1, 2.

COMMISSIONERS.

Competency of commissioners in eminent domain proceedings, see **Eminent Domain**, 1, 2.

COMMON CARRIERS.

See **Carriers**.

COMMON LAW.

Presumption as to, see **Evidence**, 2.

COMMUTATION.

Of sentence as affecting credibility of convict, see **Witnesses**, 3.

COMPETENCY.

Of witnesses, see **Witnesses**, 1.

COMPLAINT.

In criminal prosecution, see **Indictment**, etc.

CONCEALING ASSETS.

Production of bankrupt's books as infringing privilege against self-crimination, see **Criminal Law**, 2.
Impeaching witness by showing conviction for fraudulently concealing property from trustee in bankruptcy, see **Witnesses**, 4.

CONDEMNATION.

Of property, see **Eminent Domain**.

CONDITIONAL SALE.

Filing of conditional sale contract as preference, see **Bankruptcy**, 2.
Sufficiency of evidence of fraudulent intent not to record conditional sale, see **Evidence**, 21.
See also **Sale**.

CONDUCT.

Estoppel by, see **Estoppel**, 1.

CONFLICT OF LAWS.

Territorial limits of jurisdiction over crimes, see **Courts**, 1-4.
As to conflict of authority between courts, see **Courts**, 5.
Judicial notice of foreign laws, see **Evidence**, 1.
Presumption as to law of other state, see **Evidence**, 2.
Effect of divorce decree rendered in other state, see **Judgment**, 6.

CONGRESS.

Power over interstate commerce, see **Commerce**.
Validity of legislation by, generally, see **Constitutional Law**.

CONSEQUENTIAL INJURIES.

From condemnation of property, see Eminent Domain, 12.

CONSIDERATION.

For liquor bonds, see Bonds, 1.

For tax deed, see Taxes, 2.

CONSOLIDATION.

Of corporations, see Corporations, 1, 2.

CONSTITUTIONAL LAW.

Race discrimination, see Civil Rights.

Matters as to commerce, see Commerce.

Privilege against self-crimination, see Criminal Law, 2, 3.

Cruel and unusual punishment, see Criminal Law, 5.

As to taking property for public use, see Eminent Domain.

Full faith and credit to judgment of other state, see Judgment, 6.

Right to trial by jury, see Jury.

Discrimination in license tax, see License, 4.

Construction of provision abrogating fellow servant rule, see Master and Servant, 26.

Equality and uniformity of school tax, see Taxes, 1.

Retrospective laws.

1-3. A statute denying the right to remove causes from state to Federal courts may be made to apply to rights of action which have already arisen. *Teel v. Chesapeake & O. R. Co.* 47: 21, 204 Fed. 918, — C. C. A. —.

Equal protection and privileges.

Unconstitutional discrimination in segregating races, see Civil Rights, 1.

4. The modification of the fellow-servant rule as to railway employees, made by Ind. act of March 4, 1893, § 1, does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to all employees doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, but such general classification of railway employees is a proper exercise of the police power. *Louisville & N. R. Co. v. Melton*, 47: 84, 30 Sup. Ct. Rep. 676, 218 U. S. 36, 54 L. ed. 921.

(Annotated)

5. A state employers' liability act excepting from the general law of the state as to fellow servants all common carriers and all their employees, and subjecting the former to and granting to the latter causes of action for injuries caused by the negligence of their fellow servants, and for those to which their own negligence contributes in less degree than the negligence of the employer, while no such rights are granted to other employees, denies to persons similarly situated the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution. *Chicago, M. & St. P. R. v. Westby*, 47: 97, 178 Fed. 619, 102 C. C. A. 65.
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6. A state employers' liability act which by its terms subjects "every common carrier" engaged in commerce in the state to liability for, and grants to "any employee of every such carrier a cause of action for, injuries to the employee caused by the negligence of a fellow servant, and for those contributed to by his own negligence in less degree than the negligence of the employer, cannot be saved from unconstitutionality as denying equal protection of the laws by limiting it by judicial construction to common carriers using powerful and dangerous agencies, and their servants engaged in hazardous and dangerous occupations, so as to apply only to a constitutional class, since to do so would constitute judicial legislation. *Chicago, M. & St. P. R. Co. v. Westby*, 47: 97, 178 Fed. 619, 102 C. C. A. 65.

7. A state constitutional provision may abrogate the common-law fellow-servant doctrine as to all employees of railroad, street railway, interurban railway, and mining companies, because of the hazards attached to these employments, without offending against the equal protection clause of the 14th Amendment of the Federal Constitution, and is not limited merely to those employees who are engaged in the specially hazardous work of such vocations. *Kreps v. Brady*, 47: 106, 133 Pac. 216, — Okla. —.

Due process; right to life, liberty and property.

8. No unconstitutional interference with liberty, grant of special privilege, or immunities, or deprivation of property without due process of law, is effected by prohibiting the assignment of a claim against a wage earner out of the state, to evade his constitutional exemptions from execution. *Markley v. Murphy*, 47: 689, 102 N. E. 376, — Ind. —.

9. A defendant in a suit under the Federal employers' liability act is not denied due process of law or the equal protection of the laws by being forbidden to remove the cause from a state to a Federal court, although there is diversity of citizenship, which is a cause for removal in other classes of cases. *Teel v. Chesapeake & O. R. Co.* 47: 21, 204 Fed. 918, — C. C. A. —.

(Annotated)

Freedom of speech, press and worship.

10. Freedom of speech or of the press does not include the right to publish what purports to be a signed petition, as expressing the sentiment, not of the publishers, but of the signers, after the signers have disowned and repudiated it, as having been signed under a misapprehension. *Schwartz v. Edrington*, 47: 921, 62 So. 660, — La. —.

CONSTRUCTION.

Of contract, see Contracts, 2.

CONTEMPT.

Appeal from order denying a mandatory injunction to compel the restoration of the status of property disturbed in violation of a decree, see Appeal and Error, 1.

Appeal in criminal contempt case, see Appeal and Error, 6a.
Review of discretion as to judgment in contempt proceeding, see Appeal and Error, 19.

Criminal contempt.

1. The officers of a bank may be convicted of criminal contempt for failure to obey an order of court requiring the production of books, although the order merely commands the officers of the bank to produce the books, without naming any particular person. *Burnett v. State ex rel. West*, 47: 1175, 129 Pac. 1110, 8 Okla. Crim. Rep. 639.

Disobedience.

2. The officers of a bank who disobey an order for the production of the books of the bank may be punished for contempt thereof, notwithstanding the order was entered upon a petition the main purpose of which was the appointment of a receiver for the bank, and such appointment was denied. *Burnett v. State ex rel. West*, 47: 1175, 129 Pac. 1110, 8 Okla. Crim. Rep. 639.

3. One who violated an injunction forbidding the publication of the names of the signers of a petition, after the signers have disowned and repudiated it as having been signed under a misapprehension, may be punished for contempt. *Schwartz v. Edrington*, 47: 921, 62 So. 860, — La. —.

Purging from contempt.

4. The sworn answer of a party charged with contempt is evidence to purge him thereof; but not conclusive, and may be contradicted and supported by other evidence; and where, upon a consideration of all the evidence, the court is satisfied that it is within the power of the party charged with contempt to comply with the order of the court, the order may be enforced by fine or imprisonment. *Burnett v. State ex rel. West*, 47: 1175, 129 Pac. 1110, 8 Okla. Crim. Rep. 639.

CONTINGENT ESTATE.

As asset in bankruptcy, see Bankruptcy, 1.

CONTRACTS.

Consideration for liquor bonds, see Bonds, 1.

Remedy under *ultra vires* contract, see Corporations, 4.

Measure of damages for wrongfully discharging architect, see Damages, 1.

Disaffirmance of contract by infant, see Infants, 3, 4.

Insurable interest in life insurance policy, see Insurance, 3.

Construction of lease, see Landlord and Tenant.

Mandamus to trustees of water district, see Mandamus, 1.

Ratification of agent's acts, see Principal and Agent, 1.

Liability of agent for undisclosed principal, see Principal and Agent, 4, 5.

Of sale, see Sale.

Consideration for tax deed, see Taxes, 2.

As to sale of real property generally, see Vendor and Purchaser.

Statute of frauds.

1. Where the obligee in a bond for title made a warranty deed to another, which provided that the grantee bound himself to see that the obligations of his grantor under the bond should be complied with, and the grantee took possession and rented to the grantor, the grantee is bound by this provision to pay the purchase money, and the transaction is not obnoxious to the statute of frauds. *Cowart v. Singletary*, 47: 621, 79 S. E. 196, — Ga. —.

Construction.

2. Under a contract by an architect to draw plans and superintend the construction of a building to the "entire satisfaction" of the owner for a percentage of the cost of the building, which describes the character of the work and materials to be employed, the owner cannot discharge him without reasonable ground for dissatisfaction. *Gould v. McCormick*, 47: 765, 134 Pac. 676, — Wash. —.

Validity; public policy.

Ultra vires contract of corporation, see Corporations, 4.

Validity of infant's contracts, see Infants, 3, 4.

Public policy as affecting validity of life insurance policy, see Insurance, 3.

3. An unexecuted agreement to arbitrate all disputes which shall arise in the execution of a contract both, as to liability and loss, is no bar to a suit upon the contract, since it is void as an attempt to oust the courts of their jurisdiction. *Williams v. Branning Mfg. Co.* 47: 337, 70 S. E. 290, 154 N. C. 205. (Annotated)

4. A contract between a corporation and its promoter, providing for the issuance to him of capital stock of the corporation, the use of his name, processes, and knowledge in erecting a refinery in violation of a constitutional provision, will not be enforced by the court, nor will damages be awarded for the breach thereof. *Webster v. Webster Refining Co.* 47: 697, 128 Pac. 261, 38 Okla. 168.

5. If a party to an illegal agreement, by proof of part of the facts constituting the transaction out of which it grew, makes a *prima facie* case for recovery against the other party, without disclosing the illegality, the defendant's guilty participation in the transaction does not preclude him from proving, as matter of defense, the illegal part of the contract. *Lanham v. Meadows*, 47: 592, 78 S. E. 750, — W. Va. —. (Annotated)

CONTRIBUTORY NEGLIGENCE.

Relevancy of evidence as to, see Evidence, 16.

Of person riding with another, see Railroads, 6.

CONVICTIONS.

Credibility of, as witnesses, see Witnesses, 3, 4.

Effect of pardon of, on competency as witness, see Witnesses, 1.

CORPORATION COMMISSION.

1. The Supreme Court can determine the reasonableness and lawfulness of an order made by the railroad commission only upon the evidence adduced before the commission, and presented to the court by the record, and where the commission has failed to develop evidence showing the cost of furnishing a facility ordered, for the accommodation of passengers and for receiving and delivering freight and express, the court cannot determine such questions and will not enforce the order. *Woody v. Denver & R. G. R. Co.* 47: 974, 132 Pac. 250, — N. M. —.

2. A railroad company is entitled to notice, in advance of a hearing, stating definitely the order which the state corporation commission is proposing to make, and the reasons therefor, so that it will be enabled to produce and present before the commission its evidence, if any it has, showing the unreasonableness or injustice of the proposed order. *Woody v. Denver & R. G. R. Co.* 47: 974, 132 Pac. 250, — N. M. —.

CORPORATIONS.

As to banks, see Banks.

Right of action against corporate stockholders, see Case, 2.

Interstate business of, see Commerce.

Criminal contempt of corporate officers for refusing to produce books, see Contempt, 1, 2.

Validity of contract between corporation and promoter, see Contracts, 4.

Matters as to, corporation commission, see Corporation Commission.

Conflict of authority over insolvency proceedings against corporation, see Corporations, 5.

Production of corporate books as infringing privilege of officers against self-crimination see Criminal Law, 3.

Insurance companies, see Insurance.

Public corporations, see Municipal Corporations.

Imputing officer's or agent's notice to corporation, see Notice.

Right of broker to commissions on sale of corporate stock, see Principal and Agent, 4, 5.

Extension of time for payment of corporate note, as discharging sureties, see Principal and Surety, 2.

Control by public service commission of issue of corporate securities, see Public Service Commission.

Railroad corporations, see Railroads.

Venue of action against, see Venue.

Service of process on railroad station agent, see Writ and Process, 1.

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Consolidation; transfer of assets.

Equitable jurisdiction of suit by corporate creditor to reach claim assigned to another corporation, see Equity.

1. An apparent merger of two corporations by retention of the name of one and abandonment of that of the other, and increase of the capital stock of the former to take up the stock of the other, under a statute providing only for consolidation of corporations, does not prevent the operation of the rule that consolidation works a termination of the constituent parts and creates a new corporation in place of them, and therefore the new concern is liable for the tax imposed for the organization of corporations. *Chicago Title & T. Co. v. Doyle*, 47: 1066, 102 N. E. 790, 259 Ill. 489.

(Annotated)

2. A corporation which purchases all the assets of another with its own stock and bonds, which it permits to be distributed among the stockholders without any provision for payment of the debts of the latter company of which it has knowledge, actual or constructive, is liable for their satisfaction out of the property received by it. *Jennings, Neff, & Co. v. Crystal Ice Co.* 47: 1058, 159 S. W. 1088, — Tenn. —.

(Annotated)

Rights and powers generally.

3. A corporation organized to carry on a brewing business has no implied authority to rent land and construct a saloon and boarding house near a quarry, although it will thereby increase the market for its product. *United States Brewing Co. v. Dolese & Shepard Co.* 47: 898, 102 N. E. 753, 259 Ill. 274.

(Annotated)

Contracts; ultra vires.

4. Although a contract by a corporation organized to conduct a brewing business, to rent land and erect thereon a saloon and boarding house, with a proviso that, should a prohibitory law be adopted, the lessor would pay it the value of the buildings, is *ultra vires*, the corporation may, under the common counts, recover the reasonable worth of the building when it passes into possession of the lessor, upon surrender of the lease. *United States Brewing Co. v. Dolese & Shepard Co.* 47: 898, 102 N. E. 753, 259 Ill. 274.

Subscriptions to stock.

5. Under the provisions of § 39 of article 9 of the Constitution of Oklahoma that "no corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, . . ." the right to use a party's name in organizing a corporation, and a method of refining gasoline, which was not patented, which was in use at a number of other places, and which was the result of a method of construction used by the plaintiff wherever he built refineries, is not property actually received to the amount of the par value thereof, for which capital stock of the corporation should be issued. *Webster v. Webster Refining Co.* 47: 697, 128 Pac. 261, 36 Okla. 168.

Transfer of stock.

6. Purchasers of corporate stock who comply with a demand of the corporation to pay an alleged lien against the stock, which could not have been legally enforced, cannot reimburse themselves from the vendors of the stock under the implied warranty of title. *Bankers' Trust Co. v. McCloy*, 47: 333, 159 S. W. 205, — Ark. —.

Rights of shareholders.

7. A resolution of a corporation organized to take over a business, for the purchase price of which stock is issued, that any shrinkage in the assets shall be made good out of dividends declared, is not binding on bona fide purchasers of the stock without notice, although the stock was issued subsequently to and pursuant to the resolution. *Bankers' Trust Co. v. McCloy*, 47: 333, 159 S. W. 205, — Ark. —.

Liability of stockholders.

8. The possibility of shrinkage in the assets of a business for which stock is issued by a corporation organized to take over the business, which, by resolution of the corporation, is to be made up out of dividends declared, is not a debt due within the meaning of a statute giving corporations a lien on stock for all debts due it from its members. *Bankers' Trust Co. v. McCloy*, 47: 333, 159 S. W. 205, — Ark. —.

COSTS AND FEES.

Payment of, as satisfaction of criminal sentence, see Criminal Law, 7.

Cost in proceeding to review order of railroad commission, see Eminent Domain, 9.

When covered by employers' liability insurance, see Insurance, 12.

Motion to require security for cost as extending time for answer, see Pleading, 5.

COTENANCY.**Transfers of interests.**

Delay as bar to enforcement of rights under grant from one cotenant, see Limitation of Actions, 2.

1. Ratification by one of two cotenants of minerals underlying a tract of land, of an absolute grant by his cotenant of a parcel of the property, is effected by co-operating in leases of the minerals under the remaining property, and permitting the mines to be worked under them, and the resulting ore to be partitioned for a long series of years, until the equities of the grantees could no longer be protected in case he demanded partition of the parcels so granted. *Pellow v. Arctic Iron Co.* 47: 573, 128 N. W. 918, 164 Mich. 87.

2. One of two cotenants cannot carve out a parcel of the estate and convey it by warranty deed to a stranger, so as to vest the absolute title in him, or render him a cotenant with the nonconsenting co-owner in the parcel conveyed. *Pellow v. Arctic Iron Co.* 47: 573, 128 N. W. 918, 164 Mich. 87.

3. The warranty deed of one cotenant, of a parcel of the common property by 47 L.R.A. (N.S.)

metes and bounds, is not void, but creates equities in the grantee which will be protected so far as possible without injury to the non-granting cotenant, and the remaining interest, if any, of the grantor, will be charged in a partition proceeding to make good the warranties contained in the deed. *Pellow v. Arctic Iron Co.* 47: 573, 128 N. W. 918, 164 Mich. 87. (Annotated)

4. A nonconsenting cotenant may, by a course of dealing with the remaining property after an attempted grant of a parcel of the property by the other cotenant, effect a ratification of the grant so as to establish the rights of the grantee thereunder. *Pellow v. Arctic Iron Co.* 47: 573, 128 N. W. 918, 164 Mich. 87.

COUNCIL.

Legislative functions of city council, see Municipal Corporations, 1-3.

COUNTIES.

License tax on purchasers at sales for unpaid county tax, see License, 1.

COURTS.

Federal question as conferring appellate jurisdiction on Federal Supreme Court, see Appeal and Error, 3-5.

Jurisdictional amount to confer appellate jurisdiction, see Appeal and Error, 7.

Contempt of court, see Contempt.

Validity of attempt to oust court of jurisdiction, see Contracts, 3.

Review of order of corporation commission, see Corporation Commission, 1.

Equitable jurisdiction, see Equity.

Judicial notice by court, see Evidence, 1.

Matters as to judges, see Judges.

Law of case, see Judgment, 4.

As to removal of causes, see Removal of Causes.

Probate of will, see Wills, 1-3.

Process of, see Writ and Process.

Jurisdiction; territorial limitations.

Jurisdiction of court under submitted question, see Agreed Case.

Jurisdiction on appeal, see Appeal and Error.

Jurisdiction of attachment suit, see Attachment.

Jurisdiction of divorce suit generally, see Divorce and Separation, 1.

Jurisdiction to grant injunction, see Injunction.

Jurisdiction of Federal court to punish unlawful sale of intoxicating liquors on military reservation, see Intoxicating Liquors.

As to venue, see Venue.

1. A father who permitted the mother to remove his child to another state under such circumstances that he was obligated for the support of the child, and with

edge that the child was destitute and likely to become a public burden in the latter state, is punishable under the laws of the latter state. *Re Fowles*, 47: 227, 131 Pac. 598, 89 Kan. 430.

2. The mere fact that some time after a father was brought into a state in custody of an officer, his child was actually in destitute circumstances, would not of itself constitute a crime, or vest the courts of the state with jurisdiction to try him, where the father was without fault as to the child's coming into the state. *Re Fowles*, 47: 227, 131 Pac. 598, 89 Kan. 430.

3. A husband, resident of another state, who has not shown that his wife wrongfully refused to follow him to such state, and who has voluntarily come into the state of his wife's residence, may be prosecuted in the latter state for neglecting and refusing to provide for the support and maintenance of his wife. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835. (Annotated)

4. The fact that at the time of the enactment of a statute making it criminal for a husband to fail to provide for the support and maintenance of his wife in destitute circumstances, the husband was a resident of another state, is no defense to his prosecution in the state enacting the statute, where he has voluntarily come into the latter state. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

Conflict of authority.

5. A district court having jurisdiction of an insolvency proceeding against a corporation under chap. 79, N. M. Laws 1905, in which a mortgagee of the insolvent corporation is made a party defendant and answers, setting up his mortgage, is entitled to retain the jurisdiction thus acquired by it, and to administer the estate of the corporation to the exclusion of another district court in which, pending the former proceeding, said mortgagee obtained a decree of foreclosure and sale of the insolvent's property thereunder. *State ex rel. Parsons Min. Co. v. McClure*, 47: 744, 133 Pac. 1063, — N. M. —.

COVENANTS AND CONDITIONS.

Forfeiture of right to cut timber, see Timber, 3, 4.

Of one of two cotenants, see Cotenancy, 3.

Implied warranty in lease, see Landlord and Tenant, 1.

CREDIBILITY.

Discrediting witnesses, see Witnesses, 3, 4.

CRIME.

See Criminal Law.

CRIMINAL INTENT.

Allegation of, in indictment for receiving money stolen from mails, see Indictment, etc., 2.

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Exceptions to prosecution in prosecution for burglary, see Appeal and Error, 10.

What constitutes burglary, see Burglary.

Criminal contempt, see Contempt, 1.

Extradition of fugitive, see Extradition.

Matters as to grand jury, see Grand Jury.

Matters as to habeas corpus see Habeas Corpus.

Criminal liability for desertion or non-support of wife, see Husband and Wife, 5, 6.

Turning over pay of convict to abandoned wife, see Husband and Wife, 5.

Parole of husband on condition to support his abandoned wife, see Husband and Wife, 6.

As to requisites and sufficiency of indictment, information and complaint, see Indictment, etc.

Injunction against criminal act, see Injunction, 4.

Unlawful sale of intoxicating liquors on military reservation, see Intoxicating Liquors.

Larceny in abstracting money from letter given to person to mail, see Larceny.

Obstructing execution of process, see Obstructing Justice.

Violation of criminal statute as negligence, see Railroads, 3.

Commutation of sentence as affecting credibility of convict, see Witnesses, 3.

Impeaching witness by showing conviction for fraudulently concealing property from trustee in bankruptcy, see Witnesses, 4.

Procedure generally.

Reversible error in admitting evidence in homicide case, see Appeal and Error, 31.

Error in failing to instruct as to weight of circumstantial evidence of intent, see Appeal and Error, 37.

Prejudicial error in appointment of assistant prosecutor, see Appeal and Error, 38.

Setting aside verdict because juror was given wrong name, see Appeal and Error, 39.

Prejudicial error in overruling challenge to juror, see Appeal and Error, 40.

Territorial jurisdiction of criminal case, see Courts, 1-4.

Admissibility of declarations of accused, see Evidence, 13.

Correctness of instructions in criminal case, see Trial, 11, 12.

1. One may be tried at one time upon two separate indictments, one charging abduction and the other adultery with the girl abducted since the several offenses would be proved by substantially the same

evidence, or evidence connected with a single line of conduct or growing out of essentially one transaction. *Com. v. Rosenthal*, 47: 955, 97 N. E. 609, 211 Mass. 50.

(Annotated)

Crimination of self.

2. The books of a bankrupt which have been transferred to the trustee in accordance with the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511), § 70, may, be produced before the grand jury and before the petit jury at the trial of the bankrupt for concealing money from the trustee, without infringing the bankrupt's constitutional privilege against self-crimination. *Johnson v. United States*, 47: 263, 33 Sup. Ct. Rep. 572, 228 U. S. 457, 57 L. ed. 919.

(Annotated)

3. The officers of an insolvent state state bank in the hands of a state bank commissioner cannot disobey, on the ground of the constitutional protection against self-crimination, an order of court to produce and deliver the books, records, and papers of such bank to the commissioner. *Burnett v. State ex rel. West*, 47: 1175, 129 Pac. 1110, 8 Okla. Crim. Rep. 639.

(Annotated)

Pleading.

Quashing of indictment, see Indictment, etc., 3-5.

Verification of plea to jurisdiction, see Pleading, 1.

Prohibition to prevent entertaining plea to indictment, see Prohibition, 1.

4. In a criminal case, a plea to the jurisdiction, which goes only to matters of defense, may properly be denied. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

Cruel and unusual punishment.

5. A statute relating to desertion and nonsupport of a wife by her husband, which provides a penalty of hard labor in a penitentiary or reformatory for not exceeding two years upon conviction, is not void as containing a punishment that is unusual. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

Suspension or stay of sentence:

Right to jury trial on issue of violation of condition of suspended sentence, see Jury, 2.

6. A judgment suspending sentence upon condition of payment of costs and giving bonds to appear from term to term and show that accused has demeaned himself as a good and law-abiding citizen is not void for uncertainty. *State v. Everett*, 47: 848, 79 S. E. 274, — N. C. —.

7. A suspension of sentence upon payment of costs does not render such payment a satisfaction of the judgment, so that the court cannot afterward proceed with the sentence. *State v. Everett*, 47: 848, 79 S. E. 274, — N. C. —.

8. Imposing a sentence which was suspended during good behavior, upon violation of law by the accused, is not void as a punishment for something occurring after 47 L.R.A.(N.S.)

the original conviction. *State v. Everett*, 47: 848, 79 S. E. 274, — N. C. —.

9. The power of suspending sentence belongs of common right to every tribunal invested with authority to award execution in a criminal case. *State v. Everett*, 47: 848, 79 S. E. 274, — N. C. —.

Pardon.

Presumption as to pardon, see Appeal and Error, 15.

Sufficiency of identification of person named in pardon, see Evidence, 27.

Review of validity of pardon on habeas corpus, see Habeas Corpus.

Effect of pardon on competency as witness, see Witnesses, 1.

10. A pardon granted by the lieutenant governor of a state during the temporary absence of the governor is valid under a constitutional provision conferring upon the lieutenant governor the powers and duties of the office of governor upon the removal from the state of the governor. *Re Crump*, 47: 1036, 135 Pac. 428, — Okla. Crim. Rep. —.

(Annotated)

11. Pardoning the offender, and not the offense for which the pardon is granted, does not destroy its effect. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

12. A pardon is an act of grace and mercy, bestowed by the state through its chief executive, upon offenders against its laws, after conviction; and a full, unconditional pardon reaches both the punishment prescribed for the offense and the guilt of the offender: it obliterates in legal contemplation the offense itself; and hence its effect is to make the offender a new man. *Re Crump*, 47: 1036, 135 Pac. 428, — Okla. Crim. Rep. —.

13. A full, unconditional pardon granted by the lieutenant governor of a state during the absence from the state of the governor takes effect upon delivery to one who is acting for the subject of the pardon, and cannot thereafter be revoked by the governor upon his return to the state. *Re Crump*, 47: 1036, 135 Pac. 428, — Okla. Crim. Rep. —.

CROSS-EXAMINATION.

New trial for error in restricting, see New Trial, 2.

Of witnesses, see Witnesses, 2.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, 5.

CUSTODY.

Of children, see Infants, 1, 2.

CUSTOM.

Custom as excusing contributory negligence of servant, see Master and Servant, 21.

CY PRES.

Doctrine of, see Charities, 2.

DAMAGES.

Relevancy of evidence in action for, see Evidence, 17, 18.

Sufficiency of evidence to sustain amount of verdict in action for death, see Evidence, 33.

Allegations as to damages in complaint for libel, see Pleading, 6.

Contract of employment.

1. The damages for wrongfully discharging an architect who had undertaken to draw plans for and superintend the construction of a building for a percentage of its cost are the difference between the contract price and what it would have cost them to complete their undertaking at the time of their discharge. *Gould v. McCormick*, 47: 765, 134 Pac. 676, — Wash. —. **Personal injuries; death.**

2. Where an injury has been received by the servant on account of the negligence of the master, damages should be computed and ascertained and awarded on the basis, as nearly as possible, of compensating the servant for the pain, suffering, and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was in before the injury was inflicted. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

3. In an action for personal injury to a wife, there can be no recovery for expenses incurred for doctors, medicine, nurses, clothing, and ambulance service, since these are expenses of the community for which the husband is responsible, and he alone can recover. *Shield v. F. Johnson & Son Co.* 47: 1080, 61 So. 787, 132 La. 773.

4. The recovery by parents for death of an adult child under the Federal employers' liability act is limited to compensation for such prospective gifts of money, property, or services as they should reasonably expect to receive in the course of their lives from deceased, without any allowance for suffering or bereavement. *McCullough v. Chicago, R. I. & P. R. Co.* 47: 23, 142 N. W. 67, — Iowa, —. (Annotated)

5. The damages for wrongful death are such sum as will compensate decedent's estate for the destruction of his power to earn money, not exceeding the sum claimed in the petition. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

6. Fifteen thousand dollars are not excessive to award as damages for the negligent killing of a strong, vigorous man of good character and habits, twenty-seven years old, although at the time of his death he was employed as a member of a switching crew of a railroad, which is a hazardous business. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

Eminent domain.

Ascertainment of going value of plant of public utility corporation, see Eminent Domain, 3.

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Parol testimony to impeach award in eminent domain proceedings, see Eminent Domain, 4-6.

Right to compensation for consequential damages, see Eminent Domain, 12.

Admissibility of parol evidence, generally, as to what facts railroad commission based its award upon, see Evidence, 11.

7. The damages to be awarded for the turning of sewage into a stream by the permanent plant of a municipal corporation should be assessed on the theory of a permanent taking under the right of eminent domain. *McLaughlin v. Hope*, 47: 137, 155 S. W. 910, — Ark. —.

8. A public utility company which has surrendered its franchise, and received an indeterminate permit under the Wisconsin utility law, is not entitled to compensation for such permit upon the exercise by the municipality of its right to purchase the property of the company. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

9. If a railroad commission, in determining the compensation to be paid a waterworks company for its plant, which is taken by a municipality, takes into consideration, in connection with other data bearing thereon, an estimate of the present cost of reproduction of the plant, such estimate cannot rightly include the cost of trenching, and of breaking up and relaying permanent pavements, for the laying of new service pipes from the main to the corporation cock in the curb, since such expense properly belongs to the consumer. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —. (Annotated)

10. A property owner is not entitled to be reimbursed any portion of the expense which has been assessed against him for paying the street in front of his property, as a condition to the laying of street railway tracks therein, although, had the tracks been laid before the pavements were constructed, a portion of the cost would have been assessed against the railway company. *Birmingham R. Light & Power Co. v. Smyer*, 47: 597, 61 So. 354, — Ala. —.

Mental anguish.

Allegations of mental anguish in complaint for libel, see Pleading, 6.

11. One cannot recover damages for mental anguish because of the loss by a photographer of undeveloped negatives of her child, who died after the exposures were made, although he was notified of the facts when they were delivered to him for development and printing, if they were delivered by an agent who did not suggest or give notice that she was acting for the mother. *Thomasson v. Hackney & Moale* Co. 47: 1120, 74 S. E. 1022, 159 N. C. 299.

(Annotated)

DANGEROUS ATTRACTIONS.

Liability for maintaining, see Negligence, 2.

DANGEROUS PREMISES.

Liability for injury on, see Negligence, 1, 2.

DEATH.

Discretion as to amendment of complaint in action for, see Appeal and Error, 22.

Abatement of action by death, see Abatement and Revival, 1.

Right of action for inducing suicide, see Case, 2.

Exclusiveness of action for, under Federal employers' liability act, see Commerce, 3.

Measure of damages in action for, see Damages, 4-6.

Sufficiency of evidence to sustain amount of verdict in action for death, see Evidence, 33.

Death of party as requiring revival of judgment in favor of state, see Judgment, 7.

Liability of railway carrier, generally, under Federal employers' liability act, see Master and Servant, 2b.

Death of principal in saloon keeper's bond as release of surety, see Principal and Surety, 1.

1. To render one a dependent beneficiary under the Federal employers' liability act, he must have sustained some pecuniary loss on account of the death of decedent. *Illinois C. R. Co. v. Doherty*, 47: 31, 155 S. W. 1119, 153 Ky. 363.

2. A constitutional or statutory provision making one liable in damages for negligently causing another's death does not preclude the defense of contributory negligence. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

DE BONIS NON.

See Executors and Administrators, 1, 2.

DEBTOR AND CREDITOR.

Insolvency of debtor, see Bankruptcy; Banks, 1-3.

Conveyance as fraudulent as to creditors, see Fraudulent Conveyances.

As to remedy of creditor, see Garnishment.

Homestead exemption, see Homestead.

Rights of husband's creditors as affected by marital relation, see Husband and Wife, 3.

Lien of creditor, see Mechanics' Liens.

Right of creditor to enforce vendor's lien, see Vendor and Purchaser, 5-7.

DECEDENT'S ESTATE.

Rights of heirs and distributees, see Descent and Distribution.

Administration of, see Executors and Administrators.

DECLARATIONS.

Evidence of, see Evidence, 13-15.

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DECREE.

See Judges.

DEDUCTION.

From share of distributee, see Executors and Administrators, 4.

DEEDS.

Fraudulent conveyances, see Fraudulent Conveyances.

Conveyance to wife as affecting husband's creditors, see Husband and Wife, 3.

Tax deed, see Taxes, 2.

Identity of logs claimed under deed, as question for jury, see Trial, 3.

Rights of purchasers, generally, see Vendor and Purchaser.

Provisions in will as affected by rule in Shelley's case, see Wills, 4, 5.

What property passes.

Inheritance of reservation by grantor of right to cut timber, see Descent and Distribution.

Sufficiency of evidence of size of timber within reservation in deed, see Evidence, 26.

Assignment as revocation of reserved license to cut timber, see Timber, 1.

Forfeiture of reserved license to cut timber by nonremoval, see Timber, 3, 4.

1. A clause in a deed which conveys land from parents to a child as an advancement, reserving to the father and mother "the privileges of selling and removing any timber from said land that they may desire to sell or to use, and also the right of way through said lands to remove the same," does not reserve title to the timber, but creates only an unassignable license. *United States Coal & O. Co. v. Harrison*, 47: 870, 76 S. E. 346, 71 W. Va. 217. (Annotated)

2. A provision in a deed of real estate reserving certain described timber will be construed as an exception, so that the title will not pass to the grantee. *Hicks v. Phillips*, 47: 878, 142 S. W. 394, 146 Ky. 305.

3. The reservation in a grant of real estate of the timber growing upon the property does not include saplings and undergrowth which, at the time of the grant, are not of a size suitable to make lumber. *Hicks v. Phillips*, 47: 878, 142 S. W. 394, 146 Ky. 305.

DEFAULT.

Judgment by, see Judgment, 1, 2.

Effect of default judgment, see Judgment, 5.

Relief against default judgment, see Judgment, 8, 9.

Allowing additional time to answer on vacating default judgment, see Pleading, 4.

DEFICIENCY JUDGMENT.

Second levy for deficiency, see Judicial Sale.

DEFINITENESS.

Motion to make pleading more definite, see Pleading, 12.

DELAY.

As ground for refusing redelivery of replevined property, see Replevin, 3, 4.

As rendering service by publication invalid, see Writ and Process, 3.

DELIVERY.

Of gift, see Gift, 2.

DEMAND.

Maturity of note payable on demand, see Bills and Notes, 3, 5.

As condition precedent to action of replevin, see Replevin, 1.

DEMURRER.

Finding second indictment after demurrer is sustained to first, see Grand Jury.

Quashing indictment on demurrer, see Indictment, etc., 5.

See Pleading, 12.

DE NOVO.

Trial *de novo* before state railroad commission, see Eminent Domain 8.

DEPENDENT PARTIES.

Who is dependent beneficiary under Federal employers' liability act see Death, 1.

DEPOSITIONS.

Of attesting witnesses, see Wills, 3.

DESCENT AND DISTRIBUTION.

Distribution of decedents' estates, see Executors and Administrators, 4.

Title derived through deeds from heirs, see Vendor and Purchaser, 2.

Property subject to.

Timber reserved by a grantor of real estate, upon his death, passes to his heir at law. *Hicks v. Phillips*, 47: 878, 142 S. W. 394, 146 Ky. 305.

DETINUE.

Action of replevin, see Replevin.

DISAFFIRMANCE.

Of infant's contract, see Infants, 3, 4.

DISCHARGE.

Of surety, see Principal and Surety.

DISCOVERY AND INSPECTION.

Appeal from conviction of bank officers for criminal contempt in refusing to produce books, see Appeal and Error, 6a.

Criminal contempt for refusal to produce corporate books, see Contempt, 1, 2.

Privilege against compulsory production of books, see Criminal Law, 2, 3.

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DISCRETION.

Review of, on appeal, see Appeal and Error, 19-23.

DISCRIMINATION.

Unconstitutionality of, see Constitutional Law, 4-7.

In license tax, see License, 4.

In school tax, see Taxes, 1.

DISMISSAL OR DISCONTINUANCE.

Of attachment suit, see Attachment.

DISQUALIFICATION.

Of judge, see Judges.

DISSOLUTION.

Of partnership, see Partnership.

DISTRIBUTION.

See Descent and Distribution; Executors and Administrators, 4.

DISTRICT AND PROSECUTING ATTORNEYS.

Error in appointment of assistant prosecutor, see Appeal and Error, 38.

DIVIDENDS.

On corporate stock, see Corporations, 7, 8.

DIVORCE AND SEPARATION.

Estoppel of divorced husband to assert title to proceeds of insurance by leaving policy in possession of wife, see Estoppel, 1.

Effect of divorce on interest in proceeds of insurance policy, see Insurance, 9, 10.

Relief against divorce decree, see Judgment, 10.

Annulment of marriage for causes rendering marriage invalid, see Marriage.

The suit and jurisdiction thereof.

Effect of divorce decree rendered in other state, see Judgment, 6.

Service by publication in action for, see Writ and Process, 3.

1. Intention by one removing with all his effects from a town which is not his domicile of origin, to retain his residence there, is not sufficient to effect that result for the purpose of conferring jurisdiction of a divorce proceeding, if he has in that place neither property nor home nor place to which he has a right to return. *Turner v. Turner*, 47: 505, 88 Atl. 3, — Vt. —.

Grounds.

2. Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant a decree of divorce. *Svanda v. Svanda*, 47: 666, 140 N. W. 777, 93 Neb. 404.

DOCUMENTARY EVIDENCE.

See Evidence, 10.

DOMESTIC RELATIONS.

As to divorce or separation, see Divorce and Separation.

As to husband and wife, see Husband and Wife.

As to infants, see Infants.

As to marriage, see Marriage.

Master and servant, see Master and Servant.

DOMESTIC SCIENCE.

See Schools, 1.

DOMICIL.

For purposes of divorce suit, see Divorce and Separation, 1.

As affecting running of statute of limitations, see Limitation of Actions, 6, 7.

DONATION.

See Gift.

DRAINS AND SEWERS.

Right of holder of sewer warrant to penalty collected thereon, see Penalty.

DRUGS AND DRUGGISTS.

Exclusiveness of Federal food and drugs act, see Commerce, 1, 2.

Validity of Federal food and drugs act, see Commerce, 5.

Pure food laws, see Food.

1. A druggist who holds himself out as the actual manufacturer of a patent medicine put up by a wholesaler with the retailer's name on the package is not entitled to the benefit of an exception in a statute making druggists responsible for the quality of medicine sold by them, except those sold in original packages of the manufacturer, and those articles known as patent or proprietary medicines. *Willson v. Faxon, Williams, & Faxon*, 47: 693, 101 N. E. 799, 208 N. Y. 108.

2. A druggist may be found negligent in selling a patent medicine bought in the market, as a harmless preparation put up by himself, when it consists of a dangerous poison, if his only knowledge as to its contents was a statement by the manufacturer that it was similar to a well-known article, the contents of which he was ignorant. *Willson v. Faxon, Williams, & Faxon*, 47: 693, 101 N. E. 799, 208 N. Y. 108.

(Annotated)

DRUNKENNESS.

Relevancy of evidence on issue of contributory negligence, see Evidence, 16.

DUE PROCESS OF LAW.

See Constitutional Law, 8, 9.

DURESS.

Presumption as to, see Evidence, 3.

Sufficiency of evidence of, to justify cancellation of instrument, see Evidence, 30.

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DYE HOUSE.

Municipal abatement of emission of smoke from, see Municipal Corporations, 7.

EASEMENTS.

Of public in highway, see Highways, 1.

ECONOMICS.

See Schools, 1.

EDUCATION.

See Schools.

EJECTMENT.

Dispossession of homestead, see Homestead, 1.

EMBANKMENT.

Diversion or obstruction of water by, see Railroads, 9.

EMINENT DOMAIN.

Award of commissioners.

Admissibility of parol evidence, generally, as to which facts railroad commission based its award, see Evidence, 11.

Interest on award, see Interest, 1, 2.

Appeal from award of commissioners, see *infra*, 7-9.

1. One whose property is subject to assessment to pay for land taken by a city under right of eminent domain is not competent to act as a commissioner in the condemnation proceeding, although the statute makes incompetent only those interested in the property to be taken. *Re Rochester*, 47: 151, 101 N. E. 875, 208 N. Y. 188. (Annotated)

2. Failure of the property owner to object to the competency of commissioners appointed by the court in proceedings to condemn his land for public use until the award is made does not constitute a waiver of the disqualification, if he did not learn the facts which rendered them incompetent during the proceedings before them. *Re Rochester*, 47: 151, 101 N. E. 875, 208 N. Y. 188.

3. The "going value" of the plant of a public utility corporation is of such a character that an exact ascertainment in money is not necessary to the validity of the award of a railroad commission determining the entire value of the plant. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

4. Testimony of the members of a railroad commission as to the process of reasoning by which they arrive at the value placed upon the property of a public utility corporation, whose property is being taken by a municipality, will not be received to impeach the award of the commission. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

5. Where the report of a railroad commission shows that the commission considered the "going value" of the plant of a

public utility corporation in determining the entire value of the plant, testimony of the members of the commission as to the exact valuation placed upon the "going value," or the method of determining it, is incompetent. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

6. Where the record of the proceedings of a railroad commission is silent as to whether or not the commission adopted the report of engineers as to the cost of present reproduction of the property of a public utility corporation, from which the cost of paving over service pipe and trenching for the same was excluded, it is competent to establish this fact by the testimony of the members of the commission. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

Appeal.

7. The acceptance of an award of a railroad commission by a public utility corporation and its receiver, pending an action by the utility corporation to alter and amend such an award, is not a waiver of its right to prosecute the appeal from the order, since upon an appeal by the utility corporation, the amount of the award cannot be reduced. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

8. Upon a proceeding to alter or amend an order of the state railroad commission as provided in §§ 1797m-83, Wis. Stat. 1911, the court examines into the specific claims of error or unreasonableness made by the plaintiff in the action, and if it finds them satisfactorily established the order is remanded to the commission for correction in these particulars, but is not opened up for a trial *de novo*. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

9. Where a public utility company surrenders its franchise and receives an indeterminate permit under the utility law, an order thereafter made by the commission fixing the compensation to the utility company for its property taken by the municipality cannot rightly require the municipality to pay, in addition to the compensation fixed, the costs of an action which may be thereafter brought by the utility company against the commission to alter or amend the order, whether such action be successful or not, in the absence of an affirmative grant of such costs in the statute. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

Necessity of making compensation.

Measure of damages in condemnation cases, see *Damages*, 7-10.

10. The turning of sewage by a municipal corporation into a stream, to the injury of lower riparian property, is within a constitutional provision requiring compensation for damaging property for public use. *McLaughlin v. Hope*, 47: 137, 155 S. W. 910, — Ark. —. (Annotated)

To whom compensation must be paid.

11. A lessee of a water power who 47 L.R.A.(N.S.)

places a mill on the stream with intent to utilize the power, and is compelled to abandon it because of the pollution of the stream, by the discharge therein of the sewage of a city, is entitled to damages to the extent of his leasehold interest against the municipality guilty of the pollution. *McLaughlin v. Hope*, 47: 137, 155 S. W. 910, — Ark. —.

Consequential injuries.

12. An abutting property owner is not within the operation of constitutional provisions requiring compensation for injuries or actual damages to his property by the construction or enlargement of the works of a public utility in a street, so as to be entitled to compensation for the doubling of a single track electric railway in the street, because the loading of wagons at the curb in front of his property is thereby made more inconvenient. *Birmingham R. Light & Power Co. v. Smyer*, 47: 597, 61 So. 354, — Ala. —.

Additional servitude.

13. An abutting owner cannot enjoin the doubling by municipal authority of a single track electric railway in a street, 34 feet wide, as a nuisance or an additional burden on the fee. *Birmingham R. Light & Power Co. v. Smyer*, 47: 597, 61 So. 354, — Ala. —.

EMPLOYEES.

Rights, duties, and liabilities of, generally, see *Master and Servant*.

EMPLOYERS' LIABILITY.

Insurance against, see *Insurance*, 11, 12.

Liability generally, under Federal employers' liability act, see *Master and Servant*, 1-2b.

Change of fellow servant rule by statute, see *Master and Servant*, 26-31.

Notice of claim under fellow servant act, see *Notice*.

ENCUMBRANCES.

As making title unmarketable or defective, see *Vendor and Purchaser*, 4.

ENTRY.

Burglary, see *Burglary*.

EQUALITY.

Of immunity, privileges, and protection, see *Constitutional Law*, 4-7.

In license tax, see *License*, 4.

In school tax, see *Taxes*, 1.

EQUAL PROTECTION AND PRIVILEGES.

See *Constitutional Law*, 4-7.

EQUITY.

Matters as to injunction, see *Injunction*.

Pendency of equitable action as ground for enjoining legal proceedings, see *Injunction*, 5, 6.

Limitation of actions in, see Limitation of Actions.

Subrogation, see Subrogation.

Verdict of jury as advisory to court in equitable suit, see Trial, 13.

Equitable right to enforce vendor's lien, see Vendor and Purchaser, 5.

Jurisdiction generally.

Equity has jurisdiction of a suit by a creditor of a corporation to reach a claim in its favor which is alleged to have been assigned to another corporation, and to be its property, subject to the debts of the assignor, although it would have been subject to levy or attachment at law had it remained the property of the assignor. *Jennings, Neff, & Co. v. Crystal Ice Co.* 47: 1058, 159 S. W. 1088, — Tenn. —.

ERROR.

Appellate review, generally, see Appeal and Error.

ESTATES.

Tenancy in common, see Cotenancy.

ESTOPPEL.

Of insurance company, see Insurance, 4.

By conduct, request, or admissions generally.

1. The administrator of one who had taken life insurance in favor of his wife, which became paid up before the parties were divorced, so that by statute the divorce restored the right to the proceeds of the policy to him, is not estopped to assert title to such proceeds, by the fact that the policy is left in possession of the wife, if the husband collects the dividends on it. *Sea v. Conrad*, 47: 1074, 159 S. W. 622, 155 Ky. 51.

By representations.

2. An applicant for a state tax certificate for a liquor business to be conducted on a Federal military reservation is not estopped to contest the validity of the bond conditioned for the proper conducting of the business, by representations as to his right to carry on the business there. *Farley v. Scherno*, 47: 1031, 101 N. E. 891, 208 N. Y. 269.

EVIDENCE.

Reversible error in admitting clothing of victim in homicide case, see Appeal and Error, 31.

Harmless error in excluding evidence of defendant's good faith and absence of malice, see Appeal and Error, 32.

Prejudicial error in striking out, see Appeal and Error, 33, 34.

Excluding evidence as to negligence, see Appeal and Error, 35.

Presumptions on appeal, see Appeal and Error, 15-17.

Compulsory production of evidence, see Criminal Law, 2, 3.

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Production of bankrupt's books before grand or petit jury as infringing privilege against self-crimination, see Criminal Law, 2.

On proceedings to appraise insurance loss, see Insurance, 5.

Newly discovered evidence as ground for new trial, see New Trial.

On motion for new trial, see New Trial, 2.

Judicial notice.

Judicial notice of law of other state, see *supra*, 1.

1. Courts will not take judicial notice of the laws of a sister state, but, in the absence of pleading and proof to the contrary, will assume that they are the same as the local laws. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

Presumptions and burden of proof.

2. Where a question before the court is governed by the rule of the common law, instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that the common law is understood and construed to be the same in the foreign state as it is in the state of the forum. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

3. Where it is shown that an elderly man was called to the office of a lawyer, a stranger to him, suddenly presented with a deed of trust, and by his son and the lawyer given the alternative of signing the instrument or having guardianship proceedings against him begun; and that, without time to reflect or consult with friends, he signed the deed of trust, at the time stating that he was signing his life away,—the presumption arises that the instrument was obtained through duress and undue influence, and the burden is then upon the party procuring the execution of the instrument to show that the execution was not so procured. *Hogan v. Leeper*, 47: 475, 133 Pac. 100, — Okla. —.

4. The jury may infer that turkeys feeding on a railroad track would have flown beyond danger, had a warning whistle been given upon approach of a train, and that failure to give such signal was therefore the proximate cause of their being killed by the train. *Lewis v. Norfolk*, S. R. Co. 47: 1125, 79 S. E. 283, — N. C. —.

5. Where there is an attestation clause to an instrument offered for probate as a will, reciting all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

6. To probate a will in solemn form, the burden is on the proponent to prove the due execution of the instrument and the

testamentary capacity of the testator at the time of its execution. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

7. The taking of a new note payable at a future date for the same debt evidenced by a past due note, which is not surrendered, creates a presumption that action on the old note is to be suspended until the maturity of the new, in the absence of anything to indicate a contrary intention. *First Nat. Bank v. Livermore*, 47: 274, 133 Pac. 734, — Kan. —.

8. An abstract of a title derived through deeds from the heirs of a deceased owner whose estate was not probated may be made to exhibit a good title by attaching to it the affidavit of credible persons who know the facts, showing intestacy, heirship, capacity to convey, and the satisfaction of all claims against the estate of the deceased, and when such showing has been made it devolves upon the vendee objecting to the title and resisting a specific performance of a contract to purchase, to show wherein the title is bad or doubtful, or that the evidence necessary to establish the facts shown in the affidavit is so uncertain as to render the title doubtful. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720, — Kan. —.

9. An indorsement stamped by means of a rubber stamp on the back of a summons and complaint, of the words, "In Sheriff's office, Dec. 2, 1908, John J. Lee, Sheriff, Ward County," will, under a Code provision which makes it the duty of the sheriff to indorse "upon all notices and processes received by him for service, the year, month, day, hour, and minute of reception," and under another Code provision which provides that "the presumption that official duty has been regularly performed is satisfactory if uncontradicted," be deemed satisfactory evidence of the facts therein contained, and that the summons and complaint were delivered to the sheriff for service upon the day stated, in the absence of satisfactory proof to the contrary. *Galehouse v. Minneapolis*, St. P. & S. Ste. M. R. Co. 47: 965, 135 N. W. 189, 22 N. D. 615.

Documentary evidence.

10. In an action to hold a municipal corporation liable for interfering with the flow of water in the tailrace of a mill by clearing the channel of a river within its limits, which it had statutory power to do, a letter from the mayor, purporting to give the reason for the act, is properly excluded from evidence. *Chase-Hibbard Milling Co. v. Elmira*, 47: 470, 101 N. E. 158, 207 N. Y. 460.

Parol and extrinsic concerning writing.

To impeach award in eminent domain proceedings, see *Eminent Domain*, 4-6.

11. Where the report of a railroad commission shows affirmatively what facts were before it upon which it based its conclusion as to the value of the property of a public utility corporation, it is not competent to resort to parol evidence in regard to such 47 L.R.A.(N.S.)

facts. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —.

12. The legatee in a will may be shown by extrinsic evidence to be another than the person named as legatee, although the name used applied to an existing person. *Siegley v. Simpson*, 47: 514, 131 Pac. 473, 73 Wash. 69. (Annotated.)

Hearsay; declarations; res gestae.

13. In a prosecution for receiving money stolen from the mail, evidence is not admissible that, after arrest, accused informed his attorney that he did not know that the money was stolen. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

14. A statement by the conductor of a train which broke in two and injured an employee thereon, as to the cause of the break, made a half hour after he had ascertained it, in response to a question by the injured person, is not admissible in evidence in an action to hold the railroad company liable for the injury, under a statute making admissible declarations which form part of the transaction which is itself the fact in dispute or evidence of such fact. *Callahan v. Chicago, B. & Q. R. Co.* 47: 587, 133 Pac. 687, 47 Mont. 401.

14a. Statements to an employee injured on a train, by the conductor and roadmaster, whose duties are to ascertain the cause of the accident and the nature and extent of the injuries caused by it, and report the same to their superior officers, made while attempting to ascertain the extent of his injuries, as to the cause of the accident, are admissible in evidence against the railroad company in an action to hold it liable for the injury, as admissions in the line of their duty. *Callahan v. Chicago, B. & Q. R. Co.* 47: 587, 133 Pac. 687, 47 Mont. 401.

15. A report by a station agent to the general manager of a railroad on the day after a fire had occurred at his station, in which he states the cause of the fire to have been sparks from a locomotive, is not admissible against the railroad company in an action to hold it liable for the loss. *Warner v. Maine C. R. Co.* 47: 830, 88 Atl. 403, — Me. —. (Annotated.)

Relevancy and materiality.

Relevancy and materiality of evidence under particular pleading, see *infra*, 34-36.

Presumption of error in admission of evidence, see *Appeal and Error*, 16. Admissibility on issue of *devisavit* see *Wills*, 2.

Impeaching witness by showing conviction for fraudulent concealment of property, see *Witnesses*, 4.

16. Upon the issue whether at a particular time a person was exercising due care for his own safety, evidence that he was intoxicated is ordinarily admissible, not as constituting or conclusively establishing negligence on his part, but as being a circumstance to be considered in determining the matter. *McIntosh v. Stand-*

ard Oil Co. 47: 730, 131 Pac. 151, 89 Kan. 289. (Annotated)

17. Upon the question of damages to be awarded for wrongful death, the habits, character, physical condition, earning capacity, and possible duration of life of deceased may be considered. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

18. Upon the question of the amount to be allowed parents for the death of a child, under the Federal employers' liability act, evidence may be considered of the means and earning capacity of the son and of the parents, and the extent of contributions which he made to them. *McCullough v. Chicago, R. I. & P. R. Co.* 47: 23, 142 N. W. 67, — Iowa, —.

19. Upon the question whether or not a railroad employee was engaged in interstate commerce at the time of his injury, evidence is admissible as to the general duties with which he was charged during the time of his employment with the furtherance of which he was engaged at the time of his injury. *Montgomery v. Southern P. Co.* 47: 13, 131 Pac. 507, 64 Or. 597. **Weight, effect, and sufficiency.**

Review of facts on appeal, see Appeal and Error, 27.

Error in failing to instruct as to weight of circumstantial evidence of intent, see Appeal and Error, 37.

Sufficiency of evidence of negligence to go to jury, see Trial, 1.

Identity as question for jury, see Trial, 3.

20. Expert evidence as to a matter of which a layman can have no knowledge, such as post mortem digestion, must be depended upon by the court and jury, and cannot arbitrarily be cast aside, where there is no contradictory evidence. *Flege v. State*, 47: 1106, 142 N. W. 276, 93 Neb. 610.

21. A fraudulent intent to withhold conditional sale contracts from record is not shown by the facts that they were in fact so withheld until the purchaser found himself in financial difficulties, and that in prior dealings between the parties such contracts had been executed between them, but not filed when the purchaser complied with his agreement. *Big Four Implement Co. v. Wright*, 47: 1223, 207 Fed. 535, — C. C. A. —.

22. Negligence on the part of a railroad company may be found from evidence that a side bar on an engine broke when the engine was in motion, and injured an employee in the cab, and that the engine was old and out of repair, that its wheels, bushings, and bearings were worn, and that it pounded while at work. *McCullough v. Chicago, R. I. & P. R. Co.* 47: 23, 142 N. W. 67, — Iowa, —.

23. The testimony of employees working about standing cars, with knowledge of the danger when such cars are to be shifted, that no warning was given of intention to shift at a certain time, is not merely negative, but may sustain a verdict based on absence of such warning, against positive 47 L.R.A.(N.S.)

evidence that the warning was given. *Philadelphia, B. & W. R. Co. v. Gatta*, 47: 932, 85 Atl. 721, — Del. —.

24, 25. That a coupler on a railroad car was so worn and defective as to permit the train to part indicates negligence on the part of the railroad company, in an action by an employee to hold it liable for injuries caused by such parting, which, unless explained, will justify the jury in holding it responsible for the injury. *Callahan v. Chicago, B. & Q. R. Co.* 47: 587, 133 Pac. 687, 47 Mont. 401.

26. That timber which was claimed under certain deeds is of the requisite size to meet the demand of such deeds sufficiently appears from testimony that it was part of the timber described in the deeds. *Wimbrow v. Morris*, 47: 882, 84 Atl. 238, 118 Md. 91.

27. The identification of a person named in a pardon is sufficient if one bearing the name of the person so named testifies that he received and accepted it. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

28. Intention that the beneficiary in a life insurance policy shall be a woman with whom insured is living is shown by evidence that he had it made in her name as his wife, if he had held her out as his wife for several years, and was estranged from the woman to whom he was legally married. *Mutual L. Ins. Co. v. Cummings*, 47: 252, 133 Pac. 1169, — Or. —.

29. Evidence that the father of a young child turned it over to the parents of its deceased mother, intrusting it to them to raise, that he contributed to its support, and thereafter, upon his second marriage, took the child to his home, but allowed it to visit its grandparents, is insufficient to show a contract on the part of the father, surrendering the permanent custody and control of the child. *Jamison v. Gilbert*, 47: 1133, 135 Pac. 342, — Okla. —.

30. Evidence that an elderly man was invited to a lawyer's office where a deed of trust had been drawn up by the lawyer, at the instance of a son, by the terms of which the old gentleman's property was conveyed to a trustee for his life, with directions to apply a certain part of the income to the support of the father and the balance to the expense of the trust and payment of certain mortgages on some of the property; that the old gentleman was urged to sign it, and told that unless he did so a proceeding for the appointment of a guardian for him would be begun, and thereupon, under the urging of the lawyer and the son, and without time to reflect or consult with friends, he signed the instrument, saying at the time that he was signing his life away,—is sufficient to sustain a judgment of the trial court canceling the instrument. *Hogan v. Leeper*, 47: 475, 133 Pac. 190, — Okla. —.

31. The surrender, by one who had acquired title to a car of wheat by paying a draft to which a bill of lading was attached, of the bill of lading, to the railroad company,

with directions to set the car at the elevator of a purchaser, together with the drawing of a draft on the purchaser in such a manner, as in the course of exchange, will require two days before presentation, constitutes such evidence of an intention to give credit as will support the finding of the trial court that the seller cannot recover the wheat from a subvendee to whom the purchaser rebilled and sold it by transfer of the bill of lading. *Kemper Grain Co. v. Harbor*, 47: 173, 138 Pac. 565, 89 Kan. 824.

(Annotated)

32. The statutory rule that a will must be proved in solemn form by all the attesting witnesses is of necessity dispensed with where the production of all is impossible because some are beyond the jurisdiction of the court, and in such cases the due execution of the will may be proved by the subscribing witnesses who can be produced, and proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the others. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

(Annotated)

33. Evidence of contributions by a son to his parents, without anything to show their amount, is not sufficient under the Federal employers' liability act to sustain a verdict in their favor for his death for \$5,000. *McCullough v. Chicago, R. I. & P. R. Co.* 47: 23, 142 N. W. 67, — Iowa, —.

34. In an action by the hirer of a taxicab for injuries, it is error to reject the testimony of the defendant taxicab company that it was not the owner of the car, where the plaintiff was allowed to introduce evidence going to show that it had held itself out to the public as the owners of the car, and where it had denied in its answer "all and singular, the allegations contained in plaintiff's petition, and especially that any act of any person representing your respondent contributed in any way to the accident." *Shield v. F. Johnson & Son Co.* 47: 1080, 61 So. 787, 132 La. 773. Admissibility under particular pleadings.

35. Where the complaint alleges that defendant acted maliciously, and states a case for the recovery of punitive damages, defendant may, under a general denial, prove facts tending to show good faith and absence of malice on his part. *Dodge v. Gilman*, 47: 1098, 142 N. W. 147, 122 Minn. 177.

36. In an action for defamation, where the complaint claims more than nominal damages to the reputation of plaintiff, defendant may, under a general denial, prove the bad reputation of plaintiff at and prior to the time of the slander or libel, though the complaint does not specifically allege plaintiff's good reputation. *Dodge v. Gilman*, 47: 1098, 142 N. W. 147, 122 Minn. 177.

EXAMINATION.

Of witnesses, see Witnesses, 2.
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EXCAVATIONS.

Duty of carrier to light or guard excavation on right of way, see Carriers, 2.

Liability of railroad company for failing to light and guard, see Negligence, 1.

EXCEPTIONS.

See Appeal and Error, 9-12.

By petitioner in mandamus proceedings, see Mandamus, 2.

EXECUTION.

Homestead exemption, see Homestead.

Sale under, see Judicial Sale.

EXECUTORS AND ADMINISTRATORS.

Review of discretion as to amendment of complaint in action on behalf of decedent's estate, see Appeal and Error, 22.

Special deposit by administrator, see Banks, 3.

Right of action for causing death, see Death.

Estoppel of administrator to assert title to proceeds of insurance on decedent's life, see Estoppel, 1.

Resignation.

1. The status of one of two or more co-executors who has given a new bond and retained his position after the resignation of the others as an administrator *de bonis non*, and the limitations upon the rights and power of administrators *de bonis non* have not been abrogated nor changed by § 1 of chapter 118 of the West Va. Code, which deals merely with the matter of resignation and conditions requisite thereto, nor by §§ 25 and 32 of chapter 87, which deal with the settlements of fiduciaries. *Brown v. Brown*, 47: 995, 78 S. E. 1040, — W. Va. —. Suits by.

2. One of two or more co-executors, who has given a new bond and retained his position after the resignation of the others, has the status of an administrator *de bonis non administratis*, and can sue his former associate only for legally unadministered assets remaining in his hands, or in respect to transactions between themselves, but cannot maintain a bill to surcharge and falsify *ex parte* settlements made by the retired executor, nor charge him as for a devastavit. *Brown v. Brown*, 47: 995, 78 S. E. 1040, — W. Va. —. (Annotated)

3. Property converted or altered by an executor or administrator from the state or condition in which the testate or intestate left it is regarded in law and equity as having been administered, and therefore not recoverable by an administrator *de bonis non*, even though such conversion or alteration be an appropriation of the property by the personal representative to his own use, or amount to a devastavit. *Brown v. Brown*, 47: 995, 78 S. E. 1040, — W. Va. —.

Distribution.

Suit over unadministered assets, see *supra*, 2, 3.

4. Uncollectable debts due by a son who died in the lifetime of his father, to the latter, must be deducted in determining the amount which the son's children are entitled to take in the father's estate as representatives of the son. *Adams v. Yancey*, 47: 1026, 62 So. 229, — Miss. —.

(Annotated)

EXEMPTIONS.

Civil action for violating penal statute forbidding assignment of claim outside state to avoid exemption law, see *Case*.

Validity of statute forbidding assignment of claim to evade exemption laws, see *Constitutional Law*, 8.

Homestead exemptions, see *Homestead*.
Of witness from arrest, see *Writ and Process*, 4.

EXPERT TESTIMONY.

Weight of, see *Evidence*, 20.

EXTENSION OF TIME.

Discharge of surety by, see *Principal and Surety*, 2.

EXTRADITION.

Prosecution for different offense.

A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, and who, on demand of the executive authority of the state from which he fled, shall be delivered up and removed to the state having jurisdiction of the crime, may there be prosecuted for crimes other than the one specified in the demand for his delivery, without first giving him a reasonable opportunity to return to the state which surrendered him. *Re Flack*, 47:807, 129 Pac. 541, 88 Kan. 616. (Annotated)

FEDERAL EMPLOYERS' LIABILITY ACT.

Liability generally under, see *Master and Servant*, 1-2b.

FEELINGS.

Damages for injury to, see *Damages*, 11.

FELLOW SERVANTS.

Assumption of risk of negligence of, see *Master and Servant*, 18, 20.

Negligence of, see *Master and Servant*, 25-31.

FELONY.

As cause of injury, see *Insurance*, 7.

FIDUCIARY RELATION.

Of agent, see *Principal and Agent*, 2, 3.

FILMS.

Mental anguish as element of damages in case of loss of undeveloped films, see *Damages*, 11.

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FINDINGS.

Sufficiency of exception to, see *Appeal and Error*, 9.

As to penalties, generally, see *Penalty*.

FINES.

Diversion of, from support of common school, see *Husband and Wife*, 6.

FIRE INSURANCE.

See *Insurance*.

FIRES.

Admissibility of report by railroad station agent as to cause of fire, see *Evidence*, 15.

Insurance against loss by, see *Insurance*.

Liability of master for fire set by servant, see *Master and Servant*, 34.

FLAGMAN.

Municipal ordinance requiring flagman at street crossing, see *Municipal Corporations*, 3.

FOOD.

State regulation of, as affecting commerce, see *Commerce*, 1, 2.

Validity of Federal food and drugs act, see *Commerce*, 5.

The word "package," or its equivalent expression, as used by Congress in the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), §§ 7 and 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, refers to the immediate container of the article which is intended for consumption by the public, and not simply to the outside wrapping or box containing the package intended to be purchased by the consumer. *McDermott v. State*, 47: 984, 54 L. ed. 754, 33 Sup. Ct. Rep. 431, 228 U. S. 115.

FORECLOSURE.

Of mortgage, see *Mortgage*, 2.

FOREIGN LAW.

Judicial notice of, see *Evidence*, 1.

Presumption as to, see *Evidence*, 2.

FORFEITURE.

Of lease, see *Landlord and Tenant*, 2.

Waiver of forfeiture of insurance policy, see *Insurance*, 4.

Tender of payment of note constituting part of debt, see *Tender*.

Of right to cut timber, see *Timber*, 3, 4.

FORMER SUIT PENDING.

As ground for abatement, see *Abatement and Revival*, 2.

FRATERNAL SOCIETIES.

See *Benevolent Societies*.

FRAUD AND DECEIT.

Statute of frauds, see Contracts.
 Transfers in fraud of creditors, see Fraudulent Conveyances.
 As ground for relief against divorce decree, see Judgment, 10.

FRAUDULENT CONVEYANCES.

Sufficiency of evidence of fraudulent intent, see Evidence, 21.
 Cross-examination of alleged fraudulent grantee, see Witnesses, 2.

1. The question of fraud in the execution of a deed can be raised by a stranger only when he is in a position to claim title as against the grantor. *Herron v. Allen*, 47: 1048, 143 S. W. 283, — S. D. —.
 Notice of transferor's fraud.

2. A transfer of property for the purpose of securing it for the benefit of the transferor and his children, in fraud of his creditors, is not validated by the fact that the transferee is ignorant of the fraudulent intent. *Clowe v. Seavey*, 47: 284, 102 N. E. 521, 208 N. Y. 496.

FREEDOM OF SPEECH.

See Constitutional Law, 10.

FREIGHT.

Carriage of, see Carriers.

FRIGHT.

Liability for frightening horse, see Highways, 3; Railroads, 4-6; Negligence, 3.

FUGITIVES.

Extradition of, see Extradition.

FULL FAITH AND CREDIT.

To judgment of other state, see Judgment, 6.

GARNISHMENT.

Civil action for violating penal statute forbidding assigning claim against wage earner outside of state for collection, see Case.

Priorities.

1. As between a garnishing creditor and the holder of a check drawn by a depositor on his account to one who has advanced him the amount of money called for by the check, the holder of the check has the better right to the deposit, to the amount called for by his check. *Farrington v. F. E. Fleming Commission Co.* 47: 742, 142 N. W. 297, — Neb. —.

Procedure.

2. When a garnishee answers that he has money in his hands belonging to the judgment debtor, it is proper to allow one who claims the money, and is not a party to the proceedings, to appear and contest the right of the plaintiff to apply the money on his claim. *Farrington v. F. E. Fleming Commission Co.* 47: 742, 142 N. W. 297, — Neb. —.
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GAS.

Power of municipal corporation to discriminate against consumer, see Municipal Corporations, 4.
 Right of municipality to compel gas company to take out franchise, see Municipal Corporations, 5.

GIFT.

To charity, see Charities.

1. A promissory note may be the subject of a gift *inter vivos* from the payee to the maker. *Lanham v. Meadows*, 47: 592, 78 S. E. 750, — W. Va. —.

Delivery.

2. The surrender of a promissory note, with intent to cancel the debt, is a sufficient delivery thereof to constitute a gift *inter vivos* from the payee to the maker. *Lanham v. Meadows*, 47: 592, 78 S. E. 750, — W. Va. —.

GOVERNOR.

Right of lieutenant-governor to issue pardon, see Criminal Law, 10-13.

GRAND JURY.

Production of bankrupt's books before grand jury as infringing privilege against self-crimination, see Criminal Law, 2.

Finding second indictment.

A grand jury may bring in a second indictment against the same person on the same state of facts, upon the first one proving defective, under a statute providing that if a demurrer is sustained to an indictment it is a bar to another prosecution for the same offense unless the court, being of opinion that the objection to which the demurrer is allowed may be avoided in a new indictment, directs the case to be submitted to the same or another grand jury. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

GUARANTY.

Statute of frauds as to, see Contracts, 1.

GUARANTY INSURANCE.

In general, see Insurance.

GUARDIAN AND WARD.

Desire of elderly person to marry as ground for appointment of guardian, see Incompetent Persons.

Delay as bar to action to enforce guardian's liability, see Limitation of Actions, 3.

HABEAS CORPUS.

Appeal in habeas corpus proceeding, see Appeal and Error, 6.

Scope of writ; questions considered.

The court has power to inquire upon habeas corpus into the validity of a pardon under which the petitioner seeks to be discharged from the penitentiary where, after the delivery of the pardon, he is detained in

the custody of the warden upon an order of the governor, purporting to revoke the pardon. *Re Crump*, 47: 1036, 135 Pac. 428, — *Okl. Crim. Rep.* —

HANDWRITING.

Proving will by testimony as to handwriting of attesting witnesses, see *Evidence*, 32.

HEALTH.

Pure food laws, generally, see *Food*.

HEARSAY.

See *Evidence*, 13-15.

HEIRS.

As to descent and distribution, see *Descent and Distribution*.

Title derived through deeds from heirs, see *Vendor and Purchaser*, 2.

Rule in *Shelley's Case*, see *Wills*, 4, 5.

HIGHWAYS.

Right of abutting owner to reimbursement by street railway company of highway assessment, see *Damages*, 10.

Right of abutting owner to damages for obstructing access to street, see *Eminent Domain*, 12.

Electric railway in street, as additional servitude, see *Eminent Domain*, 13.

Surplusage in indictment for obstructing highway, see *Indictment*, etc., 1.

Sufficiency of indictment charging obstruction of highway, see *Indictment*, etc., 5.

Municipal ordinance requiring railway flagman at street crossing, see *Municipal Corporations*, 3.

Municipal power over abutting owner, see *Municipal Corporations*, 4, 5.

Municipal power over gas pipes in street, see *Municipal Corporations*, 4, 5.

Liability of railroad company for frightening horse notwithstanding contributory negligence of driver, see *Negligence*, 3.

Allegations charging railway company with frightening horse, see *Pleading*, 10.

Liability of railway company for personal injuries caused by obstructing crossing, see *Railroads*, 3.

Liability of railway company for frightening horse on highway, see *Railroads*, 4-6.

Rights and title of abutting owner generally.

1. An easement only in the street vests in the public, leaving the ultimate fee in the abutting owner, under a statute providing that the acknowledgment and recording of a plat shall be held in law and in equity to be a conveyance in fee simple of the premises noted as donated to the public, and the premises intended for streets shall be held in trust for the uses and pur-
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poses intended or set forth in the plat. *Cloverdale Homes v. Cloverdale*, 47: 607, 62 So. 712, — *Ala.* —

2. An abutting property owner cannot recover damages for the doubling of a single track electric railway in the street in front of his property, because of increased danger from collision with passing cars, since this danger is common to the public generally. *Birmingham R. Light & Power Co. v. Smyer*, 47: 597, 61 So. 354, — *Ala.* —

Liability for injuries on.

3. A telephone company which has the right to maintain its line along a highway is not liable for injury caused by frightening the horse of a traveler by bright new coils of wire temporarily placed between the traveled part of the highway and the fence, to be used in stringing a new line on its poles, although they remain where placed for several days before the accident occurs. *East Tennessee Teleph. Co. v. Parsons*, 47: 1021, 159 S. W. 584, 154 Ky. 801.

HOME ECONOMICS.

See *Schools*, 1.

HOMESTEAD.

Dispossession of, by ejectment, see *supra*, 1.

1. Where the husband, without cause, abandons his family, who were residing upon the homestead, he may not maintain an action of ejectment to dispossess his wife and family of said homestead or any part thereof. *Gooch v. Gooch*, 47: 480, 133 Pac. 242, — *Okl.* —

2. By § 1, art. 12, of the Oklahoma Constitution, and § 3346, Comp. Laws 1909, the homestead of a family may consist of more than one tract of land, and may be owned by either husband or wife, or by both jointly, or one tract may be owned by one and the other tract owned by the other, so long as the aggregate number of acres occupied as a home does not exceed 160 acres. *Gooch v. Gooch*, 47: 480, 133 Pac. 242, — *Okl.* —

HOMICIDE.

Reversible error in admission of evidence, see *Appeal and Error*, 31.

Correctness of instructions in, see *Trial*, 12.

HORSES.

Liability for frightening horse on highway, see *Highways*, 3; *Negligence*, 3; *Railroads*, 4-6.

HUSBAND AND WIFE.

Measure of damages in action for personal injury to wife, see *Damages*, 3.

As to divorce or separation, see *Divorce and Separation*.

Right of wife in homestead, see *Homestead*, 1.

As to marriage, see *Marriage*.

Criminal liability of husband for desertion and nonsupport of wife, see *infra*, 5, 6.

1. A tradesman approached by a wife to furnish family necessities on credit for the first time cannot assume that she has authority to pledge her husband's credit therefor. *James McCreery & Co. v. Martin*, (N. J. Err. & App.) 47: 279, 87 Atl. 433, — N. J. —.

2. A man who furnishes his wife, with whom he is living, an allowance sufficient to purchase the necessities for the family, is not liable for goods of the general description of necessities furnished to her on credit which he has forbidden her to pledge. *James McCreery & Co. v. Martin* (N. J. Err. & App.) 47: 279, 87 Atl. 433, — N. J. —. (Annotated)

Rights of husband's creditors.

Conveyance to wife as affecting husband's creditors, see *infra*, 3.

Cross-examination of husband making conveyance to wife, see *Witnesses*, 2.

3. The contingent liability of an unleased assignor of a leasehold for rent is an existing equity within the meaning of a statute providing that a conveyance by a man to his wife shall not affect existing equities in favor of creditors of the grantor at the time of the transfer. *Sallaske v. Fletcher*, 47: 320, 132 Pac. 648, 73 Wash. 593. (Annotated)

Actions by wife.

4. The authorization of the husband to the wife is unnecessary in a suit by her for damage resulting from personal injuries to her, which damages are "recoverable by herself alone." *Shield v. F. Johnson & Son Co.* 47: 1080, 61 So. 787, 132 La. 773.

Abandonment of wife.

Territorial limitation as to criminal jurisdiction to compel husband to support wife, see *Courts*, 3, 4

Cruel and unusual punishment under statutes relating to desertion or nonsupport of wife by her husband, see *Criminal Law*, 5.

Failure to support wife as ground for divorce, see *Divorce and Separation*, 2.

Abandonment of wife as affecting homestead, see *Homestead*, 1.

Privilege of husband as witness from arrest for desertion or nonsupport of wife, see *Writ and Process*, 4.

5. Chapter 163, Kansas Laws of 1911, relating to desertion and nonsupport of a wife by husband, which authorizes the warden or official in charge of the penitentiary or reformatory to which the husband may be sentenced, to pay over to the wife a sum equal to such amount as may be allowed by law to such convict for each day's hard labor performed by him, is not unconstitutional, where there is no law by which the convict receives wages for his labor. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

6. Chapter 163, Kansas Laws of 1911, 47 L.R.A. (N.S.)

wife by husband, and providing that the court may parole or release the husband on condition that he provide periodical support for his wife, is not void as being a diversion of a fine from the support of common schools as required by the Constitution, as such payment cannot rightfully be considered a fine. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

IDENTITY.

Parol evidence to identify legatee in will, see *Evidence*, 12.

Sufficiency of evidence as to, see *Evidence*, 27.

Of logs claimed under deed, as question for jury, see *Trial*, 3.

ILLEGAL CONTRACTS.

See *Contracts*, 3-5.

ILLNESS.

As ground for dissolution of partnership, see *Partnership*.

IMPEACHMENT.

Of witness, see *Witnesses*, 3, 4.

IMPLIED COVENANTS.

In lease, see *Landlord and Tenant*, 1.

IMPROVEMENTS.

Lien for, see *Mechanics' Liens*.

IMPUTED NOTICE.

See *Notice*.

INCOMPETENT PERSON.

Annulment of marriage of, see *Marriage*.

Illness as ground for dissolution of partnership, see *Partnership*.

Competency of witnesses, see *Witnesses*, 1.

What constitutes incompetency.

As to infants, see *Infants*, 2.

The fact that a man seventy-six years of age desires to marry is not sufficient ground for the appointment of a guardian of his property. *Hogan v. Leeper*, 47: 475, 133 Pac. 190, — Okla. —.

(Annotated)

INDEMNITY.

In general, see *Insurance*.

INDICTMENT, INFORMATION, AND COMPLAINT.

Simultaneous trial upon two separate indictments, see *Criminal Law*, 1.

Prohibition to prevent trial court from entertaining plea to indictment, see *Prohibition*, 1.

Surplusage.

Surplusage in indictment for obstructing highway, see *supra*, 1.

1. Although as a general rule an indictment for a statutory offense is good if the offense is charged in the language of the statute, yet where in a prosecution

under a statute relating to the obstruction of a public road, in which the language of the statute is that "any person who shall . . . obstruct or injure any road," the word "public" being omitted, the indictment after charging the obstruction of a "road" contains further allegation showing the road to be a private one, thereby effectively negating the offense meant to be covered by the statute, the descriptive language cannot, upon demurrer, be rejected as surplusage so as to hold the indictment good. *State v. Massie*, 47: 679, 78 S. E. 382, — W. Va. —. (Annotated)

Receiving stolen property.

2. Failure of an indictment for receiving money stolen from the mails to charge the intent with which the money was received, or from whom it was concealed, or the name of the owner, is not fatal under a statute providing for a punishment of any person who shall receive or conceal any bank note, etc., knowing it to have been stolen from the mail. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

Quashing.

Finding second indictment after demurrer is sustained to first, see Grand Jury.

3. An indictment cannot be quashed because it was found upon illegal evidence. *Noll v. Dailey*, 47: 1207, 79 S. E. 668, — W. Va. —. (Annotated)

4. An indictment cannot be quashed because a former one for the same offense is pending. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

5. An indictment under § 1515a 80, W. Va. Code Supp. 1909, for obstructing a public road, which charges that the defendant obstructed "a certain road and pass way, . . . said road and pass way being lawfully owned and used by said A. S. P.," and which omits the words, "and to which road the public has a right of or is not denied the use," employed in § 1515a of the West Virginia statute defining a public road, failing to describe a public road, does not charge an offense under the statute, and should be quashed on demurrer. *State v. Massie*, 47: 679, 78 S. E. 382, — W. Va. —.

INFANTS.

Territorial limitation as to criminal jurisdiction to compel parent to support child, see Courts, 1, 2.

Negligence towards children, see Negligence, 2.

Custody.

Review of order awarding custody of minor child, see Appeal and Error, 6.

Sufficiency of evidence of surrender of custody by parent, see Evidence, 29.

1. The unfitness which will deprive a parent of the right to the custody of his minor child must be positive, and not comparative; and the mere fact that his minor child might be better cared for by a third person is not sufficient to deprive the parent of his right to its custody. *Jamison* 47 L.R.A. (N.S.)

v. Gilbert, 47: 1133, 135 Pac. 342, — Okla. —.

2. It is not sufficient, to establish the unfitness of a parent for the custody and control of his minor child, to show that he has some faults of character or bad habits: it must be shown that his condition in life or his character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at the parent's hands. *Jamison v. Gilbert*, 47: 1133, 135 Pac. 342, — Okla. —.

Contracts; disaffirmance.

3. An infant may avoid his contracts either before or after he arrives at lawful age. *Ex parte McFerren*, 47: 543, 63 So. 159, — Ala. —.

4. An infant who leases real estate under a contract by which he is to pay rent for a certain number of months, after which he is to receive a deed for the premises, and under which failure to make payments will create a forfeiture of his rights, may, in case he never takes possession of the property, and his contract is forfeited during his minority, recover the payments which he has made under the contract. *Ex parte McFerren*, 47: 543, 63 So. 159, — Ala. —. (Annotated)

INFORMATION.

For criminal offense, see Indictment, etc.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

Appeal in injunction case, see Appeal and Error, 1.

Disobedience of, as contempt, see Contempt, 3.

Revival of decree, see Judgment, 7.

As to prohibition, see Prohibition.

Cross-examination of defendant in suit to enjoin sale of property, see Writ-nesses, 2.

Injury or inconvenience to defendant.

1. An injunction will not be issued to compel the removal of the wall of a building which, owing to climatic conditions during process of construction, bulged over the division line about 2 inches, several feet above the earth, where the injury to the adjoining owner is at the time of suit trifling, and at no time can be so great that it will not be many times outweighed by the expense of moving the wall. *Coombs v. Lenox Realty Co.* 47: 1085, 88 Atl. 477, — Me. —.

Mandatory injunction.

Appeal from denial of mandatory injunction, see Appeal and Error, 1, 2.

2. Where the status intended to be preserved by prohibitory injunction is changed or disturbed by the defendant in violation of that writ, such defendant may be compelled by a mandatory injunction

issued before a trial on the merits to restore such status. *Vicksburg, S. & P. R. Co. v. Webster Sand, G. & Constr. Co.* 47: 155, 62 So. 140, 132 La. 1051.

(Annotated)

Illegal or tortious acts; crimes.

3. An injunction may issue to restrain the continued publication of the names of the signers in connection with a petition after the signers have disowned and repudiated it as having been signed under a misapprehension. *Schwartz v. Edrington*, 47: 921, 62 So. 660, — La. —.

4. Injunction lies against the pollution of a stream in such a manner as to constitute a public nuisance, although such pollution is by statute made a misdemeanor punishable by fine or imprisonment. *Com. v. Kennedy*, 47: 673, 87 Atl. 605, 240 Pa. 214.

(Annotated)

Against legal proceedings.

5. The pendency in equity of the same cause of action between the same parties will not authorize an injunction against a subsequent action at law in another state by the defendant against the plaintiff, unless it appears that the prosecution of the second suit will be inequitable and unjust. *Ambursen Hydraulic Constr. Co. v. Northern Contracting Co.* 47: 684, 78 S. E. 340, — Ga. —.

6. The fact that the defendant in an equitable action in one state procured another to be made a party and asked for and obtained from the court a protective bond from the complainant, together with the fact that the contract involved in the suit was to be performed in the state in which the equitable suit was brought, and that the witnesses by whom the breach of the contract and other relevant issues may be established are more accessible in that state, are not sufficient to authorize an injunction against a subsequent action at law in another state by the defendant against the complainant, for damages arising out of the same contracts. *Ambursen Hydraulic Constr. Co. v. Northern Contracting Co.* 47: 684, 78 S. E. 340, — Ga. —.

Against officers generally.

7. Equity will restrain a municipal corporation from proceeding under an illegal and invalid order or resolution to remove an alleged nuisance, where private rights are unlawfully encroached upon and irreparable injury will ensue. *Parker v. Fairmont*, 47: 1138, 79 S. E. 660, — W. Va. —.

INSANE PERSONS.

See *Incompetent Persons*.

INSANITY.

See *Incompetent Persons*.

INSOLVENCY.

As to bankruptcy, see *Bankruptcy*.

Of bank, see *Banks*, 1-3.

Fraudulent conveyance by insolvent, see *Fraudulent Conveyances*.

INSPECTION.

Master's duty as to, see *Master and Servant*, 9, 10.

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Servant's duty as to, see *Master and Servant*, 16, 19.

INSTRUCTIONS.

See *Trial*.

INSURABLE INTEREST.

See *Insurance*, 3.

INSURANCE.

Matters as to benevolent societies other than insurance, see *Benevolent Societies*.

Rights in proceeds of insurance of cargo for account of whom it may concern, see *Carriers*, 3.

Estoppel of divorced husband to assert title to proceeds of insurance by leaving policy in possession of wife, see *Estoppel*, 1.

Sufficiency of evidence of intention respecting beneficiary in life insurance policy, see *Evidence*, 28.

Sufficiency of complaint in action by cargo owner to recover insurance proceeds from carrier, see *Pleading*, 11.

Right and manner of doing business.

1. Undertaking to meet the expense of defending suits against physicians for civil malpractice, to the total expenditure of a specified amount, for compensation, is insurance within the meaning of a statute requiring the filing of a bond and securing authority, to be entitled to do business in the state. *Physicians' Defense Co. v. Cooper*, 47: 290, 199 Fed. 576, 118 C. C. A. 50.

(Annotated)

Validity of policy.

Validity of life insurance policy taken out in favor of paramour, see *supra*, 3.

2. An insurance policy may be made in favor of one by an adopted name. *Mutual L. Ins. Co. v. Cummings*, 47: 252, 133 Pac. 1169, — Or. —.

Insurable interest.

3. A life insurance policy taken out by a man in favor of his paramour, with whom he is illegally living as his wife, may be collected by her. *Mutual L. Ins. Co. v. Cummings*, 47: 252, 133 Pac. 1169, — Or. —.

(Annotated)

Waiver or estoppel.

Waiver of right to second appraisal, see *infra*, 6.

4. The granting of a vacancy permit by an insurance company is a complete waiver of any forfeiture of the policy by reason of previous vacancy of the insured building, and gives the policy the same binding force which it originally possessed, so that the insurance company is liable for a loss occurring while the building is still vacant and subsequent to the expiration of the vacancy permit, but within the period limited for vacancy without such permit, estimating that period from the expiration of the vacancy permit. *Caledonian Ins. Co. v. Smith*, 47: 619, 62 So. 595, — Fla. —.

(Annotated)

Appraisal of loss.

5. Upon an appraisal as required by the terms of a fire insurance policy in the event of a loss, and a disagreement as to the amount of such loss, the insured has the right, if he demands it, to introduce evidence before the appraisers as to the extent of his loss, and where he is refused permission upon demand to introduce evidence, the award is not binding upon him. *Ætna Ins. Co. v. Jester*, 47: 1191, 132 Pac. 130, — Okla. — (Annotated)

6. An insurance company, by asserting the validity of an award of appraisers, waives its right to have the loss again appraised when the first award is set aside for invalidity. *Ætna Ins. Co. v. Jester*, 47: 1191, 132 Pac. 130, — Okla. —

Risks and causes of loss or injury.

7. A felon caused by an accidental bruise upon the finger of the holder of an accident insurance policy is within the clause of the policy providing compensation for accidental injury resulting from some violent, external, and involuntary cause, leaving external and visible marks of a wound. *Robinson v. Masonic Protective Asso.* 47: 924, 88 Atl. 531, — Vt. — (Annotated)

Extent of injury.

8. Total disability ensuing within twenty-four hours after an accident, although not within the calendar day upon which it occurs, is within the operation of a provision of an accident insurance policy for indemnity for an injury which totally disables insured from "the date of the accident." *Robinson v. Masonic Protective Asso.* 47: 924, 88 Atl. 531, — Vt. —

Interest in proceeds.

9. Children who are entitled to the proceeds of a policy of insurance on their father's life in case of the death of his wife, the prior beneficiary, in his lifetime, cannot claim the proceeds in case the father dies before his wife, although she has been deprived of the right to the money by divorce proceedings. *Sea v. Conrad*, 47: 1074, 159 S. W. 622, 155 Ky. 51.

10. A paid-up life insurance policy taken by a man for the benefit of his wife is within a statute providing that upon divorce the court shall restore any property which either party may have obtained directly or indirectly from or through the other during marriage and in consideration or by reason thereof. *Sea v. Conrad*, 47: 1074, 159 S. W. 622, 155 Ky. 51.

Employers' liability insurance.

11. The holder of an employers' liability insurance policy which provides that, upon occurrence of an accident, he shall give notice thereof to the insurer immediately, and at the latest within ten days, is not required to give such notice before he himself receives it. *John B. Stevens & Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 47: 1214, 207 Fed. 757, — C. C. A. — (Annotated)

12. The cost and expenses on appeal, as well as those incurred on the trial, by the holder of an employers' liability insurance 47 L.R.A. (N.S.)

policy in defense of an action against him by an injured employee, are recoverable from the insurer in case it refuses to conduct the defense, under a provision in the policy that if any proceedings are taken to enforce a claim, the insurer shall, at its own cost, undertake the defense. *John B. Stevens & Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 47: 1214, 207 Fed. 757, — C. C. A. —

INTENT.

Sufficiency of evidence of intent, see Evidence, 28.

Allegation of intent in charging receipt of money stolen from mails, see Indictment, etc., 2.

INTEREST.

On award.

1. If payment of the amount of an award fixed by a railroad commission as compensation to a public utility corporation operating a municipal waterworks plant, for the plant, which is taken by the municipality, is delayed after the municipality has taken possession of the plant, legal interest must be provided thereon. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —

2. The consent of a public utility corporation and its receiver to the entry of a court order directing the delivery of its property to a municipality on a certain date, and the payment by the municipality of the amount of the purchase price as fixed by the railroad commission at a subsequent date, and the receipt of the award by the receiver, pending proceedings to alter and amend the order of the railroad commission, is not a waiver of all claims for interest on the award, where there was no intention on the part of either party that there should result thereby any change in their rights. *Appleton Waterworks Co. v. Railroad Commission*, 47: 770, 142 N. W. 476, — Wis. —

INTERSTATE COMMERCE.

See Commerce.

INTERURBAN RAILWAYS.

Validity of state statute abolishing fellow servant rule as to employees of, see Constitutional Law, 7.

INTERVENTION.

In garnishment proceedings, see Garnishment, 2.

INTOXICATING LIQUORS.

Abatement of cause of action on saloon keeper's bond, see Abatement and Revival, 1.

Liability on statutory liquor bond, see Bonds, 1, 2.

Municipal jurisdiction over sale of intoxicating liquors in navigable boundary river, see Boundaries.

Implied power of brewing corporation to construct saloon, see Corporations, 2.

Remedy of brewing con
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Estoppel to contest v
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Parties to suit on
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Unlawful sales.

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Effect and conclusiveness.

Pendency of one suit as abatement of another, see *Abatement and Revival*, 2.

4. An order unappealed from, compelling election as to which of two theories of a case plaintiff will adopt, and granting leave to amend and set forth more fully the theory chosen, becomes the law of the case upon the character of the complaint and the nature of the issues involved. *Zeiser v. Cohn*, 47: 186, 101 N. E. 184, 207 N. Y. 407.

5. The amount for which judgment may be entered in an action under N. D. Rev. Codes 1905, § 9390, for the recovery of amounts paid for intoxicating liquor sold in violation of the prohibition law, is not admitted by failure to answer, under § 7001, subd. 1, authorizing judgment by default without assessment of damages in an action arising on contract "for the recovery of money only," as such statute contemplates proof in all cases except where the contract by its terms makes proof of the amount of recovery, such as a promissory note or similar contract which establishes the specific amount of liability. *Naderhoff v. George Benz & Sons*, 47: 853, 141 N. W. 501, 25 N. D. 165.

Foreign judgments.

6. Where a husband residing with his family in one state abandons his family, takes up his residence in another state, and brings an action for divorce there, obtaining service by publication, the wife not being personally served and not appearing in the action and without actual notice of the pendency thereof, a decree of divorce rendered in such action cannot affect the rights that the wife and children have acquired as members of the plaintiff's family in his property located in the former state. *Gooch v. Gooch*, 47: 480, 133 Pac. 242, — Okla. — *Revival*.

7. Statutory provisions limiting the time within which a revivor of an action or judgment must be had in case of the death of one or more of the parties thereto do not include the state or apply to it, so as to prevent the enforcement of a judgment in favor of the state, perpetually enjoining the maintaining of a common nuisance under the prohibitory liquor law on certain premises, and adjudging that the attorney's fees and costs in the case be a lien thereon, after the expiration of the time limited by the statute. *State v. Dixon*, 47: 905, 135 Pac. 568, 90 Kan. 594.

(Annotated)

Relief against.

As to new trial, see *New Trial*.

Grounds for new trial, see *New Trial*.

Allowing additional time to answer on vacating default judgment, see *Pleading*, 4.

8. A judgment by default may be vacated without an affidavit of merits, where judgment was erroneously entered on default without an assessment of damages or notice to defendant in a case where such 47 L.R.A. (N.S.)

assessment and notice were required. *Naderhoff v. George Benz & Sons*, 47: 853, 141 N. W. 501, 25 N. D. 165.

9. An affidavit of merit by defendant's attorney, reciting that affiant received a copy of the pleadings served on defendant, together with information to make an answer, and from such information informed defendant that he had a good and meritorious defense, and now states the same to the court as further shown by the answer, referred to and made a part of the affidavit, is insufficient to invoke the court's discretion under N. D. Rev. Code 1905, § 6884, to vacate a regularly entered judgment of default on the ground of excusable neglect, where such affidavit fails to state that affiant has been fully and fairly informed of all the facts in the case, and believes therefrom that defendant has a meritorious defense, and no facts are recited concerning the defense except in the proposed answer, which is verified by the attorney on information and belief. *Naderhoff v. George Benz & Sons*, 47: 853, 141 N. W. 501, 25 N. D. 165.

10. A complainant in a direct proceeding to set aside a decree of divorce because of fraud and lack of jurisdiction need not submit himself to the jurisdiction of the court to pass upon the merits of the divorce action, nor show a meritorious defense to such action. *Atkinson v. Atkinson*, 47: 499, 134 Pac. 595, — Utah, —.

JUDICIAL NOTICE.

See *Evidence*, 1.

JUDICIAL SALE.

Laches as precluding relief by unsuccessful bidder, see *Limitation of Actions*, 1.

License tax on purchasers at tax sales, see *License*, 1-4.

Judgment against a nonresident, founded on substituted service of process and attachment of real estate within the state, does not give such a lien upon the property as to support a second levy of execution for deficiency in case the debtor redeems from the sale under the first one. *Herron v. Allen*, 47: 1048, 143 N. W. 283, — S. D. —.

(Annotated)

JURISDICTION.

Of appellate court, see *Appeal and Error*.

Of municipal corporation over boundary river, see *Boundaries*.

Of courts, generally, see *Courts*.

Plea to jurisdiction in criminal case, see *Criminal Law*, 4.

Equitable jurisdiction, see *Equity*.

To grant injunction, see *Injunction*.

Effect of lack of, on divorce decree, see *Judgment*, 6, 10.

JURISDICTIONAL AMOUNT.

To confer appellate jurisdiction, see *Appeal and Error*, 7.

JURY.

Setting aside verdict because juror was inadvertently given wrong name, see Appeal and Error, 39.

Prejudicial error in overruling challenge to juror, see Appeal and Error, 40.

Production of bankrupt's books before jury as infringing privilege against self-crimination, see Criminal Law, 2.

As to grand jury, see Grand Jury.

Verdict or findings of jury, see Trial.

Right to trial by.

1. The defendant in a suit to cancel a deed of trust, alleged to have been executed under duress, is not entitled to a jury trial, though the effect of the cancellation will be to restore the maker of the instrument to the control of land described in said instrument. *Hogan v. Leeper*, 47: 475, 133 Pac. 190, — Okla. —.

2. One at liberty under a suspended sentence is not entitled to a jury trial of the question whether or not he has violated the conditions of the suspension so as to be subject to punishment under the verdict against him. *State v. Everett*, 47: 848, 79 S. E. 274, — N. C. —.

JUSTICE OF THE PEACE.

Review of discretion of, see Appeal and Error, 20, 21.

LABELS.

State regulation of, as affecting interstate commerce, see Commerce, 1, 2.

Under pure food laws, see Food.

LABORERS.

In general, see Master and Servant.

LACHES.

See Limitation of Actions.

LAND CONTRACT.

See Vendor and Purchaser.

LANDLORD AND TENANT.

Assignment of error on appeal from judgment in action by landlord for recovery of possession, see Appeal and Error, 8.

Implied power of brewing corporation to rent land for saloon and boardinghouse purposes, see Corporations, 3.

Remedy under *ultra vires* lease, see Corporations, 4.

Co-operation in lease as ratification of grant by one of two cotenants, see Cotenancy, 1.

Conveyance to wife as affecting contingent liability of unreleased assignor of a lease, see Husband and Wife, 3.

Right of infant on affirmance of lease, see Infants, 4.

Ratification by landlord of agent's acts as to repairs, see Principal and Agent, 1.

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Implied covenants.

1. In the lease of a building for mercantile purposes, there is no implied warranty that it is suitable or properly adapted for the uses to which it is applied, nor that it shall continue to be suitable for the lessee's use or business, or safe from exposure to danger from the elements. *Horton v. Early*, 47: 314, 134 Pac. 436, — Okla. —.

Termination of lease.

2. A lease authorizing the landlord to terminate the tenancy in the event that he shall "tear down to rebuild the building" does not authorize a termination to enable a subsequent lessee to tear down to rebuild. *Nicolopole v. Love*, 47: 949, 39 App. D. C. 343. (Annotated)

Rights and liabilities of parties, generally.

Remedy under *ultra vires* lease, see Corporations, 4.

Right of lessee of water power to compensation for municipal pollution of stream by sewage, see Eminent Domain, 11.

Liability of landlord for failure to make repairs or for making them in unskilful manner, see *infra*, 4. 5.

3. One who lets land to another who is to erect thereon a boarding house and saloon, with the understanding that, upon the adoption of a prohibitory law, the lessor will pay the lessee the cost of the buildings, cannot defeat a recovery by refusing to take possession when the law is adopted and the property surrendered to him. *United States Brewing Co. v. Dolese & Shepard Co.* 47: 898, 102 N. E. 753, 259 Ill. 274.

Defective or dangerous premises.

4. A covenant to repair in a lease does not render the landlord liable in tort for injuries to the tenant, his family, servants, or guests, caused by defects in the premises, unless they existed at the time of the lease, were known to the landlord, and concealed from the tenant. *Anderson v. Robinson*, 47: 330, 62 So. 512, — Ala. —.

5. A lessor who, in the absence of a stipulation to repair, nevertheless, at the request of the lessee, gratuitously authorizes repairs to be made upon the leased premises, but does so in such a negligent and unskilful manner that damages therefrom result to the tenant, is liable to the latter for such loss and damage. *Horton v. Early*, 47: 314, 134 Pac. 436, — Okla. —.

LARCENY.

Abstracting and appropriating to his own use, money from a sealed letter intrusted to him to mail, renders one guilty of larceny. *State v. Ruffin*, 47: 852, 79 S. E. 417, — N. C. —. (Annotated)

LAST CLEAR CHANCE.

See Negligence, 3.

LAW.

Judicial notice of, see Evidence, 1.

LAW OF CASE.

See Judgment, 4.

LEASE.

Right of infant on disaffirmance of lease, see Infants, 4.

Rights of employees securing lease of property where employer's business is carried on, see Principal and Agent, 2, 3.

LEGAL REPRESENTATIVES.

See Executors and Administrators.

LEGISLATURE.

Validity of legislation by, generally, see Constitutional Law.

Validity of license tax on purchasers at tax sales, see License, 3, 4.

Legislative functions of city, see Municipal Corporations, 1-3.

Power of legislature over schools, see Schools, 1.

LESSEE.

In general, see Landlord and Tenant.

LESSOR.

In general, see Landlord and Tenant.

LETTERS.

Abstracting money from letter intrusted to person to mail, as larceny, see Larceny.

LEVY AND SEIZURE.

Exemption of homestead, see Homestead.

Sale unner, see Judicial Sale.

LIBEL AND SLANDER.

Privileged communications.

1. Words spoken by a defendant in the course of a trial, in response to a question of the justice as to what he wanted to prove with reference to a person not a party, and who had not been a witness in the trial, though he had been a witness in a former trial of the same action, before another justice, which words are not pertinent or material to the issue in the case on trial, nor to the question asked by the justice, are not privileged. *Dodge v. Gilman*, 47: 1098, 142 N. W. 147, 122 Minn. 177.

Actions; defenses.

Harmless error in excluding in slander suit evidence of defendant's good faith and absence of malice, see Appeal and Error, 32.

Admissibility of evidence under general denial, see Evidence, 35, 36.

Allegations as to damages in complaint, see Pleading, 6.

Privilege as defense, see *supra*, 1.

2. A newspaper cannot escape liability for libel for publishing sensationally and with descriptive particulars, that a certain person was one of those who it states was indicted for crime, if such person was not in fact the one indicted, because of the fact that it was honestly mistaken after a bona fide attempt in the exercise of reasonable care and diligence to get the facts for publication, on account of the similarity in the names of the two persons. *Sweet v. Post Pub. Co.* 47: 240, 102 N. E. 660, 215 Mass. 450. (Annotated)

LIBERTY.

Guaranty of right to, see Constitutional Law, 8.

LICENSE.

Validity of state license of commercial agency, see Commerce, 6.

Reservation of right to cut timber as license, see Deeds, 1.

Negligence as to licensees, see Negligence, 1.

Revocation of license of physician, see Physicians and Surgeons.

Liability of railroad company for injury to licensee, see Railroads, 2.

Revocation of license to cut timber, see Timber, 1, 2.

On purchasers at tax sales.

Discrimination in license tax on purchaser at tax sale, see *infra*, 4.

1. That a purchaser at a tax sale does so under agreement with the owners of the property, by which they shall have a right to redeem, does not exempt him from the license tax on persons who purchase at such sales to a specified amount. *Com. v. Hazel*, 47: 1078, 159 S. W. 673, 155 Ky. 30.

2. Taxes assessed by a county are within the operation of a statute imposing a license tax on persons who purchase to a specified amount land sold for taxes "due this commonwealth." *Com. v. Hazel*, 47: 1078, 159 S. W. 673, 155 Ky. 30.

3. The legislature may impose a tax on persons purchasing property at tax sales. *Com. v. Hazel*, 47: 1078, 159 S. W. 673, 155 Ky. 30. (Annotated)

Uniformity and equality.

4. Imposing a license tax on persons who purchase at a tax sale to the amount of \$500, without taxing those who purchase a less amount, is not an unreasonable classification. *Com. v. Hazel*, 47: 1078, 159 S. W. 673, 155 Ky. 30.

LICENSEES.

Person entering telegraph office as, see Master and Servant, 32.

LIENS.

Of trustee in bankruptcy, see Bankruptcy, 3.

Of chattel mortgage, see Chattel Mortgage.

On corporate stock, see Corporations, 8.

Of mechanics or materialmen, see Mechanics' Liens.

Subrogation to, see Subrogation.

Of vendor, see Vendor and Purchaser, 5-7.

LIEUTENANT GOVERNOR.

Right to issue pardon, see Criminal Law, 10-13.

LIFE INSURANCE.

See Insurance.

LIGHTS.

Duty of carrier to light excavation on right of way, see Carriers, 2.

Liability of railroad company for failing to light excavation, see Negligence, 1.

LIMITATION OF ACTIONS.

Error in refusing to direct verdict upon issue of limitation, see Appeal and Error, 41.

As affecting encumbrance on real property, see Vendor and Purchaser, 4.

Laches.

1. While the highest bona fide bidder at a sheriff's sale who is able to comply with his bid has a right, where his bid is wilfully disregarded by the officer offering the property for sale, to go into equity for the purpose of compelling a resale of the property, and to have the sale resumed at the point of his bid, provided he acts with reasonable promptness, such a bidder who delays for two years after the sale before bringing such suit is guilty of laches and cannot be granted relief. *Hardin v. Adair*, 47: 896, 78 S. E. 1073, — Ga. — (Annotated)

2. Persons taking an absolute grant from one cotenant of a parcel of the common property are not guilty of laches in failing to take steps to establish their rights against the nongranting cotenant, so long as his conduct indicates that he acquiesces in and ratifies the grant. *Pellow v. Arctic Iron Co.* 47: 573, 128 N. W. 918, 164 Mich. 87.

3. Where, in an action brought by the plaintiff against the devisees of his former guardian, and the heirs and devisees of the guardian's bondsmen, to charge them with liability because of the failure of the guardian to redeem certain property of his ward from a mortgage foreclosure sale, it appears that the action was bought thirty-five years after the foreclosure, and twenty years after the ward became of age, the only excuse given for the delay being that he was not apprised of his ownership of the mortgaged land or his rights under the guardianship until shortly before suit, laches is affirmatively shown, and a demurrer to the complaint is properly sustained. *Sweet v. Lowry*, 47: 451, 142 N. W. 882, 123 Minn. 13. (Annotated)

By and against whom available.

4. As a general rule, statutory limitations do not run against the state when it sues in its sovereign capacity, unless the statute expressly includes the state, or the legislative intention to include it is shown by the clearest implication. *State v. Dixon*, 47: 905, 135 Pac. 568, 90 Kan. 594. When statute runs.

5. The limitation period upon a judgment begins to run from the time of its rendition or entry, and not from the expiration of the time for review on appeal, 47 L.R.A. (N.S.)

if no appeal is in fact taken, notwithstanding a provision that an action shall be deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. *Sweetser v. Fox*, 47: 145, 134 Pac. 590, — Utah, — (Annotated)

6. It is not necessary that there should be an actual change of a party's domicile in the strict legal sense of that word, that is, an abandonment of his domicile in one state and the acquisition of a domicile elsewhere, to bring him within the meaning of a statute of limitations suspending the operation of the statute, where such person, after the cause of action accrues, "departs from and resides out of," the state. *Fidelity & Deposit Co. v. Sheahan*, 47: 309, 133 Pac. 228, — Okla. — (Annotated)

7. A railroad roadmaster with headquarters in one state, where he has a settled, fixed, and permanent abode, and who has no intention to depart therefrom, at least for a time, has departed from and resides out of another state, within the meaning of the statute of limitations of the latter state, which suspends the running of the statute as to one who, after the cause of action accrues, "departs from, and resides out of, the state," notwithstanding he may have never voted in the first-mentioned state, and his family remained in the state from which he departed. *Fidelity & Deposit Co. v. Sheahan*, 47: 309, 133 Pac. 228, — Okla. —

Interruption of statute; removal of bar.Interruption of statute by absence from state, see *supra*, 6, 7.

8. An action is commenced so as to stop the running of the statute of limitations when the writ is filled out and delivered to the proper officer, with the bona fide intent to have it served at once. *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47: 965, 135 N. W. 189, 22 N. D. 615.

9. Where actions are commenced by praecipe which merely states the form of action, and amendment may be allowed in an action charging injury by a master to his servant so as to eliminate the element of service, and charge negligent injury to one bearing no contractual relation to defendant, even though the limitation period has elapsed at the time the amendment is filed, if it had not done so when the praecipe was issued. *Philadelphia, B. & W. R. Co. v. Gatta*, 47: 932, 85 Atl. 721, — Del. — (Annotated)

LIS PENDENS.

Abatement by pendency of action. see Abatement and Revival, 2.

Pendency of equitable action as ground for injunction against legal proceedings, see Injunction, 5, 6.

LIVERY STABLES.

Liability of liveryman for injury to customer, see Master and Servant, 33.

LODGE.

Secession of subordinate lodge from benevolent society, see Benevolent Societies.

LOGS AND LOGGING.

Identity of logs claimed under deed as question for jury, see Trial, 3.
As to timber, see Timber.

LOOKOUT.

For horses on highway, see Railroads, 5.

LUMBER.

Logs and Logging, see Timber.

LUNATICS.

See Incompetent Persons.

MANDAMUS.

1. Mandamus will not lie to review the discretion of the trustees of a water district in determining to what extent the system shall be extended and who shall be supplied. *Lawrence v. Richards*, 47: 654, 88 Atl. 92, — Me. —.

Procedure.

2. Exceptions by petitioner in a mandamus proceeding are not forbidden although no writ is granted, by a statute providing that the petition may be heard by a justice, who may reserve questions upon exceptions or otherwise for the full court, but that the case shall proceed until a decision is reached and the writ ordered, so that the overruling of the exceptions shall dispose of the case, and that after the writ is granted the justice shall certify all exceptions, followed by provisions as to the time within which the excepting party and adverse party may file their arguments. *Lawrence v. Richards*, 47: 654, 88 Atl. 92, — Me. —.

MANDATORY INJUNCTION.

See Injunction, 2.

MANUAL TRAINING.

See Schools, 1.

MARRIAGE.

Divorce and separation, see Divorce and Separation.

Husband and wife generally, see Husband and Wife.

Desire of elderly person to marry as ground for appointment of guardian, see Incompetent Persons.

Annulment of marriage of incompetent persons, see Marriage.

Annulment.

Divorce and separation, see Divorce and Separation.

Mere weakness of mind is not a sufficient ground for annulment of a marriage, unless it amounts to idiocy or insanity. *Svanda v. Svanda*, 47: 666, 140 N. W. 777, 93 Neb. 404.
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MARRIED WOMEN.

In general, see Husband and Wife.

MARSHALING ASSETS.

Order of sale of parcels on foreclosure, see Mortgage, 3, 4.

MASTER AND SERVANT.

Error in excluding evidence in an action by servant against employer, see Appeal and Error, 34, 35.

Civil action for violation of penal statute forbidding assignment of claim against wage earner, see Case.

Validity of change of fellow servant rule by statute, see Constitutional Law, 4-7.

Validity of statute establishing rule of comparative negligence, see Constitutional Law, 5, 6.

Validity of statute forbidding removal of suit under Federal employers' liability act, see Constitutional Law, 9.

Right to discharge architect under building contract, see Contracts, 2.

Validity of statute forbidding assignment of claim against wage earner to evade exemption law, see Constitutional Law, 8.

Measure of damages for wrongfully discharging architect, see Damages, 1.

Measure of damages in action for personal injury or death of employee, see Damages, 2-6.

Admissibility of declarations in action for personal injury as part of *res gesta*, see Evidence, 14, 14a.

Sufficiency of evidence of master's negligence, see Evidence, 22-25.

Insurance against master's liability, see Insurance, 11, 12.

Notice of claim under fellow servant act, see Notice.

Proximate cause of injury to servant, see Proximate Cause.

Concurrent negligence of master and fellow servant as proximate cause of injury, see Proximate Cause.

Liability generally under Federal employers' liability act.

Exclusiveness of Federal employers' liability act, see Commerce, 3.

Validity of statute forbidding removal of suit under Federal employers' liability act, see Constitutional Law, 9.

Measure of damages in action under Federal employers' liability act, see Damages, 4.

Who is dependent beneficiary under Federal employers' liability act, see Death, 1.

Relevancy of evidence in action under Federal employers' liability act, see Evidence, 18, 19.

Sufficiency of evidence to sustain amount of verdict in action for death under Federal employers' liability act, see Evidence, 33.

Sufficiency of complaint in action under Federal employers' liability act, see Pleading, 9.

Removal of cause arising under Federal employers' liability act, see Removal of Causes.

Directing a verdict in action under Federal employers' liability act, see Trial, 6.

1. A member of a switching crew injured while attempting to move on a switch a tank car loaded with oil for engines running between states, as well as for his own, which is engaged in moving cars between switches and the main track where they are left and taken up by interstate trains for transportation into other states as well as to points within the state where he is located, is, although his duties are all performed in one state, employed in interstate commerce within the operation of the Federal employers' liability act. *Montgomery v. Southern P. Co.* 47: 13, 131 Pac. 507, 64 Or. 597. (Annotated)

2. An operator of a railroad pumping plant which furnishes water for interstate and cross-state engines is employed in interstate commerce while riding from his home to his work on a hand car furnished by the company for that purpose, so as to be within the operation of the Federal employers' liability act if injured by those, during that time, in charge of an interstate train. *Horton v. Oregon-Washington R. & Nav. Co.* 47: 8, 130 Pac. 897, 72 Wash. 503. (Annotated)

2a. An employee engaged in replacing a bolt in the brake beam of the tender of an engine engaged in interstate commerce, while it is on a switch track at a terminal station being prepared for the return trip, is within the protection of the Federal employers' liability act. *Baltimore & O. R. Co. v. Darr*, 47: 4, 204 Fed. 751, — C. C. A. —. (Annotated)

2b. A railroad fireman who, in accordance with his contract, is obeying an order to report at a station for transportation to relieve the crew of an interstate train, is employed in interstate commerce, and therefore the railroad company is liable under the Federal employers' liability act for his negligent killing by fellow servants also engaged in interstate commerce, while crossing the track at the station where he was ordered to report. *Lamphere v. Oregon R. & Nav. Co.* 47: 1, 196 Fed. 336, 116 C. C. A. 156. (Annotated)

Duty to warn or instruct.

Sufficiency of evidence of neglect of duty to warn employee, see Evidence, 23.

2c. A railroad company is not liable for injury to an engineer who leaps from his engine upon seeing the headlight of another engine a short distance ahead apparently on the main track, but in fact on a spur, because of failure to warn him of the existence of the spur, or because of leaving an engine standing so near the main track with headlight burning. *Stew-* 47 L.R.A. (N.S.)

art v. Nashville, C. & St. L. R. Co. 47: 327, 61 So. 73, — Ala. —. (Annotated)

Duty as to place and appliances.

Sufficiency of allegations of employer's breach of duty as to furnishing safe place, see Pleading, 8.

Sufficiency of evidence of negligent equipment of locomotive, see Evidence, 22.

Sufficiency of evidence of negligence as to coupling, see Evidence, 24.

2d. An employer who furnishes defective instrumentalities is, in the absence of wanton or intentional wrongdoing, liable to an employee only when danger would reasonably be apprehended from their use. *Hill v. Atchison, T. & S. F. R. Co.* 47: 1141, 105 Pac. 447, 81 Kan. 379.

3. If persons of ordinary caution and prudence would not, in the light of the attendant circumstances, anticipate danger in using a defective appliance, and danger was not a natural and probable consequence of such use, liability to an employee for negligence in furnishing it does not arise against the employer. *Hill v. Atchison T. & S. F. R. Co.* 47: 1141, 105 Pac. 447, 81 Kan. 379. (Annotated)

4. A master is not liable for injury to an employee engaged in sawing wood, by the fall of a pile 18 feet high, where the saw was set 20 feet from the pile, since the accident was due to an error of judgment in a mere detail of the work, and the master was not required to anticipate danger to men at work at a saw placed that distance from the pile. *Deaton v. Abrams*, 47: 266, 110 Pac. 615, 60 Wash. 1.

5. In the case of a hazardous work like driving a railroad tunnel through the mountain, an increased risk is assumed and an increased duty is imposed by law on both the master and servant, proportionate to the dangers of the place and the risks of the employment,—on the master, to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant either to assume or avoid patent and obvious dangers, and those necessarily incident to the work, and the place in which the work is being prosecuted. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

6. A trapdoor in a step in a stairway used by a servant, to be opened only for purposes of sweeping dust, waste paper, and other *débris* from the floor, and not intended to be left open and unattended by the servant so using it, is a hidden danger to a servant who is ignorant of its existence, and renders the place of work unsafe as to him. *Reilly v. Nicoll*, 47: 1199, 77 S. E. 897, — W. Va. —.

7. A railroad company which maintains a tunnel with the roof lower in the middle than at the ends is liable for the death of a brakeman who, without knowledge of the danger, is killed by coming in contact with the roof while he is on top of the car, where his duties require him to be. *Cincinnati, N. O. & T. P. R. Co. v.*

Jones, 47: 483, 192 Fed. 769, 113 C. C. A. 55. (Annotated)

8. A railroad company was not guilty of such negligence in sending out an engine with a defective tank hose located under the floor of the cab, and about 10 inches behind the engine steps, as will render it liable for injuries to a fireman, caused by slipping on the engine step when it was covered by ice formed from spray blown from the leaky hose while the engine was being run backwards, since it cannot be said that the formation of the ice on the steps from the spray borne by the wind was a consequence which, in the exercise of reasonable care and caution, ought to have been foreseen by the railroad company, and especially where it does not appear that the injured person apprehended danger to himself from the imperfect hose. *Hill v. Atchison, T. & S. F. R. Co.* 47: 1141, 105 Pac. 447, 81 Kan. 379.

Inspection.

Servant's duty as to inspection, see *infra*, 16, 19.

Instructions as to inspection, see *Trial*, 8.

9. Where the master is engaged in driving a railroad tunnel, and has a large number of men engaged in drilling, blasting, and shoveling away the rock and earth, it is the duty of the master to take reasonable precautions for the safety of the men, and to that end to have some person entrusted with the duty of examining and inspecting the place after shots have been fired, and of directing the manner and method of removing loose rock or earth from the walls and roof, and of making the place reasonably safe for the men who are to work therein. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

10. A master is under no obligation to inspect strips of lumber or sticks furnished to the operator of a lath machine to keep clear the chute carrying the sawdust from the machine. *Fordyce Lumber Co. v. Lynn*, 47: 270, 158 S. W. 501, — Ark. —.

Assumption of risk.

11. A locomotive engineer assumes the risk of determining his course of action upon misjudging ordinary and usual conditions appearing to be dangerous, but not so in fact. *Stewart v. Nashville. C. & St. L. R. Co.* 47: 327, 81 So. 73. — Ala. —.

12. Where a carpenter of experience was employed to repair a pitched roof upon a shed, and having worked thereon for two days, upon the third day, slipped on snow and ice which collected while he was working, and fell from the roof, injuring himself, the danger from the snow and ice upon the roof was as obvious to him as to his master, and by continuing at the work, he assumed the risk incident thereto. *Peterson v. American Ice Co. (N. J. Err. & App.)* 47: 144, 83 Atl. 872, 83 N. J. L. 579.

13. An experienced employee in a wood yard assumes the risk of injury from the

fall of piles of wood which are too high to be safe. *Deaton v. Abrams*, 47: 266, 110 Pac. 615, 60 Wash. 1. (Annotated)

14. One employed as trackwalker to watch the tracks of a railroad and make small repairs takes the risk of injury from trains operated in a proper and usual way, so that no recovery can be had for his death from collision with a train suddenly emerging from a cloud of steam and fog while he is engaged in tightening a bolt. *Connelley v. Pennsylvania R. Co.* 47: 867, 201 Fed. 54, 119 C. C. A. 392.

15. One operating a lath machine assumes the risk of injury from being thrown against the saws by the breaking of a stick or strip of lumber with which he undertakes to clear the chute carrying the sawdust from the machine. *Fordyce Lumber Co. v. Lynn*, 47: 270, 158 S. W. 501, — Ark. —.

16. An employee has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by his boss is safe, and he is not bound to inspect it for the purpose of discovering latent defects. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

17. A servant, in entering upon the work of driving a tunnel, does not assume the risk of injury from the master's failure to have the working place inspected and maintained in a reasonably safe condition. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

18. A servant who has complained to the master of the incompetency and carelessness of a fellow servant, and has been assured by the master that the fellow servant, being careless and incompetent, will be removed, may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer, where the danger of injury from the incompetency or negligence of his fellow laborer is not so obvious and imminent that a person of ordinary care and prudence would not incur the risk for the time reasonably necessary for the master to substitute another. *Delmore v. Kansas City Hardwood Flooring Co.* 47: 1220, 133 Pac. 151, 90 Kan. 29. (Annotated)

19. The duty is on a master engaged in running a tunnel, and not on his servant, to ascertain the safety of the place after a blast, where the servant is absolutely under the control of the boss, who directs every move that shall be made and the manner in which the work shall be done. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

20. Under the law of fellow servants, a servant is deemed to have assumed only the ordinary risks incident to the work in which he is engaged, and is not precluded from recovery for injuries resulting from extraordinary risks of which he had no knowledge, and was not warned. *Reilly v. Nicoll*, 47: 1199, 77 S. E. 897, — W. Va. —.

Contributory negligence.

Directing a verdict because of contributory negligence, see Trial, 6.

Effect of general verdict on question of servant's contributory negligence, see Trial, 14.

Servant's disobedience of rules, see *infra*, 22-24.

21. A locomotive engineer is not bound, as matter of law, to slacken his speed upon seeing a hand car on the track, with men at work near it, until he knows or has reasonable ground to believe that it will not be removed in time to let his train pass, failure to do which will be such negligence as to preclude recovery in case the track is so defective that his engine is derailed to his injury. *Chicago G. W. R. Co. v. McCormick*, 47: 18, 200 Fed. 375, 118 C. C. A. 527.

21a. The existence of a custom among switching crews in a yard to couple to standing cars whenever they interfere with the movement of cars being handled by them, without notice to persons who may be about them, or any attempt to ascertain whether other employees are in danger, does not render a member of a switching crew negligent in going between standing cars which he is attempting to move from the main track to effect a coupling, without setting signals against other crews, since the custom is illegal because involving a reckless disregard of human life. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

(Annotated)

Disobedience of rules.

Directing verdict because of servant's disobedience of rules, see Trial, 7.

22. A railroad company cannot rely upon disobedience by an employee of a rule, to avoid liability for his injury, if, with its assent, it was habitually violated, and the injured person at the time of his injury was expected by his superior officers to disregard it. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

23. A bulletin forbidding the practice of leaving cars standing on the main line without protection by proper signals is not relevant upon the question of the negligence of a member of a switching crew in failing to protect a train which he is attempting to remove from the main line while he makes an emergency coupling upon finding the regular apparatus broken. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

24. A rule requiring workmen about standing cars to protect them by signal may be found not to apply to train men who, in attempting to make couplings, are delayed by defects which they are required to remedy, where the evidence shows that it is not their custom to protect their trains under such circumstances, and that they have never been supplied with the necessary signals therefor. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

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Fellow servants and their negligence.

Assumption of fellow servant's negligence, see *supra*, 20.

25. Where the common-law doctrine of "fellow servant" has not been abrogated or modified by constitutional or statutory provisions, the master is not liable to a servant for an injury occasioned by such servant's collaborators in the performance of some mere detail of the common employment, where the performance of the thing done in no sense involved a nondelegable duty of the master. *Kreps v. Brady*, 47: 106, 133 Pac. 216, — Okla. —.

Change of rule by statute.

Validity of change of fellow servant rule by statute, see *Constitutional Law*, 4-7.

Notice of claim under fellow servant act, see *Notice*.

Liability generally, under Federal employers' liability act, see *supra*, 2b.

26. Drilling a well in search of oil and gas by one contracting with the owner of the lease does not constitute mining within the meaning of a constitutional provision abrogating the common-law fellow servant doctrine in cases of employees of mining companies. *Kreps v. Brady*, 47: 106, 133 Pac. 216, — Okla. —.

27. Under a statute making the employer liable for injury to a servant through the negligence of another servant to whose order the injured employee is bound to conform and does conform, and who is at the time acting in the place of and performing the duty of the employer, a railroad company is liable for injury to an employee who, while obeying an order of his foreman, is injured by the foreman's negligent act in the operation of the appliance upon which the order is to be carried out. *Richey v. Cleveland, C. C. & St. L. R. Co.* 47: 121, 96 N. E. 694, 176 Ind. 542.

28. Substituting new wheels for old on an engine in a repair shop of a railroad is not "connected with the use and operation" of the railway within the meaning of a statute abolishing the fellow servant rule in case of wrongs so connected, although the engines to be repaired rest on rails connected with the main track of the system, and therefore a helper injured by the starting by a fellow servant without warning, while he is in a position of danger, of an engine to move another upon which such substitution is being made, cannot hold the railroad company liable for the injury. *Slaats v. Chicago, M. & St. P. R. Co.* 47: 129, 129 N. W. 63, 149 Iowa, 735.

29. A section man engaged in track repairing, who is injured by the negligence of a fellow member of the gang, is within the protection of a statute imposing liability upon a railroad company for injuries to an employee, caused by the negligence of its agents, or the mismanagement of its engineer or other employees. *Missouri P. R. Co. v. Smith*, 47: 113, 108 Pac. 76, 82 Kan. 248.

(Annotated)

30. An injury received by a fall from a

band car is not within statute making employers liable for injuries received by employees in the operation of a railroad, since the hazard is not so peculiar as to come within a proper classification of perils for which railroads alone may be rendered liable. *Richey v. Cleveland, C. C. & St. L. R. Co.* 47: 121, 96 N. E. 694, 176 Ind. 542.

31. That a lumber company operates a railroad for the carriage of logs does not bring employees engaged exclusively in sawing logs in the loading yard, preparatory to their being placed on the cars, within the operation of a statute abolishing the fellow servant rule with respect to employees of railroad companies. *Twiddy v. Dare Lumber Co.* 47: 135, 70 S. E. 282, 154 N. C. 237.

Master's liability for acts of servant.

Change of rule by statute, see *supra*, 26-31.

32. A person who goes to a telegraph office to send a message, or to make a complaint as to the failure to deliver a message, is not a trespasser or licensee, but a customer or patron, and is entitled to treatment and protection as such. *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47: 965, 135 N. W. 189, 22 N. D. 615.

33. A liveryman is liable for injury to a customer through the act of his employee in negligently or wilfully colliding with the customer while he is returning to the stable after having assisted in preparing a rig for use a short distance therefrom. *Ryan v. Keane*, 47: 142, 98 N. E. 590, 211 Mass. 543. (Annotated)

34. A master who merely sends his servant into a field to cut and pile cornstalks is not liable for injury done to neighboring property by the servant's setting fire to the pile in order to dispose of the stalks, since the attempt to burn them is not within the scope of his employment. *Marlowe v. Bland*, 47: 1116, 69 S. E. 752, 154 N. C. 140. (Annotated)

35. The owner of an automobile is not liable for an injury caused by collision of the car with a vehicle on the highway while the car is in charge of a chauffeur who, having been directed to take it to the garage, uses it for a pleasure drive for himself and his friends. *Symington v. Sipes*, 47: 662, 88 Atl. 134, — Md. —. (Annotated)

36. The mere fact that an employee is authorized to preserve order upon the premises of his employer does not make an assault committed by him upon a patron of his employer an act done within the scope of his authority, for which his employer will be liable, when the evidence shows that the assault made was not made for the purpose of preserving order or ejecting such person from the premises in pursuance of such authority. *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47: 965, 135 N. W. 189, 22 N. D. 615.

37. A storekeeper is not liable for a wilful and intentional assault by his clerk

upon an intoxicated person, who had wandered into the store and had been annoying customers, after he had ceased doing so and was standing quietly by the stove, although it appears to have been made in connection with an attempt to eject him from the store. *Ducre v. Sparrow-Kroll Lumber Co.* 47: 959, 133 N. W. 938, 168 Mich. 49. (Annotated)

38. A railroad company which is also engaged in the business of a telegraph company is liable for an assault committed by its servant upon one who came to its office to send a telegram, on account of a complaint made by such patron over the nondelivery of an earlier telegram addressed to him, since such assault, though it may not have been committed while the servant was acting within the scope of his authority, was committed as a result of a controversy arising out of a discharge of his duties. *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 47: 965, 135 N. W. 189, 22 N. D. 615.

MATERIALITY.

Of evidence, see *Evidence*, 16-19.

MATERIALS.

Lien of materialman, see *Mechanics' Liens*.

MATURITY.

Of promissory note, see *Bills and Notes*, 2-5.

MAXIMS.

1. *Cessante ratione legis cessat ipsa lex.* *Naderhoff v. George, Benz & Sons*, 47: 853, 141 N. W. 501, 25 N. D. 165.

2. *Equality is equity.* *Carlson v. Kies*, 47: 317, 134 Pac. 808, — Wash. —.

3. *Expressio unius est exclusio alterius.* *Graeb v. State Board of Medical Examiners*, 47: 1063, 135 Pac. 776, — Colo. —.

4. *He who seeks equity must do equity.* *Atkinson v. Atkinson*, 47: 49, 134 Pac. 595, — Utah, —.

5. *Nemo debet esse iudex in propria sua causa.* *Re Rochester*, 47: 151, 101 N. E. 875, 208 N. Y. 188.

6. *Qui facit per alium, facit per se.* *Re Fowles*, 47: 227, 131 Pac. 598, 89 Kan. 430.

7. *Res ipsa loquitur.* *Callahan v. Chicago, B. & Q. R. Co.* 47: 587, 133 Pac. 687, 47 Mont. 401.

8. *Salus populi suprema lex.* *State v. Gurry*, 47: 1087, 88 Atl. 546, — Md. —.

9. *Sic utere tuo ut alienum non laedas.* *Cloverdale Homes v. Cloverdale*, 47: 607, 62 So. 712, — Ala. —.

10. *Vigilantibus non dormientibus aequitas subvenit.* *Kahn v. McConnell*, 47: 1189, 131 Pac. 682, — Okla. —.

11. *Volenti non fit injuria.* *Peterson v. American Ice Co. (N. J. Err. & App.)* 47: 144, 83 Atl. 872, 83 N. J. L. 579.

MECHANICS' LIENS.

For what work or materials.

1. An architect has a lien on a building for furnishing plans for it and superintending its construction, under a statute providing that every person performing labor upon or furnishing material for a building has a lien upon the building therefor. *Gould v. McCormick*, 47: 765, 134 Pac. 676, — Wash. —.

How waived or defeated.

Enforcement of, after foreclosure sale of property, see *infra*, 4, 5.

2. The right to a mechanics' lien is not lost by claiming an excessive amount in the notice, if it was not done wilfully or in bad faith. *Gould v. McCormick*, 47: 765, 134 Pac. 676, — Wash. —.

3. A mechanics' lien on property subject to mortgage is destroyed by sale of the property in the foreclosure proceedings under the mortgage, and the lien holder is remitted to the proceeds of the sale. *Rosenberg v. Cupersmith*, 47: 706, 87 Atl. 570, 240 Pa. 162. (Annotated)

Enforcement.

4. There is no right to judgment on a scire facias to enforce a mechanics' lien after the lien has been displaced by foreclosure of a mortgage on the property, merely to ascertain the amount of the claim. *Rosenberg v. Cupersmith*, 47: 706, 87 Atl. 570, 240 Pa. 162.

5. A mechanics' lien on mortgaged property cannot be enforced after the property is sold in foreclosure proceedings under the mortgage, although that issue is not raised in the scire facias proceedings to enforce the lien. *Rosenberg v. Cupersmith*, 47: 706, 87 Atl. 570, 240 Pa. 162.

MEDICINE.

As to physicians, see *Physicians and Surgeons*.

MENTAL ANGUISH.

Damages for, see *Damages*, 11.

MERGER.

Of corporations, see *Corporations*, 1.

MILITARY RESERVATION.

Liability on bond conditioned for proper conduct of liquor business on, see *Bonds*, 1.

Estoppel to contest validity of bond conditioned for proper conduct of liquor business on, see *Estoppel*, 2.

Unlawful sale of intoxicating liquors on, see *Intoxicating Liquors*.

MINES.

Transfer of interest by one of two cotenants, see *Cotenancy*, 1-4.

Statutory abrogation of fellow servant rule as to employees of mining company, see *Master and Servant*, 26.

MINORS.

See *Infants*.

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MISBRANDING.

State regulation of, as affecting interstate commerce, see *Commerce*, 1, 2.

Validity of Federal food and drugs act, see *Commerce*, 5.

Under pure food laws, see *Food*.

MISTAKE.

Setting aside verdict because juror was inadvertently given wrong name, see *Appeal and Error*, 39.

As defense to libel suit, see *Libel and Slander*, 2.

MORTGAGE.

Chattel mortgages, see *Chattel Mortgage*.

Power of state to require consent of public service commission to issue of railroad bonds, see *Commerce*, 4.

Control by public service commission of issue of corporate bonds, see *Public Service Commission*.

Presumption that mortgage was obtained through duress and undue influence, see *Evidence*, 3.

Sufficiency of evidence to justify cancellation of mortgage, see *Evidence*, 30.

Right to jury trial in suit to cancel, see *Jury*, 1.

Rights of employees of mortgaged business on foreclosure, see *Principal and Agent*, 3.

Verdict of jury as advisory to court in suit to cancel trust deed, see *Trial*, 3.

Release of mortgage as removal of encumbrance on real property, see *Vendor and Purchaser*, 4.

Priority.

Subrogation of vendee to lien of mortgage, see *Subrogation*.

1. Where the owner of a tract of land gave a mortgage upon it, and then conveyed it in consideration of the buyer assuming the mortgage debt and giving him a note for the rest of the purchase price, secured by a second mortgage on a part of the tract, and the buyer conveyed to a third person that part of the tract covered by the first mortgage only, the rights of one who has purchased the first mortgage as against the second mortgage are not diminished by the fact that such purchase was made at the instance and for the benefit of the owner of the tract covered only by that mortgage. *Newby v. Norton*, 47: 302, 133 Pac. 890, — Kan. —.

Enforcement; sale.

Foreclosure by junior mortgagee, see *supra*, 2.

Destruction of mechanics' lien by sale in foreclosure proceedings, see *Mechanics' Liens*, 3-5.

Tender as defeating right to declare forfeiture on default in part payment, see *Tender*.

2. The existence of a prior mortgage in excess of the value of the land does not

disentitle a junior mortgagee to a decree of foreclosure. *Kahn v. McConnell*, 47: 1189, 131 Pac. 682, — Okla. —.

Order of sale of parcels.

3. The owner of a tract of land, who gives a mortgage upon it and then conveys it in consideration of the buyer assuming the mortgage debt and giving him a note for the rest of the purchase price, secured by a second mortgage on a part of the tract, is not precluded from insisting on a marshaling of securities, by the sale of the tract which is subject only to the first mortgage to a purchaser for value, who, from the record, has notice of both mortgages, and of the assumption of the first mortgage debt by the maker of the second mortgage, although such sale is made before such right has been asserted. *Newby v. Norton*, 47: 302, 133 Pac. 890, — Kan. —.

4. The owner of a tract of land, who gives a mortgage upon it and then conveys it in consideration of the buyer assuming the mortgage debt and giving him a note for the rest of the purchase price, secured by a second mortgage on a part of the tract, is not precluded by the fact that he is personally liable for the payment of the first mortgage, from requiring a marshaling of securities, so that the parcel of land on which he has no lien shall be appropriated to the payment of the first mortgage before the remainder of the tract is resorted to for that purpose. *Newby v. Norton*, 47: 302, 133 Pac. 890, — Kan. —. (Annotated)

MOTIONS AND ORDERS.

Unappealed order as law of case, see Judgment, 4.

Motion to make pleading more definite, see Pleading, 12.

Order for service by publication, see Writ and Process, 3.

MOVING PICTURE SHOW.

Infringement of trademark by moving picture place, see Trademark.

MUNICIPAL CORPORATIONS.

Submission of question as to applicability of municipal ordinances to building constructed by school district, see Agreed Case.

Jurisdiction over navigable river, see Boundaries.

Regulations as to buildings, see Buildings.

Mandamus to municipal officers, see Mandamus, 1.

Supply of water by municipality to inhabitants, see Waters, 2.

Ordinances.

Segregating races, see Civil Rights, 2.
Injunction against enforcement of ordinance, see Injunction, 7.

1. An ordinance does not violate a charter provision requiring it to embrace but one subject by providing for the use of separate blocks by white and colored persons for residences, churches, and schools. *State v. Gurry*, 47: 1087, 88 Atl. 546, — Md. —.

2. An ordinance that it shall be unlawful for a white person to use as a residence or place of habitation any house, building, or structure, or any part of any house, building, or structure, situated or located on any block, the houses, buildings, and structures on which block, so far as the same are occupied or used as residences or for places of abode in whole or in part, shall be occupied or used as residences or places of abode by colored persons, is not unenforceable because of uncertainty, since the words, "in whole or in part," modify residences or places of abode, and not blocks. *State v. Gurry*, 47: 1087, 88 Atl. 546, — Md. —.

3. An ordinance requiring a railway company to provide a flagman at a street crossing, which purports to take effect upon publication, is in force from that time, irrespective of whether the company had actual notice, or in the exercise of reasonable diligence ought to have learned of it. *Denton v. Missouri, K. & T. R. Co.* 47: 820, 133 Pac. 558, — Kan. —.

Power as to use of streets.

4. A municipal corporation which permits gas to be furnished to some of its inhabitants through mains laid by a real estate company cannot deny the right to tap the mains to anyone who has contracted therefor with the owner of the main. *Cloverdale Homes v. Cloverdale*, 47: 607, 62 So. 712, — Ala. —.

5. A corporation organized to develop a tract of residence property not within the limits of a municipal corporation, which, having no authority to engage in the business of supplying gas, has authority to contract for a supply of gas for its patrons, and enters into a contract with a gas company to supply such patrons through mains laid by it, cannot, where the fee of the street is in abutting owners and it secures permission to lay its mains from the county authorities, be compelled to secure a public service franchise by the municipality when it is incorporated, which will compel it to supply all applicants, as a condition to permitting its patrons to open the street to tap its mains. *Cloverdale Homes v. Cloverdale*, 47: 607, 62 So. 712, — Ala. —.

(Annotated)

Power as to nuisances.

Injunction to restrain municipal regulation of nuisance, see Injunction, 7.

6. Under the provisions of a city charter that "the council shall have power to abate or cause to be abated anything which, in the opinion of the majority of the whole council, shall be a nuisance, the council may not abate something which is not a nuisance *per se*, such as a dyeworks located in the residential section of the city, and emitting coal smoke and soot. *Parker v. Fairmont*, 47: 1138, 79 S. E. 660, — W. Va. —.

7. The production and emission of smoke from the plant of a lawful business such as a dyehouse cannot be abated by a city under charter powers to abate nuisances and to prevent injury and annoy-

ance to the public or individuals from anything dangerous, offensive, or unwholesome, in the absence of a reasonable ordinance applicable alike to all of a class, making such production and emission unlawful. *Parker v. Fairmont*, 47: 1138, 79 S. E. 660, — W. Va. —.

Liability for damages.

Measure of damages for municipal pollution of stream by city, see *Damages*, 7.

Necessity of compensation for turning sewage into stream, see *Eminent Domain*, 10.

Documentary evidence in action against municipal corporation for interfering with flow of water, see *Evidence*, 10.

Who must be compensated for municipal pollution of stream by sewage, see *Eminent Domain*, 11.

8. A municipal corporation which is given statutory authority over its roads and bridges, and to clean out and repair the waterways under its charge, is not liable for injury to a mill owner who, under statutory authority, places a dam across a stream within its limits which had been declared by statute to be a public highway, by restoring an old channel of the river which had become filled with *débris* in such a manner as to cast the current through a new channel against and threaten to undermine a bridge abutment, the effect of which restoration is to interfere with the flow in the tailrace and set back the water on the wheels. *Chase-Hibbard Milling Co. v. Elmira*, 47: 470, 101 N. E. 158, 207 N. Y. 460. (Annotated)

MUTUAL BENEFIT SOCIETIES.

See *Benevolent Societies*.

NAME.

Setting aside verdict because juror was inadvertently given wrong name, see *Appeal and Error*, 39.

Adopted name of beneficiary in insurance policy, see *Insurance*, 2.

NAVIGABLE WATERS.

Jurisdiction of municipal corporation over navigable boundary river, see *Boundaries*.

NECESSARIES.

Husband's liability for, see *Husband and Wife*, 1, 2.

NEGLIGENCE.

Of carrier toward passengers, see *Carriers*, 1.

Measure of damages in actions for personal injuries, see *Damages*, 2, 3.

Matters peculiar to action for death, see *Death*.

In sale of drugs, see *Drugs and Druggists*.

Relevancy of evidence of contributory negligence, see *Evidence*, 16.

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Admissibility of evidence under answer in action by hirer of taxicab for injuries, see *Evidence*, 34.

As to defects in highway, see *Highways*, 3.

Joint liability in case of concurrent negligence, see *Joint Creditors and Debtors*.

Of master or servant, see *Master and Servant*.

New trial in action for personal injuries, see *New Trial*, 2.

Proximate cause of injury by, see *Proximate Cause*.

Of railroad, see *Railroads*.

Violation of criminal statute as negligence, see *Railroads*, 3.

Imputing driver's negligence to passenger, see *Railroads*, 8.

Question for jury as to, see *Trial*, 1.

Directing verdict because of contributory negligence, see *Trial*, 6.

Direction of verdict in action for personal injuries, see *Trial*, 5-7.

Instructions in action for personal injuries, see *Trial*, 8, 9.

Dangerous premises; excavations.

Duty of carrier to light or guard excavation on right of way, see *Carriers*, 2.

Liability of landlord arising out of condition of premises, see *Landlord and Tenant*, 4, 5.

Liability of railroad for injuries to persons on, or near, railroad track, see *Railroads*.

1. A railroad company is under no obligation to light and guard an excavation near a path which it has permitted the public to use along its right of way for many years, if the excavation is far enough from the path to enable persons using it to do so with perfect safety so long as they remain in it. *Louisville & N. R. Co. v. Hobbs*, 47: 1149, 159 S. W. 682, 155 Ky. 130.

Dangerous attractions.

2. A railroad company which has created a shallow lake in a woods near a town by damming a water course is not, although it is charged with notice that children resort there to play, liable for the death of a child who, while wading in the lake, steps into a deep hole, and is drowned. *Thompson v. Illinois C. R. Co.* 47: 1101, 63 So. 185, — Miss. —. (Annotated)

Last clear chance.

Application of doctrine of last clear chance to joint tortfeasors, see *Joint Creditors and Debtors*.

3. Although one in charge of a team of horses is negligent in driving them near a railroad track, with knowledge that a train is approaching and that they will be frightened by it, he is not precluded from holding the railroad company liable for an injury resulting from their fright if those in charge of the train discovered the peril in time to have avoided the injury, and failed to make any effort to do so. *Louisville & N. R. Co. v. Johnson*, 47: 918, 159 S. W. 685, 155 Ky. 155.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

Discrimination against negroes, see Civil Rights.

Municipal ordinance for segregation of races, see Municipal Corporations, 1, 2.

NEWSPAPER.

Injunction to restrain publication of names of signers of petition, see Injunction, 3.

Liability for libel, see Libel and Slander, 2.

NEW TRIAL.

Review of discretion in ruling on motion for, see Appeal and Error, 23.

Waiver of objection by claim on motion for, see Appeal and Error, 25.

Setting aside verdict upon preponderance of evidence, see Trial, 4.

Setting aside verdict upon negative testimony, see Trial, 5.

Newly discovered evidence.

1. A new trial will not be granted for newly discovered evidence merely because new counsel believes that evidence of a fact may be material, if the original counsel had full knowledge of the facts from the beginning of the controversy. *Herron v. Allen*, 47: 1048, 143 N. W. 283. — S. D. — Practice.

2. The refusal of the trial court to allow the defendant in an action for personal injury to cross-examine the plaintiff upon the question of his intoxication at the time of the injury may be urged as a ground for a new trial, without a showing as to what answer the plaintiff would have returned if the rejected inquiries had been permitted, notwithstanding a statute which requires that where the ground of a motion for a new trial is error in the exclusion of evidence, such evidence shall be produced at the hearing of the motion. *McIntosh v. Standard Oil Co.* 47: 730, 131 Pac. 151, 89 Kan. 289.

Granting new trial of some issues.

3. A special finding that the defendant is not guilty of one of several acts of negligence charged against him, which is not affected by any erroneous ruling, may be treated as a final determination of that question, notwithstanding a new trial is granted upon other issues. *Denton v. Missouri, K. & T. R. Co.* 47: 820, 133 Pac. 558, — Kan. —.

NONRESIDENTS.

Criminal jurisdiction over, see Courts, 1-4.

Jurisdiction of divorce suit by or against, see Divorce and Separation, 1.

Running of limitation in favor of, see Limitation of Actions, 6, 7.

NOTES.

In general, see Bills and Notes.
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NOTICE.

Notice to railway company of proposed order of corporation commission, see Corporation Commission, 2.

To purchaser of corporate stock, see Corporations, 7.

Of fraud in conveyance, see Fraudulent Conveyances, 2.

Of accident covered by employers' liability insurance, see Insurance, 11.

As condition to entry of judgment by default, see Judgment, 2.

Excessive claim in, as defeating mechanics' liens, see Mechanics' Liens, 2.

Liability of railway company for frightening horse, see Railroads, 4-6.

Imputed.

Notice of injury and claim for damages, required by the Kansas fellow-servant act, mailed to an assistant claim agent of the railroad company, whose duty it is to examine and act upon such claims, and who receives the notice, and makes such examination in pursuance thereof, is notice to the company, although he is not designated in the act as an agent upon whom service may be made. *Missouri P. R. Co. v. Smith*, 47: 113, 108 Pac. 76, 82 Kan. 248.

NUISANCES.

Private action for abatement of, see Highways, 2.

Injunction against pollution of stream, see Injunction, 4.

Injunction against public nuisance which is also misdemeanor, see Injunction, 4.

Injunction to restrain municipal regulation of nuisance, see Injunction, 7.

Municipal ordinance as to smoke, see Municipal Corporations, 6, 7.

Pollution of a stream the title to the bed of which is in the riparian owners is a public nuisance, where the legislature has made it a misdemeanor to pollute any of the waters of the state. *Com. v. Kennedy*, 47: 673, 87 Atl. 605, 240 Pa. 214.

NUNC PRO TUNC.

Entry of judgment, see Judgment, 3.

OATH.

Verification of pleading, see Pleading, 1.

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 9-13.

OBSTRUCTING JUSTICE.

A stranger to a writ of attachment under which personal property is seized and delivered to a custodian, who claims to own the property, and makes demand for it upon the custodian prior to serving papers in a writ of replevin begun by him, is not guilty of obstructing the execution of process, whatever his motives may have been, where

he employs no deceit, and the property is voluntarily delivered to him in response to his demand. *State v. Tannyhill*, 47: 1146, 135 Pac. 674, 90 Kan. 598. (Annotated)

OCCUPANCY.

Waiver of forfeiture of insurance because of vacancy, see Insurance, 4.

OFFICERS.

Obstructing execution of process, see Obstructing Justice.

Injunction against, see Injunction, 7. Matters as to judges, see Judges.

OPINIONS.

Weight of, see Evidence, 20.

ORDINANCES.

In general, see Municipal Corporations, 1-3.

PACKAGE.

What constitutes under pure food laws, see Food.

PARAMOUR.

Insurable interest of paramour, see Insurance, 3.

PARDON.

In general, see Criminal Law, 10-13.

Sufficiency of identification of person named in pardon, see Evidence, 27.

Review of validity of pardon on habeas corpus, see Habeas Corpus.

Parole of husband on condition to support his abandoned wife, see Husband and Wife, 6.

Effect of, on competency of witness, see Witnesses, 1.

PARENT AND CHILD.

Territorial limitation as to criminal jurisdiction to compel parent to support child, see Courts, 1, 2.

Measure of damages in action for death of child, see Damages, 4.

Relevancy of evidence in action for death of child, see Evidence, 18.

Sufficiency of evidence of surrender by parent of custody of child, see Evidence, 29.

Sufficiency of evidence to sustain amount of verdict in action for death of child, see Evidence, 33.

Matters as to infants, generally, see Infants.

PARTIES.

Action on behalf of decedent's estate generally, see Executors and Administrators, 2, 3.

Intervention in garnishment proceedings, see Garnishment, 2.

Private action by abutting owner for improper use of street, see Highways, 2.

Action by wife for personal injuries, see Husband and Wife, 4.

Amendment of pleading as to parties, see Pleading, 3.

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In replevin suit, see Replevin, 2.

In suit to prevent dissipation of funds of public charity, see State.

Under a statute making the sureties on a saloon keeper's bond liable for any damage caused by a breach of the conditions thereof in any and all cases where the principal upon such bond may be liable, and providing further that any person who shall be injured by the intoxication of any person shall have a right of action in his or her own name against any person who shall have caused the intoxication by illegally selling intoxicating liquor, an action may be maintained on a saloon keeper's bond by a private party in his own name, notwithstanding the bond is required to be executed to the state. *Koski v. Pakkala*, 47: 183, 141 N. W. 793, 121 Minn. 450.

PARTITION.

Charging interest of cotenant in partition proceedings, see Cotenancy, 3.

PARTNERSHIP.

Amendment of pleading by striking out name of deceased partner, see Pleading, 3.

Dissolution.

Entering decree of dissolution *non pro tunc*, see Judgment, 3.

1. An attempt by one partner to exclude the other from participation in the affairs of the partnership is no defense to a dissolution of the concern because of the incapacity, through ill health, of the latter to perform his duties to the partnership. *Barclay v. Barrie*, 47: 839, 102 N. E. 602, 209 N. Y. 40.

2. That a partner who became incapacitated by ill health from performing the duties of the partnership had undertaken for a small extra percentage of the profit to perform the other partner's share of such duties does not show that the work of the partnership was of such slight importance that the partnership should not be dissolved because of his incapacity. *Barclay v. Barrie*, 47: 839, 102 N. E. 602, 209 N. Y. 40.

3. Incapacity, by reason of a stroke of paralysis, of a partner, for a period of three years and eleven months out of a partnership period of four years and eleven months, to attend to the duties of the partnership, is ground for dissolution at the suit of the other partner, although there has been a progressive recovery, and it is found that he will be practically restored to health by the expiration of the contract period of the partnership. *Barclay v. Barrie*, 47: 839, 102 N. E. 602, 209 N. Y. 40. (Annotated)

PASSENGERS.

Who are, see Carriers, 1.

PATENT MEDICINE.

See Drugs and Druggists.

PAYMENT.

Of costs, as satisfaction of criminal sentence, see Criminal Law, 7.

Place of tender of, see Tender.

Failure of the holder of a note payable at any bank in a specified city, to designate a place of payment upon request, entitles the maker to select the bank where he will make tender, and notify the holder of his choice. *Stansbury v. Embrey*, 47: 980, 158 S. W. 901, — Tenn. —.

PENALTIES.

The holder and owner of a sewer warrant issued pursuant to § 990, Comp. Laws of Oklahoma 1909, is not entitled to a penalty collected thereon by the municipality from the one assessed for the sewer for failure to pay the same at maturity. *Seymour v. Oklahoma City*, 47: 702, 134 Pac. 45, — Okla. —. (Annotated)

PENDENCY.

Of action to abate suit, see Abatement and Revival, 2.

PERSONAL INJURIES.

Measure of damages in actions for, see Damages, 2, 3.

Relevancy of evidence of contributory negligence, see Evidence, 16.

In highway, see Highways, 3.

Insurance against liability to employee for, see Insurance, 11, 12.

Landlord's liability for, see Landlord and Tenant, 4, 5.

To employee, generally, see Master and Servant.

New trial in action for, see New Trial, 2.

Proximate cause of, see Proximate Cause.

Liability of railroad for, generally, see Railroads.

Direction of verdict in action for, see Trial, 5-7.

Instructions in action for, see Trial, 8, 9.

PERSONAL PROPERTY.

Mortgage on, see Chattel Mortgage.

Sale of, see Sale.

PETITION.

Right to petition, see Constitutional Law, 10.

Publication of names of signers of petition as contempt of injunction decree, see Contempt, 3.

Injunction to restrain publication of names of signers of petition, see Injunction, 3.

PHARMACISTS.

See Drugs and Druggists.

PHOTOGRAPH.

Mental anguish as element of damages in case of loss of undeveloped films, see Damages, 11.

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PHYSICIANS AND SURGEONS.

Insurance against malpractice, see Insurance, 1.

Since there is no such thing as a manifestly incurable disease, the legislature cannot authorize the revocation of the license of a physician for obtaining a fee "on the representation that a manifestly incurable disease can be cured." *Gracv v. State Bd. of Medical Examiners*, 47: 1063, — Pac. —, — Colo. —.

PLACE.

Place of trial, see Venue.

PLEADING.

In criminal cases, see Criminal Law.

Evidence admissible under pleading, see Evidence, 34-36.

Finding second indictment after demurrer is sustained to first, see Grand Jury.

In criminal prosecution, see Indictment, etc.

Affidavit of merits on motion to vacate judgment, see Judgment, 8, 9.

Verification.

1. A plea to the jurisdiction is not receivable unless proved or positively verified. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

Amendment.

Review of discretion in ruling on right to file amended pleading, see Appeal and Error, 20-22.

Amendment of pleadings as affecting limitation of actions, see Limitation of Actions, 9.

2. Under the rule that pleadings may be amended to conform to the proof, amendment of a complaint should not be permitted merely to state a cause of action, where there is no evidence to sustain the amendment. *Illinois C. R. Co. v. Doherty*, 47: 31, 155 S. W. 1119, 153 Ky. 363.

3. In an action upon a judgment recovered by members of a partnership, the names of deceased partners may be stricken out on motion of plaintiffs. *Sweetser v. Fox*, 47: 145, 134 Pac. 590, — Utah. —.

4. Additional time to answer will be given on vacating a judgment improperly entered by default without assessment of damages, on notice to defendant, in a case where such assessment and notice were required, where the failure to answer was due to the inadvertence and mistake of defendant's attorney. *Naderhoff v. George Benz & Sons*, 47: 853, 141 N. W. 501, 25 N. D. 165.

5. Pendency of a motion by defendant to require security for costs from a non-resident plaintiff, which is undisposed of at the expiration of the thirty days allowed by N. D. Codes 1905, § 6853, for answering or demurring, does not of itself extend the time allowed for answering or demurring, as the right to such security ceases on the expiration of the time to answer, without answer or demurrer. *Naderhoff v. George*

Benz & Sons, 47: 853, 141 N. W. 501, 25 N. D. 165. (Annotated)

Declaration or complaint.

Stating cause of action for inducing suicide, see Case, 2.

Complaint showing laches, see Limitation of Actions, 3.

6. Allegations in a complaint for libel of loss of business and injury to feelings and reputation will support a recovery of damages for mental suffering and distress and illness suffered in consequence of the libel, for loss of reputation in plaintiff's profession, and loss and withdrawal of business. Sweet v. Post Pub. Co. 47: 240, 102 N. E. 660, 215 Mass. 450.

7. A complaint in an action against the payee of a promissory note, by one who had purchased the note, which, after alleging the execution and delivery of the instrument to the payee, alleges that the payee "sold and delivered for a valuable consideration the above-described promissory note to the plaintiff herein; that by such sale and delivery the said defendant warranted and agreed with this plaintiff that the aforesaid note was genuine and forceful and binding upon all parties thereto, and that he had no knowledge of any fact which would tend to prove it (the said note) worthless," and then alleges prior satisfaction of the note, states a cause of action against the payee as vendor or warrantor, but not as indorser. McAdams v. Grand Forks Mercantile Co. 47: 246, 140 N. W. 725, 24 N. D. 645.

8. The issue of negligence in an employer in failing to exercise due care to provide for his employee a safe place in which to work may be presented by allegations of specific acts or omissions, without, in so many words, referring to the safety of the working place. McIntosh v. Standard Oil Co. 47: 730, 131 Pac. 151, 89 Kan. 289.

9. A complaint is insufficient to state a cause of action under the Federal employers' liability act, for the death of an employee, if it fails to show that decedent left surviving him any one of the beneficiaries named in that act, in whose behalf a recovery can be had. Illinois C. R. Co. v. Doherty, 47: 31, 155 S. W. 1119, 153 Ky. 363.

10. A petition to hold a railroad company liable for frightening a horse to the injury of plaintiff, which alleges that those in charge of an engine, after discovering the frightened condition of the horse and the peril of plaintiff, negligently continued to operate the train, moving it up to and past the horse, is sufficient without setting out the evidence upon which liability depends. Louisville & N. R. Co. v. Johnson, 47: 918, 159 S. W. 685, 155 Ky. 155.

11. The complaint in an action by owners of cargo against the carrier, to recover insurance taken out on account of whom it may concern, and collected by him, need not allege a contract or agreement that he should procure the insurance, or that they would pay the premium; nor is it necessary to allege that the proceeds of the policy were not absorbed by the carrier's individual loss. Symmers v. Carroll, 47: 196, 101 N. E. 698, 207 N. Y. 632.

Demurrer.

Harmless error in sustaining demurrer to good count, see Appeal and Error, 30.

12. Motion to make more definite, and not demurrer, is the proper remedy where a cause of action is defectively stated in the complaint. McLaughlin v. Hope, 47: 137, 155 S. W. 910, — Ark. —.

PONDS.

As dangerous attractions, see Negligence, 2.

POSTOFFICE.

Admissibility of declarations of one accused of receiving money stolen from the mail, see Evidence, 13.

Indictment for receiving money stolen from mails, see Indictment, etc., 2.

PRÆCIPLE.

As commencement of action, see Limitation of Actions, 9.

PREFERENCES.

Avoiding prior transfers or preferences, see Bankruptcy, 2, 3.

PREJUDICIAL ERROR.

See Appeal and Error, 28-42.

PRESS.

Freedom of, see Constitutional Law, 10.

PRESUMPTIONS.

On appeal, see Appeal and Error, 15-17.

See Evidence, 2-5, 7, 9.

PRICES.

Controlling prices at which corporate securities shall be marketed, see Public Service Commission.

PRINCIPAL AND AGENT.

As to brokers, see Brokers.

Notice to agent as notice to principal, see Notice.

Matters as to partnership, see Partnership.

Ratification of agent's acts.

1. A landlord who instructs his agent to do the best he can with reference to a complaint of the tenant as to repair of the leased premises, and who subsequently directs the payment of the cost of the repairs made by the agent, thereby ratifies and approves the act of his agent. Horton v. Early, 47: 314, 134 Pac. 436, — Okla. —.

Rights and liabilities of agent.

Compensation of real estate broker, see Brokers, 1, 2.

2. An employee of a mortgaged business, who secures a lease of the property on which the business is conducted, is, upon being compelled to turn the lease over to the purchasers at the foreclosure sale, entitled to the rent which he has paid under

the lease, but not to arrears which he paid on behalf of his employer. *Essex Trust Co. v. Enwright*, 47: 567, 102 N. E. 441, 214 Mass. 507.

3. A newspaper employee cannot, upon learning in the course of, or by reason of, his employment, that the premises on which the paper is published are of peculiar value to the business, secure without his employer's knowledge the leasehold himself, and hold it as his own, to the injury of the employer. *Essex Trust Co. v. Enwright*, 47: 567, 102 N. E. 441, 214 Mass. 507.

(Annotated)

4. One who negotiates with a broker for the sale of stock of a corporation of which he owns a part, who is sued as agent and trustee for the stockholders for the broker's commissions, and gives his individual bond to release collaterals for purchase money which has been impounded to secure payment to the broker, cannot defeat liability for the commissions, on the ground that he was merely an agent for undisclosed principals. *Siler v. Perkins*, 47: 232, 149 S. W. 1080, 126 Tenn. 380.

5. One who negotiates with a broker to sell the stock of a corporation of which he is part owner, without disclosing the names of the co-owners whom he states to exist, cannot, while sharing in the benefit of the broker's services, avoid liability for the commissions, on the theory that he was merely agent for a disclosed principal. *Siler v. Perkins*, 47: 232, 149 S. W. 1080, 126 Tenn. 380.

(Annotated)

PRINCIPAL AND SURETY.

As to bonds, generally, see Bonds.

Release of surety.

1. The sureties on a saloon keeper's bond given under a statute requiring a bond conditioned for the faithful observance of all laws regulating the sale of intoxicating liquors, and providing that the surety on such a bond shall be liable for any damage caused by a breach thereof in all cases where the principal shall be liable, are not relieved of liability by the death of the saloon keeper, to a widow of one who was killed by a person to whom the saloon keeper had unlawfully sold intoxicating liquor. *Koski v. Pakkala*, 47: 183, 141 N. W. 793, 121 Minn. 450.

2. The granting of an extension of time to a corporation on a corporate note signed by the corporation and some of the principal stockholders, who are also directors, as sureties, does not release the stockholders from liability as sureties although they do not consent thereto, unless it is shown that some injury resulted to them thereby. *First Nat. Bank v. Livermore*, 47: 274, 133 Pac. 734, — Kan. —. (Annotated)

PRIORITY.

Of chattel mortgage, see Chattel Mortgage.

Between garnishing and other creditors, see Garnishment, 1.

As between mortgages, see Mortgage, 1. 47 L.R.A. (N.S.)

PRIVATE ACTION.

For violation of penal statute, see Case.

Of abutting owner, see Highways, 2.

PRIVILEGE.

Of exemption of witness from arrest, see Writ and Process, 4.

PRIVILEGED COMMUNICATIONS.

In libel suit, see Libel and Slander, 1.

PROBATE.

Title derived through deeds from heirs of decedent whose estate was not probated, see Vendor and Purchaser, 2.

Of will, see Wills, 1-3.

PROCESS.

See Writ and Process.

PROHIBITION.

1. Prohibition lies to prevent a trial court from entertaining a plea to an indictment, challenging the legality or sufficiency of the evidence on which it was found. *Noll v. Dailey*, 47: 1207, 79 S. E. 668, — W. Va. —.

2. A receiver cannot ordinarily take into custody property found in possession of a stranger to the record, claiming title, but where such stranger intervenes in the receivership proceedings, and submits his rights to the court for adjudication, he is not entitled to a writ of prohibition to restrain the court from determining those rights. *State ex rel. Parsons Min. Co. v. McClure*, 47: 744, 133 Pac. 1063, — N. M. —. (Annotated)

PROMISSORY NOTE.

See Bills and Notes.

PROPERTY.

Guaranty of right to property, see Constitutional Law, 8, 9.

PROXIMATE CAUSE.

Presumption as to, see Evidence, 4.

Of injury to servant.

The proximate cause of an injury to a servant hurt by stepping into a trapdoor in a step in a stairway, while left open by another servant, is the concurrent negligence of the servant leaving it open and the master, for which the latter is liable. *Reilly v. Nicoll*, 47: 1199, 77 S. E. 897, — W. Va. —.

PUBLICATION.

Injunction to restrain publication of names of signers of petition, see Injunction, 3.

Service by, see Writ and Process, 2, 3.

PUBLIC CHARITIES.

See Charities.

PUBLIC CORPORATIONS.

See Municipal Corporations.

PUBLIC IMPROVEMENTS.

Right of abutting owner to reimbursement by street railway company of highway assessment, see Damages, 10.

Right of holder of sewer warrant to penalty collected thereon, see Penalty.

PUBLIC NUISANCE.

See Nuisance.

PUBLIC POLICY.

As affecting validity of contract, see Contracts, 3-5.

As affecting validity of life insurance policy, see Insurance, 3.

PUBLIC SERVICE COMMISSION.

Power of state to require consent of, to issue of railroad bonds, see Commerce 4.

1. Power cannot be conferred upon a public service commission to fix the price at which securities of a public service corporation shall be placed on the market. *Laird v. Baltimore & O. R. Co.* 47: 1167, 88 Atl. 348, — Md. — (Annotated)

2. In the absence of fraud, a railroad company whose charter confers upon it the power to determine its aggregate capitalization and bond indebtedness cannot be required to obtain the consent of a public service commission to issue bonds to refund outstanding indebtedness and improve transportation facilities. *Laird v. Baltimore & O. R. Co.* 47: 1167, 88 Atl. 348, — Md. —

PUBLIC SERVICE CORPORATIONS.

Issue of securities, see Public Service Commission.

PUBLIC UTILITIES.

Power of state to require consent of public service commission to issue of railroad bonds, see Commerce, 4.

Right to compensation for indeterminate permit upon municipal purchase of property of public utility company, see Damages, 8.

Issue of securities by public service corporation, see Public Service Commission.

PURCHASE MONEY.

Lien for, see Vendor and Purchaser, 5-7.

PURE FOOD LAW.

See Commerce, 1. 2.

Validity of Federal food and drugs act, see Commerce, 5.

Construction of, see Food.

QUASHING.

Of indictment, see Indictments, etc., 3-5.

QUO WARRANTO.

Venue of transitory action in nature of, see Venue.

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RACE SEGREGATION.

Municipal ordinance for segregation of races, see Municipal Corporations, 1. 2.

See also Civil Rights.

RAILROADS.

As carriers, see Carriers.

Power of state to require consent of public service commission to issue of railroad bonds, see Commerce, 4.

Validity of change of fellow-servant rule as to railway employees, see Constitutional Law, 4-7.

Notice to railway company of proposed order of corporation commission, see Corporation Commission, 2.

Admissibility of station agent's report as to cause of fire, see Evidence, 15.

Injury to employee, see Master and Servant.

Respective duty of master and servant in hazardous work like driving railroad tunnel, see Master and Servant, 5.

Liability of, generally, under Federal employers' liability act, see Master and Servant, 1-2b.

Servant's assumption of risk, see Master and Servant, 11, 14, 17.

Disobedience of rules by employee, see Master and Servant, 22-24.

Liability of railroad company for assault committed by servant, see Master and Servant, 38.

Municipal ordinance requiring flagman at street crossing, see Municipal Corporations, 3.

Liability for unlighted and unguarded excavations, see Negligence, 1.

Liability for maintaining dangerous attractions, see Negligence, 2.

Control by public service commission of issue of railway bonds, see Public Service Commission.

Injury to persons on or near track.

1. One does not become a trespasser in using a long-used path along a railroad track by the presence thereon of "no trespass" signs, if they have been so generally disregarded as to raise a presumption of acquiescence on the part of the railroad company. *Great Northern R. Co. v. Thompson*, 47: 506, 199 Fed. 395, 118 C. C. A. 79.

2. A railroad company which has permitted the use of its tracks by pedestrians between two points cannot relieve itself from the obligation to use reasonable care in handling its trains there by merely posting "no trespass" signs along the tracks. *Great Northern R. Co. v. Thompson*. 47: 506, 199 Fed. 395, 118 C. C. A. 79.

(Annotated)

Accidents at crossings.

3. The violation by a railway company of a statute enacted to prevent obstructions to travel, making it a misdemeanor to allow cars to stand upon a street crossing for more than ten minutes at a time in

such a way as to reduce the opening in the traveled part of the street to less than 30 feet, does not necessarily constitute negligence for the purposes of an action for personal injuries in which the plaintiff relies upon the fact that the position of the cars, by obscuring his view of the track, prevented his seeing an approaching engine in time to avoid a collision. *Denton v. Missouri, K. & T. R. Co.* 47: 820, 133 Pac. 558, — Kan. — (Annotated)

Noises; frightening animals.

Liability for frightening horse notwithstanding contributory negligence of driver, see Negligence, 3.

Allegations charging railway company with frightening horse, see Pleading, 10.

4. A railroad company running a train parallel to a highway, whose employees discover that a horse has been frightened by the train, and know or have reason to know that the driver is in peril, is liable for the resulting injury if they fail to use reasonable care with the means at hand to prevent injury to him. *Louisville & N. R. Co. v. Johnson*, 47: 918, 159 S. W. 685, 155 Ky. 155.

5. Those in charge of a train running parallel with a highway are not bound to keep a lookout for frightened horses on the highway. *Louisville & N. R. Co. v. Johnson*, 47: 918, 159 S. W. 685, 155 Ky. 155.

6. Those in charge of a railroad train running parallel with a highway, who see a team on the highway ahead of the train, have a right to presume that the team is ordinarily gentle, until they know or have reason to know the contrary, and to act upon that presumption. *Louisville & N. R. Co. v. Johnson*, 47: 918, 159 S. W. 685, 155 Ky. 155.

Injuries to animals by train.

Lookout for frightening horses, see *supra*, 5.

Presumption as to proximate cause of injury to animals on track, see Evidence, 4.

7. A railroad company is bound to give warning signals when a train approaches turkeys feeding on and along the track. *Lewis v. Norfolk S. R. Co.* 47: 1125, 79 S. E. 283, — N. C. — (Annotated)

Contributory negligence.

8. Where a woman is injured through the negligence of a railway company, she is not precluded from recovery by the fact that a contributing cause of her injury was the failure of her husband to exercise due care in the management of the automobile in which they were riding. *Denton v. Missouri, K. & T. R. Co.* 47: 820, 133 Pac. 558, — Kan. —

Diversion or obstruction of water.

Use of water by railroad company, see Waters, 1.

9. A railroad company is not liable in trespass for injuries to an abutting farm by water from a mountain stream which emptied into an abandoned canal, the bed of which was narrowed by the construction

of the railroad embankment, so that it was not sufficient to carry the water of a freshet, which consequently tore out a portion of the embankment and overflowed the adjoining land, to its injury, where there was nothing to show that the result was one which must necessarily have ensued from the construction of the embankment. *Gordon v. Ellenville & K. R. Co.* 47: 462, 88 N. E. 14, 195 N. Y. 137.

RATIFICATION.

Of agent's acts, see Principal and Agent, 1.

Of transfer of interest by one of two cotenants, see Cotenancy, 1, 4.

REAL PROPERTY.

Interest of cotenant, see Cotenancy.

Deed of, see Deeds.

Matters as to landlord and tenant, see Landlord and Tenant.

Mortgage on, see Mortgage.

As to timber on, see Timber.

Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

RECEIVERS.

Preference of special deposit in insolvent bank in hands of receiver, see Banks, 3.

Prohibition to restrain court from determining certain issues in receivership proceedings, see Prohibition, 2.

Service of process on station agent of railroad in hands of receiver, see Writ and Process, 1.

RECEIVING STOLEN PROPERTY.

Admissibility of declarations of accused, see Evidence, 13.

Sufficiency of indictment for, see Indictment, etc., 2.

RECORDS AND RECORDING LAW.

Record on appeal, see Appeal and Error, 8.

Filing conditional sale, see Sale, 1.

Subrogation of vendee to lien of first mortgage as recorded second mortgage, see Subrogation.

Consideration of recorded tax deed, see Taxes, 2.

REDELIVERY.

Of replevined property, see Replevin, 3, 4.

REDEMPTION.

From judicial sale, see Judicial Sale.

REFERENCE.

Overruling objections to auditor's report, see Appeal and Error, 28, 29.

RELATIONSHIP.

Of judge as ground of disqualification, see Judges

RELEASE.

Of surety, see Principal and Surety.

Release of mortgage as removal of encumbrance on real property, see Vendor and Purchaser, 4.

RELEVANCY.

Of evidence, see Evidence, 16-19.

RELIGIOUS SOCIETIES.

Maintenance of church as charity, see Charities, 1.

Charitable gifts to, see Charities.

In suit to prevent dissipation of public charity, see State.

REMAINDERS.

Contingent remainder as asset of bankrupt estate, see Bankruptcy, 1.

REMANDING.

Of case for further evidence, see Appeal and Error, 43.

REMOVAL OF CAUSES.

Retrospective effect of statute forbidding removal of cause from state to Federal court, see Constitutional Law, 1.

Validity of statute forbidding removal of cause, see Constitutional Law, 9.

The provision in the Federal employers' liability act forbidding the removal of causes from the state to the Federal courts prevents removal in such cases on the ground of diversity of citizenship. *Teel v. Chesapeake & O. R. Co.* 47: 21, 204 Fed. 918, — C. C. A. —.

RENDITION.

Of fugitive from justice, see Extradition.

RENEWAL.

Of chattel mortgage, see Chattel Mortgage.

REPAIRS.

Landlord's liability for failure to make or for negligence in making, see Landlord and Tenant, 4, 5.

REPLEVIN.

Obstructing execution of process, see Obstructing Justice.

Demand.

1. No demand is necessary to sustain an action of replevin in the detinet for property to which the defendant claims absolute title. *Wimbrow v. Morris*, 47: 882, 84 Atl. 238, 118 Md. 91.

Parties.

2. Where the holder of a second mortgage takes chattels from the mortgagor by a writ of replevin, the holder of a prior and superior mortgage has the right to be made a party to the replevin suit by the court, under § 5574, Oklahoma Comp. Laws 1909; and the fact that such party styles his pleading an intervention, and is called 47 L.R.A. (N.S.)

an intervener, is immaterial. *First State Bank v. King & McCants*, 47: 668, 133 Pac. 30, — Okla. —.

Redelivery.

3. Mere delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit does not justify the owner's refusal to accept it when returned, especially where his refusal to accept it was based on the sole ground that it was damaged while unlawfully detained. *Wallace v. Cox*, 47: 835, 142 N. W. 891, — Neb. —.

4. Deterioration in the value of replevied property while it is unlawfully detained does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond. *Wallace v. Cox*, 47: 835, 142 N. W. 891, — Neb. —.

RESERVATIONS.

In deed, see Deeds, 1-3.

RES GESTÆ.

See Evidence, 14, 14a.

RESIDENCE.

For purposes of divorce suit, see Divorce and Separation, 1.

RESIGNATION.

Of executor, see Executors and Administrators, 1.

RESISTING OFFICERS.

See Obstructing Justice.

RETAINING JURISDICTION.

Exclusiveness of jurisdiction first acquired, see Courts, 5.

RETROSPECTIVE LAWS.

Validity of, see Constitutional Law, 1

REVIEW.

Of order or judgment, see Appeal and Error.

REVIVAL.

Of judgment, see Judgment, 7.

REVOCATION.

Of pardon, see Criminal Law, 13.

Of license of physician, see Physicians and Surgeons.

Of license to cut timber, see Timber, 1, 2.

RIPARIAN RIGHTS.

See Waters.

RISK.

Assumption of, by employee, see Master and Servant, 11-20.

RIVER.

Riparian rights in, see Waters.

ROADS.

See Highways.

RULES.

Disobedience of, see Master and Servant, 22-24.

SAFETY APPLIANCES.

Master's duty as to, see Master and Servant, 2b-10.

SALE.

Of notes, see Bills and Notes, 1-4.

Regulation of, as affecting commerce, see Commerce.

Implied warranty on sale of corporate stock, see Corporations, 6.

Sufficiency of evidence of passing of title, see Evidence, 31.

Sale as fraud on creditors, see Fraudulent Conveyances.

Judicial sale, see Judicial Sale.

Of land, see Vendor and Purchaser.

Conditional sale.

Filing of conditional sale contract as preference, see Bankruptcy, 2.

Sufficiency of evidence of fraudulent intent not to record conditional sale, see Evidence, 21.

1. Where a statute requiring filing of chattel mortgages is construed as intended to protect only those having some specific lien upon or right to the mortgaged property, the same construction will be given to statutes providing for filing of conditional sale contracts. *Big Four Implement Co. v. Wright*, 47: 1223, 207 Fed. 535, — C. A. —.

Rights of bona fide purchasers.

2. A conditional vendor may recover from a subvendee who, without notice of the conditional sale agreement, purchased from the original vendee, who had possession of the property and also of the conditional sale agreement, which, as a part of the contract of sale, he was to have signed by a surety and acknowledged before an officer, and to return to the vendor, where the vendor thereafter had the contract recorded within the statutory period. *Rowe v. Spencer*, 47: 561, 79 S. E. 144, — Ga. —. (Annotated)

SANITY.

See Incompetent Persons.

SCHOOLS.

Submission of question as to applicability of municipal building ordinances to building constructed by school district, see *Agreed Case*.

Municipal regulation as to building erected by school district, see Buildings.

Diversion of fine from support of common school, see Husband and Wife, 6.

Equality and uniformity of school tax, see Taxes, 1.

1. The legislature of a state may provide that a school district which does not 47 L.R.A. (N.S.)

furnish instructions in agriculture, manual training, and home economics shall pay the tuition of pupils resident within its limits who desire to attend and do attend a school in an associated district regularly formed under the statute where such instruction is given. *Associated Schools v. School Dist. No. 83*, 47: 200, 142 N. W. 325, 122 Minn. 254. (Annotated)

2. A statute which imposes upon a school district not furnishing certain instruction the obligation of paying tuition of its pupils which attend another school district furnishing such instruction creates by necessary implication the right to enforce such obligation by action, notwithstanding previous statutes relating to school districts provided only for actions on contracts, or for acts or omissions in the nature of tort. *Associated Schools v. School Dist. No. 83*, 47: 200, 142 N. W. 325, 122 Minn. 254.

3. A statute which requires a school district in which certain instruction is not given, to pay the tuition of its pupils in another school district in which such instruction is given, confers by necessary implication upon the school district both the power and duty to raise money for that purpose. *Associated Schools v. School Dist. No. 83*, 47: 200, 142 N. W. 325, 122 Minn. 254.

SCIRE FACIAS.

To enforce mechanics' lien after sale of property on foreclosure, see Mechanics' Liens, 4, 5.

SECESSION.

Of subordinate lodge from benevolent society, see Benevolent Societies.

SECOND EXECUTION.

See Judicial Sale.

SECURITIES.

Control by public service commission of issue of securities, see Public Service Commission.

SECURITY FOR COSTS.

Motion to require security for costs as extending time for answer, see Pleading, 5.

SEGREGATION.

Of races, see Civil Rights.

Municipal ordinance for segregation of races, see Municipal Corporations, 1, 2.

SEPARATION.

See Divorce and Separation.

SERVANTS.

See Master and Servant.

SERVICE.

Of writ, see Writ and Process.

SHAREHOLDERS.

Of corporations, generally, see Corporations.

SHELLEY'S CASE.

Rule in, see Wills, 4, 5.

SHIPPING.

Vessel as common carrier, see Carriers.
Rights in proceeds of insurance of cargo for account of whom it may concern, see Carriers, 3.

SLANDER.

See Libel and Slander.

SMOKE.

Municipal ordinance as to, see Municipal Corporations, 6, 7.

SPECIAL DEPOSIT.

See Banks, 3.

SPEECH.

Freedom of, see Constitutional Law, 10.

STALE DEMANDS.

See Limitation of Actions.

STATE.

Death of party as requiring revival of judgment in favor of state, see Judgment, 7.

Right to invoke statute of limitations against, see Limitation of Actions, 4.

The people may prosecute a suit to prevent dissipation of the funds of an incorporated religious society, which constituted a public charity, without making all members of the society parties to the proceeding. *People ex rel. Smith v. Braucher*, 47: 1015, 101 N. E. 944, 258 Ill. 604.

STATE COURTS.

Error to, from United States Supreme Court, see Appeal and Error, 3-5.
Appellate jurisdiction of, generally, see Appeal and Error, 6, 6a.

STATUTE OF FRAUDS.

See Contracts.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Constitutionality of retrospective law, see Constitutional Law, 1.

Validity of statutes, generally, see Constitutional Law.

Constitutional equality of protection and privileges, see Constitutional Law, 4-7.

Judicial notice of, see Evidence, 1.

Validity of license tax on purchasers at tax sales, see License, 3, 4.

Plurality of subjects in municipal ordinance, see Municipal Corporations, 1.

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Time of passage and taking effect of municipal ordinance, see Municipal Corporations, 3.

STAY.

Of criminal sentence, see Criminal Law, 6-8.

STOCK.

Of corporations, generally, see Corporations.

STOCKHOLDERS.

Of corporations, generally, see Corporations.

STREAMS.

Riparian rights in, see Waters.

STREET RAILWAYS.

Validity of statute abolishing fellow servant rule as to street railway employees, see Constitutional Law 7.

Right of abutting owner to reimbursement by street railway company of highway assessment, see Damages, 10.

In street, as additional servitude, see Eminent Domain, 13.

Private action by abutting owner for laying double tracks in street in front of his property, see Highways, 2.

STREETS.

See Highways.

SUBMISSION OF CONTROVERSY.

See Agreed Case.

SUBROGATION.

A vendee who, in payment of the purchase price of real estate, pays the indebtedness secured by a first mortgage, is not subrogated to the lien of that mortgage as against a second mortgagee, whose mortgage is duly recorded at the time of purchase. *Kahn v. McConnell*, 47: 1189, 131 Pac. 682, — Okla. —. (Annotated)

SUBSCRIBING WITNESS.

See Wills, 3.

SUBSTITUTED SERVICE.

Service by publication, see Writ and Process, 2, 3.

SUICIDE.

Right of action for inducing, see Case, 2.

SUMMONS.

See Writ and Process.

SUPPORT.

Failure to support wife as ground for divorce, see Divorce and Separation, 2.

Of wife, husband's liability for, see Husband and Wife, 1, 2.

SUPREME COURT OF THE UNITED STATES.

Jurisdiction on appeal, see Appeal and Error, 3-5.

SURETIES.

In general, see Principal and Surety.

SURGEONS.

See Physicians and Surgeons.

SURPLUSAGE.

In indictment, see Indictment, etc., 1.

SUSPENSION OF SENTENCE.

See Criminal Law, 6-9.

SYRUPS.

State regulation of labels on, as affecting interstate commerce, see Commerce, 1, 2.

TAX DEED.

See Taxes, 2.

TAXES.

Incorporation tax on consolidated corporations, see Corporations, 1.

Power of school district to impose tax, see Schools, 3.

Equality; uniformity.

Uniformity in license tax, see License, 4.

1. A statute which requires a school district in which certain instruction is not given, to pay the tuition of its pupils in another district in which such instruction is given, and which has a uniform application to the entire state and operates alike on all persons and property similarly situated, does not violate the constitutional requirement of equality of taxation. *Associated Schools v. School Dist. No. 83*, 47: 200, 142 N. W. 325, 122 Minn. 254.

Sale; deed; rights of purchasers.

License tax on purchasers at tax sales, see License, 1-4.

Title under tax deed as defective or unmarketable, see Vendor and Purchaser, 3.

2. A tax deed which has been of record for more than fifteen years, during all of which time the land has been in the possession of a person and his grantors, is not void on its face because the consideration stated cannot be arrived at from the data furnished by the antecedent recitals, but where this may be done under the liberal rules which have been adopted for the interpretation of tax deeds which have been of record for five years or more. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720, — Kan. —.

TAXICAB.

See Automobiles.

TELEGRAPHS.

Person sending telegram at railroad station as passenger, see Carriers, 1.

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Duty of carrier to furnish telegraph facilities, see Carriers, 4.

Who is customer or patron of telegraph company, see Master and Servant, 32.

Liability of railroad company doing telegraph business for assault committed by servant, see Master and Servant, 38.

TELEPHONE.

Liability for frightening horse on highway, see Highways, 3.

TENANTS.

See Landlord and Tenant.

TENANTS IN COMMON.

See Cotenancy.

TENDER.

Failure by the holder of a note payable at any bank in a specified city, who has left the state, taking the note with him, to specify a place of payment upon request after the note has matured, but before he has elected to declare maturity of the entire debt of which such note was a part, which he was entitled to do on default in payment, entitles the maker to deposit the funds in the bank in such city where the holder has his account, and thereby defeat the right to declare the forfeiture. *Stansburg v. Embrey*, 47: 980, 158 S. W. 991, — Tenn. —. (Annotated)

TERMINATION.

Of lease, see Landlord and Tenant, 2.

THEFT.

See Larceny.

TIMBER.

Reservation of timber from property passing under deed, see Deeds, 1-3.

Inheritance of reservation by grantor of right to cut timber, see Descent and Distribution.

Sufficiency of evidence as to size of, see Evidence, 26.

Identity of logs claimed under deed, as question for jury, see Trial, 3.

Revocation of license to cut.

1. An attempt by a parent, who, in a deed to a child by way of an advancement, had reserved the license of selling and removing timber, to assign such license, revokes it. *United States Coal & O. Co. v. Harrison*, 47: 870, 76 S. E. 346, 71 W. Va. 217.

2. Where, in a deed from parent to child by way of an advancement, a license for selling and removing timber is reserved to the parent, the sale of the land by such child terminates the license. *United States Coal & O. Co. v. Harrison*, 47: 870, 76 S. E. 346, 71 W. Va. 217.

Forfeiture for nonremoval.

3. A grantor who, in conveying his real estate, reserves certain described tim-

ber growing upon the property, does not, unless there is something to show that the parties intended that it should be severed from the land, lose his title by failure to remove it within a reasonable time. *Hicks v. Phillips*, 47: 878, 142 S. W. 394, 146 Ky. 305.

4. Where a sale of timber is one of chattels, the mere failure to remove from the land within the time specified for ingress and egress logs which have been cut under a reservation of title in a sale of the real estate will not forfeit the title. *Wimbrow v. Morris*, 47: 882, 84 Atl. 238, 118 Md. 91. (Annotated)

TIME.

Additional time to answer, see Pleading, 4, 5.

Extension of, as discharging surety, see Principal and Surety, 2.

TITLE.

Right to jury trial in suit over, see Jury, 1.

Defects in, see Vendor and Purchaser, 2-4.

TITLE BOND.

See Vendor and Purchaser, 8.

TORTS.

Injunction against tortious acts, see Injunction, 3, 4.

Joint liability for, see Joint Creditors and Debtors.

Matters as to negligence, generally, see Negligence.

TRACK WALKER.

Assumption of risk by, see Master and Servant, 14.

TRADEMARK.

A registration as a trademark of a name applied to a periodical devoted to the publication of a series of stories, does not prevent the application of the name to moving picture plays which deal with adventures similar to those of the hero of the published series, who bears the name applied to the periodical. *Atlas Mfg. Co. v. Smith*, 47: 1002, 204 Fed. 398, 122 C. C. A. 568.

TRADENAMES.

Registration of, as trademark, see Trademark.

The doctrine of unfair trade does not apply to prevent the application to a moving picture play of a name which has been applied for a long series of years by the publisher of a periodical series of stories, to the pamphlet containing such stories, although the incidents of the play are similar in character to those depicted in the periodical, if they are not based on the published stories. *Atlas Mfg. Co. v. Smith*, 47: 1002, 204 Fed. 398, 122 C. C. A. 568. (Annotated)

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TRANSFER.

Of cause, see Removal of Causes.

TRANSITORY ACTIONS.

See Venue.

TRAPDOOR.

As hidden danger to servant, see Master and Servant, 6.

TRESPASSER.

Person entering telegraph office as, see Master and Servant, 32.

Negligence as to, see Negligence, 1.

Liability of railway company for injury to, see Railroads, 1, 2.

TRIAL.

Error in refusing to direct verdict, see Appeal and Error, 41, 42.

Prejudicial error in striking out evidence, see Appeal and Error, 33, 34.

Procedure peculiar to criminal cases, see Criminal Law.

Right to trial by jury, see Jury.

Contributory negligence of employee as matter of law, see Master and Servant, 21.

Raising objection in scire facias proceeding to enforce mechanics' lien, see Mechanics' Liens, 5.

New trial, see New Trial.

Place of, see Venue.

Issues on probate of will, see Wills, 1, 2.

Examination of witnesses, see Witnesses, 2.

Questions of law and fact.

Directing a verdict in negligence case, see infra, 5-7.

1, 2. If the evidence in an action for damages for a personal injury is so conclusive of the defendant's negligence as to leave no room for a reasonable conclusion or finding to the contrary, the court may declare it as a matter of law, in passing on a motion to set aside a verdict conforming to the evidence. *Reilly v. Nicoll*, 47: 1199, 77 S. E. 897, — W. Va. —. (Annotated)

3. The jury must pass upon the sufficiency of competent evidence to identify logs claimed under a deed. *Wimbrow v. Morris*, 47: 882, 84 Atl. 238, 118 Md. 91. Taking case from jury.

4. A court cannot direct or set aside a verdict merely upon a preponderance of evidence. *Philadelphia, B. & W. R. Co. v. Gatta*, 47: 932, 85 Atl. 721. — Del. —.

5. The court cannot direct a verdict in an action to recover damages for personal injury alleged to have been negligently inflicted because the evidence in support of negligence is negative, while that in support of care is positive, nor can it set aside a verdict based on the negative testimony if the negative testimony, standing alone, is of sufficient probative force to support the verdict. *Philadelphia, B. & W. R. Co. v. Gatta*, 47: 932, 85 Atl. 721. — Del. —.

6. The jury cannot be directed to find for defendant because of contributory negligence in a personal-injury action brought under the Federal employers' liability statute, which provides that such negligence shall not bar a recovery, but merely diminish the damages. *Chicago G. W. R. Co. v. McCormick*, 47: 18, 200 Fed. 375, 118 C. C. A. 527. (Annotated)

7. The jury must decide whether or not a rule of a railroad company applied to an employee at the time he was injured, so as to relieve the company from liability for the injury because of his disobedience of it, where under the evidence there is good reason to doubt whether it did or not. *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 47: 909, 132 S. W. 569, 141 Ky. 249.

Instructions.

Sufficiency of exception to instruction, see Appeal and Error, 10.

Questioning correctness of instruction for first time on appeal, see Appeal and Error, 13, 24.

Errors in giving and refusing instructions cured by verdict, see Appeal and Error, 26.

Error in failing to instruct as to weight of circumstantial evidence of intent, see Appeal and Error, 37.

Presumption as to correctness of instructions, see Appeal and Error, 17.

Exceptions to refusal to charge, see Appeal and Error, 11.

8. There is no error in instructing the jury as to lack of inspection as an element of negligence, in an action to hold a railroad company liable for injury by the breaking of the side bar of an engine, although there was no evidence of lack of inspection, and affirmative evidence of inspection on the day before the accident, if there was no repair of conditions which should have been discovered by the inspection. *McCullough v. Chicago, R. I. & P. R. Co.* 47: 23, 142 N. W. 67. — Iowa. —

9. It is error to submit to the jury grounds for recovery in an action for damages for negligent injuries which are not set out in the petition. *Louisville & N. R. Co. v. Johnson*, 47: 918, 159 S. W. 685, 155 Ky. 155.

10. An instruction which is correct under the facts of the case in which it is given is not erroneous because it is too broad to be true in all cases. *Maloney v. Winston Brothers Co.* 47: 634, 111 Pac. 1080, 18 Idaho, 740.

11. It is not error to assume in an instruction that a particular witness was an accomplice, if he was so designated in the request of the complaining party. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575.

12. An instruction which informs the jury that if they "believe the defendant not guilty, and that he did not shoot and kill" the decedent, they should acquit, ought not to be given, although in the same instruction they are informed that they must find the accused guilty beyond a 47 L.R.A. (N.S.)

reasonable doubt before they can convict him. *Flege v. State*, 47: 1106, 142 N. W. 276, 93 Neb. 610.

Verdict or findings of jury.

Sufficiency of exception to finding, see Appeal and Error, 9.

Necessity for exceptions to finding, see Appeal and Error, 12.

Errors in instructions cured by verdict, see Appeal and Error, 26.

Effect on special finding of grant of new trial upon other issues, see New Trial, 3.

Review of verdict on appeal, see Appeal and Error, 27.

13. A suit to cancel an instrument conveying land in trust is an equitable suit, and the verdict of a jury is merely advisory to the court, and the court may make different findings if satisfied that different findings are required by the evidence. *Hogan v. Leeper*, 47: 475, 133 Pac. 190. — Okla. —

14. The question as to the contributory negligence of a servant being for the determination of the jury, and there being no special questions submitted, a general verdict in favor of the servant inferentially acquits him of such negligence. *Delmore v. Kansas City Hardwood Flooring Co.* 47: 1220, 133 Pac. 151, 90 Kan. 29.

TRUST COMPANY.

See Banks.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Trusts in insolvent bank, see Banks, 3.
Fiduciary capacity of agent, see Principal and Agent, 2, 3.

TUNNEL.

Respective duty of master and servant in hazardous work like driving railroad tunnel, see Master and Servant, 5.

Injury to employee by low roof of, see Master and Servant, 7.

Master's duty as to inspection of, see Master and Servant, 9.

Assumption of risk by employee in, see Master and Servant, 17.

TURKEYS.

Presumption as to proximate cause of injury to turkeys on railroad track, see Evidence, 4.

ULTRA VIRES.

Ultra vires acts by corporation, see Corporations, 4.

UNCERTAINTY.

In municipal ordinance, see Municipal Corporations, 2.

UNDERWRITERS.

See Insurance.

UNDUE INFLUENCE.

Presumption as to, see Evidence, 3.

UNFAIR COMPETITION.

Doctrine of, as applied to moving picture play, see Trade-name.

UNIFORMITY.

In license tax, see License, 4.

In school tax, see Taxes, 1.

UNITED STATES.

Unlawful sale of intoxicating liquors on military reservation, see Intoxicating Liquors.

UNITED STATES SUPREME COURT.

Jurisdiction on appeal, see Appeal and Error, 3-5.

UNLIQUIDATED CLAIMS.

As affecting right to enforce vendor's lien, see Vendor and Purchaser, 7.

USES.

Charitable uses, see Charities.

VACANCY.

Waiver of forfeiture of insurance because of vacancy, see Insurance, 4.

VALIDITY.

Of contract, see Contracts, 3-5.

VENDOR AND PURCHASER.

Obligation of grantee in deed by holder of bond for title, see Contracts, 1.

Matters as to deeds, see Deeds.

License tax on purchasers at tax sale, see License, 1-4.

Subrogation of vendee to lien of mortgage, see Subrogation.

Sale of standing timber, see Timber.

1. It is legally possible for one person to sell land to another at an agreed price, and at the same time to secure the right to repurchase it; and if actually made in good faith, such a transaction is enforceable. *Cowart v. Singletary*, 47: 621, 79 S. E. 196. — Ga. —

Defective or unmarketable title.

Burden of proving defective title, see Evidence, 8.

2. A vendor's title is not necessarily unmarketable because derived through deeds from the heirs of a deceased owner whose estate was not probated. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720. — Kan. —

3. A suit to quiet title purporting to be based upon adverse possession does not expose a tax deed which has been of record for more than five years, to attack for irregularities in the proceeding upon which it is based. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720. — Kan. —

4. A title is not rendered unmarketable by a mortgage given on the land to one as trustee for a named beneficiary, which mortgage was assigned by the beneficiary and released by the assignee, where the release has been acquiesced in by the
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trustee and the beneficiary for a period of time exceeding that prescribed by the statute of limitations. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720. — Kan. —
Vendor's lien.

5. The existence of the right of a creditor to maintain an action at law upon a promise made by a stranger to his debtor to pay the debt does not deprive him of the equitable right to enforce the vendor's lien on property transferred in consideration of the promise. *Zeiser v. Cohn*, 47: 186, 101 N. E. 184, 207 N. Y. 407.

6. That a substantial part of the property transferred by a debtor on consideration of the payment of his debt was personality does not prevent the enforcement of a vendor's lien in behalf of the creditor, if the promise in his favor was concealed from him until the personality was dissipated. *Zeiser v. Cohn*, 47: 186, 101 N. E. 184, 207 N. Y. 407.

7. A creditor of a vendor who conveys property on condition that the vendee shall satisfy the creditor's claim may enforce the vendor's implied lien for the satisfaction of the claim, although it was unliquidated at the time of the conveyance. *Zeiser v. Cohn*, 47: 186, 101 N. E. 184, 207 N. Y. 407.

(Annotated.)

Rights of parties as to third persons: bona fide purchasers.

8. One who has purchased the interest in land of an obligee in a bond for title, and received from such obligee a warranty deed, in which there is a provision that the grantee assumes the obligations of the obligee under the bond, and who has made certain of the payments thereunder as they matured, acquires an equitable interest in the land notwithstanding the title bond provides that it is not transferable to anyone, which enables him to secure title upon payment of the remaining instalments less any credit to which he may be entitled, as against the obligee in the bond, and a subsequent purchaser from the obligee, with notice, who paid the remaining instalments, received a deed from the obligor in the bond and conveyed a life estate to the obligee. *Cowart v. Singletary*, 47: 621, 79 S. E. 196. — Ga. —

VENUE.

As to territorial limits of jurisdiction over crimes, see Courts, 1-4.

A proceeding in insolvency against a corporation under chap. 79, N. M. Laws 1905, is a "transitory action" in the nature of quo warranto, and the venue thereof, under § 2950, N. M. Comp. Laws 1897, may be in the county where either the plaintiff or the defendant resides. *State ex rel. Parsons Min. Co. v. McClure*, 47: 744, 133 Pac. 1063. — N. M. —

VERDICT.

Review of, on appeal, see Appeal and Error, 27.

In general, see Trial.

VERIFICATION.

Of pleading, see Pleading, 1.

WAIVER.

Of error in trial court, see Appeal and Error, 25.

Of disqualification of commissioner in eminent domain proceedings, see Eminent Domain, 2.

Of forfeiture of insurance policy, see Insurance, 4.

Of interest on award, see Interest, 2.

WALL.

Compelling removal of, by injunction, see Injunction, 1.

WARNING.

Duty to give, to servant, see Master and Servant, 20.

WATERS.

Jurisdiction of municipal corporations over navigable boundary river, see Boundaries.

Measure of damages for municipal pollution of stream by city, see Damages, 7.

Necessity of compensation for municipal pollution of stream by sewage, see Eminent Domain, 10, 11.

Documentary evidence in action against municipal corporation for interfering with flow of water, see Evidence, 10.

Liability of municipal corporation for restoring stream to original channel, see Municipal Corporations, 8.

Injunction against pollution of stream, see Injunction, 4.

Pollution of stream as public nuisance, see Nuisances.

Diversion by railroad embankment. see Railroads, 9.

Water rights as between individuals.

1. A railroad company owning land on a stream has no right as against the lower riparian owners to pump the water into a reservoir several miles distant, for general railroad purposes, such as use in locomotives, shops, and stations. *Seranton Gas & Water Co. v. Delaware, L. & W. R. Co.* 47: 710, 88 Atl. 24, 240 Pa. 604.

Public water supply.

Measure of damages in case of condemnation of plant of water works company, see Damages, 9.

Mandamus to trustees of water district. see Mandamus, 1.

2. A district organized to supply its inhabitants with water is not bound to furnish a supply to everyone that demands it, regardless of the expense involved and the returns which will result in so doing; especially where the statute provides that water rates shall be established sufficient to provide for such extensions and renewals as become necessary. *Lawrence v. Richards*, 47: 654, 88 Atl. 92, — Me. —. (Annotated)

WAYS.

Public ways, see Highways.

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WILLS.

Error in refusing to direct verdict for contestant in will case, see Appeal and Error, 42.

Contingent remainder as asset of bankrupt estate, see Bankruptcy, 1.

Presumption as to regularity of execution, see Evidence, 5.

Burden of proof as to regularity of execution and testamentary capacity, see Evidence, 6.

Presumption from presence of attestation clause, see Evidence, 5.

Parol evidence to identify legatee, see Evidence, 12.

Burden of proving testamentary capacity, see Evidence, 6.

Administration of decedent's estate, see Executors and Administrators.

Deductions in case of indebtedness to estate, see Executors and Administrators, 4.

Title derived through deeds from heirs of decedent whose estate was not probated, see Vendor and Purchaser, 2.

Probate.

1. In a proceeding to probate a will in solemn form, the only issue is *devisavit vel non*, and therefore the matter of construing the terms of the instrument offered for probate is not up for determination. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

2. That the alleged testator knew the contents of the instrument offered for probate, and desired to execute it as a will, may be considered on the trial of an issue of *devisavit vel non*. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

3. While the interrogatories or depositions of attesting witnesses who reside beyond the jurisdiction of the court may be taken, it is not necessary to take them if the will can be proved by other legal and satisfactory evidence. *Wells v. Thompson*, 47: 722, 78 S. E. 823, — Ga. —.

Nature of estate or interest created.

4. A devise to testator's wife for life, then to his daughter for life, then to the daughter's children, or in default of children to such persons as the daughter shall direct, vests the fee in the daughter, notwithstanding the will provides that in no event shall the fee vest in the wife or daughter during the lifetime of either of them. *Lauer v. Hoffman*, 47: 676, 88 Atl. 496, 241 Pa. 315.

5. The rule in *Shelley's Case* applies whenever there is a clearly expressed intention of the grantor that the remainderman is to take not from him, but from the grantee of a life estate to which he has attached an inheritable succession in his grantee or devisee. *Lauer v. Hoffman*, 47: 676, 88 Atl. 496, 241 Pa. 315.

WITNESSES.

Privilege of accused against self-crimination, see Criminal Law, 2, 3.

Instructions assuming witness was accomplice, see Trial, 11.

Proof of will by attesting witnesses, see Wills, 3.

Exemption from arrest, see Writ and Process, 4.

Competency.

Presumption as to pardon of witness, see Appeal and Error, 15.

1. A full pardon of a convict restores his capacity as a witness. *Thompson v. United States*, 47: 206, 202 Fed. 401, 120 C. C. A. 575. (Annotated)

Cross-examination.

New trial for error in restricting cross-examination, see New Trial, 2.

2. In an action to enjoin the sale of property conveyed by a man to his wife, for the payment of a claim for rent against him, which did not mature until after the conveyance, he may properly be required to testify on cross-examination as to a financial statement showing property owned by him, which he made to a trust company, to secure a loan, if the company afterwards acted as agents for the owners in making the lease. *Sallaske v. Fletcher*, 47: 320, 132 Pac. 648, 73 Wash. 593.

Impeaching; discrediting.

3. Commutation of a sentence for crime does not prevent the introduction of the conviction in evidence, to affect the credibility of the convict as a witness. *Rittenberg v. Smith*, 47: 215, 101 N. E. 989, 214 Mass. 343. (Annotated)

4. Conviction for fraudulently concealing property from a trustee in bankruptcy may be given in evidence to affect the credibility of a witness, under a statute providing that conviction for crime may be shown to affect credibility. *Rittenberg v. Smith*, 47: 215, 101 N. E. 989, 214 Mass. 343.

WOODYARD.

Safety of, as place for work, see Master and Servant, 4.

Assumption of risk by employee in, see Master and Servant, 13.

WRIT AND PROCESS.

Writ of error, see Appeal and Error.

Presumption from official indorsement, see Evidence, 9.

Matters as to garnishment, see Garnishment.

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Matters as to injunction, see Injunction.

Necessity of service to support foreign divorce decree, see Judgment, 6.

As to mandamus, see Mandamus.

Obstructing execution, see Obstructing Justice.

Matters as to prohibition, see Prohibition.

Service.

1. The appointment of a receiver to operate and manage a railroad, with authority to defend suits against the road, does not prevent the service of papers necessary to institute such actions on station agents, in accordance with a statute permitting service of process upon any railroad company in the state upon any station agent along the line of such company, if the receiver continues the agents in office with directions to perform the duties theretofore performed by them. *Ennest v. Pere Marquette R. Co.* 47: 179, 142 N. W. 567. — Mich. — (Annotated)

2. An affidavit for service by publication which wholly fails to show, either by direct statement or by way of inference from other statements, that the plaintiff diligently inquired as to the residence of the defendants to be served by publication and was unable to learn the place of such residence as required by statute, is void. *Van Gundy v. Shewey*, 47: 645, 133 Pac. 720, — Kan. —

3. Delay of a month after an affidavit for publication of summons in a divorce proceeding before an order for service is made renders the service void, and the court acquires no jurisdiction of the defendant under it. *Atkinson v. Atkinson*, 47: 499, 134 Pac. 595, — Utah. — (Annotated)

4. The fact that a husband came voluntarily into a state to appear as a witness in a case between other parties is no bar to his arrest in such state for a violation of a statute making it criminal for a husband to fail to provide for his wife in destitute or necessitous circumstances. *State v. Gillmore*, 47: 217, 129 Pac. 1123, 88 Kan. 835.

WRIT OF ERROR.

See Appeal and Error.

